CRIMINAL LAW—ALIBI—GEORGIA JURY CHARGE HELD UNCONSTITUTIONAL (AGAIN)

In *Smith v. Smith*,[1] the United States Court of Appeals for the Fifth Circuit upheld the rejection by the United States District Court, Northern District of Georgia, of the trial court's charge to the jury concerning the defense of alibi.[2] The rejected charge stated in part:

> [A]libi as a defense involves the impossibility of the accused's presence at the scene of the offense at the time of its commission, and the range of the evidence in respect to time and place must be such as reasonably to exclude the possibility of presence. Alibi as a defense must be established to the reasonable satisfaction of the jury. . . . Any evidence in the nature of an alibi should be considered by the jury in connection with all other evidence in the case, and if in doing so the jury should entertain a reasonable doubt as to the guilt of the accused, they should acquit.[3]

After first holding that it could entertain a constitutional challenge to a state court's jury instructions on petition for habeas corpus,[4] and reiterating the principle that the state has the burden of proof in all criminal cases[5] and that shifting the burden of proof, *i.e.*, persuasion, to the defendant to disprove essential elements of a crime is violative of the due process clause of the fourteenth amendment,[6] the court below held that the Georgia state court instruction that alibi as a defense to criminal prosecution must be established to the reasonable satisfaction of the jury was violative of due process in that it placed the burden of proof upon the defendant as to an essential element of his crime.[7]

The State appealed, contending that the Georgia charge, considered in its entirety, did not shift the burden of proving alibi to the defendant. The State also argued that any possibility of prejudice was cured by the trial court's further instruction that the burden was on the state to prove

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1. 454 F.2d 572 (5th Cir. 1971), *rehearing & rehearing en banc denied* Feb. 1, 1972.
2. Smith v. Smith, 321 F. Supp. 482 (N.D. Ga. 1970).
3. *Id.* at 484.
4. *Id.* at 488, *quoting* Higgins v. Wainwright, 424 F.2d 177, 178 (5th Cir. 1970): Habeas corpus does not lie to set aside a conviction on the basis of improper jury instructions *unless* the impropriety is a clear denial of due proces so as to render the trial fundamentally unfair.
5. *Id.* at 488, *citing* Speiser v. Randall, 357 U.S. 513 (1958).
6. *Id.*, *citing* Deutch v. United States, 367 U.S. 456, 471 (1961).
7. *Id.* at 489, *i.e.*, he must prove his "nonpresence" rather than the state's having to prove his presence.

beyond a reasonable doubt all essential elements of the crime, necessarily including the element of presence.

The Fifth Circuit, relying on the basis of a series of Eighth Circuit cases[8] holding an Iowa charge on alibi, similar to Georgia's, unconstitutional, agreed that Georgia's charge to the jury on alibi was unconstitutional, and affirmed. The Georgia charge to the jury concerning the defense of alibi places some mandatory burden of proof on the defendant who raises the defense of alibi, and in so doing violates the due process clause of the fourteenth amendment.[9]

The Georgia law on alibi is provided by statute:

> Alibi, as a defense, involves the impossibility of the accused's presence at the scene of the offense at the time of its commission; and the range of the evidence, in respect to time and place, must be such as reasonably to exclude the possibility of presence.[10]

The early cases formulated a charge to the jury which it was thought would meet this statutory requirement,[11] and later cases have affirmed the charge.[12] Unfortunately, interpretations of the meaning of this charge varied widely and formed no consistent line of decisions demonstrating an orderly evolution of the doctrine to its present form. Some cases indicate that a preponderance of evidence is required for the defense of alibi.[13] Some cases have held the placing upon the defendant of the burden of proving his alibi by a preponderance of the evidence to

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8. Johnson v. Bennett, 414 F.2d 50 (8th Cir. 1969); Stump v. Bennett, 398 F.2d 111 (8th Cir. 1968).

9. 454 F.2d 572.

10. GA. CODE ANN. § 38-122 (1954).

11. Harrison v. State, 83 Ga. 129, 9 S.E. 542 (1889):

> Touching *alibi*, the rule in Georgia, as established by authority, consists of two branches: The first is that, to overcome proof of guilt strong enough to exclude all reasonable doubt, the *onus* is on the accused to verify his alleged *alibi*, not beyond reasonable doubt, but to the reasonable satisfaction of the jury. The second is that, nevertheless, any evidence whatever of *alibi* is to be considered on the general case with the rest of the testimony and, if a reasonable doubt of guilt be raised by the evidence as a whole, the doubt must be given in favor of innocence. *See also* Bone v. State, 102 Ga. 387, 388, 30 S.E. 845, 848 (1897).

