

No. 13-1105

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IN THE  
**Supreme Court of the United States**

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ORTIZ T. JACKSON,  
*Petitioner,*

v.

LOUISIANA,  
*Respondent.*

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**On Petition for Writ of Certiorari to the  
Louisiana Court of Appeal,  
Fourth Circuit**

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**BRIEF OF INNOCENCE PROJECT  
NEW ORLEANS AS *AMICUS CURIAE*  
IN SUPPORT OF PETITIONER**

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**INTEREST OF *AMICUS CURIAE*<sup>1</sup>**

*Amicus* Innocence Project New Orleans (hereinafter IPNO) is a non-profit law office that provides free legal representation at the post-conviction stage to life-sentenced prisoners in Louisiana and Mississippi who have provable claims of actual innocence. IPNO is dedicated to exonerating wrongfully convicted people in cases where DNA testing can provide conclusive proof of innocence as well as in more difficult cases where DNA testing is unavailable but where innocence may still be proven. Since IPNO's inception in 2001, our efforts have led to the freedom or exoneration of 23 innocent individuals who, combined, spent nearly 440 years wrongly incarcerated for crimes they did not commit.

In addition to working to exonerate and free the innocent, *amicus* uses its successes to advocate for changes in laws and policies that contribute to wrongful convictions. IPNO has a direct interest in putting an end to non-unanimous jury verdicts of guilt in Louisiana, which increase the likelihood of a wrongful conviction and remove a crucial safeguard against convicting innocent men and women in this

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<sup>1</sup> No counsel for a party authored this brief in whole or in part, and no other person or entity other than *amicus curiae* has made a monetary contribution to the preparation or submission of this brief. Counsel of record for both parties received timely notice of *amicus's* intent to file this brief and both Petitioner and Respondent have consented to the filing of this brief. Pursuant to Rule 37.3(a), *amicus* has filed their consent letters with the Clerk of Court.

state. Therefore, IPNO respectfully files this *amicus curiae* brief in support of Ortiz Jackson's petition for certiorari.

### SUMMARY OF ARGUMENT

Innocence Project New Orleans works to put an end to wrongful convictions. Thus, *amicus* is committed to assuring that the judicial process functions in such a way that only the guilty are convicted and the innocent are afforded every available protection against being wrongfully convicted. Louisiana's allowance for non-unanimous jury verdicts of guilt, even in cases where defendants face life sentences without the possibility of parole, removes a critical bulwark against wrongful conviction that forty-eight other states in this country provide. Simply put, non-unanimous jury verdicts of guilt present an unacceptable risk of convicting the innocent.

As is described below, *amicus* is familiar with forty cases of exoneration/wrongful conviction in the state of Louisiana.<sup>2</sup> Thirteen of these wrongful convictions involved capital charges, for which a

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<sup>2</sup> The National Registry of Exonerations (NRE) counts forty-two total exonerations/wrongful convictions in Louisiana. See National Registry of Exonerations, List of Exonerations, <http://www.law.umich.edu/special/exoneration/Pages/browse.aspx> (last visited Apr. 11, 2014). *Amicus* is familiar with forty of the cases identified by the NRE, and confines our analysis to these cases because we do not have sufficient knowledge of the record in the two additional cases cited by the NRE.

unanimous verdict was required. Of the remaining wrongful convictions, twenty were cases in which a non-unanimous jury verdict was available. In reviewing those cases, *amicus* has been able to establish that at least nine of the guilty verdicts were handed down by a non-unanimous jury. Eight of those men were sentenced to life without the possibility of parole. Altogether, these nine innocent men spent a combined 131.5 years in prison on account of verdicts handed down by a jury in which not every member was convinced of their guilt.

*Amicus's* role in the criminal justice system in Louisiana is to free innocent prisoners. Based on our thirteen years of experience and knowledge of the Louisiana criminal justice system, it is our strong opinion that the use of non-unanimous jury verdicts in Louisiana has led to wrongful convictions in this state and will continue to do so until such verdicts are no longer allowed by law. The statistics described below directly support this conclusion. For these reasons, *amicus* Innocence Project New Orleans submits this brief in support of Petitioner and urges the Supreme Court to grant certiorari to review the constitutionality of Louisiana's continued use of non-unanimous jury verdicts to obtain convictions.

