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IN THE SUPREME COURT OF THE UNITED STATES

JAQUEZ M. COOPER, *Petitioner*

vs.

STATE OF GEORGIA, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF GEORGIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a jury instruction requiring a defendant to testify or explain his innocent possession of property allegedly stolen was unconstitutional as applied to his case in violation of his Fifth Amendment privilege against self-incrimination under the United States and Georgia Constitutions where the defendant's reasonable explanation of his possession of allegedly stolen property consistent with his plea of innocence was the only way he could obviate the inference of guilt of armed robbery based on his recent possession of the property. Here, defendant did not testify or offer any evidence.
2. Whether a reasonable juror would have been misled by the jury instruction on inference of guilt based on recent possession of stolen property, which contradicted other principles of law regarding the State's burden of proof, presumption of innocence, and no requirement that the defendant testify or offer any evidence.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jaquez M. Cooper respectfully petitions for a writ of certiorari to review the judgment of the Georgia Court of Appeals.

OPINION AND ORDERS BELOW

The opinion of the Georgia Court of Appeals affirming Petitioner's judgment of convictions is published at 342 Ga. App. 351 (2017). Pet. App. 1a-12a. The order of the Georgia Court of Appeals denying Petitioner's motion for reconsideration is unpublished and reproduced here. Pet. App. 15a. The order of the Georgia Supreme Court denying Petitioner's petition for writ of certiorari is unpublished and reproduced here. Pet. App. 16a. The order of the Gwinnett Superior Court denying Petitioner's motion for new trial is unpublished and reproduced here. Pet. App. 13a-14a.

JURISDICTION

The Georgia Court of Appeals affirmed Petitioner's judgment of conviction on June 2, 2017. Pet. App. 1a-12a. The Supreme Court of Georgia denied Petitioner's petition for writ of certiorari on January 16, 2018. Pet. App. 14a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides that:

“No person . . . shall be compelled in any criminal case to be a witness against himself[.]”

Article I, Section 1, Par. XVI of the Georgia Constitution of 1983 states:

“No person shall be compelled to give testimony tending in any manner to be self-incriminating.”

INTRODUCTION

The trial court instructed the jury:

[I]f you should find beyond a reasonable doubt that the crime of armed robbery has been committed as charged in this indictment and that certain personal property as set forth in this indictment was stolen as a result of such crime and if recently thereafter the defendant should be found in possession of any of the stolen property, that would be a circumstance along with all the other evidence from which you may infer guilt as to the charge of armed robbery as set forth in this indictment. If you find the evidence merits such an inference, you may not draw an inference of guilt if from the evidence there is a reasonable explanation of the possession of such property consistent with a plea of innocence which is a question solely for you, the jury to determine.

The trial court also instructed the jury on reasonable doubt, the presumption of innocence, the burden never shifts to Petitioner to prove his innocence and the fact that Petitioner is not required to testify or offer any evidence. Pet. App. 6a-7a.

Here, Petitioner did not testify at his trial or call any witnesses.

Summary reversal is required where, as here, a reasonable juror could have interpreted the instruction to mean that Petitioner was compelled to give or adduce testimony regarding his innocent possession of the backpack and be a witness against himself. *See, Sandstrom v. Montana*, 442 U.S. 510, 514-519 (1979) (holding that the effect of the presumption in the allocation of proof depends on “the way in which a reasonable juror could have interpreted the [challenged] instruction”).

It was likely that the inference of guilt instruction “would mislead a jury of ordinary intelligence[]” concerning the State’s burden of proof and Petitioner’s burden of persuasion. *Brown v. State*, 275 Ga. App. 99, 102 (3) (2005). Given the jury’s general verdict, it cannot be determined whether the jury relied on an erroneous legal theory, i.e. the inference alone without corroborating evidence of

Petitioner's guilt beyond a reasonable doubt of armed robbery, or other evidence in the case. A new trial is required.