12. Williams v. State, 226 Ga. 140, 173 S.E.2d 182 (1970); *see also* Young v. State, 225 Ga. 255, 257, 167 S.E.2d 586, 587 (1969) which held that "[a]libi, as a defense, should be established to the reasonable satisfaction of the jury but not necessarily beyond a reasonable doubt."

13. 83 Ga. at 130, 9 S.E.2d at 543, approving this language: "[T]he testimony sustaining the alibi . . . should outweigh or preponderate over the evidence for the state." Laminack v. State, 187 Ga. 648, 2 S.E.2d 99 (1939); Jones v. State, 130 Ga. 274, 60 S.E. 840 (1908); Cochran v. State, 113 Ga. 726, 39 S.E. 332 (1901); Hale v. State, 110 Ga. App. 236, 138 S.E.2d 113 (1964); Copeland v. State, 33 Ga. App. 150, 125 S.E. 781 (1924).

be error.[14] Some cases have held that reasonable satisfaction of the jury and preponderance of the evidence are the same.[15] Added to this inconsistency (and perhaps, in part, explaining it) is a stream of criticism which has been directed towards the charge almost since its inception.[16]

Five other states have permitted instructions which require a defendant to present sufficient evidence of alibi to establish in the minds of the jurors a reasonable doubt of his guilt, but they at no time shift the burden of persuasion to the defendant.[17] The federal appellate courts require that evidence of alibi should come into a case like any other evidence and be submitted to the jury for consideration of whether the evidence as a whole on the issue of presence proves the defendant's guilt beyond a reasonable doubt.[18]

The heart of petitioner's contention that he had been denied due process by the trial court's charge to the jury rests on a recent series of Eighth Circuit cases dealing with the constitutionality of the Iowa alibi charge. In the first case, *Johnson v. Bennett*,[19] the trial court had

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14. Pritchard v. State, 122 Ga. App. 780, 178 S.E.2d 808 (1970); Moultrie v. State, 93 Ga. App. 396, 92 S.E.2d 33 (1956).

15. Bone v. State, 102 Ga. 387, 30 S.E. 845 (1897); Hale v. State, 110 Ga. App. 236, 138 S.E.2d 113 (1964).

16. 83 Ga. at 130, 9 S.E. at 544:

> Were our own minds not hedged in by authority, we should be inclined to adopt the view expressed by Judge Thompson, (2 Thomp. Trials, § 2436) who, after recognizing that the burden of proof is upon the accused, adds: "this burden is sustained . . . when [defendant] succeeds in raising a reasonable doubt in the minds of the jurors as to whether or not he was at the place of the crime. . . ."

Where presence is necessary to constitute guilt, it seems that a reasonable doubt of presence would, by irresistible logic, involve reasonable doubt of guilt. (dictum). Bone v. State, 102 Ga. 387, 393, 30 S.E. 845, 848 (1897):

> An alibi is as much a traverse of the crime charged as any other defense, and . . . it would be logical, I think, that the facts of an alibi should come into the case like any other matters of defense, to be considered the same way. . . . [dictum].

Smith v. State, 3 Ga. App. 803, 61 S.E. 737, 738 (1907) *held* harmless error to omit a "reasonable satisfaction" charge, terming it "a plain, palpable incongruity." Merneigh v. State, 123 Ga. App. 485, 487, 181 S.E.2d 498, 499 (1971), terms Georgia's traditional charge on alibi a "grand conglomeration of garbled verbiage and verbal garbage," *citing* Smith v. State, 3 Ga. App. 803, 61 S.E. 737 (1907).

T. GREEN, GEORGIA LAW OF EVIDENCE § 21 at 76 (1957) posits:

> Even if a lawyer can understand what is expected of the jury under the standard charge in this State on burden of proof in cases involving alibi (and it is doubted that anyone can) the charge is bound to be confusing to a jury of laymen, *citing* Annot., 124 A.L.R. 471 (1940).