## ARGUMENT

### I. Cases of Exoneration in Louisiana

*Amicus* is familiar with forty cases<sup>3</sup> prosecuted in state courts in Louisiana that resulted in an exoneration as defined by the National Registry of Exonerations (hereinafter NRE).<sup>4</sup> According to the

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<sup>3</sup> *Amicus* was counsel for successful collateral challenges to the conviction in fourteen of these cases. In a further six cases, *amicus* was counsel for the purposes of successfully obtaining the exonerated person funds from the Louisiana Innocence Compensation Funds. See La. R.S. § 15:572.8. *Amicus* is familiar with the remaining twenty cases because in the course of its operation, *amicus* collects and updates information from court records on Louisiana exoneration cases in order to maintain the central repository for information on exonerations in Louisiana.

<sup>4</sup> The NRE defines an exoneration as:

A person has been exonerated if he or she was convicted of a crime and later was either: (1) declared to be factually innocent by a government official or agency with the authority to make that declaration; or (2) relieved of all the consequences of the criminal conviction by a government official or body with the authority to take that action. The official action may be: (i) a complete pardon by a governor or other competent authority, whether or not the pardon is designated as based on innocence; (ii) an acquittal of all charges factually related to the

NRE, Louisiana is second only to Illinois in its per capita rate of exonerations.<sup>5</sup> And, according to the NRE, Orleans Parish, Louisiana, has the highest per capita rate of exoneration of any county or parish in the country.<sup>6</sup> In fact, Orleans Parish's rate of exoneration per capita is over 40% higher than the county with the second highest rate of exoneration

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crime for which the person was originally convicted; or (iii) a dismissal of all charges related to the crime for which the person was originally convicted, by a court or by a prosecutor with the authority to enter that dismissal. The pardon, acquittal, or dismissal must have been the result, at least in part, of evidence of innocence that either (i) was not presented at the trial at which the person was convicted; or (ii) if the person pled guilty, was not known to the defendant, the defense attorney and the court at the time the plea was entered. The evidence of innocence need not be an explicit basis for the official action that exonerated the person.

National Registry of Exonerations,  
Glossary, <http://www.law.umich.edu/special/exoneration/Pages/glossary.aspx> (last visited Apr. 7, 2014).

<sup>5</sup> National Registry of Exonerations, Exonerations in 2013 at 20 (Feb. 4, 2014), [http://www.law.umich.edu/special/exoneration/Documents/Exonerations\\_in\\_2013\\_Report.pdf](http://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2013_Report.pdf).

<sup>6</sup> *Id.* at 21.

per capita in the country.<sup>7</sup> Petitioner in this case was convicted in Orleans Parish.

Of the forty prosecutions and convictions that resulted in exoneration, twenty were tried in a manner that allowed conviction by a non-unanimous jury verdict. These twenty verdicts were in the following cases (individuals with the same case number were co-defendants):

- 1) *State v. Cheryl Beridon*, Terrebonne Parish Case No. 78,042;<sup>8</sup>
- 2) *State v. Gene Bibbens*, East Baton Rouge Parish Case No. 2-87-979;
- 3) *State v. Gregory Bright*, Orleans Parish Case No. 252-514;
- 4) *State v. Earl Truvia*, Orleans Parish Case No. 252-514;
- 5) *State v. Dennis Brown*, St. Tammany Parish Case No. 128-634;
- 6) *State v. Gerald Burge*, St. Tammany Parish Case No. 147,175;

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<sup>7</sup> *Id.*

<sup>8</sup> The case of Ms. Beridon is the only Louisiana case in which exoneration was by executive action rather than a court decision.

- 7) *State v. Vernon Chapman*, St. Tammany Parish Case No. 71,385;
- 8) *State v. Clyde Charles*, Terrebonne Parish Case No. 106,980;
- 9) *State v. Glenn Davis*, Jefferson Parish Case No. 92-4541;
- 10) *State v. Larry Delmore*, Jefferson Parish Case No. 92-4541;
- 11) *State v. Terrence Meyers*, Jefferson Parish Case No. 92-4541;
- 12) *State v. Douglas Dilosa*, Jefferson Parish Case No. 87-105;
- 13) *State v. Travis Hayes*, Jefferson Parish Case No. 97-3780;
- 14) *State v. Willie Jackson*, Jefferson Parish Case No. 87-205;
- 15) *State v. Henry James*, Jefferson Parish Case No. 81-4366;
- 16) *State v. Anthony Johnson*, Washington Parish Case No. 89-CRC-39701;
- 17) *State v. Craig Johnson*, Orleans Parish Case No. 380-395;
- 18) *State v. Rickey Johnson*, Sabine Parish Case No. 30,770;

- 19) *State v. John Thompson*, Orleans Parish Case No. 306-526;
- 20) *State v. Michael Anthony Williams*, Jackson Parish Case No. 20,387.

