No. 18-_____

In the Supreme Court of the United States

TAMARA COTMAN AND ANGELA WILLIAMSON,

Petitioners,

–v–

STATE OF GEORGIA,

Respondent.

On Petition for Writ of Certiorari to the Georgia Court of Appeals, Fourth Division

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether it is a Violation of the Sixth Amendment for a jury in a criminal case to return a nonunanimous verdict.

2. Whether the Double Jeopardy Clause of the Fifth Amendment bars retrial of a defendant who was previously acquitted of the same substantive offense.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioners respectfully petition for a writ of certiorari to review the judgment of the Georgia Court of Appeals.

OPINIONS BELOW

The opinion of the Georgia Court of Appeals is reported as *Tamara Cotman and Angela Williamson v. State*, 342 Ga. App. 569 (2017). A copy of this opinion is attached in the appendix at App.3a to this petition. The Opinion of the Supreme Court of Georgia denying petitions for certiorari are included at App.1a and App.2a. The jury verdicts are included at App.41a and App.44a.

JURISDICTION

The Georgia Supreme Court entered its order on April 16, 2018. This court has jurisdiction per 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- **U.S. Const. amend. V**

  Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb.

- **U.S. Const. amend. VI**

  In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury

- **U.S. Const. amend. XIV**

  No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States

STATEMENT

The Petitioners, TAMARA COTMAN AND ANGELA WILLIAMSON, were indicted along with thirty-three other educators for violating RICO in Count I, Case No: 13-SC-117954. (Cotman R. 5-94).

Petitioner Cotman was also charged with one count of influencing a witness, Count IV, by a Fulton County Grand Jury on March 23, 2013. (Cotman R. 5-94).

Petitioner Williamson was also charged with False Statements and Writings in Counts 24, 32, and False Swearing in Counts 33 and 36. (Cotman R. 5-94).

Petitioner Cotman filed a special demurrer on May 14, 2013, attacking Counts I & IV, based upon the state's failure to properly allege how the victim was intimidated pursuant to *Delaby v. State*. (R. 122-125), and (3) May 16, 2013. (Cotman R. 171-177).

As a result of the filing, the State secured on June 7, 2013, a second indictment, case no: 13-SC-119521, charging Petitioner Cotman with one count of influencing a witness. (Cotman R. 860-862).

Petitioner Cotman filed a speedy trial demand to that indictment on June 11, 2013. (Cotman R. 863-864).

Petitioner Cotman was found not guilty in case no:. 13-SC-119521 on September 12, 2013. (Cotman R. 352).

Petitioner Cotman filed a plea in bar of trial for former jeopardy on October 10, 2013. (Cotman R. 225-228).

The trial court filed an order with the Clerk of court on December 2, 2013, denying Petitioner Cotman's demurrer and plea in bar. (Cotman R. 269).

The trial in case no: 13-SC-117954 began on August 11, 2014 with jury selection, (T. 6) and ended on April 1, 2015 with the jury returning a guilty verdict on Conspiracy to Violate RICO, for all defendants save Dessa Curb. (Cotman R. 763).

Petitioner Cotman was sentenced to twenty years to serve seven in prison on April 14, 2015, (R. 847-850), then resentenced on April 30, 2015 to ten years to serve three in custody, 2000 community service hours & $10,000 fine. (T. 20568).

Petitioner Williamson was also found guilty of Count 9, False Statements and Writings; Count 15,

False Statements and Writings, Count 16, False Swearing: Count 17, False Swearing. (T. 20288).

Petitioner Williamson was sentenced, on April 14, 2015, to 5 years to serve 2 in custody, 1500 hours of community service and $5000 fine. (T. 20527).

On August 11, 2017, the Georgia Court of Appeals affirmed the Petitioners' conviction and the Georgia Supreme Court refused to exercise its discretion to review the matter on April 16, 2018.

The facts pertinent to this appeal are as follows: the State alleged in this prosecution that administrators, Petitioner Cotman was the administrator for some 21 schools not including the school that Petitioner Williamson worked as a teacher, along with a number of other teachers entered into a conspiracy to change answers on the Criterion-Referenced Competency Test, ("CRCT"), a standardized test, for the purpose of obtaining an interest in United States Currency. " . . . conspired and endeavored to acquire and maintain, directly and indirectly, AN INTEREST IN AND CONTROL OF U.S. CURRENCY . . . " (R. 5). Yet, virtually no witness testified that there was a financial motive.

Bob Wilson who was specially appointed by Governor Sunny Purdue to conduct an investigation, in this case, (the results of said investigation where never introduced into evidence), testified after examining the RICO count of the indictment that "I do not deny . . . that our finding is and was that the financial benefits i.e., the bonuses played a little part, they were not the primary incentive to cheat. We found that it played a part but it was relatively small. That the big elephant in the room was the targets and the meeting of the targets . . . " (T. 9027)

Tremelia Donaldson, a former third grade teacher at Gideons Elementary School, testified that she did not cheat for an interest in U.S. currency as alleged in the indictment, Count I, to wit:

"Q. And you were not involved in an agreement to change answers to make money even for yourself, correct?

A. No.

Q. And you were not involved with—any agreement or any scheme or plan to change answers to make money . . . for Diane Buckner-Webb or any of these other individuals sitting over here, correct?

