

**MISSISSIPPI CRIMINAL PROCEDURE –  
CIRCUMSTANTIAL EVIDENCE AND TRIAL  
IN ABSENTIA – DEFENDANTS ARE NOT  
ENTITLED TO RECEIVE A  
CIRCUMSTANTIAL EVIDENCE  
INSTRUCTION AND A DEFENDANT MAY  
WAIVE THEIR RIGHT TO BE PRESENT AT  
TRIAL EXCEPT DURING SENTENCING**

I. FACTS.....	835
II. RELATED LAW.....	836
A. <i>Circumstantial Evidence Instruction</i> .....	836
B. <i>Trial in Absentia</i> .....	837
III. MAJORITY OPINION.....	837
A. <i>Circumstantial Evidence Instruction</i> .....	837
B. <i>Trial in Absentia</i> .....	838
IV. DISSENTING OPINION.....	839
V. DISCUSSION.....	839
CONCLUSION.....	840

I. FACTS

Johnny Nevels was under supervised parole when he was arrested for failing to provide his parole officer with a drug urinalysis test.<sup>1</sup> The arresting officers frisked Nevels and discovered car keys that opened a car in an adjacent parking lot.<sup>2</sup> Local police then searched the vehicle and discovered drugs inside of it.<sup>3</sup> Nevels was indicted on three counts of possession and released on bail.<sup>4</sup> Nevels failed to show at his trial and was tried in

---

<sup>1</sup> Nevels v. State, 325 So. 3d 627, 630 (Miss. 2021).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

absentia by the court.<sup>5</sup> The jury found Nevels guilty on all three counts.<sup>6</sup> Nevels then failed to appear at his sentencing hearing and was sentenced to over thirty years in prison.<sup>7</sup> Nevels appealed his convictions from the Warren County Circuit Court arguing (1) that the “judge wrongly refused his proposed circumstantial evidence instruction” and (2) that “the trial court erred by trying him in absentia.”<sup>8</sup>

## II. RELATED LAW

### A. *Circumstantial Evidence Instruction*

There are two types of evidence in criminal cases: direct and circumstantial.<sup>9</sup> Direct evidence directly implicates the accused, such as the defendant’s confession or eyewitness testimony.<sup>10</sup> Circumstantial evidence is “evidence that implicates the defendant by inference.”<sup>11</sup> The Supreme Court of Mississippi previously held that there is an “arguably stricter burden of proof placed upon the state in circumstantial evidence cases.”<sup>12</sup> When a defendant’s charges were based solely on circumstantial evidence, this heightened burden required special jury instructions—instead of juries having to find a defendant guilty “beyond a reasonable doubt,” they had to find a defendant guilty “to the exclusion of every reasonable hypothesis consistent with innocence.”<sup>13</sup> So, even though direct and circumstantial evidence carried the same weight, circumstantial evidence required a burden of proof greater than “beyond a reasonable doubt.”<sup>14</sup>

---

<sup>5</sup> *Id.*

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

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

<sup>8</sup> *Id.*

<sup>9</sup> *Williams v. State*, 305 So. 3d 1122, 1129 (Miss. 2020).

<sup>10</sup> *Burleson v. State*, 166 So. 3d 499, 509 (Miss. 2015) (quoting *Price v. State*, 749 So. 2d 1188, 1194 (Miss. Ct. App. 1999)).

<sup>11</sup> *Nevels*, 325 So. 3d at 644 (Kitchens, P.J., dissenting) (quoting *Moore v. State*, 247 So. 3d 1198, 1202 (Miss. 2018)).

<sup>12</sup> *Fisher v. State*, 481 So. 2d 203, 214 (Miss. 1985).

<sup>13</sup> *Nevels*, 325 So. 3d at 632.