Of the remaining twenty cases, thirteen were tried as first-degree murders so a non-unanimous verdict was not permitted.<sup>9</sup> See *State v. Goodley*, 398 So.2d 1068, 1071 (La. 1981). A disproportionate number of Louisiana exonerations are in cases that were tried as first-degree murders because post-conviction counsel is provided to individuals who are sentenced to death. La. R.S. § 15:169. In every exoneration case, the defendant has required the assistance of post-conviction counsel to obtain relief. Therefore, the number of wrongly convicted people still in prison who were convicted in cases where non-unanimous jury verdicts were permitted (and who do not have the right to a state-appointed attorney following direct appeal) is likely significantly higher than those known and listed.<sup>10</sup>

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<sup>9</sup> Louisiana law was amended by Act 125 of 2007 which made non-unanimous verdicts permissible in cases in which the charge was first-degree murder, but the prosecution did not seek the death penalty. All cases discussed in this brief were prosecuted before this amendment was passed.

<sup>10</sup> See Samuel Gross, National Registry of Exonerations, Exonerations in the United States: 1989-2012 at 16 n. 26 (June 2012), [http://www.law.umich.edu/special/exoneration/Documents/exonerations\\_us\\_1989\\_2012\\_full\\_report.pdf](http://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf) (noting that although death sentences comprise a very small percentage of

The thirteen verdicts in cases tried as first-degree murders were in the following cases (individuals with the same case number were co-defendants):

- 1) *State v. Dan Bright*, Orleans Parish Case No. 375-994;
- 2) *State v. Albert Burrell*, Union Parish Case No. 28,734;
- 3) *State v. Michael Graham*, Union Parish Case No. 28,734;
- 4) *State v. Shareef Cousin*, Orleans Parish Case No. 376-479;
- 5) *State v. Glenn Ford*, Caddo Parish Case No. 126,005;
- 6) *State v. Roland Gibson*, Orleans Parish Case No. 203-904;
- 7) *State v. Isaac Knapper*, Orleans Parish Case No. 270-437;
- 8) *State v. Curtis Kyles*, Orleans Parish Case No. 303-970;
- 9) *State v. Dwight Labran*, Orleans Parish Case No. 388-287;

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all prison sentences in the U.S., they form a disproportionately high percentage of known exonerations).

- 10) *State v. Ryan Matthews*, Jefferson Parish Case No. 97-3780;
- 11) *State v. Damon Thibodeaux*, Jefferson Parish Case No. 96-4522;
- 12) *State v. John Thompson*, Orleans Parish Case No. 305-826;
- 13) *State v. Calvin Williams*, Orleans Parish Case No. 259-071.

Of the remaining seven cases, four were tried by a judge sitting without a jury. These four exoneration cases were:

- 1) *State v. Allen Coco*, Calcasieu Parish Case No. 14891-95;
- 2) *State v. Darrin Hill*, Orleans Parish Case No. 359-046;
- 3) *State v. Calvin Willis*, Caddo Parish Case No. 118,517;
- 4) *State v. Michael Williams*, Jefferson Parish Case No. 96-2599.

In two cases, the defendant pled guilty. These exoneration cases were:

- 1) *State v. David Lazzell*, Iberia Parish Case No. Unknown;<sup>11</sup>
- 2) *State v. Hayes Williams*, Orleans Parish Case No. 199-523.

And in the final case, the defendant was tried by a six-person jury, which requires a unanimous verdict. See La. C. Cr. P. art. 782. This exoneration case was:

- 1) *State v. Eddie Triplett*, Orleans Parish Case No. 400-740.

Therefore, there is a pool of twenty exoneration cases in Louisiana in which a non-unanimous verdict was possible at trial.

## **II. Cases of Exoneration in Louisiana in Which Conviction Was by Non-Unanimous Verdict**

As stated above, *amicus* has identified twenty cases in which a jury was able to return a non-unanimous guilty verdict and a guilty verdict was later followed by an exoneration. In at least nine of these twenty cases, the guilty verdict was returned by a non-unanimous jury. These nine cases are nearly half of the identified exonerations in which a non-unanimous verdict was possible.

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<sup>11</sup> See National Registry of Exonerations, Exoneree Profile: David Lazzell, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4078> (last visited Apr. 11, 2014).