A. No." (T. 4871)

Bernadine Macon, a former fifth grade teacher at Gideons Elementary School, testified, again and again, that she did not cheat for an interest in U.S. currency as alleged in Count I of the indictment to wit:

"Q. Okay. All Right. Now, when you started the process of changing answers with your fifth grade team, how much money did you all make?

A. Pardon Me?

Q. How much money were you going to make by changing these test answers?

A. I don't think—I didn't assume I was going to make any money.

Q. You mean to tell me that you all weren't changing test answers for the purpose of making money?

A. No, Sir.

Q. You weren't changing test answers for the purpose—

A. Money was never mentioned.

Q. You didn't do it to make money for yourself?

A. No, Sir.

Q. You didn't do it to make money for Mr. Salters, nice old Mr. Salters?

A. No, Sir.

Q. You didn't do it to make money for your SRT director?

A. No, Sir.

Q. You didn't do it to make money for Dr. Hall?

A. No, Sir.

Q. There wasn't an agreement for you to make money for them and them give some money to you?

A. No, Sir. Money was not mentioned at any time that I can recall.

Q. Okay. And as you sit here today, is the reason that you changed those answers in order for you or anybody else to get some money?

A. No, Sir." (T. 5197-98)

Lavonia Ferrell, a former teacher and testing coordinator at Deerwood testified that she did not cheat for bonus money to wit:

"Q. Would it be fair to say that you never did any of this in order to make money for yourself?

A. What money was there to make?

Q. And you definitely never did it to make any money for teachers or administrators with the Atlanta Public Schools, correct?

A. That's Ridiculous. No.

Q. And you definitively never did it to make any money for Superintendent Beverly Hall, correct? Yes or No?

A. No." (T. 6709).

Lucious Brown, the former principal of Kennedy Middle School, testified that he did not cheat for money to wit:

"Q. And you didn't cheat for money, correct?

A. Correct.

Q. You didn't do it to make any money for Beverly Hall?

A. No." (T. 7037).

Andrew Porter, Dean of the University of Pennsylvania School of Education, (T. 4360), wrote a report where he and an assistant analyzed the cheating evidence, States' Exit 43 & 44, (T. 4369), testified that he found no evidence of systemic cheating to wit:

"Q. Dr. Porter, . . . I just want to ask you about one of the parts of your report that you read out earlier. On page 7 of your report, the second sentence, which begins with nevertheless . . .

A. Yes. I wrote nevertheless unusually large residuals were not systemic across grade levels and tested subjects in the schools, suggesting

that the unusually large residuals are localized to specific grades and subjects.

Q. Okay. When you say systemic, I'm going to ask you about that would you—if it were systemic, would you have expected it to be school wide?

A. That's what I meant by systemic. That's correct . . . If there would have been unusually large gains in every one of those nine boxes or cells, that would be systemic. That would be systemic or if it was in seven or eight out of the nine, I would call that systemic." (T. 4399-4400)

Gary Cizak, the State's expert on school cheating, testified that cheating occurs everywhere and that statistics alone should never be primarily relied upon to base a conclusion that cheating has occurred to wit:

"Q. It is important to admit that none of the methods actually detect cheating, Is that right?

A. That's correct. (T. 3669)

Q. . . . it is commonly recommend by experts in testing that statistical methods of detecting cheating not be used to initiate investigations of suspected cheating—in case you can't find that, right here. You see that?

A. I do. (T. 3670).

Q. Did you write: among experts in our field, there is little disagreement with the notion that statistical evidence should never be used to trigger an investigation to suspected cheating?

A. I did. . . . (T. 3674)

Q. Okay. Now, I want to draw your attention to the middle quote on page 142, did you write: our position is supported by both courts and statisticians, is that one should never accept probabilistic evidence as sufficient evidence of cheating merely because a pattern of answers is deemed to be statistically improbable? Did you write that in the quote "our position"?

A. I was quoting two authors, Dwyer and Hecht, 1996. (T. 3675)

Q. That's your book, no?

A. That is my book and yes that's exactly what I was quoting, them and I think that I still have some sense in me that without any other evidence, statistical evidence is not proof . . . " (T. 3676)

Q. Okay. So statistics alone is not proof of anything, is that what you're saying?

A. Not in any field." (T. 3676)

Q. Okay. Did you write: for example, as can be seen in all of the research studies, every cheating index produces its share of false positives, is that right?

A. Yes, that's correct.

Q. Cases flagged, right?

A. That's correct.

Q. As cheating, correct?

A. Yes.

Q. In which no cheating occurred?

A. Yes, sir. (T. 3676)

Q. All right and the point, you sort of, given these guidelines, you stated these guidelines is that if you rely solely on statistics, you could end up accusing someone who is innocent of something, right?

A. Yes, my intention was to urge people to be cautious in using a statistical approach, because every time we base something on probability in any field, we're going to be wrong in some instances . . . (T. 3676-77)

Q. . . . did you write: "attempts to develop indices that are highly sensitive to detecting true cheating invariably" and what does that mean, "invariably"?