<sup>14</sup> *Id.*

### B. *Trial in Absentia*

A defendant is guaranteed by the United States Constitution and the Mississippi Constitution the right to be “present at every stage of his or her trial.”<sup>15</sup> However, under the Mississippi Rules of Criminal Procedure Rule 10.1(b)(1)(B), this right may be waived if the defendant’s “absence was voluntary and constitutes a knowing and intelligent waiver of the right to be present.”<sup>16</sup> Rule 10.1(b)(2)(A) provides an exception: a defendant cannot waive their right to be present “during the imposition of his/her sentence in a felony case.”<sup>17</sup> Thus, the court has held that a defendant may waive their right to be present during trial but must be present during sentencing of a felony case.<sup>18</sup>

## III. MAJORITY OPINION

### A. *Circumstantial Evidence Instruction*

In *Nevels v. State*, the Supreme Court of Mississippi overruled *Moore v. State* and held that defendants in criminal cases are not entitled to a circumstantial evidence instruction.<sup>19</sup> The majority held that “in all criminal cases, there is but one burden of proof—guilt beyond a reasonable doubt.”<sup>20</sup> The majority held that the United States Constitution does not provide for any heightened burden of proof in circumstantial evidence cases.<sup>21</sup> Additionally, the two-burden approach created confusion for trial judges who had to discern whether evidence was direct or circumstantial because, “[i]n many cases, the proof does not fall neatly into one of these evidentiary categories.”<sup>22</sup> And, most importantly, applying a heightened burden of proof contradicts the court’s position that direct and circumstantial evidence carry the same weight.<sup>23</sup>

---

<sup>15</sup> *Id.* at 634 (quoting *Hampton v. State*, 309 So. 3d 1055, 1060 (Miss. 2021)).

<sup>16</sup> MISS. RULE CRIM. P. 10.1(b)(1)(B).

<sup>17</sup> *Id.* at 10.1(b)(2)(A).

<sup>18</sup> *Nevels*, 325 So. 3d at 636.

<sup>19</sup> *Id.* at 634.

<sup>20</sup> *Id.* at 631.

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

<sup>22</sup> *Williams v. State*, 305 So. 3d 1122, 1129 (Miss. 2020).

<sup>23</sup> *Nevels*, 325 So. 3d at 632.

Because of these reasons, the court overruled *Moore* and rejected the circumstantial evidence instruction requirement.<sup>24</sup>

Here, Nevels's criminal charges are based entirely on circumstantial evidence because the car keys on his person did not prove the existence of the fact that Nevels possessed the drugs but instead gave rise to the logical inference that he did.<sup>25</sup> Because of the court's decision to overrule *Moore*, Nevels was not entitled to a circumstantial evidence instruction, so the trial court did not err in denying this jury instruction.<sup>26</sup>

### B. Trial in Absentia

The court also held that a defendant can waive her right to be present at trial.<sup>27</sup> Here, the majority found no abuse of discretion of the trial court's finding of waiver under Rule 10.1(b)(1)(B).<sup>28</sup> Nevels knew his trial date and made no attempt to contact the court except for leaving a voicemail at his attorney's office.<sup>29</sup> The only excuse given for Nevels's absence was by his mother, who claimed that high water levels had prevented him from attending.<sup>30</sup> However, high water had not prevented Nevels from attending the pretrial conference just days before, so the trial court dismissed this excuse.<sup>31</sup> Because Nevels's absence was voluntary and constituted a knowing and intelligent waiver of his right to be present, the court held that the trial court did not err in trying him in absentia.<sup>32</sup>

In regard to Nevels's sentencing hearing, the court held that the trial court did err by sentencing Nevels without him being present.<sup>33</sup> Nevels was convicted by the trial court of three felonies.<sup>34</sup> Because Nevels's convictions were felonies, he was barred from waiving his right to be present at sentencing under Rule

---

<sup>24</sup> *Id.* at 634.

<sup>25</sup> *Id.* at 644 (Kitchens, P.J., dissenting).

<sup>26</sup> *Id.* at 634.

<sup>27</sup> *Id.* at 634.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 636.

<sup>30</sup> *Id.* at 635.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 634.

<sup>33</sup> *Id.* at 636.