The nine wrongfully convicted individuals who received these non-unanimous verdicts were Gene Bibbens, Gerald Burge, Glenn Davis, Larry Delmore, Terrence Meyers, Douglas Dilosa,<sup>12</sup> Travis Hayes, Willie Jackson, and Rickey Johnson.<sup>13</sup> These individuals served a total of 131.5 years imprisoned at hard labor. These nine verdicts and the 131.5 years of wrongful incarceration served by the men who received them were a direct result of Louisiana's law allowing juries to convict without reaching unanimous decisions.

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<sup>12</sup> After reviewing the jury polling slips, the judge at Mr. Dilosa's trial stated that "a sufficient number of jurors have voted yes that this was their verdict," which implies the vote was not unanimous. *State v. Dilosa*, Jefferson Parish Case No. 87-105 at 185 (July 21, 1985) (transcript). The polling slips themselves are not available for inspection. A later appellate court that did not have the polling slips—in an opinion in which the issue was not material—described the verdict as unanimous in the procedural history. *State v. Dilosa*, 529 So.2d 14, 16 (La. App. 5 Cir. 1988). In subsequent proceedings in which he obtained relief, Mr. Dilosa disputed this description of the record. *Dilosa v. Cain*, E.D. La. Case No. 2:98-cv-03297 at 31 (Dec. 7, 1998) (petition). Based on the totality of the available evidence on this point, *amicus* believes the verdict was not unanimous in this case.

<sup>13</sup> The record in Mr. Johnson's case is ambiguous: the State and the defense waived jury polling, and the court only asked the foreman whether ten members of the jury concurred in the verdict, to which the foreman responded in the affirmative. *See State v. Johnson*, Sabine Parish Case No. 30,770 at 546 (transcript). Mr. Johnson, who was present in court at the time, has since stated that the verdict was a non-unanimous 10-2 verdict.

### **III. Non-unanimous juries have made incorrect determinations that resulted in wrongful convictions.**

Closer examination of some of the cases in which juries handed down non-unanimous guilty verdicts illustrates how allowing such verdicts can diminish the jury's role as a safeguard against wrongful conviction. Glenn Davis, Larry Delmore, and Terrence Meyers were convicted based on the testimony of a single eyewitness who testified he saw the three men perpetrate a drive-by shooting. *State v. Meyers*, 638 So.2d 1378, 1381 (La. App. 5 Cir. 1996). The witness admitted smoking crack about an hour before the crime. *Id.* Ten of the jurors found the witness credible beyond a reasonable doubt, whereas two did not. Because Louisiana allows non-unanimous guilty verdicts, the views of these two jurors were discounted and the three men were convicted.

Evidence discovered after trial demonstrates that the two jurors were right to have doubts. Several witnesses testified that the State's crucial eyewitness was not at the crime scene when the shooting occurred. *State v. Davis*, Jefferson Parish Case No. 92-4541 at 5 (Feb. 16, 2007) (opinion). Additional evidence identified another individual as the perpetrator. *Id.* This led to all three defendants' convictions being vacated and the State dropping charges.

This case also illustrates how non-unanimous verdicts allow the views of minorities to be sidelined.<sup>14</sup> Mr. Davis, Mr. Delmore, and Mr. Meyers were tried in Jefferson Parish, where there is a long history of underrepresentation of African Americans on juries.<sup>15</sup> In this case three African-American

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<sup>14</sup> *Amicus* is unable to present complete data on this point because in many cases the races of the jurors is not discernible from the record or the jury was not polled and so it is not apparent which jurors' views were nullified.

<sup>15</sup> See *Snyder v. Louisiana*, 552 U.S. 472 (2008) (finding *Batson* violation and noting "implausibility" of reasons offered by Jefferson Parish prosecutor for striking African-American jurors); *State v. Harris*, 820 So.2d 471, 474 (La. 2002) (finding *Batson* violation where Jefferson Parish prosecutor explained that she was striking an African-American juror because he was a "single black male on the panel with no children . . . I don't want him relating to the defendant more so than he would the State's part of the case"); *State v. Jacobs*, 789 So.2d 1280 (La. 2001) (though reversing on other grounds, court rebuked the judge for the careless manner in which the judge considered the defendant's *Batson* challenges); *State v. Myers*, 761 So.2d 498 (La. 2000) (reversing on grounds the trial court erred in failing to address the defendant's *Batson* challenges to the State's use of peremptory challenges to exclude six of seven African Americans). See also *State v. Bridgewater*, 823 So.2d 877 (La. 2002) (all-white jury seated after prosecutor used peremptory strikes to remove prospective black jurors); *State v. Neal*, 796 So.2d 649 (La. 2001) (prosecutor used strikes to remove three African Americans; one African American seated on jury); *State v. Taylor*, 781 So.2d 1205 (La. 2001) (prosecutor struck five African Americans, leaving one on jury); *State v. Lucky*, 755 So.2d 845 (La. 1999) (entire panel of jurors struck when juror accused prosecutor of using challenges to remove African-American women; resulting jury consisted of eleven whites and one black) (information regarding jury composition obtained from post-conviction investigator); *State v. Seals*, 684 So.2d 368 (La. 1996) (all-white jury seated after the prosecutor struck three African Americans over defendant's *Batson*

