5-3-2011

Burdens of Proof

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I. Introduction

The Anglo-American adversary adjudicative process is designed to produce unambivalent win-lose decisions. There can be no ties. This article examines the fundamental procedural mechanisms which assure outcomes consonant with this design. Those mechanisms, conceptualized broadly as burdens of producing evidence and burdens of persuasion, operate both in civil cases and in criminal cases. However, they are modified to some extent in criminal cases by certain constitutional constraints.

The imprecise and ambiguous term "burden of proof" is too often used indiscriminately to refer to one or the other of two distinct, though related, outcome-regulating mechanisms. These are (1) the burden of producing evidence, which relates to the sufficiency of the evidence and to motions for a directed verdict and for judgment notwithstanding the verdict, and (2) the burden of persuasion, which relates to the weight of the evidence produced and to the motion for a new trial.[1] It generally is said that the burden of production may pass from party to party as the case progresses

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* This article is a modified and augmented version of a chapter from the forthcoming book, W. SCHROEDER, J. HOFFMAN & R. THIGPEN, ALABAMA EVIDENCE (1987), to be published by The Harrison Company.

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1. *See* Burroughs Corp. v. Hall Affiliates, Inc., 423 So. 2d 1348, 1353-54 (Ala. 1982); Casey v. Jones, 410 So. 2d 5, 8 (Ala. 1981), *aff'd*, 445 So. 2d 873 (Ala. 1983); King v. Aird, 251 Ala. 613, 618, 38 So. 2d 883, 888 (1949); Alabama Great So. R.R. v. Hill, 34 Ala. App. 466, 468, 43 So. 2d 136, 137, (Ct. App.), *cert. denied*, 253 Ala. 124, 43 So. 2d 139 (1949).

while the burden of persuasion rests throughout on the party asserting the affirmative of an issue.[2]

To say that a party bears a burden of production or persuasion is somewhat misleading, since it may create the mistaken impression that only evidence adduced by the party bearing the burden counts towards satisfying the requirement. Since a party may take advantage of any favorable evidence adduced by his opponent,[3] and thus actually bears no burden that may not be carried for him, careful thinkers have come to say that a party bears a risk of nonproduction rather than a burden of production and a risk of nonpersuasion rather than a burden of persuasion. In this article, these more precise terms will be employed. The less careful but more common burden language may be used whenever it affords a more convenient mode of expression.

II. Burdens of Production

A. The Risk of Nonproduction

Who loses the case if neither plaintiff nor defendant produces any evidence upon which the fact finder can rationally resolve the issues material to the controversy? The rules about producing evidence designate the loser as to each material issue in the case, identifying him as the party bearing the risk that no evidence will be placed before the fact finder, that is, the risk of nonproduction. This risk sometimes is also called the burden of production or the burden of going forward with the evidence. When no evidence, or no sufficient evidence, is produced (either intentionally or inadvertently), a verdict may be directed against the party to whom the risk of nonproduction is allocated.[4] The quantum of evidence which suffices to survive the risk of nonproduction and which will therefore prevent a claim from being dismissed is known as prima

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2. *King*, 251 Ala. at 618, 38 So. 2d at 888, *quoted in* Tanana v. Alexander, 404 So. 2d 61, 63 (Ala. Civ. App. 1981); *Hill*, 34 Ala. App. at 468, 43 So. 2d at 137.

3. "Although the plaintiff may not make out a prima facie case from his own evidence introduced by him[,] . . . if the defendant offers evidence which, when taken in connection with the plaintiff's evidence, might reasonably satisfy the jury of the plaintiff's right to recover, this would be sufficient." Southern Ry. v. Hill, 39 So. 987, 987 (Ala. 1905).

4. *See* Rose v. Miller & Co., 432 So. 2d 1237, 1239 (Ala. 1983); Perdue v. Mitchell, 373 So. 2d 650, 652 (Ala. 1979); *see also infra* pt. II §§ C.2.(b), C.2.(d) & C.3.

facie evidence.[5] When a court holds a party's evidence sufficient, it says, in effect, the party has survived the risk of nonproduction allocated to him.

B. Allocating the Risk of Nonproduction

As a rule of thumb, the party who pleads a material fact also bears the risk of nonproduction upon that fact at trial.[6] Thus, a plaintiff must proceed with the evidence on all of the material elements of the claim alleged, and a defendant must go forward with the evidence on the elements of any affirmative defense. It is said that the risk of nonproduction may pass back and forth between proponent and opponent during the course of trial.[7] This may be so when the proponent produces evidence that activates a presumption in his favor. It may also be true when the proponent's evidence upon a proposition of material fact is a judgment, promissory note, or other solemnly executed document which must be taken as speaking conclusively unless the opponent produces evidence challenging its authenticity or regularity. Furthermore, the Alabama Supreme Court has said that, because prima facie evidence will suffice for proof of a particular fact unless contradicted by other evidence, the proponent who presents a prima facie case is entitled to judgment if no contradictory evidence is presented.[8] Presenting a prima facie case thus may, in a proper case, satisfy not only the proponent's burden of production but, if no contradictory evidence is produced, his burden of persuasion as well.[9] Consequently, if the proponent adduces a prima facie case, his opponent risks an adverse directed verdict and judgment unless he presents some contradictory evidence on one or more of the elements of the proponent's claim or defense. However, it would be

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5. Lavett v. Lavett, 414 So. 2d 907, 912 (Ala. 1982); *see also* Johnson v. State, 455 So. 2d 997, 999 (Ala. Crim. App.), *cert. denied*, 455 So. 2d 997 (Ala. 1984).

6. McCormick on Evidence § 337, at 948 (E. Cleary 3d ed. 1984); *see also* Teng v. Diplomat Nat'l Bank, 431 So. 2d 1202, 1203 (Ala. 1983) ("The burden of proving facts on which a claim is based rests on the party claiming rights or benefits therefrom . . . . [The defendant] failed to produce any admissible evidence which would entitle him to any relief.").

7. " 'The burden in the sense of duty of producing evidence may pass from party to party as the case progresses . . . .' " Tanana v. Alexander, 404 So. 2d 61, 63 (Ala. Civ. App. 1981) (quoting King v. Aird, 251 Ala. 613, 618, 38 So. 2d 883, 888 (1949)).

8. *Lavett*, 414 So. 2d at 911-12.

9. *Id.*

easy to overstate this risk. The proponent's proof will not impose a burden of production in every case upon his opponent; even when the proponent's evidence is uncontradicted, the credibility of that evidence and the inferences to be drawn from the circumstantial evidence are usually for the jury.

In most actions, the risks of nonproduction were allocated long ago, usually by case law, though occasionally by statute. When a court must allocate the risks of nonproduction in a newly created action, the court may consider "(1) the natural tendency to place the burdens on the party desiring change, (2) special policy considerations such as those disfavoring certain defenses, (3) convenience, (4) fairness, and (5) the judicial estimate of the probabilities."[10]

C. *Quantum of Proof Required to Survive the Risk of Nonproduction; Sufficiency Standards*

1. *Generally.*—To understand the concept of sufficiency (and the concepts of relevance[11] and weight[12] as well) one must focus on the distinction between direct and circumstantial evidence.[13] Questions of sufficiency arise when a risk-bearing party must rely solely upon circumstantial evidence to establish an essential element of a claim or defense. Except when corroboration of eyewitness testimony is required[14] or when direct testimony is nullified by judicial

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10. McCormick on Evidence § 337, at 952 (E. Cleary 3d ed. 1984).

11. Relevant evidence is defined by Rule 401 of the Federal Rules of Evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *See also* Dawkins v. State, 455 So. 2d 220, 221 (Ala. Crim. App. 1984).

12. *See infra* pts. III-V.

13. Direct evidence speaks directly to a material proposition of fact. Circumstantial evidence speaks indirectly to a material proposition of fact by asserting some other proposition of fact from which a logical mind might infer or draw the conclusion that the material proposition of fact is more or less likely to be true than would be the case in the absence of the circumstantial evidence. The difference between direct evidence and circumstantial evidence is one of degree and not one of kind.

14. *See, e.g.*, Ala. Code § 12-21-222 (1986) ("A conviction of felony cannot be had on the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense . . . .") (discussed *infra* pt. VI § A.). The difference between direct evidence and circumstantial evidence is one of degree and not one of kind. *See also* Oglesby v. State, 337 So. 2d 381, 384 (Ala. 1976) (noting traditional rule that a perjury conviction cannot be sustained without the testimony of two witnesses or one witness with strong corroboration, but changing rule as to two inconsistent statements by same person); F. James & G. Hazard, Civil Procedure § 7.11, at 271 (2d ed. 1977) ("In a

notice,[15] the testimony of one percipient witness to the truth of a certain material proposition of fact will satisfy the sufficiency requirement for that proposition.[16] On the other hand, a proponent's proof generally will not fail for want of direct evidence. Circumstantial evidence may be sufficient to supply the required quantum of proof upon one or more essential elements of the claim or defense.[17] Whether the evidence is sufficient will depend upon the probability of the inference which must be drawn from the evidentiary proposition of fact to the material proposition to be proved thereby. If the inference is probable, the proof will be held sufficient. If the inference is improbable, the proof may be held insufficient.

No certain degree of probability marks the line between sufficiency and insufficiency. Courts typically have not defined sufficiency in terms of percentages of probability. Instead, they have employed broad and indefinite descriptive language. Most state[18] and federal[19] courts require substantial evidence to satisfy

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few instances our law imposes an artificial requirement of corroboration, as in the case of treason or perjury. Such rules were once fairly common throughout out law, but today have almost disappeared from civil cases.").

15. *See, e.g.*, King v. Brindley, 255 Ala. 425, 430, 51 So. 2d 870, 875 (1951); Louisville & N.R.R. v. Moran, 190 Ala. 108, 117-25, 66 So. 799, 802-04 (1914); Peters v. Southern R.R., 135 Ala. 533, 540, 33 So. 332, 334 (1903). *But cf.* Louisville & N.R.R. v. Tucker, 262 Ala. 570, 576, 80 So. 2d 288, 293 (1955) (refusing to apply the physical facts rule that would negate testimony regarding distances). For a complete discussion of "physical facts" reasoning, see Hoffman, *The Probative Force of "Physical Facts" in Missouri Jursprudence*, 47 Mo. L. Rev. 369 (1982). Although the discussion is illustrated with Missouri cases, the principles established are clearly applicable in Alabama.

16. "In this jurisprudence we do not travel on the numerical number of witnesses. . . . 'A fact may be established as firmly by the testimony of one witness as by the testimony of an entire community.' " Kent v. State, 56 Ala. App. 1, 2, 318 So. 2d 742, 743 (Crim. App. 1975) (quoting in part Smith v. State, 53 Ala. App. 27, 29, 296 So. 2d 925, 927 (1974)); *see also* Lamar Life Ins. Co. v. Kemp, 30 Ala. App. 138, 1 So. 2d 760 (1941); F. James & G. Hazard, Civil Procedure § 7.11, at 270 (2d ed. 1977) ("Where there is direct testimony of the existence of a simple fact[,] . . . such testimony is generally held in civil cases to satisfy the test of sufficiency—it will, as we say, justify or warrant a finding by the trier that the fact existed.").

17. McCormick on Evidence § 338, at 954 (E. Cleary 3d ed. 1984) ("the burden of producing is satisfied, even by circumstantial evidence").

18. Hoffman, *Alabama's Scintilla Rule*, 28 Ala. L. Rev. 592, 607 (1977).

19. *See, e.g.*, Boeing Co. v. Shipman, 411 F.2d 365, 373-77 (5th Cir. 1969) (expressly rejecting scintilla rule).

the sufficiency standard. Circumstantial proof is said to be substantial if a logical and informed mind could reasonably draw the inference for which the proof was offered.[20]

The Alabama Supreme Court continues to say that it requires only a scintilla of evidence to satisfy this jurisdiction's sufficiency standard.[21] Circumstantial evidence is said to provide the requisite scintilla if the court can discern "a mere gleam, glimmer, spark, [the least bit or particle, the] smallest trace"[22] of an inference from the circumstantial proof to the material proposition to be proved thereby. Under this expansive language, a proponent's circumstantial evidence should be held sufficient even when the inference for which it is offered appears quite improbable to the court. Nevertheless, the court maintains that a proponent's circumstantial evidence is not sufficient if the inference for which it is offered seems no more probable than a competing inference under which the opponent would win.[23] Consequently, it has been suggested that the difference between the substantial evidence standard of most jurisdictions and Alabama's scintilla rule is merely a matter of labels and that the sufficiency standards to which the respective labels attach are indistinguishable in practice.[24] When all attempts to quantify or describe a general sufficiency standard fail, as they ultimately do, specific judicial rulings on the sufficiency of a proponent's proof depend upon the court's own life experiences and its willingness to hold that a conclusion with which it disagrees is nonetheless within the bounds of reason.

2. *Testing the sufficiency of evidence in civil cases.*—

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20. *See Shipman*, 411 F.2d at 377.

21. *See* Allstate Enterprises, Inc. v. Alexander, 484 So. 2d 375, 376-77 (Ala. 1985). *See generally* Hoffman, *Alabama's Scintilla Rule*, 28 ALA. L. REV. 592 (1977).

22. Murdoch v. Thomas, 404 So. 2d 580, 582 (Ala. 1981); Turner v. Peoples Bank, 378 So. 2d 706, 709 (Ala. 1979); Land v. Shaffer Trucking, Inc., 290 Ala. 243, 245, 275 So. 2d 671, 673 (1973).

23. Roberts v. Carroll, 377 So. 2d 944, 947 (Ala. 1979); Maddox v. Ennis, 274 Ala. 229, 230, 147 So. 2d 788, 789 (1962); McClinton v. McClinton, 258 Ala. 542, 544-45, 63 So. 2d 594, 596-97 (1952). *See generally* Hoffman, *Alabama's Scintilla Rule*, 28 ALA. L. REV. 592, 632-36 (1977). It has been said "that it is not permissible to build inference upon inference leading to pure conjecture or guess." Johnson v. Louisville & N.R.R., 240 Ala. 219, 225, 198 So. 350, 354 (1940).

24. Hoffman, *The Scintilla Rule and Other Topics*, 43 ALA. LAW. 259 (1982); Hoffman, *Alabama's Scintilla Rule*, 28 ALA. L. REV. 592 (1977); *see, e.g.*, cases cited *infra* note 59 and accompanying text.

(a) *Motion for summary judgment.*—Rule 56(c) of both the Alabama Rules of Civil Procedure and the Federal Rules of Civil Procedure provides that a trial court may, upon motion, grant summary judgment, "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Properly understood and applied, summary judgment functions as a gatekeeper to avert needless trials.[25]

A summary judgment is, in effect, nothing more or less than an accelerated directed verdict, but its distinctive procedural features, unlike those of the directed verdict, are characteristic of the pretrial context. These features do not originate in some novel purpose alien to the traditional policies of civil practice or detrimental to the constitutional right to trial by jury. Subject to the provisions of Rule 56(f), a court may enter summary judgment for a *plaintiff* whenever the same state of the proofs would justify a directed verdict for him at trial.[26] Subject to the provisions of Rule 56(f) and Rule 56(e), sentence 4, clause 1, a court may enter summary judgment for a *defendant* whenever the same state of the proofs would justify a directed verdict for him at trial.[27] If a court denies summary judgment on proofs that would justify a directed verdict, the court defeats the policy underlying summary judgment. On the other hand, if a court, in a jury docket case, enters summary judgment on proofs that would not justify a directed verdict, it violates the losing party's constitutional right to trial by jury. The "no genuine issue" language in which Rule 56 presently is cast tends to obscure these important commonsense propositions. Perhaps the time has come to amend the Rule.

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25. *See* Tripp v. Humana, Inc., 474 So. 2d 88, 90 (Ala. 1985) (the motion for summary judgment tests the sufficiency of the evidence to determine if any real issue exists that warrants a trial); *accord* Celotex Corp. v. Catrett, 106 S. Ct. 2548, 2555 (1986) (motions for summary judgment have replaced motions to dismiss or to strike as the principal tools by which factually insufficient claims or defenses can be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources).

26. *See* Hoffman, *Pretrial Motion Practice Under the Alabama Rules of Civil Procedure*, 25 ALA. L. REV. 709, 730 (1973).

27. *Id.*; *see also Catrett*, 106 S. Ct. at 2553 (" 'The standard for granting summary judgment mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a) . . . .' ") (quoting Anderson v. Liberty Lobby, Inc., 106 S. Ct. 2505, 2511 (1986)).

When ruling on a motion for summary judgment, the court must consider any material that would be admissible at trial, all evidence of record, and any material submitted in support of, or in opposition to, the motion.[28] Thus, the court may consider pleadings,[29] admissions on file,[30] answers to interrogatories if otherwise admissible,[31] depositions,[32] and any other admissible material.[33] An affidavit must be based upon the personal knowledge of the affiant,[34] and circumstantial evidence must lend reasonable support to the inferences upon which the presenting party relies.[35] The opposing party cannot prevent summary judgment merely by relying upon his pleadings or by denying the allegations of the moving party's pleadings.[36] Nor is it sufficient to dispute or refute immaterial propositions of fact or to offer evidence which is inadmissible under the normal rules of evidence.[37] If the party against whom summary judgment is sought fails to respond,[38] or makes no evidentiary showing,[39] summary judgment may be entered against him, "if appropriate."[40] Because the moving party must be entitled to summary judgment as a matter of law,[41] summary judgment is rarely appropriate in negligence actions, for the jury normally

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28. Braswell Wood Co. v. Fussell, 474 So. 2d 67, 70 (Ala. 1985). In federal court, it is clear that a motion for summary judgment need not be accompanied by supporting affidavits, *Catrett*, 106 S. Ct. at 2553.

29. *Fussell*, 474 So. 2d at 70-71.

30. FED. R. CIV. P. 56(c); ALA. R. CIV. P. 56(c).

31. Wallace v. Alabama Ass'n of Classified School Employees, 463 So. 2d 135, 137 n.1 (Ala. 1984).

32. FED. R. CIV. P. 56(c), (e); ALA. R. CIV. P. 56(c), (e).

33. *See, e.g.*, Butler v. Michigan Mut. Ins. Co., 402 So. 2d 949, 951 (Ala. 1981).

34. *Id.* at 952; *see also* FED. R. CIV. P. 56(e); ALA. R. CIV. P. 56(e).

35. *See Butler*, 402 So. 2d at 952.

36. *Id.*; *see* First Nat'l Bank of Arizona v. Cities Service, Co., 391 U.S. 253, 288-89 (1968); FED. R. CIV. P. 56(e); ALA. R. CIV. P. 56(e). *But cf.* Braswell Wood Co. v. Fussell, 474 So. 2d 67, 70-71 (Ala. 1985).

37. Horner v. First Nat'l Bank, 473 So. 2d 1025, 1027-28 (Ala. 1985); *see also* Richter v. Central Bank, 451 So. 2d 239, 241-42 (Ala. 1984). In Anderson v. Liberty Lobby, Inc., 106 S. Ct. 2505, 2510 (1986), the Supreme Court said that "[f]actual disputes which are irrelevant or unnecessary will not be counted [in determining materiality]." However, the Court went on to say that "proof or evidentiary requirements imposed by the substantive law are not germane to this inquiry." *Id.*

38. *See* Garrigan v. Hinton Beef & Provision Co., 425 So. 2d 1091, 1093 (Ala. 1983).

39. *See* Holliyan v. Gayle, 404 So. 2d 31, 33-34 (Ala. 1981).