STATEMENT OF THE CASE

A jury convicted Petitioner of armed robbery, aggravated assault and possession of a firearm during the commission of a felony, armed robbery. Pet. App. 1a. Petitioner appealed the denial of his motion for new trial, and the judgment of his conviction was affirmed by the Georgia Court of Appeals on June 2, 2017. Pet. App. 1a. On July 13, 2017, the Georgia Court of Appeals denied Petitioner's motion for reconsideration. Pet. App. 15a. On January 16, 2018, the Supreme Court denied Petitioner's petition for writ of certiorari. Pet. App. 16a.

On October 7, 2014, at approximately 1:00 a.m., Stephen Green, who was homeless, walked toward an overpass where he frequently slept at night. Pet. App. 2a. He saw two stationary figures in the distance. One man was talking on a cell phone and the other was nearby. Pet. App. 2a-3a. Green tried to walk between the men but was struck in the head by an object, which he believed to be the butt of a gun. Pet. App. 3a. He did not see who struck him in the head, but assumed it was the man who pointed a gun at him. Pet. App. 4a. The man who had a gun wrestled with Green and asked for his wallet. Pet. App. 3a. When Green stated that he did not have a wallet, the man with the gun took his backpack and walked away. Pet. App. 3a.

Green called 911 and police officers responded to the scene. Pet. App. 3a. The officers observed two black men in the street matching the description of the suspects and stopped and searched both men. One man was Petitioner. The other was Michael Odus. Pet. App. 3a-4a. The officers brought Green to where the suspects were located. Green assumed that Petitioner was the man who struck him because he was in a possession of a gun. Pet. App. 4a. Petitioner also possessed a backpack that matched the description of the one stolen from Green. Pet. App. 3a.

Green admitted that he lied to police about the fact that the men took \$25.00 from him. No money was stolen from him. Pet. App. 4a.

Odus testified that he saw Petitioner with a backpack and asked him where he got it. Petitioner responded that he found it in the woods. Pet. App. 3a. Odus testified but Petitioner did not testify. Pet. App. 4a.

Both Odus and Petitioner were indicted for armed robbery, aggravated assault and possession of a firearm during the commission of a felony. Following a joint trial, Petitioner was found guilty of all charges, and Odus was acquitted. Pet. App. 4a.

REASONS FOR GRANTING THE PETITION

It is well settled that when a defendant enters a plea of not guilty, he makes his intent a material issue, *See, United States v. Clay*, 700 Fed. Appx. 898, 901 (II) (B) (11th Cir. 2017) (holding that when a defendant entered a not guilty plea, he “placed his knowledge and intent at issue[.]”) (citations omitted); *United States v. Matthews*, 431 F.3d 1296, 1311 (V) (11th Cir. 2005) (in conspiracy cases, a not guilty plea renders the defendant’s intent a material issue).

The inference of guilt instruction based on recent possession of stolen property pertained to an element of the crime that was at issue in the trial, i.e. whether Petitioner had the intent to rob Green of money and his backpack. Armed robbery as alleged in this indictment is a specific intent crime. *See, Taylor v. State*, 177 Ga. App. 624, 626 (3) (1986).

Due process requires “proof beyond a reasonable doubt of every fact necessary to commit the crime with which [Petitioner] is charged.” *In re Winship*, 397 U.S. 358, 364 (1970). “[W]hat constitutes an ‘element’ of the crime for purposes of due process is defined as a fact which the State deems so important that it must be either proved or presumed.” *Patterson v. New York*, 432 U.S. 197, 215 (1977). “[T]he law is absolutely clear that a criminal defendant carries no burden of proof or persuasion whatsoever.” *Wyatt v. State*, 267 Ga. 860, 863 (1) (1979). “It is constitutional error to shift to the defendant the ultimate burden of

persuasion on an essential element of the crime.” (Citations omitted.) Jarrell v. Balkcom, 735 F.2d 1242, 1255 (5) (B) (11th Cir. 1984).

“An inference merely allows a jury to draw a conclusion if it thinks it proper, while a presumption requires it to do so unless the defendant presents an adequate rebuttal.” Tucker v. Wolff, 581 F.2d 235, 238 (II) (9th Cir. 1978).