jurors were seated. Nevertheless, two of these African-American jurors had their votes nullified. These two jurors did not vote to convict, but the jury was able to return a guilty verdict regardless. In the case of a particularly obvious *Batson* violation, the Louisiana Supreme Court once observed:

Because only ten votes were needed to convict defendant of armed robbery, the prosecutor could have assumed, contrary to *Batson's* admonition that it was unacceptable to do so, that all black jurors would vote on the basis of racial bias and then purposefully discriminated by limiting the number of blacks on the jury to two.

*State v. Collier*, 553 So.2d 815, 819-20 (La. 1989).

In another exoneration case, Travis Hayes was charged with being the getaway driver for a person who murdered a store owner. *State v. Hayes*, 806 So.2d 816, 820-21 (La. App. 5 Cir. 2001). At trial the jury heard that, after around six hours of through the night interrogation, Mr. Hayes had accepted the

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objection); *State v. Durham*, 673 So.2d 1103 (La. App. 5 Cir. 1996) (same).

police's accusation that his friend Ryan Matthews was the murderer and he was the getaway driver. *Id.* Additionally, two witnesses to the aftermath of the crime identified Travis Hayes's car. *Id.* at 820. The defense's main evidence was that DNA from the ski mask left at the scene by the perpetrator did not match Travis Hayes or Ryan Matthews. *Id.* at 822. Ten jurors weighed this evidence and were certain of Mr. Hayes's guilt beyond a reasonable doubt. Two jurors, including the sole African American on the jury, did not accept this and did not vote to convict. These two jurors' opinions were nullified.

After the verdict, evidence came to light that proved the two dissenting jurors were correct. Most significantly, the unaccounted for DNA from the perpetrator's ski mask was matched to an individual who had no connection to Travis Hayes (or Ryan Matthews) and who had been bragging about perpetrating the crime.<sup>16</sup> As a result, Mr. Hayes's conviction was vacated and the State dropped charges.

## CONCLUSION

Louisiana has the second highest per capita rate of proven wrongful conviction in the country. An alarming number of wrongful convictions have

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<sup>16</sup> Innocence Project New Orleans, Exoneree Profile: Travis Hayes, <http://www.ip-no.org/exonoree-profile/travis-hayes> (last visited Apr. 8, 2014).

occurred in this state, and there are almost certainly more to be discovered. The exoneration cases described above and the fact that non-unanimous guilty verdicts led to at least nine wrongful convictions in Louisiana where such a verdict was available illustrate that the continued use of non-unanimous verdicts presents a high risk of wrongful conviction and has directly contributed to wrongful convictions in Louisiana in the past. In each of these nine identified cases, at least one member of the jury had serious doubts about the defendant's guilt. The exonerations of these nine individuals show that those jury members were right to be suspicious of the State's case.

There are various causes that contribute to wrongful convictions across the country: eyewitness misidentification, false confessions, flawed forensic testimony, and others. These issues plague the criminal justice system, and are hard to cure. In Louisiana (and Oregon), however, innocent defendants faced with criminal charges have yet another obstacle to overcome: the possibility that a non-unanimous jury can convict them of a crime they did not commit. While the requirement of the other forty-eight states that a guilty verdict come from a unanimous jury does not provide failsafe protection against convicting the innocent, removing it eliminates the most significant protection afforded a citizen facing the loss of his liberty.

Louisiana and Oregon are the only two states in the union that continue to permit non-unanimous jury verdicts. Non-unanimous jury verdicts have been shown to be a cause of wrongful convictions. Where problems like eyewitness misidentification may be difficult to remedy, this problem is much less so: the practice should be and can be discontinued. In sum, *amicus* Innocence Project New Orleans supports Ortiz Jackson's petition for certiorari. The issue presented is an important one: disallowing the continued use of non-unanimous jury verdicts in this state will likely prevent innocent men and women from losing their freedom in the future. For all the foregoing reasons, and for those presented by Petitioner, Mr. Jackson's petition for certiorari should be granted.

Respectfully Submitted,

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