40. FED. R. CIV. P. 56(e); ALA. R. CIV. P. 56(e).

41. Butler v. Michigan Mut. Ins. Co., 402 So. 949, 951 (Ala. 1981).

bears the responsibility of applying the appropriate standard of care to the established conduct of the parties.[42]

The Alabama Supreme Court has said that the scintilla rule applies to motions for summary judgment.[43] If a scintilla of evidence supporting the position and assertions of the nonmoving party exists, summary judgment should be denied.[44] The evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the nonmoving party,[45] and conflicting inferences from the same testimony may establish the requisite scintilla.[46] It must appear to the court that the party opposing the motion could not prevail under any discernible circumstances.[47]

Some unfortunate folklore, unsupported by the language of Rule 56 and unjustified by the purpose of summary judgment, has grown up around Rule 56. Because the language of this mythology obstructs the intended function of summary judgment, it should be suppressed and forgotten. Nevertheless, the careful practitioner should know that the courts have spoken in this careless way and be prepared to meet them on their own grounds, if necessary.

Alabama courts have said, for example, that a party seeking summary judgment has a heavy burden to show clearly[48] the absence of any genuine issue of material fact,[49] and that all reasonable doubts concerning the existence of such an issue of fact will be resolved against the movant.[50] Likewise, it is said that, if the moving party makes a prima facie showing that there are no issues of material fact, the burden shifts to the opposing party to

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42. Tripp v. Humana, Inc., 474 So. 2d 88, 90 (Ala. 1985); *see also* Evans v. Alabama Power Co., 474 So. 2d 1102, 1103 (Ala. 1985).

43. Booth v. United Servs. Auto. Ass'n, 469 So. 2d 1281, 1282 (Ala. 1985).

44. Bank of the Southeast v. Jackson, 413 So. 2d 1091, 1094 (Ala. 1982); *see also Booth*, 469 So. 2d at 1282. The federal courts reject the scintilla rule. Instead, the Supreme Court recently said that "there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. . . . If the evidence is merely colorable or is not significantly probative, summary judgment may be granted." Anderson v. Liberty Lobby, Inc., 106 S. Ct. 2505, 2511 (1986) (citing Improvement Co. v. Munson, 81 U.S. (14 Wall.) 442, 448 (1872), for the proposition that in the context of directed verdicts the federal courts have long since rejected the scintilla rule).

45. *Tripp*, 474 So. 2d at 90.

46. Malone v. Daugherty, 453 So. 2d 721, 723-24 (Ala. 1984).

47. Butler v. Michigan Mut. Ins. Co., 402 So. 2d 949, 951 (Ala. 1981).

48. *Tripp*, 474 So. 2d at 90.

49. Murphree v. Alabama Farm Bureau Ins. Co., 449 So. 2d 1218, 1221 (Ala. 1984).

50. Sadie v. Martin, 468 So. 2d 162, 165 (Ala. 1985); Pruitt v. Elliott, 460 So. 2d 1275, 1277 (Ala. 1984).

show clearly that a genuine issue of material fact exists.[51] Nothing in the language or purpose of Rule 56 supports these assertions. A defendant who, by motion for summary judgment, attacks the merits of a plaintiff's prima facie case would have no burdens of proof at trial and, therefore, has none upon motion for summary judgment. Rule 56 requires the moving defendant to make an evidentiary showing not because he bears any burden of proof as to the material issues of his adversary's case, but because requiring such a showing imposes costs of preparation upon defendants which will discourage them from interposing motions for summary judgment routinely and frivolously. A party bears burdens of proof upon his motion for summary judgment only when that party will bear burdens of proof at trial, *e.g.*, a plaintiff upon the elements of his prima facie case or a defendant upon his affirmative defenses.[52] Discussing the *genuine issue* requirement of Rule 56(c) in terms of "burdens," "shifting burdens," and "prima facie cases," diverts the court's attention from the crucial inquiries implicit in the gatekeeping purpose of Rule 56.

When a defendant's motion for summary judgment attacks the merits of plaintiff's prima facie case, the crucial inquiries are (1) what burden(s) of *production* will the plaintiff bear at trial and (2) has the plaintiff now shown sufficient evidence to carry those burdens against an eventual motion for directed verdict? When a plaintiff moves for a summary judgment premised upon the overwhelming strength of his prima facie case, the crucial inquiries are (1) what burden(s) of *persuasion* will the plaintiff bear at trial and (2) has the plaintiff now shown uncontradicted evidence so overwhelming that a reasonable jury could not disbelieve it when produced at trial?

Upon reviewing a summary judgment, an appellate court may not, as a rule, consider evidence which was not before the trial court.[53] However, it may consider rules of law other than those applied by the trial court.[54] If it rejects the rule of law upon which

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51. Horner v. First Nat'l Bank, 473 So. 2d 1025, 1027-28 (Ala. 1985).

52. *See* Hoffman, *Pretrial Motion Practice Under the Alabama Rules of Civil Procedure*, 25 ALA. L. REV. 709, 733-35 (1973).

53. Barnes v. Liberty Mut. Ins. Co., 472 So. 2d 1041, 1042 (Ala. 1985); *see also* Osborn v. Johns, 468 So. 2d 103, 108 (Ala. 1985).

54. *See* Wright v. Robinson, 468 So. 2d 94, 97-99 (Ala. 1985); *see also* Bank of Southeast v. Koslin, 380 So. 2d 826, 828-30 (Ala. 1980).

the trial court relied, the appellate court may reverse the decision.[55] In a proper case, it may affirm the trial court by substituting the appropriate rule of law to reach the same result.[56]

(b) Motion for a directed verdict.—The usual device for testing the sufficiency of the evidence in civil jury cases is the motion for a directed verdict.[57] When a directed verdict has been requested, the trial court must view the entire evidence, and all reasonable inferences which a jury might draw therefrom, in the light most favorable to the nonmoving party.[58] Under a competing thumbrule, the trial court would look only to the evidence that favored the nonmoving party. The "all the evidence" rule seems more likely to produce consistently appropriate results, because it accommodates more comfortably the proper evaluation of presumptions. Under the "favorable evidence only" rule, the moving party's evidence rebutting the nonmoving party's presumption could not be considered. This stricture might require the court to deny a motion for directed verdict that should have been granted.

A directed verdict is said to be proper only when "a complete absence of proof exists upon an issue material to the claim or when there are no disputed questions of fact on which reasonable people could differ."[59] The Supreme Court of Alabama has said that "if the evidence, or any reasonable inference arising therefrom, furnishes a mere gleam, glimmer, spark, the least particle, smallest trace, or a scintilla in support of the theory of the complaint," the trial court must submit the case to the jury.[60] The supreme court

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55. *See, e.g., Wright*, 468 So. 2d at 99.

56. *See, e.g., Koslin*, 380 So. 2d at 829-30.

57. FED. R. CIV. P. 50; ALA. R. CIV. P. 50.

58. City of Mobile v. Dirt, Inc., 475 So. 2d 503, 504 (Ala. 1985); Carnival Cruise Lines, Inc. v. Snoddy, 457 So. 2d 379, 384 (Ala. 1984); Alabama Power Co. v. Taylor, 293 Ala. 484, 492, 306 So. 2d 236, 243 (1975).

59. Sprayberry v. First Nat'l Bank, 465 So. 2d 1111, 1114 (Ala. 1984); Ritch v. Waldrop, 428 So. 2d 1, 2 (Ala. 1982); *see, e.g, Dirt, Inc.*, 475 So. 2d at 504; *accord* Bickford v. Int'l Speedway Corp., 654 F.2d 1028, 1031 (5th Cir., Unit B Aug. 1981).

"A defendant as well as a plaintiff is entitled to the benefit of the scintilla rule." *Taylor*, 293 Ala. at 492, 306 So. 2d at 243. However, it is a rare instance when a plaintiff is entitled to a directed verdict in a negligence case. *Id.* at 499, 306 So. 2d at 250.

60. Dixie Electric Co. v. Maggio, 294 Ala. 411, 414, 318 So. 2d 274, 276 (1975) (quoting Kilcrease v. Harris, 288 Ala. 245, 252, 259 So. 2d 797, 802 (1972)); *see, e.g., Snoddy*, 457 So. 2d at 384-85; Davis v. Balthrop, 456 So. 2d 42, 44 (Ala. 1984). Whether a case should go to the jury depends on substantive law, Upton v. Mississippi Valley Title Ins. Co., 469 So. 2d 548, 553 (Ala. 1985); but the theory to which the evidence in question relates must have been advanced at trial, Osborn v. Johns, 468 So. 2d 103, 110 (Ala. 1985).

maintains, however, that evidence which does nothing more than afford a basis for suspicion,[61] speculation, conjecture, or guess work does not constitute a scintilla.[62] The scintilla doctrine "does not vitiate the rule that a conclusion based on speculation or conjecture . . . is not a proper basis for a jury verdict."[63] This distinction probably is too fine to maintain either in theory or in practice.

An appellate court's review of a directed verdict must, of necessity, be based on evidence presented at trial.[64] The appellate court must view the evidence and all reasonable inferences from it in the light most favorable to the nonmoving party[65] and the same scintilla rule that governs the trial court is said to apply on appeal.[66]

(c) *Motion for judgment notwithstanding the verdict.*—Rule 50(b) of the Alabama Rules of Civil Procedure provides that, not later than thirty days after entry of judgment, a party who previously has moved for a directed verdict may move to have the judgment set aside and judgment entered in accordance with his motion for a directed verdict.[67] This motion for judgment notwithstanding the verdict (j.n.o.v.) "tests the sufficiency of the evidence in the same way as a motion for a directed verdict at the close of all the evidence."[68] A party who does not

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61. Penn v. Jarrett, 447 So. 2d 723, 725 (Ala. 1984); Arrington v. Working Women's Home, 368 So. 2d 851, 854 (Ala. 1979).

62. *Sprayberry*, 465 So. 2d at 1114; Allstate Ins. Co. v. Fitzsimmons, 429 So. 2d 1059, 1062 (Ala. 1983).

63. Thompson v. Lee, 439 So. 2d 113, 115-16 (Ala. 1983); *see also* Evans v. Alabama Power Co., 474 So. 2d 1102, 1103-05 (Ala. 1985) (defining conjecture and discussing difference between conjecture and a scintilla of evidence in the context of causation).

64. Osborn v. Johns, 468 So. 2d 103, 105 (Ala. 1985).

65. *E.g.*, Thomaston v. Thomaston, 468 So. 2d 116, 119 (Ala. 1985). Where a complaint has more than one count, a motion for a directed verdict must be directed toward one or more specific counts. If this is not done and the jury returns a general verdict, it will be assumed the verdict was returned on a valid count. Treadwell Ford, Inc. v. Campbell, 485 So. 2d 312, 315 (Ala. 1986) (quoting Aspinwall v. Gowens, 405 So. 2d 134, 138 (Ala. 1981)).

66. Upton v. Mississippi Valley Title Ins. Co., 469 So. 2d 548, 553 (Ala. 1985); *Thomaston*, 468 So. 2d at 119; *see* Davis v. Balthrop, 456 So. 2d 42, 44 (Ala. 1984).

67. ALA. R. CIV. P. 50(b); *see also* FED. R. CIV. P. 50(b) (setting period at ten days).

68. Morgan v. South Cent. Bell Tel. Co., 466 So. 2d 107, 113 (Ala. 1985); Stauffer Chem. Co. v. Buckalew, 456 So. 2d 778, 782 (Ala. 1984); Independent Life & Accident Ins. Co. v. Parker, 470 So. 2d 1289, 1291 (Ala. Civ. App. 1985); *see also* Hoffman, *Comparing the Standards for Granting Motions for Directed Verdict and Judgment Notwithstanding the Verdict: Harville v. Goza*, 33 ALA. L. REV. 23 (1981). *But see* Harville v. Goza, 393 So. 2d 988, 988-89 (Ala. 1981) (overruled by *Ex parte* Bennett, 426 So. 2d 832, 833-34 (Ala. 1982)).

move for a directed verdict at the close of all the evidence is precluded from later making a motion for j.n.o.v.[69] and a party who does not move for j.n.o.v. waives any right to attack the sufficiency of the evidence on appeal.[70]

Alabama courts have said that the scintilla rule applies to motions for j.n.o.v.,[71] and that evidence sufficient to present the case to a jury in the face of a motion for a directed verdict is sufficient to withstand a motion for j.n.o.v.[72] A motion for j.n.o.v. does not allow a trial judge to substitute his judgment for that of the jury on the facts, nor may the trial judge consider the demeanor of the witnesses or the credibility of the evidence.[73] Thus, neither a directed verdict nor a motion for j.n.o.v. should be granted, it is said, if there is any conflict in the evidence for the jury to resolve.[74] Rather, granting a motion for j.n.o.v. requires that "without weighing the *credibility* of the evidence, there can be but one reasonable conclusion from the evidence."[75] An appeals court evaluating the granting of a j.n.o.v. should view the evidence in the light most favorable to the party who secured the jury verdict,[76] and should, it is said, apply the scintilla rule to its determination.[77]

(d) Motion for involuntary dismissal.—In a nonjury civil case, the proper motion to test the sufficiency of a plaintiff's evidence is a motion for involuntary dismissal under Rule 41(b) of the

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69. Black v. Black, 469 So. 2d 1288, 1290 (Ala. 1985) (citing Great Atl. & Pac. Tea Co. v. Sealy, 374 So. 2d 877, 881 (Ala. 1979)).

70. Skipper v. Alabama Farm Bureau Mut. Cas. Ins. Co., 460 So. 2d 1270, 1272-73 (Ala. 1984) (citing *Sealy*, 374 So. 2d at 880, 881-82).

71. *Buckalew*, 456 So. 2d at 783; Basin Coal Co. v. Gulledge, 470 So. 2d 1258, 1261 (Ala. Civ. App. 1985); *see also* Allen v. Mobile Interstate Piledrivers, 475 So. 2d 530, 532 (Ala. 1985) (acknowledging scintilla rule, but declining to decide whether that rule applies to a suit in state court to which federal law applies).

72. Casey v. Jones, 410 So. 2d 5, 7 (Ala. 1981), *cited in* Hartselle Real Estate & Ins. Co. v. Atkins, 426 So. 2d 451, 452 (Ala. Civ. App. 1983); *Gulledge*, 470 So. 2d at 1261. *But see* Hoffman, *Comparing the Standards For Granting Motions for Directed Verdict and Judgment Notwithstanding the Verdict: Harville & Goza*, 33 ALA. L. REV. 23 (1981).

73. Transport Acceptance Corp. v. Matheny, 460 So. 2d 1320, 1321 (Ala. Civ. App. 1984).

74. *Buckalew*, 456 So. 2d at 782-83; Independent Life & Accident Ins. Co. v. Parker, 470 So. 2d 1289, 1291 (Ala. Civ. App. 1985).

75. Morgan v. South Cent. Bell Tel. Co., 466 So. 2d 107, 113 (Ala. 1985) (emphasis in original).

76. *See Matheny*, 460 So. 2d at 1321; *Morgan*, 466 So. 2d at 113.

77. Upton v. Mississippi Valley Title Ins. Co., 469 So. 2d 548, 553 (Ala. 1985).

Alabama Rules of Civil Procedure.[78] A Rule 41(b) motion to dismiss, however, is not strictly the equivalent of a Rule 50 motion for a directed verdict, and the role of the trial court is not strictly or necessarily the same.[79]

To see this point clearly, one must distinguish between verdict-directing and verdict-rendering behavior in a jury-tried case. One must also distinguish between directing a verdict at the close of all the evidence and directing a verdict at the close of the plaintiff's case. In deciding whether to direct a verdict for the defendant at the close of all the evidence, the trial court must accept as true the testimonial and tangible evidence that favors the plaintiff and draw all those inferences essential to the plaintiff's case which the jury could reasonably accept. This is prescribed verdict-directing behavior. In deciding whether to render a verdict for the defendant, which it can only do at the close of all the evidence, the jury is not bound by either of these restrictions; indeed, its quintessential functions are to decide which of all the evidence it believes and to choose from among all reasonable inferences those it deems most probable under the evidence before it. This is prescribed verdict-rendering behavior.

In nonjury cases, however, the court is the ultimate trier of fact and must determine credibility and assess the probabilities from circumstantial evidence.[80] Said another way, the court itself must apply verdict-rendering reasoning. Thus, when the defendant presents a Rule 41(b) motion at the close of all the evidence, only an empty separation of functions would be served by requiring the trial judge first to perform his verdict-directing function to determine whether next he could properly proceed to his verdict-rendering function. Consequently, the judge may and should proceed with his verdict-rendering function at the close of all the evidence, whether or not a Rule 41(b) motion has been interposed.

The procedure might be different, however, when a defendant interposes the motion at the close of the plaintiff's case. At that point, a jury would not be allowed to render a verdict. Should the judge, in a nonjury case, be permitted to do so? Or must he justify

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78. Hales v. Scott, 473 So. 2d 1028, 1030 (Ala. 1985) (citing Feaster v. American Liberty Ins. Co., 410 So. 2d 399, 401 (Ala. 1982)).

79. *Id.* at 1030-31 (citing Chaney v. General Motors Corp., 348 So. 2d 799, 801 (Ala. Civ. App. 1977)).

80. *Id.* at 1031 (citing ALA. R. CIV. P. 41(b) committee comments).

a Rule 41(b) dismissal solely by verdict-directing reasoning? Applying strictly the analogy to Rule 50, at least one state court has held that he must do the latter.[81] Federal case law, however, is said to be to the contrary,[82] and the Alabama Court of Civil Appeals has followed the federal authorities.[83] The federal (and Alabama) position appears more in harmony with the explicit language of Rule 41(b), sentence 3, of both the Federal and Alabama Rules of Civil Procedure, which provides: "The court as trier of the facts may then [*i.e.*, after the plaintiff has completed the presentation of his evidence] determine them [*i.e.*, the facts] and render judgment against the plaintiff . . . ." On appeal, the trial court's ruling need only be supported by credible evidence and will not be set aside unless "clearly erroneous or palpably wrong."[84]

(e) Presenting the issue of sufficiency on appeal.—To appeal successfully that the evidence was insufficient to support the verdict, the verdict-loser must have followed in the trial court the procedures prescribed by Rule 50 of the Alabama Rules of Civil Procedure. The verdict-loser may not have the judgment reversed and the cause remanded for judgment notwithstanding the verdict unless he moved for a directed verdict at the close of all the evidence and for a judgment notwithstanding the verdict within thirty days after entry of judgment on the jury's verdict against

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81. Tillman v. Baskin, 260 So. 2d 509, 511-12 (Fla. 1972); *see also* Rogge v. Weaver, 368 P.2d 810 (Alaska 1962); Arbenz v. Bebout, 444 P.2d 317 (Wyo. 1968).

82. 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 2371 (1971); 5 J. MOORE, W. TAGGART & J. WICKER, MOORE'S FEDERAL PRACTICE ¶ 41.13[4] (2d ed. 1985); *see, e.g.*, Bach v. Friden Calculating Mach. Co., 148 F.2d 407 (6th Cir. 1945).

83. *Chaney*, 348 So. 2d at 801.

84. *Hales*, 473 So. 2d at 1031; ALA. R. CIV. P. 52(a). In Anderson v. City of Bessemer, 470 U.S. 564, 573-75 (1985), the United States Supreme Court discussed the clearly erroneous standard at length and stated that "a finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Id.* at 573 (quoting United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)). Thus, clear error cannot be found in the factfinder's choice of one of two equally permissible inferences. The Court stated that these rules apply even when the district court's findings do not rest on credibility determinations but instead are based on documentary evidence or inferences from other facts and concluded that Rule 52 demands even greater deference to the trial court's findings when those findings are based on the credibility of witnesses. These latter findings, said the Court, "if not internally inconsistent, can virtually never be clear error." *Id.* at 575.

him.[85] The verdict-loser may, of course, *present* a motion for judgment notwithstanding the verdict without having first made the prescribed motion for directed verdict. However, since such a naked motion for judgment notwithstanding the verdict cannot be granted under Rule 50(b), the trial court cannot consider it formally. Therefore, according to the Supreme Court of Alabama, the issue of sufficiency will not have been formally presented or considered in the trial court and, thus, the predicate for presentation on appeal will not have been laid.[86]

3. *Testing the sufficiency of the evidence in criminal cases.*—The motion for judgment of acquittal,[87] or to exclude the State's evidence because it failed to present a prima facie case,[88] tests the sufficiency of the evidence to support a conviction.[89] This motion is the criminal law equivalent of a motion for a directed verdict. A motion for judgment of acquittal may be made at the close of the State's evidence, at the close of all the evidence,[90] or

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85. Alford v. Dobbs, 477 So. 2d 348, 349-50 (Ala. 1985); Swain v. Terry, 454 So. 2d 948, 952 (Ala. 1984); ALA. R. CIV. P. 50(b); *see also* Wells v. Croft, 470 So. 2d 1237, 1239 (Ala. Civ. App.), *cert. denied*, 470 So. 2d 1237 (Ala. 1985).