Here, the language of the objectionable jury instruction was a presumption which required the jury to find Petitioner guilty of armed robbery based on his mere possession of the back unless he “presents an adequate rebuttal[]” by his testimony or evidence adduced by him at trial. *Id.* Petitioner did not testify and did not explain why he possessed the backpack to dispel this inference of guilt. Additionally, the instruction mandates that the explanation must be ‘reasonable’ in the jury’s eyes. This clearly violates Petitioner’s Fifth amendment privilege against self-incrimination under the United States Constitution: “No person . . . shall be compelled in any criminal case to be a witness against himself.” U.S. Const. Amend V. As applied to the facts of this case, the inference instruction violated the parallel provision under the Georgia Constitution: “No person shall be compelled to give testimony tending in any manner to be self-incriminating.” Art. I, Sec. I, Par. XVI of Georgia Constitution of 1983. “[T]he Georgia Constitution has been construed to limit the State from forcing the individual to present evidence, oral or real.” Creamer v. State, 229 Ga. 511, 516 (1972).

The trial court's judgment denying the motion for new trial is a summary denial lacking any reasoned explanation. Pet. App. 13a. The Court of Appeals' Opinion affirming the trial court's judgment was based on an erroneous legal theory, failing to consider the language of the jury instruction in the context of how a reasonable juror would construe it, relied on inapposite law and failed to address all appellate claims raised on appeal. This Court should grant the writ of certiorari, reverse Petitioner's conviction and remand the case to the trial court for findings consistent with this Opinion.

I. THE INFERENCE OF GUILT INSTRUCTION CONFLICTS WITH
IN RE WINSHIP.

A. *The Plain Language of the Jury Instruction Shifts the Burden to
Petitioner to Testify and Prove His Innocence In Violation of His
Fifth Amendment Privilege Against Self-Incrimination.*

This Court has recognized that “[i]nferences and presumptions are a staple of our adversary system of factfinding.” County Court of Ulster County v. Allen, 442 U.S. 140, 156 (II) (1979). The ultimate test of the inference's constitutional validity is that it “must not undermine the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt.” Id., citing Winship, 397 U.S. at 364. A permissive inference or

presumption is constitutional when it “leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof[.]” *Id.* at 157. However, “[a]n erroneous presumption on a disputed element of the crime renders irrelevant the evidence on the issue because the jury may have relied upon the presumption rather than upon the evidence.” Connecticut v. Johnson, 460 U.S. 73, 85 (1983). “A presumption which would permit but not require the jury to assume intent from an isolated fact would prejudice a conclusion which the jury should reach of its own volition.” Morissette v. United States, 342 U.S. 246, 275, 72 S. Ct. 240, 96 L.Ed. 288 (1952).

Despite any presumption of law in a criminal case countenanced in the form of a jury instruction, a criminal defendant is presumed innocent; he “is under no obligation to prove or disprove anything.” Parker v. State, 279 Ga. 439, 441 (2) (2003). Yet, the inference of guilt instruction places an affirmative burden of production on Petitioner to demonstrate why he did not commit the crimes charged. A criminal defendant has the right to remain silent and not testify; he is not required to take the witness stand to explain himself or incriminate himself in any manner. Rather, he can simply point to evidence which shows reasonable doubt in the case, cross-examine witnesses to show that they have lied and are not worthy of belief, impeach witnesses with their prior inconsistent statements or

prior convictions, show that the witness is biased in some way, or prove that someone else committed the crimes.

For all intents and purposes, the inference of possession charge required Petitioner to incriminate himself and explain why he should not be found guilty of armed robbery. If he testifies about his innocent possession of the backpack, the jury then weighs the inference of guilt based on his recent possession of the backpack against Petitioner's testimony and determines whether Petitioner's explanation is reasonable or credible given the other evidence in the case, considering his and other witnesses' demeanor on the witness stand.

But, without Petitioner's testimony, the jury can conclude that he is guilty of armed robbery without any corroborating evidence.

Petitioner's not guilty plea is not the substantial equivalent of the assertion of an affirmative defense. Unlike an affirmative defense, a defendant does not have the burden of production to prove his innocence. *Compare, Walden v. State*, 251 Ga. 505, 507 (3) (1983) (noting that the "initial burden of producing evidence to support an affirmative defense rests with the defendant[]").

