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IN THE STATE OF MISSISSIPPI COURT OF APPEALS.

BART UDE. :
Defendant/Appellant. Case No 2007-KM-00268-COA
V. :

STATE OF MISSISSIPPI. :
Appellee.

APPELLANT'S BRIEF.

STATEMENT OF THE ISSUES.

I. Whether the trial court erred by denying the defendant's / Appellant's request for a perfect jury, and whether such denial contravenes the decission of the ***United States Supreme Court in Duncan v. louisiana, Baldwin v. New York, Frank v. U.S., and Blanton v. City of N. Las Vegas, Nevada*** *?*

II. Whether the defense counsel's failure to present a coherent and correct argument with regards to the defendant's request for a perfect jury constitute inneffective counsel representation ?

III. Whether the defendant as a Doctoral Student had the constitutionally protected right to make phone calls to and come to attend classes, use facilities open to students, and consult with members of faculty, and associate with fellow students in his academic department where he was attending classes and hoped to obtain his degree from at a time when such department was open to the public

(Absent any process / order prohibiting him from doing so) ?

IV. Whether the following elements as defined and explained in the previous decissions of the United States and State of Mississippi Courts were established and proven beyond reasonable doubt

a) The necessary element of substantial Emotional Distress ?

b) The necessary element of Malice ?

c) The necessary element of "Wilful" ?

d) The element of criminal threat ?

e) Harrassment ?

V. Whether the accuser's "I don't Recall" and sudden loss of memory with respect to her previous testimony under oath in the Justice Court which was inconsistent with her testimony in the circuit court made her (the accuser) unavailable for cross examination and thus, deprived the defendant of his sixth amendment right to confront the witness against him especially when such testimony was used against the defendant by the prosecution in the circuit court ?

VI. Whether the crime of Stalking was established and proven beyond reasonable doubt where there was no substantial and independent evidence (tapes, video, eye witness(available but not called by the state) etc) presented at trial ? Whether the defendant's right to speedy trial was violated considering that this is an appeal de novo ?

VII. Whether the trial court erred by refusing prior testimony of an unavailable eye witness and subsequent statement by the trial court that the prior testimony by both available and unavailable witnesses would not be helpful to the defendant in his court (Circuit court) since it did not help the defendant in the lower court (justice court) ?

STATEMENT OF THE CASE.

1. The defendant was arrested and charged of Stalking, and tried on April 12, 2005 and was found guilty in the Okitibbeha county Justice court by the same judge who prepared the charges. The defendant was found guilty of Stalking or harassment by telephone.

2. The defendant then filed an appeal to the Okitibbeha county circuit court on April 12, 2005 for a de novo trial in accordance with MRCP . He also filed motions for dismissal of the charges against him, and for a perfect jury trial. Both motions were denied by the trial court. The request for perfect jury was denied because the prosecutor and the trial judge opined that the maximum sentence authorized by the Stalking ***statute 97-3-107*** was 6 (six) months.

3. After prolonged delay caused by the state either because they were attempting to dismiss the defendant's appeal or because they were not ready to proceed, the case was tried on January 22, 2007, and the defendant was found guilty of Stalking. The defendant filed this appeal to the Court of Appeals of the state of Mississippi.

FACTS.

4. The defendant and the accuser were graduate students (Doctoral) at Mississippi State University, and belonged to the same department which the accuser called her place of employment. The defendant arrived in Starkville Mississippi on November 2, 2003 and met the accuser on November 4, 2003, at which time the accuser gave the defendant her home phone number written her. ***See exhibit "A".*** The defendant called her and she called him a lot of times. They went out several times to eat in restaurants with the defendant paying the bills.They also went shopping several times and the accuser visited the defendant many times, and they also attended classes together throughout the spring semester of 2004. In all these activities, the defendant paid bills where bills were to be paid, while the accuser provided the rides where rides were needed.

5. On September 2004, the defendant was arrested on a warrant issued by hon Judge Crump and charged of ***Stalking 97-3-107 See exhibit "B".*** On April 12, 2004 a hearing was held infront of the same judge Crump, the state produced three witness and the defendant produced one the only eye witness whom he subpoenaed. The State did not call him. During the hearing he contradicted

6. The witnesses produced by the state were not eye witnesses to any crime or incidences, nevertheless the judge found the defendant guilty but was not sure of what, so he wrote in his order guilty of Stalking or harassment by telephone ***See exhibit "D"*** (The justice court order).

7. The defendant then appealed the matter to the Circuit court on April 12, 2004 ***See exhibit "E"***. The delays that followed after this date was caused by the state who thought that the appeal to the circuit court was untimely, and sought to dismiss it. ***See exhibit "F"*** (Circuit court order denying their motion), further delay was caused by the unavailability of their witnesses.