86. Black v. Black, 469 So. 2d 1288, 1290 (Ala. 1985) (quoting Great Atl. & Pac. Tea Co. v. Sealy, 374 So. 2d 877, 880-82 (Ala. 1979)) (the procedures contained in Rule 50 set out a precise plan for challenging the sufficiency of the evidence that recognizes the important role played by the trial judge in determining sufficiency).

87. FED. R. CRIM. P. 29; ALA. R. CRIM. P. TEMP. R. 12. The motion for judgment of acquittal provided for in Temporary Rule 12 subsumes and abolishes, in criminal cases, the motion for directed verdict, the motion for affirmative charge, and the demurrer. *See* ALA. R. CRIM. P. TEMP. R. 12 comment.

88. The motion to exclude is not improper practice in a criminal case, Gautney v. State, 284 Ala. 82, 86, 222 So. 2d 175, 179 (1969), and this motion was not abolished by Temporary Rule 12 of the Alabama Rules of Criminal Procedure. In criminal cases motions to exclude and motions for judgment of acquittal serve essentially identical functions and are thus properly judged by the same standard. *See* Johnson v. State, 455 So. 2d 997, 999 (Ala. Crim. App.), *cert. denied*, 455 So. 2d 997 (Ala. 1984).

89. Cowan v. State, 460 So. 2d 284, 286 (Ala. Crim. App.) (quoting comment following ALA. R. CRIM. P. TEMP. R. 12.1(b)), *cert. denied*, 460 So. 2d 287 (Ala. 1984).

Inquiry is not permitted into the sufficiency of the evidence considered by a grand jury which returned an indictment, Ware v. State, 472 So. 2d 447, 448 (Ala. Crim. App. 1985), unless the matter is first raised in the trial court by a proper motion to quash the indictment, McConico v. State, 458 So. 2d 743, 747-48 (Ala. Crim. App. 1984), and, if it appears that *any* evidence was presented to the grand jury, either by way of live witnesses or by legal documentary evidence, *no* inquiry into the sufficiency of the evidence is permitted. *Id.* at 748.

90. ALA. R. CRIM. P. TEMP. R. 12.2(a). A motion for judgment of acquittal should be argued outside the hearing of the jury, ALA. R. CRIM. P. TEMP. R. 12.1(b), but the motion need not be made outside the presence of the jury, *Cowan*, 460 So. 2d at 286 (Ala. Crim. App.), *cert. denied*, 460 So. 2d 287 (Ala. 1984).

within thirty days after verdict or entry of the judgment of conviction.[91] In ruling on a motion for judgment of acquittal, the trial judge can consider only that evidence which is before him at the time of the motion.[92] If at the time the motion is made, the evidence of any charged offense, or of any lesser included offense, is insufficient to support a finding of guilt beyond a reasonable doubt, the court should grant the motion, or enter a judgment of acquittal on its own motion, as to that offense.[93]

The scintilla rule does not apply in criminal cases.[94] Instead, substantial evidence must tend to prove all the elements of the charge.[95] From this evidence, the jury could, by fair inference, find the accused guilty beyond a reasonable doubt.[96] The evidence presented by the State must be accepted as true and viewed in the light most favorable to the State,[97] and the State must be accorded all legitimate inferences from that evidence.[98] Because the weight of the evidence, the credibility of the witnesses, and the inferences to be drawn from the evidence are for the jury,[99] the testimony of a single credible witness is enough to make out a prima facie case.[100]

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91. ALA. R. CRIM. P. TEMP. R. 12.3(b)(1). In contrast to a motion for j.n.o.v., there is no requirement that a similar motion have been made earlier. ALA. R. CRIM. P. TEMP. R. 12.3(a).

92. *See* Adams v. State, 459 So. 2d 999, 1000-01 (Ala. Crim. App. 1984); *see also* Moore v. State, 457 So. 2d 981, 986 (Ala. Crim. App.), *cert. denied*, 457 So. 2d 981 (Ala. 1984), *cert. denied*, 470 U.S. 1053 (1985); Walker v. State, 416 So. 2d 1083, 1089 (Ala. Crim. App.), *cert. denied*, 416 So. 2d 1083 (Ala. 1982).

93. ALA. R. CRIM. P. TEMP. R. 12.1; *see* FED R. CRIM. P. 29(a); Jones v. State, 481 So. 2d 1183, 1185-87 (Ala. Crim. App. 1985).

94. Willcutt v. State, 284 Ala. 547, 549, 226 So. 2d 328, 330 (1969); *Ex parte* Grimmett, 228 Ala. 1, 2, 152 So. 263, 264 (1933); *Adams*, 459 So. 2d at 1000; Gilbert v. State, 30 Ala. App. 214, 3 So. 2d 95, 95-96 (Crim. App. 1941).

95. *Willcutt*, 284 Ala. at 549, 226 So. 2d at 330; *see also Adams*, 459 So. 2d at 1000 (without substantial evidence of a defendant's guilt, it is prejudicial error to deny a timely motion to exclude the evidence).

96. *Willcutt*, 284 Ala. at 550, 226 So. 2d at 330.

97. LaBarber v. State, 455 So. 2d 941, 942 (Ala. Crim. App.), *cert. denied*, 455 So. 2d 941 (Ala. 1984); *see* Jones v. State, 481 So. 2d 1183, 1185 (Ala. Crim. App. 1985).

98. *LaBarber*, 455 So. 2d at 942.

99. *Willcutt*, 284 Ala. at 549, 226 So. 2d at 330.

100. *See, e.g.*, McMillan v. State, 448 So. 2d 463, 464 (Ala. Crim. App. 1984) ("[a]lthough disparity in the number of witnesses is a circumstance the jury may properly consider '. . . a fact may be established as firmly by the testimony of one witness as by the entire community' ") (quoting White v. State, 410 So. 2d 135, 137 (Ala. Crim. App. 1981)); Hyman v. State, 338 So. 2d 448, 453 (Ala. Crim. App. 1976). However, where testimony is inherently or physically impossible, it must be disregarded even when uncontradicted. Parker v. State, 280 Ala. 685, 691, 198 So. 2d 261, 267-68 (1967) (reversing conviction and ordering acquittal of defendant).

Similarly, circumstantial evidence is sufficient to establish all elements of any offense if a jury reasonably might conclude that the evidence introduced excluded every reasonable hypothesis but guilt.[101] When the evidence raises questions of fact and that evidence, if believed, would be sufficient to sustain a conviction, a motion to exclude or for judgment of acquittal should be denied.[102] However, a trial judge should not permit a case to go to the jury if the evidence raises a mere suspicion, or if, after viewing the evidence in the light most favorable to the State, a defendant's guilt is uncertain or is dependent upon conjecture or suspicion.[103] In criminal cases, appellate review of the sufficiency of the evidence involves an assessment by the appellate court of whether the evidence adduced at trial could support any rational determination of guilt beyond a reasonable doubt.[104] Ordinarily, the sufficiency of the evidence in a criminal case is not before an appellate court unless the defendant previously challenged the evidence by a motion to exclude the prosecution's evidence,[105] a motion for judgment of acquittal,[106] or an equivalent motion.[107] If one of these procedures

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101. *See* Cumbo v. State, 368 So. 2d 871, 874-76 (Ala. Crim. App. 1978), *cert. denied*, 368 So. 2d 877 (Ala. 1979) (venue, corpus delicti, and guilt all established by circumstantial evidence): *see also* Tanner v. State, 291 Ala. 70, 71, 277 So. 2d 885, 886 (1973) ("conviction may be had on evidence which is entirely circumstantial, so long as that evidence is so strong and cogent as to show defendant's guilt to a moral certainty").

102. *See* Young v. State, 283 Ala. 676, 681, 220 So. 2d 843, 847 (1969); Manning v. State, 471 So. 2d 1265, 1267 (Ala. Crim. App. 1985).

103. Jones v. State, 481 So. 2d 1183, 1186 (Ala. Crim. App. 1985) (quoting *Parker*, 280 Ala. at 692, 198 So. 2d at 268).

104. United States v. Powell, 469 U.S. 57 (1984); *see* Jackson v. Virginia, 443 U.S. 307, 316, 319 (1979); Weathers v. State, 439 So. 2d 1311, 1316 (Ala. Crim. App.), *cert. denied*, 439 So. 2d 1311 (Ala. 1983); FED. R. CRIM. P. 29(a).

105. *See* Parker v. State, 395 So. 2d 1090, 1098-99 (Ala. Crim. App. 1980), *cert. denied*, 395 So. 2d 1103 (Ala. 1981). The motion to exclude is proper in criminal cases, *Gautney*, 284 Ala. at 86, 222 So. 2d at 179, and was not abolished by Temporary Rule 12 of the Alabama Rules of Criminal Procedure. The defendant who moves to exclude the State's evidence when the State rests has preserved the right of appeal and does not waive that right by presenting evidence in his defense. *Parker*, 395 So. 2d at 1098-99.

106. *See* English v. State, 457 So. 2d 458, 458 (Ala. Crim. App. 1984).

107. Despite the fact that Temporary Rule 12 of the Alabama Rules of Criminal Procedure abolishes in criminal cases the motion for a directed verdict, the motion for the affirmative charge, and the demurrer, *see* ALA. R. CRIM. P. TEMP. R. 12 comment, Alabama courts have been willing to review challenges to the sufficiency of the evidence predicated on such motions. *See, e.g.*, *Jones*, 481 So. 2d at 1185 (court reviews sufficiency of the evidence and reverses conviction on the basis of appellant's motion at trial for a "directed verdict" without mentioning that such motions were abolished by Temporary Rule 12); *English*, 457 So. 2d at 458 (stating that the sufficiency of the evidence is not subject to review on appeal

was followed, an appellate court must determine, as a matter of law,[108] whether sufficient evidence existed at the time appellant made his motion for acquittal (or an equivalent motion)[109] from which the jury could, by fair inference, find the accused guilty beyond a reasonable doubt.[110] The appellate court must accept as true the evidence presented by the State, view that evidence in the light most favorable to the prosecution, and accord the State all legitimate inferences therefrom.[111] If the evidence was sufficient for the jury to conclude, by fair inference, that the appellant was guilty of the crime charged, the appellate court will affirm the conviction.[112] In a case involving the sufficiency of circumstantial evidence, the Court of Criminal Appeals said, in *Cumbo v. State*,[113] that "[t]he test to be applied is whether the jury might reasonably find that the evidence excluded every reasonable hypothesis except that of guilt; *not* whether such evidence [in fact] excludes every

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unless it was challenged "by a motion to exclude the State's evidence, motion for judgment of acquittal, request for the affirmative charge, or through a motion for a new trial filed in the trial court").

108. Walker v. State, 416 So. 2d 1083, 1089 (Ala. Crim. App.) (whether there is sufficient legal evidence is a question of law), *cert. denied*, 416 So. 2d 1083 (Ala. 1982) (citing Scroggins v. State, 341 So. 2d 967, 971 (Ala. Crim. App. 1976), *cert. denied*, 341 So. 2d 972 (Ala. 1977)).

109. *Jones*, 481 So. 2d at 1185; Adams v. State, 459 So. 2d 999, 1000-01 (Ala. Crim. App. 1984); *Walker*, 416 So. 2d at 1089 (the evidence before the trial court at the time the motion is made is all that can be considered on review).

110. Prantl v. State, 462 So. 2d 781, 784 (Ala. Crim. App. 1984), *cert. denied*, 462 So. 2d 781 (Ala. 1985); Linzy v. State, 455 So. 2d 260, 262 (Ala. Crim. App.), *cert. denied*, 455 So. 2d 260 (Ala. 1984); Weathers v. State, 439 So. 2d 1311, 1316 (Ala. Crim. App.), *cert. denied*, 439 So. 2d 1311 (Ala. 1983); *accord* United States v. Lee, 694 F.2d 649, 652 (11th Cir. 1983) ("The Eleventh Circuit, in reviewing the sufficiency of the evidence to support a criminal conviction inquires whether 'a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt.' "), *cert. denied*, 460 U.S. 1086 (1983).

111. Roberts v. State, 451 So. 2d 422, 424 (Ala. Crim. App.), *cert. denied*, 451 So. 2d 422 (Ala. 1984); Favors v. State, 437 So. 2d 1358, 1366-67 (Ala. Crim. App.), *aff'd*, 437 So. 2d 1370 (Ala. 1983); *accord* United States v. Melton, 739 F.2d 576, 578 (11th Cir. 1984) (in reviewing the sufficiency of the evidence the appellate court will "view the evidence in the light most favorable to the government, with all reasonable inferences and credibility choices read in support of the jury's verdict").

112. Wilbourn v. State, 457 So. 2d 1001, 1004 (Ala. Crim. App. 1984); *see, e.g.*, Dolvin v. State, 391 So. 2d 133, 137-39 (Ala. 1980); Williams v. State, 451 So. 2d 411, 418 (Ala. Crim. App.), *cert. denied*, 451 So. 2d 411 (Ala. 1984); *Favors*, 437 So. 2d at 1366-67.

113. 368 So. 2d 871 (Ala. Crim. App. 1978), *cert. denied*, 368 So. 2d 877 (Ala. 1979).

reasonable hypothesis but guilt, but whether a jury might reasonably so conclude."[114] Subsequent cases in the Court of Criminal Appeals and in the Alabama Supreme Court have reaffirmed this formulation.[115] Other cases have applied similar tests.[116]

None of the formulas used to evaluate circumstantial evidence appears to have been used in cases involving the sufficiency of direct evidence. However, there is no reason to believe that decisions involving the sufficiency of circumstantial evidence are subject to a different standard of review.[117] Circumstantial evidence is not inferior to direct evidence. It is entitled to the same weight as direct

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114. *Cumbo*, 368 So. 2d at 874 (emphasis added). Of course, circumstantial evidence also must be viewed in the light most favorable to the prosecution. Barnes v. State, 429 So. 2d 1114, 1119 (Ala. Crim. App. 1982), *cert. denied*, 429 So. 2d 1114 (Ala. 1983).

115. *See, e.g., Dolvin*, 391 So. 2d at 137; Jones v. State, 481 So. 2d 1183, 1185 (Ala. Crim. App. 1985); Johnson v. State, 444 So. 2d 891, 892 (Ala. Crim. App. 1983), *cert. quashed*, 444 So. 2d 894 (Ala. 1984); *see also Ex parte* Williams, 468 So. 2d 99, 102 (Ala. 1985); *accord* United States v. Hinds, 662 F.2d 362, 366 (5th Cir. 1981), *cert. denied*, 455 U.S. 1022 (1982).

116. *See, e.g., Ex parte Williams*, 468 So. 2d at 101-02 (seemingly approving the *Cumbo* formula, but also stating at one point that the test is whether the evidence is consistent with guilt and inconsistent with any reasonable hypothesis that the accused is innocent); Weathers v. State, 439 So. 2d 1311, 1316-17 (Ala. Crim. App.) (circumstantial evidence must be consistent with the hypothesis that the accused is guilty and inconsistent with any reasonable hypothesis that the accused is innocent), *cert. denied*, 439 So. 2d 1311 (Ala. 1983); *see also* Holland v. United States, 348 U.S. 121, 140 (1954); Jarrell v. State, 255 Ala. 128, 129, 50 So. 2d 774, 775 (1949).

In *Cumbo*, the court cited with approval cases stating that the evidence is not sufficient to prove guilt beyond a reasonable doubt if the circumstances can be reconciled with the theory that some other person did the act. These cases are arguably inconsistent with the court's holding that the test is not whether the evidence failed to exclude every hypothesis other than guilt, "but whether a jury reasonably might so conclude." *Cumbo*, 368 So. 2d at 874. However, in *Ex parte Williams*, the court observed that the general legal requirement of evidence sufficiently strong to prove guilt to a moral certainty has not always been repeated in the same terms, and it appears that the Alabama Supreme Court views these various formulations as interchangeable. *Ex parte Williams*, 468 So. 2d at 101.

The Alabama courts now reject the instruction that the hypothesis of the defendant's guilt "should flow naturally from the facts proven and be consistent with all the facts in the case." Hubbard v. State, 471 So. 2d 497, 499 (Ala. Crim. App. 1984), *cert. quashed*, 471 So. 2d 497 (Ala. 1985). Similarly, a jury charge is properly refused if it states that the guilt of the defendant is not proved if the facts can be reconciled with the theory that some other person may have done the acts. Mayes v. State, 475 So. 2d 906, 907 (Ala. Crim. App.), *cert. denied*, 475 So. 2d 906 (1985).

117. *See* United States v. Hinds, 662 F.2d 362, 367 (5th Cir. 1981) (in the federal courts, "the test for evaluating the sufficiency of the evidence is the same whether the evidence is direct or circumstantial") (citations omitted), *cert. denied*, 455 U.S. 1022 (1982); *see also* Holland v. United States, 348 U.S. 121, 140 (1954).

evidence provided it points to the guilt of the accused.[118] Ultimately, whether the evidence is direct or circumstantial, it must be sufficient to establish guilt beyond a reasonable doubt.[119] If a jury necessarily must have entertained a reasonable doubt as to guilt, the conviction must be reversed.[120] Numerous cases purporting to deal with the sufficiency of the evidence state that a verdict of conviction should not be set aside unless, after allowing all reasonable presumptions of its correctness, the preponderance of the evidence clearly convinces the reviewing court that the verdict is wrong and unjust.[121] This statement confuses the standard for reviewing sufficiency with the standard for reviewing the *weight* of the evidence. If the evidence is *insufficient* to support a conviction, a judgment

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118. Linzy v. State, 455 So. 2d 260, 262 (Ala. Crim. App.), *cert. denied*, 455 So. 2d 260 (Ala. 1984); Tolbert v. State, 450 So. 2d 805, 809 (Ala. Crim. App. 1984) (citing Davis v. State, 418 So. 2d 959, 960 (Ala. Crim. App. 1982)); *see also* Moore v. State, 474 So. 2d 190, 195 (Ala. Crim. App. 1985); *cf. Holland*, 348 U.S. at 140 (circumstantial and testimonial evidence are both capable of convincing a jury beyond a reasonable doubt). It is clear that circumstantial evidence may afford satisfactory proof of the *corpus delicti* in a murder prosecution. Todd v. State, 472 So. 2d 707, 714-15 (Ala. Crim. App. 1985); Barnes v. State, 429 So. 2d 1114, 1119 (Ala. Crim. App. 1982), *cert. denied*, 429 So. 2d 1114 (Ala. 1983). The *corpus delicti* of other crimes may also be proved by circumstantial evidence. *See* Martin v. State, 461 So. 2d 1340, 1342 (Ala. Crim. App.) (receiving stolen property), *cert. denied*, 461 So. 2d 1343 (Ala. 1984). Likewise, it is clear that circumstantial evidence alone is enough to convict a defendant of any crime including murder. *See* Dolvin v. State, 391 So. 2d 133, 137 (Ala. 1980). However, an uncorroborated extrajudicial confession is insufficient to show the *corpus delicti*. Watters v. State, 369 So. 2d 1262, 1271 (Ala. Crim. App. 1978), *rev'd on other grounds*, 369 So. 2d 1272 (Ala. 1979); *see also* Smith v. United States, 348 U.S. 147, 152-53 (1954). Circumstantial evidence may also afford proof of venue. Willcutt v. State, 284 Ala. 547, 550, 226 So. 2d 328, 330 (1969); *Cumbo*, 368 So. 2d at 876.