A. Statistically certain to have it.

Q. Certain to have it?

A. Yeah.

Q. "Invariably" means certain to have it?

A. Right.

Q. —"invariably end up identifying an increased' percentage of innocent persons as well."

A. That's correct." (T. 3677)

Randall Fry, a retired computer programmer, who worked for 25 years at CTB/McGraw-Hill, the company that Georgia hired to process its CRCT tests, testified

that there are problems with the reliability of an erasure analysis to wit:

"Q. . . . could you tell this jury what the uncertainties of erasure analysis are?

A. Well, the uncertainties of erasure analysis are that you're working with a fairly small window of darknesses. If the bubble is 5 or above, it is an intentional mark, if the bubble is below 3, if it is 2 or 1 or zero, it is in the grays and not a meaningful piece of data anymore, and it disappears into the grays, so that's one reason for the uncertainty, is that usually, not always, but usually, you're dealing with bubbles in that very, very low level, not always because of that margin of 3 thing, it is possible for there to be a 5 or a 6 that was ignored due to mark discrimination logic, three levels apart from the intended response and then you can have a bubble entering your erasure analysis data that was a 5 or a 5, 6, or a 7. It is possible but usually they are very low level bubbles and a low level bubble, as we were talking about, can be a number of things. I think I already mentioned that I cannot tell you at the scanner whether something was an erasure. All I know is it's a light mark. (T. 11991-92)

Q. So based upon what the machine picks up, you can't determine whether or not that's an erasure, right?

A. That's correct. I have no idea. (T. 11992).

Q. So why didn't you just call it a light mark analysis?

A. Well, that would be a valid thing to call it because—in fact, when I'm talking with people, I call them possible erasures.

Q. Possible erasures?

A. Possible erasures, that's all we know at that time. (T. 11992)

Q. Okay, now, the statistical analysis was based on this light mark analysis, right?

A. That's correct, it is based on the light mark data from the scanners.

Q. Okay, now, is it also true that you wrote in your paper on page 3, by nature, erasure or light mark analysis at the scanner operates on the margins of determinability?

A. That's correct.

Q. What do you mean by margins of determinability?

A. Close to the margin where you cannot determine it.

Q. So it may be certain, may not be certain, is that what you're saying?

A. What I find at the scanner is light marks, it takes, it takes further analysis to determine why there are light marks there and what they mean. (T. 11993).

Q. And specifically with regard to the Georgia CRCT in 2009, you caught at least two problems that made it out the door?

A. Yes. . . . " (T. 11995)

A. . . . our scanners were out of calibration." (T. 11995)

Although Fry testified to the dangers of relying upon an erasure analysis, the State nevertheless hired Brian Jacob, a person who did not consider himself much of an expert, to perform an analysis based upon data gathered from scanners that operate on the "margins of determinability" for $80,000 to wit: (T. 17367).

"Q. You didn't hold yourself out as an expert in cheating the last time you came here to testify, correct?

A. I mean, I don't consider myself an expert in that very narrow area. I mean, I think I do statistical analyses, and I have in the past done statistical analyses of cheating, it is one of a dozen different areas I have done research on, so I think in my one-paragraph bio, I don't mention that one specific area." (T. 17110).

Jacobs testified that he only looked at the schools that the State told him to exam.

"Q. When you were here last time, I asked you why in SRT-4 did you only focus on certain schools: You remember me asking you that question? Why didn't you look at all the schools in SRT-4:

A. I looked at schools that Ms. Willis asked me to look.

Q. Okay, you only looked at the schools that Ms. Fani Willis asked you to look at that was your answer, right?

A. Yes.

Q. Okay, she told you to only focus on certain schools?

A. That's correct.

Q. Did you collect any information yourself?

A. No. (T. 17356)

Q. That was the problem that you had with the GOSA analysis, is that they compared inner city school kids to the rest of the state, right?

A. I think that was one of the problems with that analysis. (T. 17360)

Q. Okay, now, who gave you those districts to make a comparison?

A. No one gave them to me. I knew that I was looking for districts with a similar demographic population, so I went in the data and tried to find other districts with kind of over—I think the numbers were like 70 percent African-American, over 70 percent free and reduced price lunch, that I tried to look for districts that were largely urban districts, so I kind of picked some of these kind of characteristics that I thought were an important part of the Atlanta student population and then went to the data to try to find other districts that were like these. (T. 17361)

Q. In any event, you've never been to the State other than the last time you testified; is that correct?

A. No. I may have been to Atlanta a few times just for personal reasons, but I have never traveled throughout the state, No.

Q. Okay. And when I asked you, you know, do you know anything about this State, have you ever lived in it, it is true, is it not, that you said, no, I don't know anything about the State of Georgia?

A. That's correct. I don't know, have any particular knowledge of this State." (T. 17362)

Jacob did not find that there was cheating at the one school which was identified by the State as the epicenter for cheating, Deerwood Academy, *i.e.*, " . . . not a strong indication of intervention." (T. 17453).

Furthermore, the notion that the gains made on the CRCT were sufficiently incredible so as to notice anyone examining the data that the jump was caused by human intervention was impeached by the assertions made by Georgia officials, who reviewed the same data, during the application and interview phase of a federal competition called Race-To-The-Top.