B. The Georgia Court of Appeals' Arguments to the Contrary Are Wrong.

This Court has repeatedly held that when determining the meaning of a constitutional provision, "we look first to its language, giving the words used their

ordinary meaning.” Moskal v. United States, 498 U.S. 103, 108 (1990) (citation and punctuation omitted). The plain language of the Fifth Amendment states that “[n]o person . . . shall be compelled in a criminal case to be a witness against himself[.]” The parallel Georgia provision states: “No person shall be compelled to give testimony tending in any manner to be self-incriminating.” Georgia Constitution of 1983, Art. I, Sec. I, Par. XVI.

But, the instruction states the jury “may not draw an inference of guilt if from the evidence *there is a reasonable explanation of the possession of such property consistent with a plea of innocence* which is a question solely for you, the jury to determine.” Pet. App. 6a. Since the only person who can provide an explanation of Petitioner’s possession of the backpack consistent with his plea of innocence, much less one that is reasonable, the instruction necessarily compels Petitioner to be a witness against himself to preclude the operation of the inference.

Contrary to the conclusion of the Court of Appeals, Byrd v. Hopper, 234 Ga. 248, 250-251 (1975) does not hold that the inference of guilt instruction was not a violation of Petitioner’s Fifth Amendment privilege against self-incrimination under the U.S. and Georgia Constitutions as applied to him. In Byrd, the petitioner, who was convicted of motor vehicle theft, argued that the jury instruction on inference of guilt based on recent possession of stolen property violated due process by shifting the burden of proof to him.

Here, Petitioner has not challenged the inference instruction on due process grounds; rather, he raised an as applied challenge to the jury instruction grounded in his Fifth amendment privilege against self-incrimination under the U.S. and Georgia Constitutions.

C. The Question Presented is Important

Under the facts and circumstances of this case, the inference instruction was constitutionally impermissible and perforce violated Cooper's Fifth amendment privilege against self-incrimination under the United States and Georgia Constitutions. Petitioner should not be forced to rebut a constitutionally impermissible inference to obtain an acquittal. *See, Leary v. United States*, 395 U.S. 6, 31 (1969).

Additionally, the unexplained possession of recently stolen property alone does not raise the presumption that the property was stolen or that Petitioner committed the armed robbery. *Cf. Daughtie v. State*, 297 Ga. 261, 262 (2) (2015) (holding that knowledge that a gun was stolen cannot be inferred when "there is only evidence that [defendant] found a gun that had been reported stolen"). Based on the evidence adduced at trial, there was nothing distinctive about this backpack. The State did not produce any evidence that there was something about the backpack which would suggest to Petitioner that it was stolen. *See, Stacey v. State*, 292 Ga. 838, 840 (1) (b) (2013) (holding that knowledge that property is stolen

“may be inferred from circumstances, when the circumstances would excite suspicion in the minds of ordinarily prudent persons”); Orr v. State, 34 Ga. 342, 345 (1866) (“For it is not enough that the evidence *goes to show* guilt; it must be inconsistent with the reasonable supposition of his innocence.”) (citation omitted). There must be other evidence of the *corpus delecti* or corroborating evidence because Petitioner’s possession of the backpack is circumstantial evidence only; it does not speak to the other essential elements of armed robbery.

For example, a pattern jury instruction on burglary in California reads as follows:

“Conscious possession of recently stolen property is not in and of itself sufficient to permit an inference that the defendant committed the crime of burglary. Before guilt may be inferred, there must be corroborating evidence tending to prove defendant’s guilt. However, this evidence need only be slight, and need not in and of itself be sufficient to warrant an inference of guilt. As corroboration you may consider the attributes of possession – time, place and manner, that the defendant had an opportunity to commit the crime charged, the defendant’s conduct, his false or contradictory statements, if any, or other statements he may have had with reference to the property, and any other evidence which tends to connect the defendant with the crime charged.”

See, People v. Johnson, 6 Cal. 4th 1 (1993) (citing CALJIC No. 2.15, 5th ed. 1988).