Circumstantial evidence sufficient to support a jury finding of guilty may be found in the form of a single highly incriminating event, or it may be found in the accumulation of several relatively insignificant pieces of evidence. Tombrello v. State, 431 So. 2d 1355, 1358 (Ala. Crim. App. 1983). In either event, the chain of circumstances must be complete and must constitute a " 'well-connected train.' " Calloway v. State, 473 So. 2d 601, 603 (Ala. Crim. App.), *cert. denied*, 473 So. 2d 601 (Ala. 1985) (quoting in part DeSilvey v. State, 245 Ala. 163, 167, 16 So. 2d 183, 186 (1943)). Where circumstantial evidence consists of a number of connected and interdependent facts and circumstances, the whole is no stronger than the weakest link. *Calloway*, 473 So. 2d at 603.

119. *Dolvin*, 391 So. 2d at 139.

120. *Hinds*, 662 F.2d at 366; *see also Ex parte* Williams, 468 So. 2d 99, 102 (Ala. 1985). Of course, the requirement of proof beyond a reasonable doubt is applicable in bench trials. *See* Kelly v. State, 273 Ala. 240, 243, 139 So. 2d 326, 329 (1962); *see also* Jackson v. Virginia, 443 U.S. 307, 317 n.8 (1979).

121. *See, e.g.*, Bridges v. State, 284 Ala. 412, 420, 225 So. 2d 821, 829 (1969); Grice v. State, 481 So. 2d 449, 452 (Ala. Crim. App. 1985); Haslerig v. State, 474 So. 2d 196, 198 (Ala. Crim. App. 1985); McMurphy v. State, 455 So. 2d 924, 928 (Ala. Crim. App.), *cert. quashed*, 455 So. 2d 924 (Ala. 1984).

of acquittal should be entered.[122] If, however, the evidence is sufficient to support a conviction, but the verdict is against the clear preponderance of the evidence, a new trial should be ordered.[123]

III. Burdens Of Persuasion

A. The Risk of Nonpersuasion

Who loses the case if, after receiving all the evidence produced by both plaintiff and defendant, the fact finder cannot decide which party has the better of it? The rules designate the loser as to each material issue in the case, identifying him as the party bearing the risk that the fact finder will not be persuaded in his favor, that is, the risk of nonpersuasion. The risk often is called the burden of persuasion. The rules also establish by how much, that is by what "weight," a risk-bearing party's evidence must prevail over that of his opponent.[124] When a jury returns a verdict in favor of a risk-bearing party, it has found, in effect, that the party has survived his risk of nonpersuasion. When the court enters judgment on that verdict, denying any motion to set it aside, the court has held the jury's determination not unreasonable. When the trial court deems the risk-bearing party's proof to fall so far short of the prescribed weight that the jury's verdict is unreasonable, it will set

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122. *See, e.g.*, Parker v. State, 280 Ala. 685, 692, 198 So. 2d 261, 268 (1967); Jones v. State, 481 So. 2d 1183, 1187 (Ala. Crim. App. 1985); Prantl v. State, 462 So. 2d 781, 784 (Ala. Crim. App. 1984) (noting that the double jeopardy clauses of the Fifth Amendment to the United States Constitution and of the Alabama Constitution preclude a second trial once a reviewing court has found the evidence presented at trial insufficient), *cert. denied*, 462 So. 2d 781 (Ala. 1985).

123. *See, e.g.*, Parker v. State, 395 So. 2d 1090, 1103 (Ala. Crim. App. 1980), *cert. denied*, 395 So. 2d 1103 (Ala. 1981); Bell v. State, 461 So. 2d 855, 865-67 (Ala. Crim. App.), *cert. quashed*, 461 So. 2d 855 (Ala. 1984); Graham v. State, 374 So. 2d 929, 941 (Ala. Crim. App.), *cert. quashed*, 374 So. 2d 942 (Ala. 1979). In a bench trial reversal would appear to be in order in both weight and sufficiency situations. *See* Kelly v. State, 273 Ala. 240, 139 So. 2d 326, 329-30 (1962). Where a defendant pleads insanity, Alabama courts have been extremely reluctant to overturn a conviction on the ground that the guilty verdict ran against the overwhelming weight of the evidence. *See* Sistrunk v. State, 455 So. 2d 287, 289 (Ala. Crim. App. 1984) (citing cases).

124. *See infra* pts. IV and V.

the verdict aside and order a new trial.[125] It may not enter a judgment notwithstanding the verdict.[126] The terms "weight," "preponderance," "clear and convincing," and "beyond a reasonable doubt" all relate to the risk of nonpersuasion.

B. Allocating the Risk of Nonpersuasion

As a rule of thumb, the party who must allege a proposition of material fact in his pleadings must also bear the risk of nonpersuasion as to that fact at trial.[127] The risk of nonpersuasion generally follows the risk of nonproduction. Thus, a plaintiff usually must prove all of the material elements of the claim alleged in his complaint,[128] and a defendant usually must prove the elements of any affirmative defense alleged in his answer.[129] Although generally it is agreed that the risk of nonpersuasion does not shift between proponent and opponent during trial,[130] sometimes it is said that certain presumptions shift the risk of nonpersuasion to the opponent against whom they operate.[131] When a court must allocate the

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125. *See, e.g.*, Marsh v. Illinois Cent. R.R., 175 F.2d 498, 500 (5th Cir. 1949); Barber v. Stephenson, 260 Ala. 151, 157, 69 So. 2d 251, 256 (1953); *Parker*, 395 So. 2d at 1103.

126. Chavers v. National Sec. Fire & Cas. Co., 405 So. 2d 1, 9-10 (Ala. 1981); *Marsh*, 175 F.2d at 500. *See generally* Hoffman, *Comparing the Standards for Granting Motions for Directed Verdict and Judgment Notwithstanding the Verdict: Harville v. Goza*, 33 ALA. L. REV. 23 (1981).

127. MCCORMICK ON EVIDENCE § 337, at 948 (E. Cleary 3d ed. 1984); *see* Teng v. Diplomat Nat'l Bank, 431 So. 2d 1202, 1203 (Ala. 1983) ("[t]he burden of proving facts on which a claim is based rests on the party claiming rights or benefits therefrom"); *accord* Joseph A. Bass Co. v. United States, 340 F.2d 842, 844 (8th Cir. 1965).

128. *See, e.g.*, White v. Brookley Fed. Credit Union, 283 Ala. 597, 602, 219 So. 2d 849, 853 (1968); *see also* Dorsey v. Dorsey, 259 Ala. 220, 224, 66 So. 2d 135, 139 (1953) (noting that plaintiff may properly be required to prove a negative unless knowledge of the fact in question is peculiarly within the knowledge of the opposing party).

129. *See, e.g.*, Lambert v. Jefferson, 34 Ala. App. 67, 74, 36 So. 2d 583, 588 (Ct. App. 1948), *rev'd on other grounds*, 251 Ala. 5, 36 So. 2d 594 (1948).

130. *See, e.g.*, Lavett v. Lavett, 414 So. 2d 907, 912 (Ala. 1982); King v. Aird, 251 Ala. 613, 618, 38 So. 2d 883, 888 (1949).

131. For example, in a will contest, proof of a confidential relationship between the will's proponent and the testator, plus proof of undue activity of the proponent in procuring the will, raises the presumption of undue influence which puts on the proponent the burden of proving there was no undue influence. Brunson v. Brunson, 278 Ala. 131, 135, 176 So. 2d 490, 494 (1965); *see also* Reed v. Shipp, 293 Ala. 632, 636-37, 308 So. 2d 705, 708-09 (1975). *But see* FED. R. EVID. 301 (providing in civil cases that, while a presumption operates to place the burden of going forward with evidence to rebut the presumption on the party against whom the presumption operates, the burden of proof, in the sense of the risk of nonpersuasion, does not shift).

risks of nonpersuasion applicable to a newly created claim or defense, its decision will be informed by the same considerations relevant to the allocation of risks of nonproduction.[132]

C. *Degree of Persuasion; Generally*

While the jury need not be instructed upon the risks of nonproduction, it must be instructed upon the risks of nonpersuasion. It must be told not only which party bears the risks of nonpersuasion on which material propositions of fact, but also by how much a risk-bearing party's evidence must prevail over that of his opponent. The required degree of persuasiveness may be described in terms of the figurative gravity of the evidence ("weight" or "preponderance") or in terms of its effect on the mind of the fact finder ("clear and convincing" or "beyond a reasonable doubt").

Close questions of weight or convincing effect generally arise only when a proponent must rely solely upon circumstantial evidence. Circumstantial evidence does not, when accepted as true, automatically dispose of the issue at which it is directed.[133] Circumstantial evidence speaks indirectly to a material proposition of fact by asserting some other proposition of fact from which a logical mind may conclude, that is, draw the *inference*,[134] that the material proposition of fact is more (or less) likely to be true.[135] Thus, if the fact finder accepts the circumstantial proposition of fact as true, it must still evaluate the probability of the inference from that proposition to the material proposition to be proven. The weight of the evidence is measured by the likelihood that a certain inference will be drawn from the circumstantial evidence.[136] The mental process of evaluating essential inferences is commonly called "weighing the evidence."

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132. *See generally supra* pt. II.

133. Hoffman, *Alabama's Scintilla Rule*, 28 ALA. L. REV. 592, 595-96 (1977).

134. "An inference is merely a permissible deduction from the proven facts which the jury may accept or reject or give such probative value to as it wishes." Thomas v. State, 363 So. 2d 1020, 1022 (Ala. Crim. App. 1978), *quoted in* Weathers v. State, 439 So. 2d 1311, 1316 (Ala. Crim. App.), *cert. denied*, 439 So. 2d 1311 (Ala. 1983).

135. *See* White v. State, 294 Ala. 265, 272, 314 So. 2d 857, 864, *cert. denied*, 423 U.S. 951 (1975).

136. Hoffman, *Alabama's Scintilla Rule*, 28 ALA. L. REV. 592, 594 n.11 (1977).

IV. Required Degree of Persuasion; Civil Actions

A. Reasonable Satisfaction

In most civil actions in Alabama, a proponent (*i.e.*, risk- or burden-bearer) must prove each element of his claim or defense to the reasonable satisfaction of the jury.[137] Although the proposition was questionable, older Alabama decisions said that the reasonable satisfaction standard was less onerous than the preponderance of evidence standard,[138] which is the general civil standard maintained by most jurisdictions.[139] However, Alabama courts have said that charges defining the measure of proof as "reasonably satisfies the jury by a preponderance of the evidence" may be given without error.[140] More recently, the Alabama Supreme Court has said that preponderance of evidence charges "may be refused without error, but it is not reversible error to give them."[141] The court has characterized as not objectionable a closing argument which implied "that the preponderance of the evidence must balance in favor of the plaintiffs, which is the correct standard."[142]

This compromise position would seem to represent a commendable accommodation with logic. As to material propositions supported by direct evidence, the preponderance standard is satisfied when the fact finder believes the proponent's witness(es).[143] As to material propositions supported solely by circumstantial evidence, the preponderance standard is satisfied when the fact finder

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137. ALABAMA PATTERN JURY INSTRUCTIONS-CIVIL APJI-CIV 2.04; 5.00; 7.10; 8.00-.04; 13.02; 17.01; 20.02; 20.06; 24.01, -.03; 27.02; 30.01, -.03; 32.15, -.20; 35.00; 36.00-.02; 36.23-.24; 36.26; 36.55; 36.72-.75; 36.91, -.93; 37.03, -.05, -.09, -.15; 38.03, -.05, -.06, -.08, -.15; 39.02 (1974); *see* Edwards v. Sentell, 282 Ala. 48, 51, 208 So. 2d 914, 916 (1968). It is clear that the word "satisfaction" must be preceded by the word "reasonable." Torrey v. Burney, 113 Ala. 496, 504-06, 21 So. 348, 350-51 (1897).

138. *See, e.g.*, Jones v. Mullin, 251 Ala. 501, 505, 38 So. 2d 281, 284 (1949) ("[preponderance of evidence] charges have been condemned repeatedly as imposing on the parties a greater burden of proof than the law requires").

139. MCCORMICK ON EVIDENCE § 339, at 956 (E. Cleary 3d ed. 1984).

140. *See* Nelson v. Belcher Lumber Co., 232 Ala. 116, 119, 166 So. 808, 810-11 (1936). *But cf.* Armstrong v. State, 294 Ala. 100, 104, 312 So. 2d 620, 623-24 (1975) (differentiating between the two burdens by holding that in probation revocation hearings, the standard of proof is not reasonable doubt or preponderance of the evidence, but reasonable satisfaction from the evidence).

141. Gunthorpe v. State, 277 Ala. 452, 453, 171 So. 2d 842, 842-43 (1965) (condemnation proceeding) (citing *Nelson*, 232 Ala. at 119, 166 So. at 810-11).

142. Osborne Truck Lines, Inc. v. Langston, 454 So. 2d 1317, 1324 (Ala. 1984).

143. *See* Deal v. Johnson, 362 So. 2d 214, 218 (Ala. 1978).

accepts the proponent's essential inference(s) to be more probable than not, even if by the slimmest of margins.[144] It is difficult to see how the reasonable satisfaction standard could be less onerous than that without becoming no burden at all. Simply stated, if the fact finder concludes that the proponent's story is probably true, it has been both reasonably satisfied and persuaded by a preponderance of the evidence.

B. Preponderance of the Evidence

In a few civil actions, Alabama law specifically provides that proof must be by a preponderance of the evidence. Thus, preponderance of the evidence is the standard when an adult is alleged to be in need of protective services,[145] or when a proposed ward is sought to be declared legally incapacitated.[146] Similarly, a private figure seeking to recover for an allegedly defamatory statement must prove by a preponderance of the evidence that the defendant was negligent in making the statement.[147]

C. Clear and Convincing Evidence

In some civil actions, Alabama, like other jurisdictions,[148] traditionally has required a higher standard of persuasion ("clear and convincing evidence") on some or all issues. Recently, the United States Supreme Court has interpreted the federal Constitution to require clear and convincing evidence in certain cases.[149] A precise

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144. *See* McCormick on Evidence § 339, at 957-58 n.13 (E. Cleary 3d ed. 1984) (discussing a trial judge's discretion to deny a motion for new trial when evidence, if believed, supports the verdict).

145. *In re* Tillery, 481 So. 2d 386, 389 (Ala. Civ. App. 1985), *cert. denied*, 481 So. 2d 386 (Ala. 1986).

146. Ala. Code § 26-7A-4 (Supp. 1986).

147. Mead Corp. v. Hicks, 448 So. 2d 308, 313 (Ala. 1983).

148. *See generally* McCormick on Evidence § 340 (E. Cleary 3d ed. 1984). In civil contempt cases, when the party cited for contempt shows that he is unable to comply due to want of means rather than contumacy, the burden of proof shifts to the petitioner to show *beyond a reasonable doubt* that the accused can comply. Hurd v. Hurd, 485 So. 2d 1194, 1195 (Ala. Civ. App. 1986).

149. *See, e.g.*, Addington v. Texas, 441 U.S. 418, 433 (1979) (civil commitment proceedings); Woodby v. Immigration & Naturalization Serv., 385 U.S. 276, 286 (1966) (deportation proceedings); Chaunt v. United States, 364 U.S. 350, 353 (1960) (denaturalization proceedings).

definition of the phrase "clear and convincing" is difficult,[150] but simply stated, if the fact finder concludes that the proponent's story is highly probable, the proponent's evidence has satisfied this standard of persuasion.[151]

The requirement that the plaintiff must prevail by clear and convincing evidence is applicable in suits to reform instruments such as insurance policies,[152] deeds or mortgages,[153] written contracts,[154] suits to establish title on the basis of adverse possession,[155] suits for specific performance,[156] suits to establish that a gift was made,[157] libel actions by public officials,[158] suits to establish lost instruments,[159] suits seeking to recover damages on

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150. Edwards v. Sentell, 282 Ala. 48, 51, 208 So. 2d 914, 916 (1968).

151. McCORMICK ON EVIDENCE § 339, at 956 n.4, 959-60 (E. Cleary 3d ed. 1984).

152. Reliance Ins. Co. v. Substation Prod. Corp., 404 So. 2d 598, 603 (Ala. 1981) (requiring "clear, exact, convincing and satisfactory evidence").

153. Finley v. Bailey, 440 So. 2d 1019, 1021 (Ala. 1983); Jim Walter Homes, Inc. v. Phifer, 432 So. 2d 1241, 1243 (Ala. 1983); Adams v. Adams, 346 So. 2d 1146, 1148 (Ala. 1977); *see also* Miller v. Davis, 423 So. 2d 1354, 1356 (Ala. 1982) (suit to cancel deed); Entrekin v. Entrekin, 388 So. 2d 931, 932 (Ala. 1980) (clear, satisfactory, and convincing evidence required to establish that consideration for deed was promise of grantee to support grantor for life); Lee v. McDonald, 338 So. 2d 407, 409 (Ala. 1976) (clear and convincing proof required in suit to have deed declared a mortgage); *cf.* Strother v. Strother, 436 So. 2d 847, 850 (Ala. 1983) (facts warranting establishment of resulting trust in favor of one who provided money to purchase property must be shown by clear and convincing evidence); Nall v. Nall, 382 So. 2d 575, 576 (Ala. Civ. App. 1980) (a suit under ALA. CODE § 35-4-153 (1975) for reformation of a deed requires "clear, exact, convincing and satisfactory" evidence of parties' intentions).

154. Federated Guar. Life Ins. Co. v. Painter, 360 So. 2d 309, 311 (Ala. 1978) ("clear, convincing and satisfactory"); *accord* Phillippine Sugar Estates Dev. Co. v. Phillipine Islands, 247 U.S. 385, 391 (1918) (proof in suit for reformation must be of "the clearest and most satisfactory character").

155. Hurt v. Given, 445 So. 2d 549, 551 (Ala. 1983) (quoting Calhoun v. Smith, 387 So. 2d 821, 823 (Ala. 1980) (ten-year period)); *see* Knowles v. Golden Stream Fishing Club, Inc., 331 So. 2d 253, 254 (Ala. 1976) (adverse possession must be shown by clear and convincing evidence).

156. Edwards v. Sentell, 282 Ala. 48, 51, 208 So. 2d 914, 916 (1968); Aniton v. Robinson, 273 Ala. 76, 81, 134 So. 2d 764, 767 (1961); Borden v. Case, 270 Ala. 293, 299, 118 So. 2d 751, 756 (1960).

157. First Ala. Bank v. Adams, 382 So. 2d 1104, 1111 (Ala. 1980).

158. Pemberton v. Birmingham News Co., 482 So. 2d 257, 259 (Ala. 1985) (proof of actual malice must be made by clear and convincing evidence); Mead Corp. v. Hicks, 448 So. 2d 308, 313 (Ala. 1983).

159. Bruner v. Walker, 366 So. 2d 695, 697 (Ala. 1978); Bates v. Bates, 247 Ala. 337, 339, 24 So. 2d 440, 441-42 (1946). Where an insurer claims it is not liable for a loss because it cancelled a policy, that insurer must prove through clear and convincing evidence that a timely and proper notice of cancellation was mailed. Great Southwest Fire Ins. Co. v. Mobil

the basis of fraud,[160] and suits challenging various official acts.[161] Before an attorney can be disciplined, his guilt must be shown by clear and convincing evidence,[162] and before a disbarred lawyer can be reinstated, he must show by clear and convincing evidence that he has the moral qualifications to practice.[163] Clear and convincing proof is necessary to establish a common law marriage[164] and, before the rights of a parent to custody of his child can be terminated, there must be clear and convincing evidence that termination would be in the child's best interest.[165]

D. Testing the Weight of the Evidence in Civil Cases

To test the weight of the evidence in civil jury cases, the party seeking review ordinarily must file a motion for a new trial[166] within thirty days from entry of judgment.[167] It is said that no ground for a new trial is more carefully scrutinized than that the

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Equip. Co. II, 473 So. 2d 1049, 1052 (Ala. 1985); Currie v. Great Cent. Ins. Co., 374 So. 2d 1330, 1331 (Ala. 1979).