17. *In Re* Corey, 230 Cal. App. 2d 813, 41 Cal. Rptr. 379 (1964); State v. Withrow, 142 W. Va. 522, 96 S.E.2d 913 (1957); State v. Vanek, 59 Idaho 514, 84 P.2d 567 (1938); Sangston v. State, 172 Ark. 1177, 289 S.W. 478 (1927); State v. Wilson, 76 Mont. 384, 247 P. 158 (1926).

18. Thomas v. United States, 213 F.2d 30 (9th Cir. 1954); United States v. Marcus, 166 F.2d 497 (3d Cir. 1948); Falgout v. United States, 279 F. 513 (5th Cir. 1922).

19. 386 F.2d 677 (8th Cir. 1967).

charged the jury that the defendant had the burden of proving his alibi defense by a preponderance of the evidence, adding that if "upon the whole case including the evidence of an alibi, there is reasonable doubt" of the defendant's guilt, he should be acquitted.[20] The three member Eighth Circuit panel held that the alibi instruction given did not shift the burden of proof of alibi to the defendant, thereby destroying the fundamental presumption of his innocence, because the trial court in other instructions had stressed the presumption of innocence and the necessity of the State's proving all essential elements of the crime charged byond a reasonable doubt.[21] The Supreme Court of the United States granted certiorari.[22] The Eighth Circuit (*en banc*) then considered *Stump v. Bennett*,[23] a case involving the same Iowa charge: "[B]efore you can acquit the defendant by reason of this defense [alibi] you must find that he has established it by a preponderance . . . of the evidence . . . ."[24] The court held that the Iowa charge, in spite of the reasonable doubt instruction, tended to burden the defendant with disproving his presence, and that such a burden of proof on an essential element of the crime was in violation of due process standards. The shifting of the burden of proof to a person claiming to have been elsewhere when the crime was committed was held to create an irrational and arbitrary presumption of guilt, which conflicted with the overriding presumption of innocence which belongs to the accused and extends to every element of the crime.[25] Further, since the burden only shifted if the defendant actively raised the defense of alibi, it forced the defendant to choose between the exercise of two constitutional rights: the right to offer corroborative evidence of innocence; and the right of having the state prove his guilt beyond a reasonable doubt. The court found this procedure would "chill the assertion of constitutional rights by penalizing those who choose to exercise them . . . ," an impermissible burden.[26] Shortly thereafter, the Supreme Court vacated *Johnson* for reconsideration in light of *Stump*,[27] and on the same day denied certiorari in *Stump*.[28] The Eighth Circuit then reconsidered *Johnson* and reversed the earlier decision, finding no telling distinction between the two cases.[29]

20. *Id.* at 682.
21. *Id.*
22. Johnson v. Bennett, 390 U.S. 1002 (1968).
23. 398 F.2d 111 (8th Cir. 1968).
24. *Id.* at 115.
25. *Id.* at 116.
26. *Id.* at 120.
27. Johnson v. Bennett, 393 U.S. 253 (1968).
28. Bennett v. Stump, 393 U.S. 1001 (1968).
29. Johnson v. Bennett, 414 F.2d 50 (8th Cir. 1969).

Soon afterward, in *Parham v. State*,[30] the Georgia Court of Appeals held the Georgia charge on alibi unconstitutional on the basis of *Stump* and *Johnson*. The Georgia Supreme Court then refused to follow *Parham* and held in *Thornton v. State*[31] that the Georgia charge was distinguishable on its face from the Iowa charge, and that the Georgia charge on alibi coupled with the parts of the charge dealing with presumption of innocence and burden of proof did not have the effect of shifting the burden of proof to the defendant to prove alibi by a preponderance of the evidence. The United States District Court for the Northern District of Georgia, in the case from which this appeal is taken,[32] gives a tightly reasoned explanation of the confusion surrounding the term "burden of proof," to which it attributes the confusion in the case law.[33]

In its brief, the state contended that the Iowa charge was distinguishable from the Georgia charge on its face: the Iowa charge requiring a preponderance of the evidence, Georgia only requiring the reasonable satisfaction of the jury; and the Iowa charge being mandatory requiring a finding of no alibi absent a preponderance of proof from the defendant, the Georgia charge giving the jury a choice between two burdens of proof. The court found no significant distinction between the two charges, saying that although it was possible that the Georgia charge did not require a preponderance of evidence,[34] the actual standard utilized was immaterial. Though the standard might be unclear, the court said, it was enough to say it is clear that the Georgia defendant has some burden on his alibi defense,[35] and this burden cannot be sustained under the Constitution. The court said that evidence of alibi should come into

30. 120 Ga. App. 723, 171 S.E.2d 911 (1969); *see also* 21 MERCER L. REV. 511 (1970) for in depth discussion.