Unlike the jury instruction in Johnson, here, the jury instructions as a whole did not inform the jury that they must find corroborating evidence to support the inference of guilt based on recent possession of the backpack. Nor did the instruction advise the jury that they could not consider the inference unless they first found that Petitioner committed the armed robbery beyond a reasonable doubt.

The jury instructions as a whole were unlike the instruction given in United States v. Carter, 522 F.2d 666, 683-684 III (D) (D.C. Cir. 1975), which assimilated the inference of guilt instruction with other relevant legal principles in a readily understandable format:

The defendant's possession of recently stolen property does not shift the burden of proof. The government always has the burden of proving beyond a reasonable doubt every essential element of the offense.

Before you may draw an inference from the defendant's unexplained or unsatisfactorily explained possession of the property, you must first find that the government has proved beyond a reasonable doubt every essential element of the offense.

Since the State tried the case jointly against Petitioner and Odus and the jury instruction did not state that “if you should find beyond a reasonable doubt that the crime of armed robbery has been committed as charged in this indictment by Petitioner,” the jury instruction as a whole connotes that Petitioner can be found

guilty of armed robbery based on his mere possession of the backpack. Because the trial evidence was insufficient to prove beyond a reasonable doubt that Petitioner was guilty of theft by receiving stolen property, the inference alone was insufficient to authorize his armed robbery conviction. Daughtie, 297 Ga. at 264 (2) (defendant's statement to police that he found the gun was insufficient to support his conviction for theft by receiving stolen property).

Since Petitioner did not testify, the jury could not infer that the truth was the opposite of his statement to Odus as they were unable to judge his demeanor and credibility from the witness stand. *See, United States v. Hasner*, 564 F.3d 1280, 1285 (II) (11th Cir. 2003) ("A proper inference the jury can make from disbelieved testimony is that the opposite of the testimony is true."). Given the dictate in the jury instruction, the jury was left with the impression that Petitioner must be guilty of armed robbery based on his mere possession of the backpack at issue. At bottom, the jury instruction unlawfully directed a verdict of guilty against Petitioner. *See, Gaskin v. State*, 119 Ga. App. 593, 597 (1969) (holding that a jury instruction that "where one is found in possession of stolen goods immediately after the theft, the burden to prove that his was not a guilty possession rests upon him 'in effect, directs a verdict of guilty in the absence of an explanation of how the defendant secured possession of the stolen goods.'").

II. *A REASONABLE JUROR COULD HAVE CONSTRUED THE JURY INSTRUCTION TO REQUIRE PETITIONER TO TESTIFY ABOUT HIS INNOCENT POSSESSION OF THE BACKPACK.*

This Court has “employ[ed] the term ‘presumption’ as the equivalent of ‘permissible inference[.]’” in several appellate decisions. *See, e.g., Tot v United States*, 319 U.S. 463, 467 (1943); *United States v. Gainey*, 380 U.S. 63 (1965); *U.S. v. Romano*, 382 U.S. 136 (1965); and *Leary, supra*. “A permissive inference is constitutional if it does not undermine the jury’s duty to find guilt beyond a reasonable doubt.” *Ulster County*, 442 U.S. at 156. Permissive inferences have been criticized, however, because they “isolate and abstract a single circumstance from the complex of circumstances presented in any given case, and, on proof of that isolated fact, authorize an inference of some other fact beyond a reasonable doubt.” Charles R. Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 Harv. L. Rev. 1187, 1192 (1979).

When a statute “leaves the jury free to act on the presumption alone once the specified facts are proved, unless the defendant comes forward with opposing evidence[.]” this is “enough to vitiate the statutory presumption.” *Tot*, 319 U.S. at 469. Since the instruction in this case was not based on a statute, the same logic applies. The inference of guilt based on recent possession of stolen property instruction “says in substance that unless [Petitioner] can and does prove it, he will

have failed to discharge his burden, and will therefore, be found guilty.” Morrison v. California, 291 U.S. 82, 96 (1934).