160. D.H. Holmes Dep't Store v. Feil, 472 So. 2d 1001, 1004 (Ala. 1985) (fraud must be clearly and satisfactorily proved by the party seeking relief on that basis).

161. *See* Raine v. First Western Bank, 362 So. 2d 846, 848 (Ala. 1978) (party challenging correctness of sheriff's return of service must establish lack of service by clear and convincing proof); Ardis v. State, 380 So. 2d 301, 304 (Ala. Crim. App. 1979) (party challenging acknowledgment by notary must establish its invalidity by clear and convincing evidence), *cert. denied*, 380 So. 2d 305 (Ala. 1980).

162. Jackson v. Alabama State Bar, 462 So. 2d 365, 369 (Ala. 1985); Hunt v. Disciplinary Bd., 381 So. 2d 52, 54 (Ala. 1980).

163. Bonner v. Disciplinary Bd., 401 So. 2d 734, 737 (Ala. 1981) (citing ALA. CODE OF PROFESSIONAL RESPONSIBILITY DR 19(c) (1984)).

164. Bishop v. Bishop, 57 Ala. App. 619, 622, 330 So. 2d 443, 445 (Civ. App. 1976).

165. *Accord* Santosky v. Kramer, 455 U.S. 745, 769 (1982); Turley v. Department of Pen. & Sec., 481 So. 2d 406, 408 (Ala. Civ. App. 1985); *In re* Abbott, 450 So. 2d 118, 120 (Ala. Civ. App. 1983), *cert. denied*, 450 So. 2d 118 (Ala. 1984); *see also* Leonard v. Leonard, 360 So. 2d 710, 713 (Ala. 1978) (clear and convincing proof needed to rebut presumption that husband of a child's mother is its father); ALA. CODE § 12-15-65(e) (1986) (clear and convincing proof required in dependency and need of supervision proceedings).

166. *See* Securitronics of Am., Inc. v. Bruno's, Inc., 414 So. 2d 950, 951 (Ala. 1982) (citing Francis v. Tucker, 341 So. 2d 710, 712 (Ala. 1977)); ALA. CODE § 12-13-11 (1986); ALA. R. CIV. P. 59; *see also* FED. R. CIV. P. 59. The court may also order a new trial on its own motion. FED. R. CIV. P. 59(d); ALA. R. CIV. P. 59(d).

167. ALA. CODE § 12-13-11(a) (1986); *see* State Farm Mut. Auto. Ins. Co. v. Key, 46 Ala. App. 303, 304, 241 So. 2d 332, 333 (Civ. App. 1970) (weight and sufficiency of evidence not reviewable because motion for new trial filed later than thirty days after judgment). In federal court a motion for a new trial must be filed within ten days. FED. R. CIV. P. 59(b).

verdict is against the weight of the evidence.[168] The decision on such a motion rests largely in the discretion of the trial court,[169] and, it is said, a strong "presumption" favors the jury's verdict.[170] The court should grant a new trial only when the judgment goes against the great preponderance of the evidence,[171] but the judge may weigh the evidence, consider the demeanor of the witnesses, and allow another jury to pass on the case if he is convinced the verdict was unjust.[172] A new trial may be granted even though there was sufficient evidence for a party to survive a motion for a directed verdict or for judgment notwithstanding the verdict.[173]

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168. Wilder v. DiPiazza, 481 So. 2d 1091, 1093 (Ala. 1985); Whitfield v. Burttram, 471 So. 2d 401, 403 (Ala. 1985); Deal v. Johnson, 362 So. 2d 214, 218 (Ala. 1978); Walker v. Cardwell, 348 So. 2d 1049, 1051 (Ala. 1977) (citing Hodges & Co. v. Albrecht, 288 Ala. 281, 285, 259 So. 2d 829, 832 (1972)).

A new trial may also be had on the grounds of newly discovered evidence. ALA. CODE § 12-13-11(a)(7) (1975). A party who seeks a new trial on this ground must show that the evidence on which he bases his claim (1) was discovered since the trial, (2) could not in the exercise of due diligence have been discovered in time to be produced at trial, (3) is material, (4) is not merely cumulative or impeaching, and (5) is of such a nature that a different verdict would probably result if a new trial were granted. Welch v. Jones, 470 So. 2d 1103, 1112 (Ala. 1985). The decision to grant or deny a new trial on the ground of newly discovered evidence rests largely in the discretion of the trial court, Hancock v. City of Montgomery, 428 So. 2d 29, 32 (Ala. 1983), and its decision will not be reversed on appeal absent a showing that the trial court abused its discretion or violated some legal right of the appellant, Gilmer v. Salter, 285 Ala. 671, 676, 235 So. 2d 813, 817 (1970).

169. Deaton, Inc. v. Burroughs, 456 So. 2d 771, 776 (Ala. 1984); *see* Pacheco v. Paulson, 472 So. 2d 980, 982 (Ala. 1985) (holding that trial judge was within his discretion in denying motion for a new trial, but stating that he would not have abused his discretion had he granted the motion); Chavers v. National Sec. Fire & Cas. Co., 405 So. 2d 1, 9 (Ala. 1981).

170. *Wilder*, 481 So. 2d at 1093; Matthews Bros. Constr. Co. v. Lopez, 434 So. 2d 1369, 1375 (Ala. 1983); *see also Whitfield*, 471 So. 2d at 403; Clinton v. Hanson, 435 So. 2d 48, 49 (Ala. 1983).

171. *Lopez*, 434 So. 2d at 1375; ALA. CODE § 12-13-11(a)(6) (1986); *see* Walker v. Cardwell, 348 So. 2d 1049, 1051 (Ala. 1977) (citing Hodges & Co. v. Albrecht, 288 Ala. 281, 285-86, 259 So. 2d 829, 832 (1972)). Of course, if there is no evidence to support a jury verdict, a trial court may grant a party's motion for a new trial, Posey v. Myers, 370 So. 2d 986, 986 (Ala. 1979), even though the moving party could have had a properly predicated j.n.o.v. upon timely motion. *But cf.* Black, Sivalls & Bryson v. Shondell, 174 F.2d 587, 591 (8th Cir. 1949) (upholding district court's denial of defendant's motion for j.n.o.v. or, alternatively, for a new trial, notwithstanding that plaintiff's evidence was arguably insufficient because defendant waived right to appellate review of the sufficiency of the evidence when he failed to assert a timely motion for directed verdict).

172. *See Chavers*, 405 So. 2d at 10. The scintilla rule does not apply to rulings on motions for a new trial. *Walker*, 348 So. 2d at 1051 (citing *Albrecht*, 288 Ala. at 285, 259 So. 2d at 832).

173. *See Chavers*, 405 So. 2d at 9-10; *accord* Marsh v. Illinois Cent. R.R., 175 F.2d 498, 500 (5th Cir. 1949); *see also* Casey v. Jones, 410 So. 2d 5, 8 (Ala. 1981) (noting that

However, no more than two new trials may be granted a party on grounds relating to the weight and preponderance of the evidence.[174]

The so-called "presumption" in favor of the jury's verdict is strengthened, it is said, when the trial judge denies a motion for a new trial based on a claim that the verdict is not supported by the evidence.[175] On appeal, the reviewing court should view the evidence in the light most favorable to the prevailing party and should indulge such reasonable inferences as the jury was free to draw.[176] The decision of the trial court, refusing to grant a new trial on the ground that the verdict is against the great proponderance of the evidence, will not be reversed on appeal, it is said, unless, after allowing all reasonable "presumptions" of correctness, the preponderance of the evidence convinces the reviewing court that the verdict is wrong and unjust.[177] It is the function of the jury to determine the credibility of the witnesses, to draw reasonable inferences from the evidence, and to resolve controverted factual issues.[178] Nevertheless, appellate courts are fond of saying that a jury does not have an absolute right to ignore proven facts[179] or to disregard the undisputed testimony of competent witnesses

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evidentiary challenges are divided into two distinct categories: (1) challenges to the sufficiency of the evidence raised by motions for directed verdict and for j.n.o.v., and (2) challenges to the weight and preponderance of the evidence raised by a motion for a new trial).

174. ALA. CODE § 6-8-104 (1975); *see Casey*, 410 So. 2d at 8 n.2. The history of § 6-8-104 indicates a legislative intention that litigation come to an end, even though a wrong apparently may have been imposed. Liberty Nat'l Life Ins. Co. v. Trammell, 37 Ala. App. 204, 208, 67 So. 2d 41, 45 (Ct. App. 1953). This section, however, does not preclude the court from granting a new trial for error committed by the trial court, misconduct of the parties, counsel, or jurors, or because of newly discovered evidence. *Id.* at 207, 67 So. 2d at 43-45.

175. Wilder v. DiPiazza, 481 So. 2d 1091, 1093 (Ala. 1985); Kent v. Singleton, 457 So. 2d 356, 359 (Ala. 1984); *Walker*, 348 So. 2d at 1051 (citing *Albrecht*, 288 Ala. at 285, 259 So. 2d at 832); *see also Casey*, 410 So. 2d at 8.

176. Strait v. Vandiver, 472 So. 2d 1034, 1036 (Ala. 1985).

177. *Wilder*, 481 So. 2d at 1093; Trans-South-Rent-A-Car, Inc. v. Wein, 378 So. 2d 725, 727 (Ala. 1979); *Walker*, 348 So. 2d at 1051 (citing *Albrecht*, 288 Ala. at 286, 259 So. 2d at 832). Conversely, "an order granting a motion for new trial on the sole ground that the verdict is against the great weight or preponderance of the evidence will be reversed for abuse of discretion where on review it is easily perceivable from the record that the jury verdict is supported by the evidence." Jawad v. Granade, 497 So. 2d 471, 477 (1986) (overruling Cobb v. Malone, 92 Ala. 630, 9 So. 738 (1891)).

178. *Wein*, 378 So. 2d at 727.

179. *See* Glanton v. Huff, 404 So. 2d 11, 13 (Ala. 1981). It has been said that a motion for a new trial on the ground that the verdict is against the weight of the evidence may

and substitute its own conclusions.[180] An appellate court will reverse a trial court's denial of a motion for new trial and order a new trial when the jury's verdict is contrary to the great weight of the evidence[181] or is unsupported by any evidence.[182]

In a nonjury civil case in Alabama, a motion for a new trial is not necessary to obtain appellate review of the weight of the evidence supporting the decree of the trial court.[183] However, when a case is tried orally (*ore tenus*) before a trial judge, his findings

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properly be denied if evidence is presented which, if believed, supports the verdict. Deal v. Johnson, 362 So. 2d 214, 218 (Ala. 1978).

180. *See* Farmers & Ginners Cotton Oil Co. v. Reliance Ins. Co., 341 So. 2d 147, 148 (Ala. 1976).

181. *See, e.g., Glanton*, 404 So. 2d at 13; Barber v. Stephenson, 260 Ala. 151, 157, 69 So. 2d 251, 256-58 (1953).

182. *See, e.g.*, Posey v. Myers, 370 So. 2d 986, 986-87 (Ala. 1979); *Farmers*, 341 So. 2d at 148; *see also* General Motors Corp. v. Van Marter, 447 So. 2d 1291, 1294 (Ala. 1984) (neither the court nor the jury have the right to arbitrate differences between the parties and when a verdict cannot be justified on any reasonable interpretation of facts in evidence it should be set aside as being the result of compromise or mistake) (citing Holcombe & Bowden v. Reynolds, 200 Ala. 190, 190, 75 So. 938, 938 (1917)).

When a new trial is sought on the grounds that the damages awarded were excessive or inadequate, *see* ALA. CODE § 12-13-11(a)(4) (1986), the basic inquiry is whether the amount awarded is unsupported by, or opposed to, the clear weight of the evidence, *see* Walker v. Henderson, 275 Ala. 541, 544, 156 So. 2d 633, 636 (1963). The verdict of the jury is assumed correct, White v. Fridge, 461 So. 2d 793, 794 (Ala. 1984), and that assumption is especially strong when the damages in question are for pain and suffering, Coca-Cola Bottling Co. v. Parker, 451 So. 2d 786, 788 (Ala. 1984). Whether to grant a new trial rests in the jurisdiction of the trial judge, Merritt v. Roberts, 481 So. 2d 909, 910 (Ala. Civ. App. 1985), but when a case is tried to a jury, a new trial cannot be ordered solely on the issue of damages, *see* ALA. R. CIV. P. 59(a).

A jury verdict should be set aside only when the amount awarded was the result of mistake, inadvertence, or failure to comprehend the issues, *see Parker*, 451 So. 2d at 788-89, or if the amount awarded was so excessive or inadequate as to plainly indicate that the verdict was the result of passion, bias, prejudice, or improper motive, Brown v. Seaboard Coast Line R.R., 473 So. 2d 1022, 1025 (Ala. 1985) (FELA case); *White*, 461 So. 2d at 795-96 (pain and suffering); Yeager v. Hurt, 433 So. 2d 1176, 1181 (Ala. 1983) (punitive damages). The appellate courts have occasionally been willing to order a new trial because of inadequate damages. *See, e.g.*, Patterson v. Byrd, 459 So. 2d 883, 883 (Ala. 1984) (award in personal injury suit included no compensation for pain and suffering); Roland v. Krazy Glue, Inc., 342 So. 2d 383, 384-86 (Ala. Civ. App. 1977) ($100 award for $591.50 special damages). When an award is excessive, an appellate court may order a new trial or condition its denial upon a remittitur pursuant to ALA. CODE § 12-22-71 (1986). *See Parker*, 451 So. 2d at 789.

183. Securitronics of Am., Inc. v. Bruno's, Inc., 414 So. 2d 950, 951 (Ala. 1982) (citing Francis v. Tucker, 341 So. 2d 710, 712 (Ala. 1977)) (noting that the trial judge's ruling on the sufficiency of the evidence is implicit in his decree). However, such a motion may be made, *see, e.g.*, Moore v. Johnson, 471 So. 2d 1250, 1251 (Ala. 1985); Johnson v. Cleveland, 460 So. 2d 1257, 1257 (Ala. 1984); ALA. R. CIV. P. 59(a), and, if made, the court's ruling on

have the effect of a jury verdict[184] and are accorded, as it is said, a strong "presumption" of correctness.[185] Whether sufficient evidence supports the trial court's findings is said to be a question of law.[186] An appellant is said to bear a heavy burden in seeking reversal on the ground of insufficient evidence.[187] An appellate court should view the evidence in the light most favorable to the prevailing party,[188] and the trial court's findings of fact should be affirmed if there is evidence or reasonable inferences to support them.[189] Affirmance may not follow if the facts found are mani-

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the motion is accorded the usual assumption of correctness, *see Cleveland*, 460 So. 2d at 1258.

184. Chrisman v. Brooks, 291 Ala. 237, 241, 279 So. 2d 500, 504 (1973). In a non-jury case, it is the function of the trial judge to weigh the evidence and determine its credibility, Lee v. Jackson County Dep't of Pen. & Sec., 470 So. 2d 1294, 1296 (Ala. Civ. App. 1985), and to reconcile, Abney v. Estate of Jenkins, 470 So. 2d 1293, 1294 (Ala. Civ. App. 1985), or resolve conflicting tendencies in the evidence on the basis of his observations, Zirlott v. Radcliff, 406 So. 2d 879, 880 (Ala. 1981). The rationale behind the *ore tenus* rule is that the trial judge deserves an assumption of correctness because he is in a position to see and hear the testimony and to evaluate the demeanor of the witnesses. Hospital Corp. of Am. v. Springhill Hosps., Inc., 472 So. 2d 1059, 1060 (Ala. Civ. App.), *cert. denied*, 472 So. 2d 1059 (Ala. 1985); *accord* ALA. R. CIV. P. 52(a); *see* FED. R. CIV. P. 52(a). Except as to evidence which is inherently incredible, the reviewing court should not substitute its judgment for that of the trial court in making choices about credibility. Marcum v. United States, 452 F.2d 36, 39 (5th Cir. 1971).

185. Thompson v. Hartford Accident & Indem. Co., 460 So. 2d 1264, 1267 (Ala. 1984). The so-called "presumption" of correctness which attends the findings of a trial judge who has heard the evidence *ore tenus* is said to be especially strong in adverse possession cases, May v. Campbell, 470 So. 2d 1188, 1190 (Ala. 1985), and that "presumption" is further strengthened when the court visits, or is familiar with, the premises in question, Smith v. Smith, 482 So. 2d 1172, 1174 (Ala. 1985); Moore v. Johnson, 471 So. 2d 1250, 1252 (Ala. 1985).

There is no "presumption" of correctness on appeal as to the lower court's decisions on questions of law. Porter v. Porter, 472 So. 2d 630, 632 (Ala. 1985).

186. Curtis White Constr. Co. v. Butts & Billingsley Constr. Co., 473 So. 2d 1040, 1041 (Ala. 1985).

187. *Id.* at 1041.

188. Alabama Farm Bureau Mut. Cas. Ins. Co. v. Scott Paper Co., 452 So. 2d 878, 880 (Ala. Civ. App. 1984).

189. Bettis v. Bettis, 475 So. 2d 847, 853 (Ala. 1985). The *ore tenus* rule also applies where evidence is heard by a hearing examiner or administrative body. Harbin v. Alabama Pub. Serv. Comm'n, 474 So. 2d 63, 65 (Ala. 1985). In reviewing administrative decisions, the Alabama Supreme Court has said that the decision will stand if supported by "substantial evidence." *See Ex parte* Morris, 263 Ala. 664, 668, 83 So. 2d 717, 720 (1955); *see also Harbin*, 474 So. 2d at 65; Alabama Bd. of Nursing v. Herrick, 454 So. 2d 1041, 1043 (Ala. Civ. App. 1984); Little Caesar's, Inc. v. Alabama Beverage Control Bd., 386 So. 2d 224, 225-27

festly unjust, palpably erroneous,[190] or against the great weight of the evidence,[191] or if the court took an erroneous view of the law as applied to the facts.[192] When a case is tried *ore tenus* and the judge makes no specific findings of fact, the appellate court will assume the trial court made those findings necessary to support its judgment, unless such findings would be clearly erroneous and against the great weight and preponderance of the evidence.[193]

Where a case is tried to a judge sitting without a jury, the *ore tenus* rule applies whether the case is tried in whole, or in part, on the basis of oral testimony.[194] However, when the evidence is presented by way of depositions, stipulations, and other written testimony and no testimony is presented orally, the appellate court

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(Ala. Civ. App. 1979), *aff'd*, 386 So. 2d 228 (Ala. 1980); ALA. CODE § 41-22-20(k) (Supp. 1986). Substantial evidence has been defined as such " 'evidence as a reasonable mind might accept as adequate to support a conclusion.' " Barker v. State, 437 So. 2d 1375, 1377 (Ala. Crim. App. 1983) (quoting Richardson v. Perales, 402 U.S. 389, 401 (1971)); *see also Ex parte Morris*, 263 Ala. at 668, 83 So. 2d at 720 (noting that substantial evidence is more than a scintilla and must do more than create a suspicion; it must be enough to survive a motion for a directed verdict if the trial were to a jury and it must provide a rational basis for the conclusion of an administrative body).

190. *Bettis*, 475 So. 2d at 853; May v. Campbell, 470 So. 2d 1188, 1190 (Ala. 1985); McDuffie v. First Nat'l Bank, 450 So. 2d 451, 454 (Ala. 1984); *see also* Holcombe & Bowden v. Reynolds, 200 Ala. 190, 190, 75 So. 938, 938 (1917) (verdict should be set aside where it cannot be justified on any reasonable hypothesis presented by the evidence).