Kathleen Mathers, the former Executive Director of the Governor's Office of Student Achievement (GOSA), (T. 7711), testified that she was selected by Governor Purdue to be one of five people to go to Washington, D.C. to answer reviewers' questions about Georgia's Race-To-The-Top application which included student achievement on standardized tests such as the CRCT. (T. 8219). The application was admitted as Cotman's Exhibit 33. (T. 8223) The application, according to Mathers, was the second application submitted. (T.

8219) This application to the federal government covered the results of the Georgia CRCT to wit:

> "Q. All Right. Now, When you submitted that application one of the things you talked about was the CRCT results, correct? You recall that? If you look at—turn to page 51.
>
> A. Yes." (T. 8220).

Contrary to the State's theory of the case, the State of Georgia had taken the position with the federal government that the rise in CRCT results was unrelated to cheating.

> "Q. . . . Did you submit in the application that the reason that the CRCT results had increased was because there were higher standards and harder assessments, accompanied by effective professional development for teachers. You did say that right, at the bottom?
>
> A. Yes." (T. 8220)

Matthews then suggested that as used in the application the phrase "the entire state," did not include Atlanta.

Contrary to Mathers contention, Governor Purdue testified that the application, Cotman's Exhibit 3, did include statistics from the Atlanta Public Schools wit:

> "Q. Okay, and when you're talking about statewide, you were including Atlanta as well; is that not correct?
>
> A. Yeah. it is in Georgia, statewide."

Further rebutting Matthew's assertion is the application, itself, which lists on page 25, the participating

local education agencies (LEAs) in the Appendix, "Appendix A17" entitled "Evidence Table 2." Atlanta is in the first position. (T. 8223, Cotman Exhibit 33).

What is uncontroverted is the content of the application, which attributed the gains in CRCT scores to among other things good teaching to wit:

"Q. And could you read that paragraph for us?

A. It says: "Reading CRCT results. The pattern of increased student achievement in reading show on the NAEP is also reflected by scores on the CRCT, the state's assessment for Grade One through Eight under ESEA. Georgia's students saw gains in reading in all levels prior to implementation of the GPS. Since the implementation of the new GPS in reading in 2005-2006, all grade levels have seen gains in the percent meeting or exceeding standards, ranging from 2.4 percent gained (Grade Two) to 8.9 percent (Grade Seven) on the CRCT. Overall achievement rates (PERCENT MEETING OR EXCEEDING STANDARDS) RANGED FROM 87.3 PERCENT (GRADE FOUR) TO 96 PERCENT (GRADE EIGHT)." (T. 8222, Cotman Exhibit 33 p. 53)

Q. Language Arts CRCT results, could you read that paragraph?

A. LANGUAGE ARTS CRCT RESULTS. The pattern of increased student achievement in reading shown on the NAEP is also reflected by scores on the language arts CRCT. Since the implementation of the new GPS in reading in 2005-2006, all grade levels have seen gains

in the percent meeting or exceeding standards, ranging from 3 percent gained (Grade Two) to 8.2 percent (Grade Four) on the CRCT. Overall language arts achievements rates (percent meeting or exceeding standards) ranged from 84 percent (Grade One) to 92 percent (Grade Eight)." (T. 8224, Cotman Exhibit 33 pg 53)

Q. . . . If you turn to the next page, you talk about the math CRCT results, could you read that paragraph for us?

A. "MATH CRCT RESULTS. The staggered implementation in mathematics began with grade six in 2005-2006. In the three years since the baseline year for the new assessment, grade six students experience a gain of 13 points in the percent of students meeting or exceeding the standards. In the two years since the 2007 baseline year for Grade seven mathematics, students have experienced an increase of 10 percentage points. See table A4 for CRCT increases by grade level for both ELA and Mathematics since GPS implementation . . . " (T. 8225, Cotman Exhibit 33 pg 54)

The Race-To-The-Top application was endorsed by Governor Sonny Purdue, Erin Hames, Governor Purdue's Policy Director, Kathy Cox, Georgia Education Secretary, Wanda Barrs, President of the Georgia Board of Education and Julia B. Anderson on behalf of the Georgia Attorney General. (T. 8234, Cotman Exhibit 34). In fact the application was certified by the Attorney General for accuracy and completeness. (T. 8234).

Mathers did not request that the Governor appoint someone to investigate cheating in the Atlanta Public School system until two days after Georgia won the federal grant money. Governor Purdue testified that he did not receive the Mather's letter requesting he appoint an investigator until two days after Georgia had be awarded four hundred million dollars to wit:

"Q. Okay. now, as a result of submitting the application for Race-To-The-Top, did Georgia receive any money?

A. Not for submitting, but for winning the Race-To-The-Top, yes.

Q. All right, so this is what we're talking about, that August 24th, 2010, Governor Sonny Perdue today announced that Georgia was selected as the winner by the U.S. Department of Education for the second round of Race To The Top grants, the state is projected to receive $400 million. right?

Okay, now, do you recall when Ms. Mathers sent you that letter asking you to appoint investigators to investigate districts in the State of Georgia because there was this wide-spread cheating; and in particular, Atlanta and Dougherty County? Do you recall when you got that letter? (T. 8569)

A. I can't recall getting a letter. (T. 8569)

Q. Is this the letter you received from Ms. Mathers?

A. It is addressed to me on August 26th . . .

Q. . . . so you found out about the money on August 24th, 2010 and then the letter is dated —is that August 26th, 2010?

A. That's what it looks like to me." (T. 8570).

Barbara Lunsford, the Associate Superintendent for School Improvement for State of Georgia, (T. 11012), testified that there was no rationale for believing that performance targets led to teachers cheating. (T. 11141).