“[I]f the meaning of the presumption as conveyed to the jury by an instruction in a particular case is that the defendant must personally explain his possession of the stolen property to the police or to the jury, reversible error will have been committed.” (Citations omitted). State v. Searle, 339 So. 2d 1194, 1203 (1976). A statute “cannot be interpreted to mean, or a jury led to believe, that the defendant must do anything other than produce some evidence contrary to or, at most, create a reasonable doubt as to the presumed fact in order to destroy the presumption. Otherwise, the ultimate burden of persuasion upon an essential element of the crime would be shifted by the presumption to the defendant in violation of federal and state constitutional principles.” (Citation omitted). *Id.*; Fifth and Fourteenth Amendments to the U.S. Constitution; Mullaney v. Wilbur, 421 U.S. 684 (1975); Winship, 397 U.S. at 364.

Moreover, the use of either ‘inference’ or ‘presumption’ “is *not* conclusive of whether the device is permissive or mandatory. An “inference” can be mandatory and a “presumption” may be permissive.” (Citation omitted; emphasis in original). Isaacs v. State, 259 Ga. 717, 735 (35) (b) (1989).

In Leary, *supra*, this Court held unconstitutional a statutory presumption that a person found in possession of marijuana also had knowledge that it had been

illegally imported. It reasoned that “it was incumbent upon the prosecution to demonstrate that the inference was permissible before the burden of coming forward could be placed upon the defendant.” *Id.* at 45. It went on to state that “it should at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.” *Id.* at 36. *See also, Carter*, 522 F.2d at 679 III (B) (holding that “for an inference to be valid under established principles of criminal law, the presumed fact must, beyond a reasonable doubt, flow from the proved facts on which the inference depends.”).

“[B]efore a jury can be told that if it finds one proven fact it must presume that another is true, the inference must be one which reasonable minds beyond a reasonable doubt could draw from the proven fact.” *Searle*, 339 So. 2d at 1205. “[I]f the meaning of the presumption as conveyed to the jury by an instruction in a particular case is that the defendant must personally explain his possession of the stolen property to the police or to the jury, reversible error will have been committed.” (Citation omitted). *Id.*

Here, reversible error occurred because a reasonable juror could have interpreted the inference of guilt instruction to mean that Petitioner must personally explain his possession of the backpack by his testimony alone. *Id.* A reasonable juror could have been misled as to the State’s burden of proof. *See, U.S. v. Pappert*, 112 F.3d 1073, 1076 (10th Cir. 1997); *Carter*, 522 F. 2d at 679-680 III (B) (holding

that the trial court's instruction "sanctioned inferences that the jury might not have felt to be warranted by the evidence, absent the instruction.").

Moreover, based on the evidence adduced at trial, it cannot be concluded with substantial assurance that Petitioner's guilt of armed robbery "is more likely than not to flow from [his] possession of the backpack[.]" Leary, 395 U.S. at 36.

There was no evidence to support a finding that Petitioner knew or should have known that the backpack was stolen, rather than abandoned or lost.

Petitioner's possession of the backpack alone does not establish the essential elements of armed robbery beyond a reasonable doubt. "[T]he jury must be satisfied, on knowledge as on all other elements, beyond a reasonable doubt." (Citations omitted.) United States v. Adams, 293 F. Supp. 776, 782 (II) (1968). But the inference instruction failed to speak to Petitioner's knowledge as to armed robbery and effectively gave the State a leg up without requiring that the State prove beyond a reasonable doubt every essential element of armed robbery beyond a reasonable. Theft "is but one element of the crime of armed robbery." (Citation omitted). State v. Montoya, 340 So.2d 557, 561 (1976).

To allow the jury to draw the inference like the one present here, "we must be telling juries (or ourselves as triers of fact) that the inference is one sustained by substantially more than a preponderance of the evidence, that the probability is far in excess of 50-50, that it is sufficient to warrant a reasonable man's being

convicted ‘to a moral certainty’ of the correctness of the inference.” (Citations omitted). Adams, 293 F. Supp. at 784 (II).

Under the specific facts and circumstances of this case, there was nothing distinctive about the backpack that would excite passion in a reasonable person to believe that it was stolen, rather than abandoned or lost. *Cf. Adams*, 293 F. Supp. at 783 (holding that Congress “cannot authorize a jury to find from a man’s presence near a still, without more, that the man has ‘possession, custody and control’ of the still”).