191. Dean v. Sfakianos, 472 So. 2d 1009, 1012 (Ala. 1985); Burroughs v. Great Atl. & Pac. Tea Co., 462 So. 2d 353, 359 (Ala. 1984).

In civil contempt cases, appellate review does not extend to the weight and sufficiency of the evidence but only to the question of whether there was any evidence to support the decision of the trial court. Hawkins v. Hawkins, 470 So. 2d 1283, 1285 (Ala. Civ. App. 1985); McDaniel v. McDaniel, 464 So. 2d 108, 109 (Ala. Civ. App. 1985). Similarly, in workmen's compensation cases, the standard of review is whether any legal evidence supports the trial court's findings. The reviewing court will neither weigh the evidence nor consider the propriety of the trial court's findings. Goodyear Tire & Rubber Co. v. Bradley, 473 So. 2d 514, 516 (Ala. Civ. App. 1985). However, in unemployment compensation cases the usual *ore tenus* rule applies. Hale v. Cullman County Bd. of Educ., 465 So. 2d 1143, 1145-46 (Ala. Civ. App. 1984), *cert. denied*, 465 So. 2d 1143 (Ala. 1985).

192. Smith v. Style Advertising, Inc., 470 So. 2d 1194, 1196 (Ala. 1985); *see, e.g.*, Dickey v. McClammy, 452 So. 2d 1315, 1320 (Ala. 1984) ("presumption" of correctness overcome by both the law and evidence).

193. Metals, Inc. v. Jones, 468 So. 2d 154, 156 (Ala. 1985); Johnson v. Cleveland, 460 So. 2d 1257, 1257-58 (Ala. 1984); Reliance Ins. Co. v. Substation Prod. Corp., 404 So. 2d 598, 603 (Ala. 1981).

194. *Burroughs*, 462 So. 2d at 359 (citing First Ala. Bank v. Martin, 425 So. 2d 415, 425 (Ala. 1982)). *But cf.* Hospital Corp. of Am. v. Springhill Hosps., Inc., 472 So. 2d 1059, 1061 (Ala. Civ. App.) (*ore tenus* rule not applicable where trial court heard part of the testimony of one witness, but remainder of case was tried on depositions and exhibits), *cert. denied*, 472 So. 2d 1059 (Ala. 1985).

may review without any "presumption" in favor of the trial court's findings.[195] Similarly, when testimony was presented orally before one judge, but the decree under review was issued by another judge who did not hear the testimony, the *ore tenus* rule does not apply.[196] Finally, when the facts are not disputed, *ore tenus* review does not apply;[197] the reviewing court will construe the evidence de novo[198] and determine if the lower court properly applied the law to the facts.[199]

V. Required Degree of Persuasion; Criminal Prosecutions

A. Proof Beyond A Reasonable Doubt

In criminal prosecutions, the Due Process Clause of the Fourteenth Amendment protects the accused against conviction except upon proof beyond a reasonable doubt on every fact necessary to constitute the crime with which he is charged.[200] Consequently, the prosecution bears the burden of proving to the jury beyond a reasonable doubt each and every material element of the crime charged.[201] Proof beyond a reasonable doubt is the highest burden

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195. Bownes v. Winston County, 481 So. 2d 362, 364 (Ala. 1985); Porter v. Porter, 472 So. 2d 630, 632 (Ala. 1985); Continental Elec. Co. v. City of Leeds, 473 So. 2d 1056, 1058 (Ala. Civ. App. 1984), *aff'd*, 473 So. 2d 1060 (Ala. 1985).

196. Marino v. Smith, 454 So. 2d 1380, 1381 (Ala. 1984).

197. McLean v. Brasfield, 460 So. 2d 153, 155 (Ala. 1984).

198. *Burroughs*, 462 So. 2d at 359 (citing Stiles v. Brown, 380 So. 2d 792, 794 (Ala. 1980)).

199. United Farm Agency v. Green, 466 So. 2d 118, 120-21 (Ala. 1985); Logan v. Citizens Nat'l Bank, 460 So. 2d 1239, 1242 (Ala. 1984); Burton Mfg. Co. v. State, 469 So. 2d 620, 622 (Ala. Civ. App.), *cert. denied*, 469 So. 2d 620 (Ala. 1985).

200. Francis v. Franklin, 471 U.S. 307, 313 (1985); Jackson v. Virginia, 443 U.S. 307, 309, 316 (1979). Of course, a conviction supported by no evidence whatsoever cannot stand. *See* Thompson v. City of Louisville, 362 U.S. 199, 206 (1960).

201. *See* Dolvin v. State, 391 So. 2d 133, 139 (Ala. 1980); Willcutt v. State, 284 Ala. 547, 549, 226 So. 2d 328, 330 (1969); Cook v. State, 469 So. 2d 1350, 1351 (Ala. Crim. App.), *cert. denied*, 469 So. 2d 1350 (Ala. 1985). ALABAMA PATTERN JURY INSTRUCTIONS-CRIMINAL APJI-CRIM III-B-3 (1980) ("The State has the burden of proving the guilt of the defendant beyond a reasonable doubt . . . .") Proof beyond a reasonable doubt also is required in juvenile delinquency proceedings. *In re* Winship, 397 U.S. 358, 368 (1970); Burttram v. State, 448 So. 2d 497, 498 (Ala. Crim. App. 1984); ALA. CODE § 12-15-65(d) (1986). *But cf.* ALA. CODE § 12-15-65(e) (1986) (clear and convincing evidence may convince a court that a delinquent child is in need of care or supervision).

At sentencing hearings disputed facts shall be determined by a preponderance of the evidence. ALA. R CRIM. P. TEMP. R. 6(b)(2), 6(b)(3)(iii); *see also* McMillan v. Pennsylvania, 106 S. Ct. 2411, 2419-20 (1986) (upholding constitutionality of statute that permits facts

of proof in the law and symbolizes the importance our society attaches to individual liberty.[202] The reasonable doubt standard reflects the fundamental value judgment that it is far worse to convict an innocent person than to let a guilty person go free.[203] In so doing, the reasonable doubt standard enhances the moral force of the criminal law by assuring the community at large that only the guilty are and will be punished for criminal behavior.[204]

Despite its importance in the scheme of Anglo-American justice, proof beyond a reasonable doubt is not synonymous with "absolute" proof of guilt,[205] proof beyond all doubt,[206] or proof to a mathematical certainty.[207] Although it has been observed that attempts to explain the term reasonable doubt to the jury are usually unsuccessful,[208] it often is said that " '[t]he doubt which requires an acquittal in a criminal case is actual and substantial . . . . It is

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that are relevant considerations in sentencing to be proved by a preponderance of the evidence and suggesting that even this minimal burden may not be constitutionally required). However, in capital cases, aggravating circumstances must be proved beyond a reasonable doubt. Beck v. State, 396 So. 2d 645, 663 (Ala. 1980).

202. *See Jackson*, 443 U.S. at 315; *In re Winship*, 397 U.S. at 363-64.

203. Rose v. Clark, 106 S. Ct. 3101, 3107 (1986) (citing *Francis*, 471 U.S. at 313. For a discussion of studies suggesting that the exceptional demands of proof beyond a reasonable doubt instructions are in fact understood by juries and result in a lower conviction rate than preponderance instructions, see Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299, 1309-11 (1977).

204. *See In re Winship*, 397 U.S. at 363-64; *see also Rose*, 106 S. Ct. at 3107; Underwood, *supra* note 203, at 1307-08.

205. White v. State, 294 Ala. 265, 272, 314 So. 2d 857, 863 (1975); Gray v. State, 455 So. 2d 163, 166 (Ala. Crim. App.), *cert. denied*, 455 So. 2d 163 (Ala. 1984); *see also Jackson*, 443 U.S. at 315 (The reasonable doubt standard imposes on the factfinder "the need to reach a subjective state of near certitude of the guilt of the accused."); Whatley v. State, 91 Ala. 108, 9 So. 236 (1891).

206. *See* Chavers v. State, 361 So. 2d 1106, 1108-09 (Ala. 1978) (disapproving use of the expression "all reasonable doubt"); Craft v. State, 402 So. 2d 1078, 1080 (Ala. Crim. App.), *cert. denied*, 402 So. 2d 1080 (Ala. 1981); *see also* 1 E. DEVITT & C. BLACKMAN, FEDERAL JURY PRACTICE & INSTRUCTIONS § 11.14 (3d ed. 1977); *cf.* Guenther v. State, 282 Ala. 620, 625, 213 So. 2d 679, 683 (1968) ("[t]he correct terminology in a criminal case is beyond a reasonable doubt"), *cert. denied*, 393 U.S. 1107 (1969). It has been argued that at one time English law required proof beyond any doubt. *See* Morano, *A Reexamination of the Development of the Reasonable Doubt Rule*, 55 B.U.L. REV. 507, 511-13 (1975).

207. *See* Holland v. United States, 348 U.S. 121, 138 (1954); Hicks v. State, 123 Ala. 15, 18, 26 So. 337, 338-39 (1899). For a discussion of the problems associated with the use of mathematics and probability theory in criminal trials, see generally Tribe, *Trial By Mathematics, Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329 (1971).

208. *Holland*, 348 U.S. at 140; United States v. Moss, 756 F.2d 329, 333 (4th Cir. 1985); United States v. Lawson, 507 F.2d 433, 442-43 (7th Cir. 1974), *cert. denied*, 420 U.S. 1004 (1975).

not mere possibility or speculation . . . [but] is the doubt the evidence generates, when the jury, carefully weighing all the evidence, cannot say they feel an abiding conviction of the defendant's guilt.' "[209] It has also been said that a reasonable doubt may arise from a lack of evidence as well as from the evidence produced.[210]

Alabama courts consistently have rejected charges that equate a reasonable doubt with the kind of doubt that would cause a juror to hesitate in his own most important affairs.[211] Similarly, Alabama courts have rejected charges that equated proof beyond a reasonable doubt with the kind of proof one would require before acting in one's own most important affairs.[212] In contrast, the federal courts generally have approved the hesitate-to-act formula.[213]

Comparison of proof beyond a reasonable doubt with the kind of proof one would require before acting in one's own most important affairs has been "criticized for its tendency to trivialize the constitutionally required burden of proof."[214] This same criticism could also be directed at the hesitate-to-act formula. In addition, doubts that would cause a person to hesitate, but in the face of which he would ultimately proceed, are not necessarily reasonable.[215] Moreover, both formulae suffer from the fact that some very cautious individuals might hesitate in the face of the slightest doubt and would require overwhelming proof before acting, while more adventurous types rarely hesitate and often act despite what others would see as substantial reason for caution. The fact that

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209. Williams v. State, 455 So. 2d 210, 212 (Ala. Crim. App.) (quoting Owens v. State, 52 Ala. 400, 404-05 (1875)), *cert. denied*, 455 So. 2d 210 (Ala. 1984); *see also* Hurst v. State, 469 So. 2d 720, 722 (Ala. Crim. App. 1985) (approving charge to jury that "you cannot convict if there is a probability that the defendant is innocent"). *But cf.* Taylor v. Kentucky, 436 U.S. 478, 488 (1978) (noting that the definition of reasonable doubt as a substantial or real doubt has often been criticized as confusing).

210. *See* Daniels v. State, 375 So. 2d 523, 526 (Ala. Crim. App. 1979).

211. Allen v. State, 111 Ala. 80, 89, 20 So. 490, 493-94 (1896).

212. Odum v. State, 253 Ala. 571, 576, 46 So. 2d 1, 3, 5 (1950).

213. *See* Holland v. United States, 348 U.S. 121, 140 (1954); Dunn v. Perrin, 570 F.2d 21, 24 (1st Cir.), *cert. denied*, 437 U.S. 910 (1978); *see also* Scurry v. United States, 347 F.2d 468, 469 (D.C. Cir. 1965).

214. *Dunn*, 570 F.2d at 24; *see also* United States v. Baptiste, 608 F.2d 666, 688 (5th Cir. 1979); Scurry v. United States, 347 F.2d 468, 470 (D.C. Cir. 1965); *cf. Holland*, 348 U.S. at 140; United States v. Cranston, 686 F.2d 56, 62 (1st Cir. 1982). *But cf.* United States v. Morris, 647 F.2d 568, 571-72 (5th Cir. 1981) (approving charge that "[p]roof beyond a reasonable doubt . . . is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs").

215. *See, e.g.*, *Allen*, 111 Ala. at 89, 20 So. at 494.

only one reported Alabama case in the last thirty-five years has even touched on either formula[216] would seem to indicate that both are probably gone, and deservedly so, from Alabama jurisprudence.

Alabama courts have been more sympathetic to charges which define a reasonable doubt as a doubt for which a reason can be given. Although such charges have been said to be misleading,[217] the courts have held that the giving of such a charge is not reversible error.[218] To the extent that a trend can be discerned, the Alabama courts seem to be moving toward unequivocal approval of this formulation. This is a desirable result. The "doubt for which a reason can be given" formula has two important virtues. First, it forces each juror to articulate and to confront in his own mind any doubts he may have. In so doing it encourages him to examine those doubts in greater depth. Second, this formula enhances discussion by encouraging each juror to articulate his doubts in such a way that the other jurors may confront and examine them. Once articulated, such doubts may persuade others who had not noticed or who had not thought of the particular facts which may have triggered the doubt. Conversely, once the doubter has articulated his reasons, others may be able to persuade him that his doubt is insubstantial or unfounded. In either event, the result is a more thoughtful and rational verdict.

Numerous cases have approved statements that equate proof beyond a reasonable doubt *and* proof to a moral certainty.[219] Presumably, proof to a moral certainty relates to the intensity of one's

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216. *See, e.g.*, Garrison v. State, 372 So. 2d 55, 61 (Ala. Crim. App. 1979). The California courts long ago rejected these general formulations. *See, e.g.*, People v. Bemmerly, 87 Cal. 117, 120-21, 25 P. 266, 267-68 (1890) (error to instruct jury that a reasonable doubt is "such a doubt as would induce a man of reasonable firmness and judgment to act upon it in matters of importance to himself").

217. *Compare* Williams v. State, 455 So. 2d 210, 212 (Ala. Crim. App.) (citing case criticizing this formula because a reason can be given for even capricious or speculative doubts which are not enough to justify acquittal), *cert. denied*, 455 So. 2d 210 (Ala. 1984), *with Dunn*, 570 F.2d at 23 (criticizing this formula because it suggests that a doubt based on reason was not enough to acquit). *See also* Avery v. State, 124 Ala. 20, 21, 27 So. 505, 505-06 (1900). *But cf.* Jackson v. Virginia, 443 U.S. 307, 317 (1979) (a reasonable doubt is, at a minimum, one based upon reason).

218. Baker v. State, 477 So. 2d 496, 502-03 (Ala. Crim. App.), *cert. denied*, 477 So. 2d 496 (Ala. 1985), *cert. denied*, 106 S. Ct. 1231 (1986); *Williams*, 455 So. 2d at 212; Hall v. State, 54 Ala. App. 198, 202, 306 So. 2d 290, 293 (Crim. App. 1974), *cert. denied*, 293 Ala. 757, 306 So. 2d 294 (1975).

219. *See, e.g.*, Bayne v. State, 375 So. 2d 1237, 1238 (Ala. 1978); Grace v. State, 456 So. 2d 862, 863 (Ala. Crim. App.), *cert. denied*, 456 So. 2d 862 (Ala. 1984); Daniels v. State, 375

belief, while proof beyond a reasonable doubt looks more to the quality of the evidence that engenders that belief.[220] In fact, it is no easier, and probably more difficult, to measure the intensity of a person's belief than to define which doubts are reasonable and which are not.[221]

As a matter of federal constitutional law, a defendant is entitled to be judged solely on the basis of proof adduced at trial.[222] Ordinarily, although not inevitably, this means that an instruction on the "presumption" of innocence is appropriate.[223] It does not follow, however, that the jury must be charged that the "presumption" of innocence *is evidence*. Although the Alabama Supreme Court has said that the defendant is entitled to such a charge,[224] the federal constitution has been held not to require such a charge[225] and the Alabama Court of Criminal Appeals recently held that such a charge is not necessary.[226]

Beyond the general formulations set forth above, the precise meaning of proof beyond a reasonable doubt is not altogether clear. Appellate courts often have said that speculation, conjecture,

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So. 2d 523, 526 (Ala. Crim. App. 1979); *see also* Kelly v. State, 273 Ala. 240, 243, 139 So. 2d 326, 329 (1962); Hurst v. State, 469 So. 2d 720, 722 (Ala. Crim. App. 1985). This formulation may have originated in Commonwealth v. Webster, 59 Mass. (5 Cush.) 295 (1849). It has been said that the phrase " 'to a moral certainty' means practically the same thing as beyond a reasonable doubt." Woodard v. State, 401 So. 2d 300, 304 (Ala. Crim. App. 1981). *But cf.* United States v. Indorato, 628 F.2d 711, 720-21 (1st Cir.) (criticizing this equation), *cert. denied*, 449 U.S. 1016 (1980); Commonwealth v. Kloiber, 378 Pa. 412, ___, 106 A.2d 820, 828 (1954) (rejecting this equation as confusing).

220. *See Indorato*, 628 F.2d at 721 n.8 (noting that moral certainty could be interpreted as referring to a certainty based on feelings, not facts).

221. *See In re* Winship, 397 U.S. 358, 369 (1970) (Harlan, J., concurring) (Because "no one has yet invented or discovered a mode of measurement for the intensity of human belief[,] . . . there can be yet no successful method of communicating intelligibly . . . a sound method of self analysis for one's belief.") (quoting 9 J. WIGMORE, EVIDENCE 325 (3d ed. 1940)).

222. *See* Taylor v. Kentucky, 436 U.S. 478, 485-86 (1978).

223. *See id.* at 486-90; *cf.* Coffin v. United States, 156 U.S. 432, 453 (1895); United States v. Dilg, 700 F.2d 620, 623-27 (11th Cir. 1983).

224. *See* Guenther v. State, 282 Ala. 620, 625, 213 So. 2d 679, 683 (1968), *cert. denied*, 393 U.S. 1107 (1969); *see also* Carroll v. State, 407 So. 2d 177, 178-79 (Ala. 1981) ("presumption" of innocence must be communicated to jury, though it need not be labeled "a matter of evidence").

225. *See* Agnew v. United States, 165 U.S. 36, 51-52 (1897); *cf. Taylor*, 436 U.S. at 490 ("presumption" of innocence charge is necessary, though it need not be phrased in evidentiary terms).

226. *See* Grace v. State, 456 So. 2d 862, 864 (Ala. Crim. App.), *cert. denied*, 456 So. 2d 862 (Ala. 1984) (citing cases).

surmise, possibility, suspicion, guesswork, and the like will not suffice to sustain a conviction.[227] Similarly, it is said that the possibility that a thing may occur is not evidence that it did occur,[228] and thus, the mere fact that a person charged with a crime was present at the time and place of the crime,[229] or had the opportunity to commit that crime, will not, standing alone, sustain a conviction.[230] However, reasonable inferences[231] from the evidence may furnish a basis for proof beyond a reasonable doubt,[232] and it is clear that the testimony of only one witness is sufficient to establish guilt.[233] Moreover, once the State presents sufficient evidence to establish a prima facie case,[234] the trier of fact is responsible for determining the credibility of the witnesses,[235] the inferences to be

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227. Benefield v. State, 286 Ala. 722, 724, 246 So. 2d 483, 485 (1971); Parker v. State, 280 Ala. 685, 692, 198 So. 2d 261, 268 (1967); Calloway v. State, 473 So. 2d 601, 602 (Ala. Crim. App.), *cert. denied*, 473 So. 2d 601 (Ala. 1985); Cook v. State, 469 So. 2d 1350, 1351 (Ala. Crim. App.), *cert. denied*, 469 So. 2d 1350 (Ala. 1985); Lollar v. State, 398 So. 2d 400, 402 (Ala. Crim. App. 1981); Thomas v. State, 363 So. 2d 1020, 1022 (Ala. Crim. App. 1978), *quoted with approval in Ex parte* Williams, 468 So. 2d 99, 101 (Ala. 1985). A jury may not compromise and convict a defendant of a lesser included offense of which there is no evidence. Southerland v. State, 471 So. 2d 522, 524-25 (Ala. Crim. App. 1985).