Bob Wilson testified in response to the hypothetical, assuming "I pressure someone to meet targets that I set, what crime have I committed? A. . . . I don't know that you have per se committed a crime just by that." (T. 9027).

It is uncontroverted that none of Petitioner Cotman's principals were charged in this indictment. She did not receive bonus money. Petitioner Cotman was not accused at the time of trial of committing a predicate act.

REASON FOR GRANTING THE WRIT

I. WHETHER IT IS A VIOLATION OF THE SIXTH AMENDMENT FOR A JURY IN A CRIMINAL CASE TO RETURN A NON-UNANIMOUS VERDICT

It is well settled law that a trial court can not instruct a jury that it is allowed to return a non-unanimous verdict. "Gipson's non-unanimity challenge is based not on the result reached by the jury, but on a court instruction that may have judicially sanctioned

a non-unanimous verdict." *U.S. v. Gipson*, 553 F.2d 453 (1977).

Gipson, the first case to address duplicity, established that it is a violation of the Sixth Amendment for a Judge to instruct a jury that it could reach a non-unanimous guilty verdict on a single count of an indictment where two or more distinct and separate offenses are joined as elements of a crime, duplicity.

In *Gipson*, the jury, about an hour after they retired to deliberate, returned to the courtroom to request additional instructions from the court, handing the judge a note that read, "In Count Two, will he be guilty of all counts or will it be broken down?" In response to the jury's question, the judge charged the jury as follows:

> "A third question that may be the one that the jury is really asking is, must there be an agreement by all twelve jurors as to which act of those several charged in Count Two, that the defendant did. For example, would it be possible for one juror to believe that the Defendant had stored property, and another juror to believe that he had received property, and so on. If all twelve agreed that he had done some of those acts, but there was not agreement that he had done the same act, would that support a conviction? The answer is yes. If each of you is satisfied beyond any reasonable doubt that he did any one of those acts charged, and did it with the requisite state of mind, then there would be a unanimous verdict, and there could be a return of guilty under Count Two of the indictment, even though

> there may have been disagreement within the jury as to whether it was receiving or storing or what.
>
> "A superficial analysis of the problem might yield the conclusion that since every juror was still required to find all elements of the charged offense present in order to convict the defendant, there was necessarily unanimous jury agreement as to his guilt. This reasoning loses its cogency, however, when the policy underlying the unanimous jury right is taken into account." *Gipson* at 457.

Like the "reasonable doubt" standard, which was found to be an indispensable element in all criminal trials in *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), the unanimous jury requirement "impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue."

The unanimity rule thus requires jurors to be in substantial agreement as to just what a defendant did as a step preliminary to determining whether the defendant is guilty of the crime charged. Requiring the vote of twelve jurors to convict a defendant does little to insure that his right to a unanimous verdict is protected unless this prerequisite of jury consensus as to the defendant's course of action is also required. *See also State v. Frisby*, 174 N.J. 583, 811 A.2d 414, 425 (N.J., 2002) ("We note that the State contends that because there was no evidence of "jury confusion" a reversal is not required. That argument dices the notion of jury confusion referred to in our unanimity case law too finely. To be sure, if a jury affirmatively evidences "confusion" by its questions or its answers

on a jury verdict form, that would be an important factor in determining whether the absence of a specific unanimity charge caused defendant to be prejudiced. But the converse does not follow. As a result of the absence of a specific unanimity charge, the jurors here may have been perfectly clear that they could convict Frisby although they completely disagreed regarding contradictory and conceptually distinct theories and the evidence underlying them. That is especially true in light of the court's instruction that to convict the State had to prove "either" of its theories beyond a reasonable doubt. Such a jury would "evidence" no confusion but would nevertheless meet the confusion standard in the cases.")

The *Gipson* court, considered the trial court's instructions, and found that the jury was authorized to convict the defendant, if each individual juror found that the defendant performed one of the six prohibited acts receiving, concealing, storing, bartering, selling, or disposing of a stolen vehicle. These six acts fell into two distinct conceptual groupings; the first consisting of receiving, concealing, and storing, and the second comprised of bartering, selling, and disposing. Within each grouping, the acts are sufficiently analogous to permit a jury finding of the actus reus element of the offense to be deemed "unanimous" despite differences among the jurors as to which of the intragroup acts the defendant committed.

In short, the trial judge's instruction in *Gipson* authorized the jury to return a guilty verdict despite the fact that some jurors may have believed that Gipson engaged in conduct only characterizable as receiving, concealing, or storing while other jurors were convinced

that he committed acts only constituting bartering, selling, or disposing. Thus, under the instruction, the jury was permitted to convict Gipson even though there may have been significant disagreement among the jurors as to what he did. The instruction was therefore violative of Gipson's right to a unanimous jury verdict.