“[S]uitable cases for ‘presumptions’ are those where the truth of the fact in question, and the existence of evidence about it, is almost certain to be within the [petitioner’s] ken – as, for example, . . . how he himself came to be in possession of something[.]” (Citations omitted). *Id.* at 786. *See also, State v. Johnson*, 406 So. 2d 153, 155 (La. 1981) (A presumption is constitutional “when its effect is shown only to create an inference that the person in possession of recently misappropriated property was the misappropriator; the jury must be informed the defendant need not testify to explain away this circumstantial evidence any more than any other circumstantial evidence.”).

*III. BECAUSE A REASONABLE JUROR COULD HAVE BEEN MISLED
BY THE CONTRADICTORY JURY INSTRUCTIONS, THE JURY'S
GENERAL VERDICT WAS INFIRM.*

Here, the instruction on inference of a defendant's guilt based on recent possession of stolen property directly conflicted with other jury charges on presumption of innocence, the State's burden of proof, burden never shifts to defendant to prove his innocence, and a defendant is not required to produce any evidence or testify. Pet. App. 7a. Because the jury charge as a whole was a juxtaposition of wholly conflicting legal principles, there is a reasonable probability the jury instructions "may have misled or confused the jury regarding what the State was required to prove." Able v. State, 312 Ga. App. 252, 257 (2) (2011). "The jury cannot be expected to select one part of a charge to the exclusion of the other, nor to decide between conflicts in the charge or determine whether one part cures a previous error, without having its attention specially called thereto and being instructed accordingly." Id. See also, Clements v. Clements, 247 Ga. 787, 788 (2) (1981) ("A charge containing two distinct propositions conflicting the one with the other is calculated to leave the jury in such a confused condition of mind that they can not render an intelligent verdict, and requires the grant of a new trial.") (citations omitted); U.S. v. Robinson, 435 F.3d 1244, 1248 (II) (A) (10th Cir. 2006) ("The standard of review for a challenge to the jury instructions is

whether the jury, considering the instructions as a whole, was misled.”). A new trial is required.

Given the jury’s general verdict, it cannot be determined whether the jury convicted Petitioner based on an erroneous legal theory, i.e. his mere possession of the backpack, or other evidence in the case. *See, Zant v. Stephens*, 462 U.S. 862, 881 (1983) (“[A] general verdict must be set aside if the jury was instructed that it could rely on any of one or more independent grounds, and one of those grounds is insufficient because the verdict may have rested exclusively on the insufficient ground.”). *Pappert*, 112 F.3d at 1076 (“Only where the reviewing court has ‘substantial doubt that the jury was fairly guided will the judgment be disturbed’”). *See also, Southeastern Pain Specialists P.C. v. Brown*, 2018 Ga. LEXIS 151 * (2) 10-11 (holding that because the jury returned a general verdict and the Court cannot determine that the jury did not rely on an erroneous negligence theory of liability, the ordinary negligence charge was harmful to defendants; the case was reversed with instructions that the Court of Appeals on remand order a full retrial as to the defendants); *Ga. Power Co. v. Busbin*, 242 Ga. 612, 616-617 (8) (1978) (reversing general verdict for plaintiff where some of the theories on which the case was submitted to the jury were erroneous).

“[W]hen a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction be set aside.”

(Citations omitted). Sandstrom, 442 U.S. at 526 (IV). Here, the jury might have convicted Petitioner solely on the basis of a presumption that did not meet due process requirements. *See, Leary*, 395 U.S. at 31 (“For all we know, the conviction did rest on that ground.”).

The Court of Appeals erred when it failed to rule on this enumeration of error or rejected the enumeration *sub silentio*. Pet. App. 2a-12a. The Court of Appeals denied the motion for reconsideration requesting a ruling on the issue. Pet. App. 15a.

CONCLUSION

The inference instruction violated Petitioner’s Fifth amendment privilege against self-incrimination under the United States and Georgia Constitutions as applied to him. Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 LE2d 653 (1963); Howard v. State, 237 Ga. 471, 473 (1976). The petition for a writ of certiorari should be granted.

This 16th day of April, 2018.

Respectfully submitted,
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