228. *Parker*, 280 Ala. at 691, 198 So. 2d at 268; *Calloway*, 473 So. 2d at 603; *Lollar*, 398 So. 2d at 402.

229. *Lollar*, 398 So. 2d at 402. However, presence coupled with other facts and circumstances tending to connect the accused with the crime may be sufficient for the jury to find the accused guilty. Dolvin v. State, 391 So. 2d 133, 137-39 (Ala. 1980); Moore v. State, 457 So. 2d 981, 986 (Ala. Crim. App.), *cert. denied*, 457 So. 2d 981 (Ala. 1984), *cert. denied*, 105 S. Ct. 1757 (1985).

230. *See Parker*, 280 Ala. at 691-92, 198 So. 2d at 268; Wheaters v. State, 439 So. 2d 1311, 1316 (Ala. Crim App.), *cert. denied*, 439 So. 2d 1311 (Ala. 1983); *Thomas*, 363 So. 2d at 1022-23.

231. An inference is merely a permissible deduction from proven facts. *Thomas*, 363 So. 2d at 1022. A reasonable inference is an inference of a fact which follows as a natural consequence from known collateral facts. Andrews v. State, 473 So. 2d 1211, 1216 (Ala. Crim. App.), *cert. denied*, 473 So. 2d 1211 (Ala. 1985).

232. Favors v. State, 437 So. 2d 1358, 1367 (Ala. Crim. App.), *aff'd*, 437 So. 2d 1370 (Ala. 1983); *Thomas*, 363 So. 2d at 1022.

233. *See* Willcutt v. State, 284 Ala. 547, 550, 226 So. 2d 328, 329-30 (1969); Faircloth v. State, 471 So. 2d 485, 488 (Ala. Crim. App. 1984), *aff'd*, 471 So. 2d 493 (Ala. 1985); Raines v. State, 429 So. 2d 1104, 1108 (Ala. Crim. App.) (death penalty case—identification by only one witness), *aff'd*, 429 So. 2d 1111 (Ala. 1982), *cert. denied*, 460 U.S. 1103 (1983).

234. *See* Moseley v. State, 461 So. 2d 34, 36 (Ala. Crim. App. 1984); McMillian v. State, 448 So. 2d 463, 464 (Ala. Crim. App. 1984); Magro v. State, 384 So. 2d 871, 874 (Ala. Crim. App.), *cert. denied*, 384 So. 2d 875 (Ala. 1980).

235. Crosslin v. State, 446 So. 2d 675, 680 (Ala. Crim. App.), *cert. denied*, 446 So. 2d 675 (Ala. 1984); Cumbo v. State, 368 So. 2d 871, 876 (Ala. Crim. App. 1978), *cert. denied*, 368 So. 2d 877 (Ala. 1979).

drawn therefrom, and the weight to be given the evidence,[236] and for resolving any conflicts in the evidence.[237] Whether evidence is direct or circumstantial, a reviewing court must view the evidence in the light most favorable to the State[238] and must accept all choices about credibility that tend to support the jury's verdict.[239]

B. Criminal Prosecutions—Motion for a New Trial

Although it has been said that a verdict on conflicting evidence is conclusive on appeal,[240] such a verdict is not necessarily conclusive on the trial court. In criminal cases, if the defendant files a motion for a new trial within thirty days of sentencing,[241] a new trial may be granted if the verdict is contrary to the weight of the evidence.[242] In theory, this ground is distinct from insufficiency

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236. *Willcutt*, 284 Ala. at 549, 226 So. 2d at 330.

237. Suggs v. State, 403 So. 2d 309, 313 (Ala. Crim. App.), *cert. denied*, 403 So. 2d 313 (Ala. 1981), *cert. denied*, 455 U.S. 938 (1982); *see* Granger v. State, 473 So. 2d 1137, 1139 (Ala. Crim. App.), *cert. denied*, 473 So. 2d 1137 (Ala. 1985).

"[A] fact may be established as firmly by the testimony of one witness as by the testimony of an entire community," Hyman v. State, 338 So. 2d 448, 453 (Ala. Crim. App. 1976), and, although a disparity in the number of witnesses may be considered by the jury, it should not be the basis for determining guilt or innocence, McMillian v. State, 448 So. 2d 463, 464 (Ala. Crim. App. 1984).

238. Wilbourn v. State, 457 So. 2d 1001, 1003 (Ala. Crim. App. 1984); *see* Lawrence v. State, 443 So. 2d 1351, 1353 (Ala. Crim. App. 1983) (direct evidence), *cert. denied*, 443 So. 2d 1351 (Ala. 1984); Favors v. State, 437 So. 2d 1358, 1367 (Ala. Crim. App.) (circumstantial evidence), *aff'd*, 437 So. 2d 1370 (Ala. 1983).

239. Ashurst v. State, 462 So. 2d 999, 1003 (Ala. Crim. App. 1984), *cert. denied*, 462 So. 2d 999 (Ala. 1985) (citing with approval United States v. Hinds, 662 F.2d 362, 366 (5th Cir. 1981), *cert. denied*, 455 U.S. 1022 (1982)).

240. *Granger*, 473 So. 2d at 1139; *McMillian*, 448 So. 2d at 464.

241. ALA. CODE § 15-17-5(a) (1982); ALA. R. CRIM. P. TEMP. R 13(a)(2). The issue of the sufficiency of the evidence is preserved by the filing of a motion for a new trial notwithstanding the defendant's failure to move for a judgment of acquittal or to exclude the State's evidence. *See* Gosha v. State, 389 So. 2d 563, 567 (Ala. Crim. App. 1980).

242. ALA. R. CRIM. P. TEMP. R 13(a)(3) (verdict is contrary to law or to the weight of the evidence); *see also* ALA. CODE § 15-17-5(a)(4) (1982) (verdict not sustained beyond a reasonable doubt). Literal precision in the statement of grounds is not necessary. Bell v. State, 461 So. 2d 855, 857 (Ala. Crim. App.), *cert. quashed*, 461 So. 2d 855 (Ala. 1984); Parker v. State, 395 So. 2d 1090, 1099 n.1 (Ala. Crim. App. 1980), *cert. denied*, 395 So. 2d 1103 (Ala. 1981).

A new trial is frequently requested on the ground of newly discovered evidence. *See* ALA. CODE § 15-17-5(a)(5) (1982). Appellate courts look with disfavor on motions based on such ground, Gass v. State, 431 So. 2d 1347, 1349 (Ala. Crim. App.), *cert. denied*, 431 So. 2d 1350 (Ala. 1983), but a new trial may be granted if, for example, newly discovered credible evidence tends to show that the crime of which the accused was convicted was committed by another, *see* Perry v. State, 455 So. 2d 999, 1003 (Ala. Crim. App.), *cert. denied*, 455 So. 2d

of the evidence. In a proper case, there could be evidence sufficient to send the case to the jury, but not persuasive enough to justify a conviction.[243] However, many cases blur the distinction and seemingly lose sight of the appellate court's right to set aside a verdict as contrary to the weight of the evidence.[244] Instead, it is frequently said that a conviction will not be set aside on the ground of *insufficient* evidence unless, allowing all reasonable presumptions of the verdict's correctness, the preponderance of the evidence convinces the appellate court that the verdict was wrong and unjust.[245]

As in civil cases, no ground for a new trial is more difficult to establish than that the verdict was contrary to the great weight of the evidence.[246] The decision to award a new trial on the ground that a verdict is contrary to the preponderance of the evidence

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999 (Ala. 1984). Where a defendant seeks a new trial on this ground, the evidence must be such that it could not have been found by thorough examination of the witnesses. Chappell v. State, 457 So. 2d 995, 997 (Ala. Crim. App. 1984). More specifically, a motion for new trial in a criminal case based on newly discovered evidence must show that the evidence (1) will probably change the result if a new trial is granted, (2) has been discovered since the trial, (3) could not have been discovered before the trial by the exercise of due diligence, (4) is material to the issue, and (5) is not merely cumulative or impeaching. Taylor v. State, 266 Ala. 618, 620, 97 So. 2d 802, 804 (1957); *Perry*, 455 So. 2d at 1003; *Gass*, 431 So. 2d at 1350; Zuck v. State, 57 Ala. App. 15, 21, 325 So. 2d 531, 536 (Crim. App. 1975), *cert. denied*, 295 Ala. 430, 325 So. 2d 539 (1976). Assessing the credibility of the witnesses at a new trial hearing is the function of the trial judge, *Perry*, 455 So. 2d at 1003, and the decision to grant a motion for a new trial on the ground of newly discovered evidence rests in the sound discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion, Page v. State, 273 Ala. 5, 5-6, 130 So. 2d 227, 227 (1961).

A defendant seeking a new trial on the ground that the State used perjured testimony "*must allege and prove* (1) that the testimony was perjured; (2) that it was on a matter of such importance that the truth would have prevented a conviction; (3) that the State had knowledge that the testimony was perjured; and (4) that the defendant was not negligent in discovering the falsehood and in raising the issue." McConico v. State, 458 So. 2d 743, 746 (Ala. Crim. App. 1984) (emphasis in original); Moore v. State, 457 So. 2d 981, 989 (Ala. Crim. App.), *cert. denied*, 457 So. 2d 981 (Ala. 1984), *cert. denied*, 470 U.S. 1053 (1985).

243. *See, e.g.*, Bell v. State, 461 So. 2d 855, 864 (Ala. Crim. App.), *cert. quashed*, 461 So. 2d 855 (Ala. 1984); Parker v. State, 395 So. 2d 1090, 1099 (Ala. Crim. App. 1980), *cert. denied*, 395 So. 2d 1103 (Ala. 1981).

244. *See, e.g.*, Stewart v. State, 350 So. 2d 764, 766 (Ala. Crim. App. 1977); *see also* Young v. State, 283 Ala. 676, 681-82, 220 So. 2d 843, 847-48 (1969).

245. *See, e.g.*, Bridges v. State, 284 Ala. 412, 420, 225 So. 2d 821, 829 (1969); Wilbourn v. State, 457 So. 2d 1001, 1004 (Ala. Crim. App. 1984).

246. Peterson v. State, 227 Ala. 361, 368, 150 So. 156, 162 (1933), *cert. denied*, 291 U.S. 661 (1934).

rests in the sound discretion of the trial judge.[247] Again, the "presumption" favoring the verdict is strengthened if the trial judge denies the motion on this ground.[248] When the evidence presents questions of fact for the jury, and such evidence if believed is sufficient to sustain a conviction, overruling the motion is not error[249] unless the preponderance against the verdict is so great as to convince the court that the verdict is wrong and unjust.[250]

Although the "presumption" in favor of the verdict and the ruling of the trial court can be overcome if an appellate court is convinced that the verdict is so contrary to the great weight of the evidence that it is palpably wrong and unjust,[251] Alabama appellate courts have seemed hesitant to use this power. Of course, an appellate court attempting to evaluate conflicting evidence is in a difficult position. Nonetheless, in some cases, if there is substantially conflicting evidence in the court below, a new trial might well result in a verdict in which the court and the public have greater confidence. For example, in *Granger v. State*,[252] the defendant, charged with the sale of marijuana, presented what the court of criminal appeals characterized as a "substantial alibi defense." Specifically, the defendant presented the testimony of three witnesses, as well as documentary evidence, tending to establish that he was in the New York City area and not in Aliceville, Alabama, at the time that he was alleged to have sold marijuana to an undercover officer. As the court observed, after noting that the officer "was positive and unequivocal in his identification, . . . [u]nder these circumstances, someone is either terribly mistaken or intentionally lying."[253] Although the court reversed the conviction on

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247. White v. State, 294 Ala. 265, 272, 314 So. 2d 857, 864 (Ala.), *cert. denied*, 423 U.S. 951 (1975).

248. *Peterson*, 227 Ala. at 368, 150 So. at 162; Parker v. State, 395 So. 2d 1090, 1100 (Ala. Crim. App. 1980), *cert. denied*, 395 So. 2d 1103 (Ala. 1981).

249. *Wilbourn*, 457 So. 2d at 1004 (citing Duncan v. State, 436 So. 2d 883, 904 (Ala. Crim. App.), *cert. denied*, 436 So. 2d 883 (1983), *cert. denied*, 464 U.S. 1047 (1984)); Cole v. State, 443 So. 2d 1386, 1390-91 (Ala. Crim. App. 1983).

250. Willcutt v. State, 284 Ala. 547, 550-51, 226 So. 2d 328, 331 (1969); Gholston v. State, 338 So. 2d 454, 460 (Ala. Crim. App. 1976); Colvin v. State, 39 Ala. App. 355, 357, 102 So. 2d 911, 912-13 (1957), *cert. denied*, 267 Ala. 694, 102 So. 2d 913 (1958).

251. *See* Bell v. State, 461 So. 2d 855, 865 (Ala. Crim. App.), *cert. quashed*, 461 So. 2d 855 (Ala. 1984); *Parker*, 395 So. 2d at 1100; Graham v. State, 374 So. 2d 929, 941 (Ala. Crim. App.), *cert. quashed*, 374 So. 2d 942 (Ala. 1979).

252. 473 So. 2d 1137 (Ala. Crim. App.), *cert. denied*, 473 So. 2d 1137 (Ala. 1985).

253. *Granger*, 473 So. 2d at 1139.

evidentiary grounds, in the absence of such grounds a new trial might well have been appropriate even though the evidence was sufficient to sustain the jury's verdict. A new trial provides the defendant with an opportunity to gather additional evidence to support his claim that he was elsewhere at the time of the offense. If he fails to do so and is again convicted, the court might feel reasonably confident that no such additional evidence existed. Conversely, a new trial provides the State with an opportunity to show that the defendant's documents were forged or to otherwise rebut his alibi.

Cases where the defendant has a substantial alibi of a nature which could be supported, or rebutted, by further investigation are few. However, they are disturbing. Quite possibly, appellate courts look exceptionally hard to find reasons to order a new trial in cases of this nature. Nonetheless, there is much to be said for confronting the problem head on. The burden of a new trial in the few such cases that arise seems minimal compared to the increased likelihood of a result which is both just and perceived as just.

VI. Criminal Prosecutions; Special Problems of Proof and Persuasion

A. Testimony of Accomplices

By statute in Alabama, a person cannot be convicted of a felony on the testimony of an accomplice unless that testimony is "corroborated by other evidence tending to connect the defendant with the commission of the offense."[254] The requirement of corroboration does not apply unless it clearly appears that the witness in question is in fact an accomplice.[255] The defendant has the burden of proving that a witness is an accomplice unless that fact is clearly shown by the prosecution's evidence.[256] Whether a witness is an accomplice and whether that testimony has been corroborated are

254. ALA. CODE § 12-21-222 (1986); *see Ex parte* Bates, 461 So. 2d 5, 6 (Ala. 1984); Humber v. State, 466 So. 2d 165, 166-67 (Ala. Crim. App. 1985). Two special statutes permit the use of testimony by discharged or acquitted codefendants. ALA. CODE §§ 12-21-223, -224 (1986).

255. *Ex parte Bates*, 461 So. 2d at 6 (stating that the test for determining whether a witness is an accomplice is whether he could have been indicted and convicted, as either an accessory or principal, for the offense charged).

256. *Id.*

issues which must be presented to the trial judge or those issues are waived.[257] Being a participant in a crime is not synonymous with being an accomplice,[258] and when there is doubt or conflict in the evidence about a witness's complicity, the question of whether that witness is an accomplice is for the jury.[259]

Whether the jury may have sufficient corroborative evidence connecting the defendant to the crime is a question of law for the trial court.[260] The test for determining whether there is sufficient corroboration of an accomplice's testimony consists of disregarding the testimony given by the accomplice and examining the remaining evidence for evidence sufficient to connect the accused to the offense.[261] To be legally sufficient, corroborative evidence must do more than raise a suspicion of guilt.[262] It must be unequivocal, of a substantive character, and inconsistent with the innocence of the accused,[263] and must legitimately tend to connect the accused with the offense.[264] However, corroborative evidence need not be direct and conclusive,[265] it need not refer to any statement or fact testified to by the accomplice,[266] it need not be strong nor sufficient in itself to support a conviction,[267] and it need not directly connect the accused to the offense.[268]

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257. Crowder v. State, 448 So. 2d 507, 508 (Ala. Crim. App. 1984).

258. *Ex parte* Bell, 475 So. 2d 609, 613, *cert. denied*, 106 S. Ct. 607 (1985).

259. *Id.* at 611-12.

260. Miller v. State, 290 Ala. 248, 252, 275 So. 2d 675, 679 (1973); White v. State, 48 Ala. App. 111, 117, 262 So. 2d 313, 319 (Crim. App. 1972); *see also Ex parte Bell*, 475 So. 2d at 613; Skumro v. State, 234 Ala. 4, 6-7, 170 So. 776, 778 (1936).

261. *Ex parte Bell*, 475 So. 2d at 613 (citing Senn v. State, 344 So. 2d 192, 193 (Ala. 1977); Scott v. State, 473 So. 2d 1167, 1172 (Ala. Crim. App.), *cert. denied*, 473 So. 2d 1167 (Ala. 1985); Ware v. State, 409 So. 2d 886, 891 (Ala. Crim. App. 1981), *cert. quashed*, 409 So. 2d 893 (Ala. 1982); *see, e.g.*, Booker v. State, 477 So. 2d 1388, 1390 (Ala. Crim. App. 1985). Lack of corroboration cannot be raised until the State has rested its case. Smith v. State, 45 Ala. App. 63, 66, 223 So. 2d 605, 608 (Ala. Ct. App.), *cert. denied*, 284 Ala. 734, 223 So. 2d 610 (1969).

262. *Ex parte Bell*, 475 So. 2d at 613 (citing *Senn*, 344 So. 2d at 193); *Booker*, 477 So. 2d at 1390; White v. State, 48 Ala. App. 111, 117, 262 So. 2d 313, 319 (Crim. App. 1972).

263. *White*, 48 Ala. App. at 117, 262 So. 2d at 319; *see also Ex parte Bell*, 475 So. 2d at 613; McCoy v. State, 397 So. 2d 577, 587 (Ala. Crim. App.) (proof of motive alone is not sufficient corroboration), *cert. denied*, 397 So. 2d 589 (Ala. 1981).

264. *Ex parte Bell*, 475 So. 2d at 613; *see also Ware*, 409 So. 2d at 891 (citing cases).

265. McConnell v. State, 429 So. 2d 662, 666 (Ala. Crim. App. 1983).

266. *Id.* at 666; *see also Ware*, 409 So. 2d at 891.

267. Miller v. State, 290 Ala. 248, 252, 275 So. 2d 675, 679 (1973); Jackson v. State, 451 So. 2d 435, 437 (Ala. Crim. App. 1984) (citing Andrews v. State, 370 So. 2d 320, 322 (Ala. Crim. App.), *cert. denied*, 370 So. 2d 323 (Ala. 1979)).

268. *Ware*, 409 So. 2d at 891 (citing *Andrews*, 370 So. 2d at 322).