31. 226 Ga. 837, 839, 178 S.E.2d 193, 195 (1970).

32. Smith v. Smith, 321 F. Supp. 482 (N.D. Ga. 1970).

33. *Id.* at 489. There are two aspects to the "burden of proof:" the burden of persuasion (traditionally called burden of proof) which is always upon the State to rebut by sufficient evidence the accused's presumption of innocence; and the burden of going forward with the evidence. If, and only if, the State succeeds in rebutting the accused's presumption of innocence does the burden of going forward with the evidence fall upon the accused—if he stood silent now, he would stand convicted. The accused is never *required* to present evidence or establish it by any quantum of proof. In the interests of justice he is *allowed* to present evidence, and if he succeeds in raising a reasonable doubt as to his presence, he is acquitted. At no time does the burden of proof shift to the accused. *See* T. GREEN, GEORGIA LAW OF EVIDENCE §§ 17, 18, 21, 22 (1957); 9 J. WIGMORE, EVIDENCE §§ 2485, 2487, 2489 (3d ed. 1940).

34. *But see* Harrison v. State, 83 Ga. 129, 9 S.E.2d 542 (1889).

35. 102 Ga. at 392, 30 S.E. at 848. "There was no question as to the correctness of the charge as to where the burden rested—it was with the defendants . . . ." *See* T. GREEN, GEORGIA LAW OF EVIDENCE § 21 at 75-77 (1957).

a case as any other evidence and be submitted to the jury for consideration of whether the evidence as a whole on the presence issue proves the defendant's guilt beyond reasonable doubt.[36]

Turning next to the issue on mandatory requirement, the court found the Georgia charge no less so than Iowa's. The Georgia charge states, "Alibi as a defense *must* be established . . . ."[37] Iowa charged, "Before you can acquit . . . by reason of this defense you *must* find. . . ."[38] The court said the effect of these respective charges on the jury must assuredly be identical. Concerning the matter of choice of burden of proof, the court noted that both states, in addition to the alibi burden of proof instruction, also instructed the jury to consider all the evidence in determining guilt beyond reasonable doubt, both instructions thereby leaving the jury a choice of conflicting burdens of proof. The court found that such an option could not help but cause confusion and create a substantial likelihood of the jury's incorrectly placing the burden of proof on the defendant, to his prejudice, and held that in the absence of proof it must be assumed that prejudice did in fact result in the instant case. A doctrine which serves no useful function whatever creates the clear probability that a defendant might be deprived of his constitutional rights and could not, the court held, be sanctioned.

The court has made it clear that no burden of proof of any essential element of a crime is to fall upon a defendant in a criminal action. The distinction, as always, is one of mandate, timing, and degree. A defendant may never be *forced* to present evidence of any kind in his own defense. He must be *allowed* to do so at any time, though he need do so to avoid conviction only when the State has produced such evidence of his presence and all the other elements of the crime that the jury believes the defendant guilty beyond a reasonable doubt. Further, he need produce only enough evidence to cast a reasonable doubt upon his guilt—he never need convince the jury of his "non-presence" to their reasonable satisfaction or beyond a reasonable doubt. Finally, no specific quantum of proof may be required, as a "preponderance" of the evidence. As long as the State requires, to overcome a prima facie case, that the defendant negatively raise a doubt, the instruction will stand; as soon as the defendant is required to positively prove something—be it to the reasonable satisfaction of the jury or beyond a reasonable doubt—the instruction will fall.

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36. *Citing* Falgout v. United States, 279 F. 513 (5th Cir. 1922). *See* United States v. Marcus, 166 F.2d 497 (3d Cir. 1948); Thomas v. United States, 213 F.2d 30 (9th Cir. 1954).

37. 321 F. Supp. at 484.

38. 398 F.2d at 115.