Similar to the jury instruction in *Gipson*, here, the trial court, instructed the jury, that it could base its verdict as to Count I on any one of two, separate and distinct crimes, to wit:

> "I charge you that, whereas in Count I of the indictment, the State alleges that the defendant committed a crime in more than one way, the state need not prove that the defendant committed the crime in each way charged, rather, it is sufficient if you, the jury, should find beyond a reasonable doubt that the defendant committed the crime in at least one way, one of the ways alleged." (T. 20055).

The vice of duplicity was most evident during the State's closing when Judge Baxter's instruction was used by the State to convince the jury that it did not have to agree on the Petitioner's conduct before deciding that she violated the Georgia RICO statute to wit:

> "Let me tell you this about the indictment crimes committed in more than one way, okay, in a single count in the indictment, the state alleges that the defendant committed a crime in more than one way. The state need not prove that the defendant committed the crime in each way charged, rather, it is sufficient if

> you, the jury, should find beyond a reasonable doubt that the defendant committed the crime in at least one of the ways alleged. Tell you that answer, Count I of the indictment involves RICO, the law allows us to charge them in two different ways based on two different kinds of conduct that they did, okay there is (a) and there is (b), we charged them in two different ways in a single count what the law says is we don't have to prove that they committed the crime in each way but when Mr. Floyd gets finished, you will see that they are guilty of both but the law doesn't require us to do it it is sufficient if you find them guilty of just one way, okay? and all them words up there, that's a long way of saying this right here 'and' means 'or,' so in the—when in the indictment, where it says 16-14-4(a) and 16-14-4(b), what that really means is 'or.' that's just some lawyer stuff. Okay." (T. 19424-425).

Perhaps the case most analogous to the case at hand is *State v. Seymour*, 177 Wis.2d 305, 502 N.W.2d 591 (Wis. App., 1993).

There, during the instruction conference, the trial court stated: "I don't think that it would be fatal if for example [the jury was] instructed in regard to use, transfer, conceal or retain." (Emphasis added). Subsequently, the prosecutor asked the trial court: "Are all four alternatives going to be given—use, transfer, conceal, or retain possession?" The trial court responded, "I think so. . . . " Over Seymour's objection, the trial court instructed the jury:

> "If you are satisfied beyond a reasonable doubt from the evidence in this case that the defendant, by virtue of his employment, had possession of money belonging to another, that the defendant intentionally used, transferred, concealed or retained possession of such money without the owner's consent, contrary to his authority, and with intent to convert it to his own use, you should find the defendant guilty as to the count under consideration."

Had the trial court charged in the conjunctive, there would have been no constitutional problem. By charging in the conjunctive, the vices of duplicity are avoided.

The information or charging document became duplicitous, according to the Court, when it was amended at the close of trial to substitute "or" for the word "and." In the verdict instructions conference, the trial court noted that the language of the statute was in the disjunctive, but the information was in the conjunctive. The trial court stated that the information should be stated in the disjunctive and the word "and" therein should be "or." The court said, "[I] will change the wording on the charges as far as the [i]nformation is concerned to make sure it adheres at this time to the—I'm concerned about using the term embezzlement, when the statute clearly defines it as theft."

Similarly, here, the indictment became duplicitous when Judge Baxter charged the jury in the disjunctive to wit:

> "The state alleges that all the defendants conspired or endeavored to violate the Georgia

> racketeer influenced and corrupt organizations act that act is commonly referred to as the Georgia RICO act it is unlawful for any person to conspire or endeavor to violate any of the following provisions: [subsection], A, it is unlawful for a person, through a pattern of racketeering activity or proceeds derived therefrom, to acquire or maintain, directly or indirectly, any interest in or control of any enterprise, real property, or personal property of any nature, including money; [subsection], B, it is unlawful for any person employed by or associated with any enterprise to conduct or participate in, directly or indirectly, such enterprise through a pattern of racketeering activity." (T. 20045-46).

Prejudice occurred when the jury was instructed that it could find Seymour guilty if the jury was satisfied beyond a reasonable doubt that Seymour had used, or transferred, or concealed or retained possession of the money he was alleged to have stolen. At that point, one of the vices of duplicity manifested itself.

One of the vices of duplicity equally manifested itself, in the case at hand, when the conjunctive "and" was replaced with the disjunctive "or." This resulted in four different ways of violating Count I: (1) conspire to violate subsection (a); conspire to violate subsection (b); (3) endeavor to violate subsection (a) or (4) endeavor to violate subsection (b).

The last part of the *Seymour* court's analysis was to determine the legislature's intent. Did the legislature intend that the statutory alternatives, "uses," "transfers," "conceals" or "retains possession" are mere

means of committing a single offense, or did the legislature intend to define independent offenses? "We believe that the Wisconsin Supreme Court decisions in *State v. Genova*, 77 Wis.2d 141, 252 N.W.2d 380 (1977), and *State v. Tappa*, 127 Wis.2d 155, 378 N.W.2d 883 (1985), require that we conclude that the legislature intended to enumerate independent offenses and not mere means by which the offense of theft may be committed."

The U.S. Supreme Court settled any lingering questions concerning what distinguishes "means" from so-called "elements," in *Richardson v. U.S.*, 526 U.S. 813, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999). There, the Court resolving a split amongst jurisdictions, began its analysis with the question presented. The question before us arises out of the trial court's instruction about the statute's "series of violations" requirement. The judge rejected Richardson's proposal to instruct the jury that it must "unanimously agree on which three acts constituted [the] series of violations." Instead, the judge instructed the jurors that they "must unanimously agree that the defendant committed at least three federal narcotics offenses," while adding, "[y]ou do not . . . have to agree as to the particular three or more federal narcotics offenses committed by the defendant." *Id.*, at 37.