Evidence which merely tends to confirm the general credibility of an accomplice is not sufficient.[269] However, the defendant's own statement can provide sufficient corroboration.[270] Sufficient corroboration also may be furnished by a tacit admission by the accused, by suspicious conduct of the accused, by association of the accused with the accomplice, by the defendant's proximity and opportunity to commit the crime,[271] or by other circumstantial evidence.[272] Whether the evidence is sufficiently corroborated to warrant a conviction is a question for the jury.[273]

B. Elements of Defense

In Alabama, a criminal defendant bears the burden of production as to numerous "defenses."[274] However, excepting the insanity defense,[275] to characterize an issue as a "defense" means only that the defendant must produce some evidence to raise the issue or point to some evidence inadvertently adduced by the prosecution which raises the issue.[276] If he does not, the issue is not in the case, and the prosecution bears no responsibility to address it. If he does, the prosecution must prove beyond a reasonable doubt the

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269. *Jackson*, 451 So. 2d at 437; *see also* McCoy v. State, 397 So. 2d 577, 586 (Ala. Crim. App.) (out-of-court statements of accomplice, whether written or oral, cannot be used to corroborate his testimony), *cert. denied*, 397 So. 2d 589 (Ala. 1981).

270. Golden v. State, 452 So. 2d 1359, 1361 (Ala. Crim. App.), *cert. denied*, 452 So. 2d 1359 (Ala.), *cert. denied*, 469 U.S. 886 (1984).

271. *Ware*, 409 So. 2d at 891 (citing Jacks v. State, 364 So. 2d 397, 405 (Ala. Crim. App.), *cert. denied*, 364 So. 2d 406 (Ala. 1978)).

272. *See, e.g.*, Toles v. State, 459 So. 2d 1003, 1005 (Ala. Crim. App. 1984); *Jackson*, 451 So. 2d at 437 (association and proximity at an unusual hour); Kimmons v. State, 343 So. 2d 542, 547 (Ala. Crim. App. 1977); White v. State, 48 Ala. App. 111, 118, 262 So. 2d 313, 319 (Crim. App. 1972) (evidence of defendants' flight); *cf.* Senn v. State, 344 So. 2d 192, 193-94 (Ala. 1977) (association and proximity at a usual place and at a usual time may not be sufficient corroboration).

273. *See* Miller v. State, 290 Ala. 248, 250, 275 So. 2d 675, 679 (1973); McLaren v. State, 353 So. 2d 24, 34 (Ala. Crim. App.), *cert. denied*, 353 So. 2d 35 (Ala. 1977).

274. ALA. CODE §§ 13A-1-2(14), 13A-3-2 to -31 (1982); *see, e.g.*, Farley v. State, 406 So. 2d 1045, 1050 (Ala. Crim. App.), *cert. denied*, 406 So. 2d 1050 (Ala. 1981). It has been said that in a criminal case the establishment by the State of a prima facie case does not shift or change the burden of proof. Eldridge v. State, 415 So. 2d 1190, 1194 (Ala. Crim. App.), *cert. denied*, 415 So. 2d 1190 (Ala. 1982); Russell v. State, 359 So. 2d 1165, 1167 (Ala. Crim. App. 1978).

275. *See infra* notes 279-285 and accompanying text.

276. ALA. CODE § 13A-1-2(14) (1982); *see* Tyson v. State, 361 So. 2d 1182, 1186 (Ala. Crim. App. 1978); *see also* Kent v. State, 367 So. 2d 508, 515-16 (Ala. Crim. App. 1978) (issue of self-defense injected by State's evidence), *cert. denied*, 367 So. 2d 518 (Ala. 1979).

nonexistence of the proposition(s) of fact upon which the "defense" depends[277] and the defense becomes, in effect, an element of the crime. Thus, instructions which place the burden on the accused to prove an alibi are improper and should not be given.[278]

The only defense upon which a criminal defendant in Alabama bears the burden of persuasion, and thus the only true affirmative defense recognized in Alabama criminal law, is the criminal defense of mental disease or defect.[279] According to the controlling statute, this defense must "be clearly proved to the reasonable satisfaction of the jury."[280] The applicable Alabama pattern jury instruction states: "Whether or not the defendant was, as he pleads, suffering from such a disease or defect of the mind is for

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277. ALA. CODE § 13A-1-2, commentary at 9 (1982); *see, e.g.*, Hurst v. State, 469 So. 2d 720, 722 (Ala. Crim. App. 1985) (where defendant claimed self-defense, trial court accurately stated that the "State has the burden of convincing you beyond a reasonable doubt and to a moral certainty that the defendant was not acting in self-defense").

When a defendant claims entrapment, the question is one for the jury unless the defendant establishes beyond a reasonable doubt that he was entrapped as a matter of law. *See Tyson*, 361 So. 2d at 1186.

278. Wabbington v. State, 446 So. 2d 665, 670 (Ala. Crim. App. 1983), *cert. denied*, 446 So. 2d 665 (Ala.), *cert. denied*, 467 U.S. 1254 (1984); *see also* Ragland v. State, 238 Ala. 587, 589, 192 So. 498, 499-502 (1939).

279. *See* Weeks v. State, 342 So. 2d 1335, 1337 (Ala. Crim. App. 1977); *see also* ALA. R. CRIM. P. TEMP. R. 16.1(b). It is not altogether clear to what extent the Constitution permits imposing the burden of persuasion on a defendant in a criminal case. *Compare* Mullaney v. Wilbur, 421 U.S. 684 (1975) (holding unconstitutional the traditional state practice of requiring a defendant accused of murder to disprove a presumption of malice), *with* Patterson v. New York, 432 U.S. 197 (1977) (defendant properly assigned the burden of proving the affirmative defense of extreme emotional disturbance). It has been observed that "[a]lmost all commentators agree that the way the *Patterson* majority distinguished *Mullaney* is unpersuasive." Saltzburg, *Burdens of Persuasion in Criminal Cases: Harmonizing the Views of the Justices*, 20 AM. CRIM. L. REV. 393, 398 (1983); *see also* Allen, *The Restoration of In re* Winship*: A Comment on Burdens of Persuasion in Criminal Cases After* Patterson v. New York, 76 MICH. L. REV. 30 (1977); Allen & DeGrazia, *The Constitutional Requirement of Proof Beyond a Reasonable Doubt in Criminal Cases: A Comment Upon Incipient Chaos in the Lower Courts*, 20 AM. CRIM. L. REV. 1, 3 (1982); Jeffries & Stephan, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325 (1979). The Supreme Court recently has granted certiorari in a case which may clarify some of these questions. Martin v. Ohio, 21 Ohio St. 3d 91, 488 N.E.2d 166, *cert. granted*, 106 S. Ct. 1634 (1986).

280. ALA. CODE § 15-16-2 (1982). Mental disease or defect as a defense, *id.* § 13A-3-1, is the only defense besides the general denial of guilt that must be specifically pleaded, ALA. R. CRIM. P. TEMP. R 16.1(b). The legal principles governing the burden and sufficiency of proof of insanity are set forth in Cunningham v. State, 426 So. 2d 484, 486-91 (Ala. Crim. App. 1982), *cert. denied*, 426 So. 2d 484 (Ala. 1983); *see also* Thompson v. State, 462 So. 2d 753, 754-55 (Ala. Crim. App. 1984), *cert. denied*, 462 So. 2d 753 (Ala. 1985).

you the jury to determine from the preponderance of all the evidence to your reasonable satisfaction."[281] Numerous cases have repeated the language of the statute.[282] Other cases have focused on the "preponderance of the evidence" language[283] or referred to preponderance of the evidence and reasonable satisfaction interchangeably.[284] The question of sanity is one for the jury unless the evidence of insanity is overwhelming and uncontradicted.[285]

C. *Ancillary Matters*

Although most facts or issues in a criminal case must be proved beyond a reasonable doubt,[286] in a large number of settings ancillary or preliminary to criminal prosecutions, burdens of persuasion other than proof beyond a reasonable doubt are required. Thus, the reasonable satisfaction standard is applicable in proceedings to forfeit property used in the illegal sale of narcotics[287]

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281. ALABAMA PATTERN JURY INSTRUCTIONS-CRIMINAL APJI-CRIM III-D-3 (1980). This approach appears to be constitutional. *See* Leland v. Oregon, 343 U.S. 790, 798-99 (1952); *see also* Rivera v. Delaware, 429 U.S. 877 (1976) (per curiam) (dismissing for want of a substantial federal question an appeal questioning the constitutionality of a statute which required a criminal defendant raising an insanity defense to prove mental illness or defect by a preponderance of the evidence).

282. Hawkins v. State, 267 Ala. 518, 523, 103 So. 2d 158, 163 (1958); Smith v. State, 257 Ala. 47, 49, 57 So. 2d 513, 515 (1952); Weeks v. State, 342 So. 2d 1335, 1337 (Ala. Crim. App. 1977); Breen v. State, 53 Ala. App. 588, 594-95, 302 So. 2d 562, 568 (Crim. App. 1974).

283. *See, e.g., Ex parte* Magwood, 426 So. 2d 929, 931 (Ala.), *cert. denied*, 462 U.S. 1124 (1983); Maxwell v. State, 89 Ala. 150, 164, 7 So. 824, 829 (1890); Foust v. State, 414 So. 2d 485, 487 (Ala. Crim. App. 1982); Grissom v. State, 33 Ala. App. 23, 25, 30 So. 2d 19, 21 (Ct. App.), *cert. denied*, 249 Ala. 125, 30 So. 2d 26 (1947).

284. *See, e.g., Ex parte* Turner, 455 So. 2d 910, 911 (Ala. 1984) (citing Christian v. State, 351 So. 2d 623, 624 (Ala. 1977)); Dean v. State, 54 Ala. App. 270, 279, 307 So. 2d 77, 85-86 (Crim. App. 1975); *cf.* Cunningham v. State, 426 So. 2d 484, 490 (Ala. Crim. App. 1982) (emphasizing at one point that "[i]nsanity is an affirmative defense which must be proven by the defendant to the reasonable satisfaction of the jury"), *cert. denied*, 426 So. 2d 484 (Ala. 1983). A person who was acquitted of a criminal charge on the ground of insanity must prove by a preponderance of the evidence that he is no longer mentally ill or dangerous in order to secure his release. Knight v. State, 460 So. 2d 876, 877 (Ala. Crim. App. 1984).

285. *Ex parte Magwood*, 426 So. 2d at 931.

286. Venue must be proved beyond a reasonable doubt. Stokes v. State, 373 So. 2d 1211, 1216 (Ala. Crim. App.), *cert. denied*, 373 So. 2d 1218 (Ala. 1979).

287. Pickron v. State *ex rel.* Johnson, 443 So. 2d 905, 907 (Ala. 1983); Tucker v. State, 445 So. 2d 311, 313 (Ala. Civ. App. 1984); ALA. CODE § 20-2-93(a)(4)d.1. (1984).

and in probation revocation hearings.[288] In hearings to suppress evidence obtained in violation of the Fourth Amendment, the burden of proving standing to contest a search is on the defendant.[289] However, the state has the burden of proving that a search was conducted pursuant to a warrant or that there was no necessity for a warrant.[290] In addition, the state has the burden of proving that consent was freely and voluntarily given when it relies on consent to justify a search.[291] In these contexts it appears that no greater burden is required of the State than proof by a preponderance of the evidence.[292] Similarly, when the prosecution seeks to avoid the exclusionary rule by showing that the evidence in question inevitably would have been discovered lawfully, it must establish that fact by a preponderance of the evidence.[293] If a witness made an out-of-court identification under circumstances suggesting a violation of due process, the prosecution nonetheless can introduce evidence of an in-court identification by that witness if it can show by clear and convincing evidence that the in-court identification has an independent origin.[294]

When the State seeks to introduce a statement made by the defendant in the course of custodial interrogation,[295] the State must show that the statement was voluntary, that it was preceded by the *Miranda* warnings,[296] and that the defendant waived his

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288. Powell v. State, 485 So. 2d 379, 381 (Ala. 1986); Armstrong v. State, 294 Ala. 100, 103, 312 So. 2d 620, 623-24 (1975); Fletcher v. State, 484 So. 2d 565, 567 (Ala. Crim. App. 1986); Salter v. State, 470 So. 2d 1360, 1361-62 (Ala. Crim. App. 1985).

289. Collier v. State, 413 So. 2d 396, 400 (Ala. Crim. App. 1981) (the burden of persuasion in the context is not clear), *aff'd*, 413 So. 2d 403 (Ala. 1982).

290. Paschal v. State, 365 So. 2d 681, 682 (Ala. 1978); *see also* W. LaFave & J. Israel, Criminal Procedure § 10.3(b), at 459 (1985) (suggesting that burden of proof is on defendant where search was conducted pursuant to a warrant).

291. Bumper v. North Carolina, 391 U.S. 543, 548 (1968). Although the question is not altogether clear in Alabama, it appears that the State need only prove consent by a preponderance of the evidence. *See* Lott v. State, 456 So. 2d 857, 859 (Ala. Crim. App.), *cert. denied*, 456 So. 2d 857 (Ala. 1984).

292. *See* United States v. Matlock, 415 U.S. 164, 177 n.14 (1974).

293. Nix v. Williams, 467 U.S. 431, 444, 445 n.5 (1984).

294. United States v. Wade, 388 U.S. 218, 240 (1967); Brazell v. State, 369 So. 2d 25, 29 (Ala. Crim. App. 1978), *cert. denied*, 369 So. 2d 31 (Ala. 1979).

295. *See Ex parte* Crowe, 485 So. 2d 373, 376-77 (Ala. 1985) (per curiam).

296. *Ex parte* Callahan, 471 So. 2d 463, 470-71 (Ala. 1985). However, the failure of the State to make these showings may be harmless error under some circumstances. *See Ex parte* Williams, 484 So. 2d 503, 504-05 (Ala. 1986).

rights under *Miranda*.[297] The trial judge need only be convinced of the voluntariness of the confession by a preponderance of the evidence.[298] However, if there is conflicting evidence on the question of voluntariness, the defendant's evidence must go to the jury along with the confession.[299]

In sentencing hearings, disputed facts, including prior offenses, "shall be determined by the preponderance of evidence."[300] If a defendant was convicted under the Alabama Habitual Offender Act,[301] a hearing must be held on the existence of prior convictions,[302] and the State has the burden of proving such offenses by a preponderance of the evidence.[303] In death penalty cases, the existence of aggravating circumstances must be proved beyond a reasonable doubt.[304] In addition, if the defendant injects the issue of mitigating circumstances, the State has the burden of proving the nonexistence of mitigating circumstances by a preponderance of the evidence.[305]

D. The Innocent Defendant and the Verdict of "Not Guilty"

In Alabama, as in all American jurisdictions, only two final verdicts are possible after a criminal trial. If the fact finder is persuaded beyond a reasonable doubt of the defendant's guilt, it will

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297. *See Ex parte Crowe*, 485 So. 2d at 377-78; *see also Ex parte* Shula, 465 So. 2d 452, 453 (Ala. 1985).

298. Lego v. Twomey, 404 U.S. 477, 489 (1972); *Ex parte* Singleton, 465 So. 2d 443, 445 (Ala. 1985); Thomas v. State, 393 So. 2d 504, 507 (Ala. Crim. App. 1981).

299. *See Ex parte Shula*, 465 So. 2d at 454-55; *see also* Crane v. Kentucky, 106 S. Ct. 2142, 2146-47 (1986) (defendant had a constitutional right to present evidence of circumstances surrounding his confession).

300. ALA. R. CRIM. P. TEMP. R. 6(b)(2).

301. *See* ALA. CODE § 13A-5-9 (1982); *see also id.* § 15-18-9 (penalties for persons previously convicted of felonies).

302. *See* ALA. R. CRIM. P. TEMP. R. 6(b)(3)(i).

303. *See* ALA. R. CRIM. P. TEMP. R. 6(b)(3)(iii); *see also* Crittenden v. State, 414 So. 2d 476, 481 (Ala. Crim. App. 1982).

304. Beck v. State, 396 So. 2d 645, 663 (Ala. 1980); *see also Ex parte Dobard*, 435 So. 2d 1351, 1358 (Ala. 1983), *cert. denied*, 464 U.S. 1063 (1984).

305. ALA. CODE § 13A-5-45(g) (1982); *see* Berard v. State, 486 So. 2d 458, 471 (Ala. Crim. App. 1984), *rev'd on other grounds*, 486 So. 2d 476 (Ala. 1985); *cf. Ex parte Dobard*, 435 So. 2d at 1358 (aggravating circumstances may be balanced against mitigating circumstances, but the former must be proved by the State beyond a reasonable doubt).

ordinarily return a verdict of guilty.[306] If the fact finder is not so persuaded, it will return a verdict of not guilty. The fact finder cannot return a verdict of innocent. As a result, even though the defendant is assumed to be innocent at the beginning of the trial, the best possible outcome for him at the end of trial is not a finding of innocence, but an ambiguous verdict of "not guilty." This outcome leaves him vulnerable in a number of collateral areas. For example, in both state and federal court, the mere fact that a person has been acquitted of a particular offense does not automatically render evidence of that offense inadmissible as part of the prosecution's case-in-chief in another prosecution.[307] In addition, a judgment of acquittal does not bar a civil suit based on the same facts and is not admissible in favor of the defendant in a civil case even when that suit involves the same issues and parties.[308] The acquitted defendant may also be vulnerable to other collateral consequences, such as loss of professional licenses, and, of course, a widespread public feeling that "where there's smoke, there's fire" leaves the acquitted defendant forever under a cloud of suspicion.[309]

The "guilty" and "not guilty" dichotomy is probably a consequence of the fact that in criminal trials both the burden of production and the burden of proof are on the prosecution. As a result, there is a natural tendency to view the result from the perspective of whether those burdens were met. However, this tendency is not an inevitable consequence of the current assignment of burdens. Conceivably, a total failure of proof on the part of the State, as manifested in a judgment of acquittal, could be

306. "Ordinarily" is used here because "the fact finder [sic] in a criminal case traditionally has been permitted to enter an unassailable, but unreasonable verdict of 'not guilty.'" Jackson v. Virginia, 443 U.S. 307, 317 n.10 (1979).

307. *See, e.g.*, United States v. Van Cleave, 599 F.2d 954, 957 (10th Cir. 1979); Smith v. State, 409 So. 2d 455, 457 (Ala. Crim. App. 1981).

308. *See* Fidelity-Phenix Fire Ins. Co. v. Murphy, 226 Ala. 226, 233, 146 So. 387, 392 (1933); Carlisle v. Killebrew, 89 Ala. 329, 334, 6 So. 756, 758 (1889).

309. *See In re* Fried, 161 F.2d 453, 458-59 (2d Cir. 1947) ("The stigma [of a wrongful indictment] cannot be easily erased . . . [and] is seldom wiped out by a subsequent judgment of not guilty. Frequently, the public remembers the accusation, and still suspects guilt, even after an acquittal."); *see also* United States v. Serubo, 604 F.2d 807, 817 (3d Cir. 1979) ("an indictment will often have a devastating personal and professional impact that a later dismissal or acquittal can never undo").

reflected in a verdict of innocent. Or, since a party may take advantage of favorable evidence introduced by his opponent,[310] a verdict of innocent would be appropriate even if the case went to the jury only on the State's evidence. And of course, the fact that no burdens are imposed on a defendant in a criminal case does not mean that the defendant may not introduce evidence if he so chooses. In any event, provision for a third possible verdict, a verdict of innocent, would go far in appropriate cases to eliminate the problems encountered by the innocent defendant who is found "not guilty."

VII. Conclusion

The rules about burdens of proof provide the logical and legal framework within which judicial factfinders answer often difficult questions affecting life, liberty, and property. Because these rules provide the principal discipline for the fallible human minds that power the judicial process and the principal constraints upon conscious and unconscious deviations from rational deliberation, they are important whether the fact finder be judge or jury. They become additionally important, however, whenever the fact finder is the jury guaranteed by both federal and state constitutions, for the rules about burdens of proof then also become the practical guarantors of the constitutional right. Careful and conscientious application of the rules draws the line between true realization of the right and mere lip service which eventually could render it a dead letter.

310. *See* Southern Ry. v. Hill, 39 So. 987, 987 (Ala. 1905).