<sup>34</sup> *Id.*

10.1(b)(2)(A).<sup>35</sup> The court affirmed Nevels's convictions, vacated his sentences, and remanded to the trial court for Nevels to be sentenced "at a hearing during which he is present."<sup>36</sup>

#### IV. DISSENTING OPINION

In his dissent, Presiding Justice Kitchens disagreed with the majority's decision to scrap the circumstantial evidence requirement.<sup>37</sup> Justice Kitchens argued that in cases where the State's evidence is purely circumstantial, the defendant "is entitled to an instruction requiring the jury 'to exclude every other reasonable hypothesis other than that of guilt before a conviction can be had.'"<sup>38</sup> Additionally, Justice Kitchen took issue with the majority's decision to violate *stare decisis*.<sup>39</sup> He argued that, even if the majority believed the previous rulings were incorrect, they cannot be overruled unless the decision was "mischievous and it results in a detriment to the public."<sup>40</sup>

#### V. DISCUSSION

The majority correctly held that "[t]here is no higher criminal standard of *beyond* [than] beyond a reasonable doubt."<sup>41</sup> The "beyond a reasonable doubt" standard supports the "presumption of innocence" that prosecutors must overcome to convict an accused defendant.<sup>42</sup> Moreover, the United States Supreme Court held that the reasonable doubt standard is constitutionally required under the Due Process Clause because of "the need to reduce the risk of convicting the innocent."<sup>43</sup>

Justice Kitchens argued that the circumstantial evidence instruction does not create a higher burden of proof but is actually

---

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 637 (Kitchens, P.J., dissenting).

<sup>38</sup> *Moore v. State*, 247 So. 3d 1198, 1203 (Miss. 2018).

<sup>39</sup> *Nevels*, 325 So. 3d at 637 (Kitchens, P.J., dissenting).

<sup>40</sup> *Id.* at 638 (Kitchens, P.J., dissenting) (citing *Land Comm'r v. Hutton*, 307 So. 2d 415, 421 (Miss. 1974)).

<sup>41</sup> *Id.* at 631.

<sup>42</sup> *Jackson v. Virginia*, 443 U.S. 307, 315 (1979) (quoting *In re Winship*, 397 U.S. 358, 363 (1970)).

<sup>43</sup> *King v. State*, 580 So. 2d 1182, 1193 (Miss. 1991) (Banks, J., concurring) (quoting *In re Winship*, 397 U.S. at 361-64).

“on the same level as the beyond a reasonable doubt standard.”<sup>44</sup> However, Justice Kitchens also argued that the instruction is “an extra measure of protection” for defendants.<sup>45</sup> These claims contradict each other and undermine the dissent’s rationale for needing the instruction in the first place.<sup>46</sup>

Furthermore, the dissent pointed out how courts do not inform jurors of the difference between direct and circumstantial evidence because “the weight and credibility of the evidence [is] to be resolved by the jury.”<sup>47</sup> In fact, the Supreme Court of Mississippi has held that jurors should be informed that there is no distinction between the two types of evidence, and that the jury should be “satisfied of the defendant’s guilt beyond a reasonable doubt from *all* the evidence in the case.”<sup>48</sup>

#### CONCLUSION

In *Nevels*, the Supreme Court of Mississippi overruled *Moore* and held that a defendant is not entitled to the circumstantial evidence instruction. This decision strengthened the notion that “beyond a reasonable doubt” is the highest burden of proof available to a defendant in a criminal case. The *Nevels* decision also reiterated when a defendant can waive their right to be present at court proceedings and when they cannot.

---

<sup>44</sup> *Nevels*, 325 So. 3d at 641 (Kitchens, P.J., dissenting).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 632.

<sup>47</sup> *Id.* at 644 (Kitchens, P.J., dissenting) (quoting *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993)).

<sup>48</sup> *Id.* at 634 (Robertson, J., concurring) (emphasis added) (quoting *Mack v. State*, 481 So. 2d 793, 797 (Miss. 1985)).