The Richardson court found that the deciding factor was statutory language. "In this case, that language may seem to permit either interpretation, that of the Government or of the petitioner, for the statute does not explicitly tell us whether the individual violation is an element or a means. But the language is not totally neutral. The words "violates" and "violations"

are words that have a legal ring. It is an act that is contrary to law. That circumstance is significant because the criminal law ordinarily entrusts a jury with determining whether alleged conduct "violates" the law.

To hold that each "violation" here amounts to a separate element is consistent with a tradition of requiring juror unanimity where the issue is whether a defendant has engaged in conduct that violates the law. To hold the contrary is not."

Just as the terms "uses," "transfers," "conceals" or "retains possession" were determined to be independent offenses in Seymour and "violation" a separate crime in Richardson, so too have subsections (a) & (b) of Georgia Code Section 16-14-4, been deemed separate crimes, in the case at hand. Accordingly, the jury should have been instructed that it was required to unanimously agree on the Petitioner's course of conduct before reaching a guilty verdict. The failure to do so was reversal error.

II. WHETHER THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT BARS RETRIAL OF A DEFENDANT WHO WAS PREVIOUSLY ACQUITTED OF THE SAME SUBSTANTIVE OFFENSE

The State presented the same witnesses against Petitioner Cotman in a trial in which she was acquitted of Intimidating a Witness on September 12, 2013, Case No:. 13-SC-119521, as it did in Case No:. 13-SC-117954, a second trial that ended with her conviction on Count I, RICO, on April 1, 2015.

The best evidence that the State alleged the same violation of the law, albeit in Case 13-SC-11921, the allegation was a sole count of Intimidating A Witness

and in 13-SC-117954, RICO, the identical allegation of Intimidating A Witness was the only predicate act, is the State's opening statement in Case No:. 13-SC-119521 where the State alleged that Petitioner Cotman's role in the APS conspiracy to inflate test scores was to cover it up by demoting, transferring, or firing whistleblowers to wit:

> " . . . there was cheating going on, and I'm not talking about a little bit, you are going to hear there was a lot, so much so that I suspect that the evidence will have you astounded when you hear it with the witnesses we present, we are going to prove to you that there was cheating going on, we are going to prove to you this defendant knew that the people who were accused of cheating got rewarded and those that told the truth got punished; and that within the 21 schools that she was in charge of, there was this environment that you are going to hear about that existed, well, people knew that you better not say nothing even if you go to Ms. Cotman and you tell her directly, listen, there is cheating going on you are going to hear from the witnesses that actually did that, and they will tell you what Ms. Cotman said and how she did nothing, nothing to get to the bottom of it and that how later on, short time after they told her, they were either demoted, transferred, had their pay reduced, or they were just let go permanently." (Case No:. 13-SC-119521 T. 9-10)

The witnesses that testified to various forms of retaliation by Petitioner Cotman to include being forced to resign, transferred or "just let go permanently," in both cases were: Michael Milstead, (T. 5217) (Case No:. 13-SC-119521 T. 1015); Tonette Hunter, (T 53590) (Case No:. 13-SC-119521 T. 594); Mary Gordon, (T. 5566) (Case No:. 13-SC-119521 T. 194); Patricia Wells, (T. 5641) (Case No:. 13-SC-119521 T. 1323); Curt Green, (T. 5721) (Case No:. 13-SC-119521 T. 1418); and Monica Hooker, (T. 5898) (Case No:. 13-SC-119521 T. 1478).

And when the State mentioned in its opening in Case No:. 13-SC-119521 that " . . . the last category of witnesses you pay careful attention to, because they will give you evidence that this just didn't start in 2010 for years before, you are going to hear from principals, teachers, paraprofessionals, even some parents who are going to say, we all told Tamara Cotman that something was going on our numbers weren't right . . . ,"(Case No:. 13-SC-119521 T. 42) those witnesses in both trials were Michael Milstead, who was a principal (T. 5217) (Case No:. 13-SC-119521 T. 1015); Tonette Hunter, who was a paraprofessional (T 53590) (Case No:. 13-SC-119521 T. 594); Mary Gordon, who was a teacher (T. 5566) (Case No:. 13-SC-119521 T. 194); Patricia Wells, who was a principal (T. 5641) (Case No:. 13-SC-119521 T. 1323); Curt Green, who was a principal (T. 5721) (Case No:. 13-SC-119521 T. 1418); and Monica Hooker, who was a teacher (T. 5898) (Case No:. 13-SC-119521 T. 1478).

The child that told his mother that the teacher had given him the answers was Dequayvious Clark, (T. 5554) (Case No:. 13-SC-119521 T. 224) and his mother Keylina Clark, (T. 5435) (Case No:. 13-SC-119521 T.

245), who knew another child, Tymesha Mobley (T. 5544) (Case No:. 13-SC-119521 T. 238), that Ms. Cotman failed to act upon learning that she, Tymesha, had been given answers. These allegations were also the subject of overt acts, 23 and 24. (R. 5-94)

The State even admitted during its opening that part of the evidence that was going to be presented against Petitioner Cotman in Case No:. 13-SC-119521, had nothing to do with any of the schools which she supervised to wit:

> " . . . how did all this come to light? Let me tell you in 2008 there was a school in the Atlanta Public School System, not in Ms. Cotman's SRT, it is called Deerwood Academy in the spring of 2008 Deerwood had taken the CRCT the numbers off the charts I'm talking about like year before, the fourth graders in math, only like 20 percent of them passed, okay? 2009, the fifth graders in math, like 85 percent of them passed. and didn't just passed, they exceeded expectations, okay? So the State has an office that's responsible for monitoring every single school in the whole State of Georgia. it is called the office of student achievement . . . they have got an abbreviation, too. they call them GOSA . . . they said, you know what, we are going to do what's called an erasure analysis . . . they have got a company, big company, McGraw Hill. they have got a big machine . . . so they got a machine, the machine will take a snapshot of the answer sheet, the computer can analyze it, and they can tell you whether or not there have been

any erasures on that answer sheet." (Case No:. 13-SC-11952 T. 18-20).

When the State talked about, the Office of Student Achievement (GOSA) beginning an investigation into unusually large gains in student test scores on the CRCT, that witness, in both cases, was Kathleen Mathers (T. 7704) (Case No:. 13-SC-119521 T. 89). The witness presented in both cases from that "big company," McGraw-Hill was Marc Julian (T. 12497) (Case No:. 13-SC-119521 T. 480) and the statistical expert, in both cases, Brian Jacob (T. 17102) (Case No:. 13-SC-119521 T. 504).

It is significant to note that the State presented its body of evidence that Ms. Cotman had cheated in Case No:. 13-SC-11952, despite the fact, that the alleged victim, Jimme Hawkins, who was the subject of the single count of Intimidating A Witness, never witnessed a single act of cheating to wit: "DID I ACTUALLY WITNESS CHEATING ON THE ACTUAL TEST? NO." (13-SC-11952 T. 997)

In the second trial, 13-SC-117954, the State repeated the same theory presented in the first trial, 13-SC-11952, specifically, that Petitioner Cotman retaliated against whistleblowers, referencing the same evidence, in its opening to wit: " . . . she also had some notices, Patricia Wells was a principal at Ben Carson . . . she's under contract, so they leave her under contract and demote her to an assistant principal position for that Spring semester at a high school, and come June, she is out of a job." (T. 3240). "Dequayvious Clark he is actually a child at Blalock elementary school. Dequayvious goes home and tells his mama, the teacher gave me answers . . . so she is going to tell you, when

Dequayvious comes home, this is not the first report she has gotten of a child saying that some years before, she had a child with her named Tymesha Mobley . . . . she had stomped up to that school and told them she wasn't having it and got all the way to Ms. Cotman with Tymesha and they told her, basically, it is not your child . . . so when Dequayvious comes home and says this, she says, oh, no, this my bloodline here and she tells Ms. Cotman, you are not going to shut me up and disguise this secret with my child like you did before . . . " (T. 3242-43).

> "The underlying policy of the Double Jeopardy Clause of the United States Constitution is that the [s]tate with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

State v. Jackson, 290 Ga. App. 250, 251 (2008).

The *Jackson* court in addition to enunciating the policy underlying Georgia's double jeopardy statute also made clear that the statute was more expansive than the federal constitution to wit: "[U]ntil adoption of the 1968 Georgia Criminal Code[,] questions of double jeopardy were determined under the criteria contained in the United States and Georgia Constitutions. However, those provisions are now "minimum standards" as the 1968 Georgia Criminal Code has expanded

the proscription of double jeopardy beyond that provided in the United States and Georgia Constitutions. Therefore, questions of double jeopardy in Georgia must now be determined under the expanded statutory proscriptions." *id.*

Georgia statutory law provides greater protection than federal law. *See Garrett v. State*, 306 Ga. App. 429 (2010) ("We note that by choosing . . . [to abandon double jeopardy argument found in 16-1-8 and proceed under a federal constitutional claim].); *State v. Estevez*, 232 Ga. 316 (1974) (Federal . . . constitutional criteria provide the minimum standards for double jeopardy questions); *McCannon v. State*, 252 Ga. 515, 517(1984) (Georgia statutes provide expanded protection against double jeopardy); *See also Gerisch v. Meadows*, 278 Ga. 641 (2004) (The Georgia Supreme Court reversed the trial court for failing to grant the Petitioner's Writ of Habeas Corpus based upon a finding that the Petitioner's trial attorney was ineffective for failing to raise double jeopardy.); *Tanks v. State*, 292 Ga. App. 177 (2008) (Tanks moved to dismiss a Fulton County aggravated stalking indictment. The Georgia Court of Appeal, *citing United States v. Dixon*, 113 S.Ct. 2849 (1993), held that the Dekalb criminal contempt proceedings triggered the Fifth Amendment's double jeopardy bar to subsequent prosecution and vacated the judgment.

CONCLUSION

For all of the reasons stated above Petitioners move this Court to grant this petition and reverse the decision of the Georgia Court of Appeals.

Respectfully submitted,

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