8. The defendant sought to dismiss the charges against him See exhibit "G", and also filed a request for a **perfect jury trial** ***See exhibit "H"*** Both requests were denied by the trial judge because the prosecutor told him that the maximum sentence authorized by the Stalking statute 97-3-107 was six (6) months and that like DUI the right to jury trial does not exist. See ***exhibit "I"*** (The trial court opinion denying the requests).

9. The defendant also sought and obtained a subpoena for Mr Subramania (The only eye witness). The defendant was unsuccessful in finding the witness to serve him with the subpoena. The state did not call this eye witness.

10. The hearing was held on January 22nd in the Okitibbeha Circuit Court room, with Hon. Judge Kitchens presiding. The State presented three witnesses, the accuser (Lakeisha Claude-Williams), Mr Mike White (Dean of Students) and Professor. Cathcart Of Mississippi State University. Mr White recounted his encounter with both the accuser and the defendant. He did not testify that

he observed or witnessed any harassment or stalking, but said that the accuser had complained to him that she did not want the defendant to have any contact with her. Cathcart's Testified that the defendant was in his own office and left after he threatened to call the Police, and that there was no scene, the encounter was between him and the defendant. The accuser did not know what happened between both of them because she was not there and her testimony did not support the testimony of Dr Cathcart's, in other words she did not testify that she was with the defendant in Dr. Cathcart's office when Dr Cathcart asked the defendant to leave (Dr. Cathcart's office). The accuser took the stand and testified that she was acquainted with the defendant, went out to places like Kentucky fried chicken, attended classes together in the same department, that she gave the defendant rides and that the defendant later was trying to change the relationship between them, when asked how the defendant was trying to do so she said by coming to the department, and talking loud to other students about how nice she is and that such discussion was making her uncomfortable. See the Circuit court transcript at page 15 # 5 . She also testified that the defendant never hit her, that he was angry and threw a chair, and that she was uncomfortable and afraid of the defendant. On cross examination, she withdrew her testimony that the defendant threw a chair, and said that she used the wrong word that the defendant did not throw a chair but, moved a chair. See the accuser's testimony at page 29 line 1 Excerpt presented below.

LAKEISHA CLAUDE WILLIAMS - CROSS-EXAMINATION 29

chair.

Q Are those your words?

A Correct, that is -- those are my words.

Q That he was nearly throwing a chair. Not that he threw a chair, but he was nearly throwing a chair?

A Right. He pushed the chair. I should have used other words.

11. She was confronted with her testimony in the justice court which was inconsistent to her testimony in the circuit court and her response was **"I do not recollect"** see the transcript at page excerpt below, rest is provided as ***exhibit J.***

Q Do you recall at that hearing saying that you and Mr. Ude did go out to restaurants several times?
A I don't recall.
Q Like out to dinner? Do you recall that?
A I don't recall.
Q But you may have testified to that at the hearing in Justice Court?
A I don't remember today. On this day, I don't remember.
Q And do you remember testifying in Justice Court that you did come over to his apartment and pick him up several times, not just once?
A I don't remember.

12. The accuser also testified that the defendant was permanently dismissed from Mississippi State University, which was not true (a big lie), The defendant was never, I repeat never dismissed from Mississippi State University at any time, let alone permanently. No dates, time and place of any harassment was presented.

13 The defendant took the stand and testified that he met the accuser and that they met, became friends, went out together to restaurants ant shopping several times, and that the accuser visited, and called him several times and most importantly that they attended classes together.

The defendant further testified that Mr Srikanth Subramania was the student studying with the

accuser when he came to the office on September 21, 2004, and that he (Subramania) testified under oath in justice court after the defendant subpoenaed him. The defendant was about to present his (Mr. Subramania's) testimony which contradicted the accuser's testimony, when the state objected and the trial court sustained the objection. See page 56 of the transcript. Excerpt presented below. The rest is presented as ***exhibit K***.

Q In fact, I believe you hired a private investigator to serve him with process?
A I did.
Q Was he able to locate Mr. Supramanni?
A No, he wasn't. But Mr. Supramanni testified in the Justice Court. I subpoenaed him, and he came --
BY MR. CARPENTER: Your Honor, I'm going to object.
BY THE DEFENDANT: -- and he contradicted everything Lakeisha said.
BY THE COURT: Sustained. Apparently it was -- His testimony was not helpful, because Mr. Ode is appealing the conviction from lower court.

14 The defendant also testified that the accuser stated on direct in the Justice court that none of the calls were directed to her, but was again cut short by the state's objection which the trial court sustained. See the transcript at page 58 excerpt below, the rest presented as ***exhibit L***.

The defendant stated that the accuser was an available witness in both the justice and cicuit courts and could rebutt the defendant's testimony if the state chooses.

She testified in the Justice Court, and I have to say that, because she's here She can dispute that. She told Judge Crump that I neve met -- the calls were not directed at her. That's Lak isha's testimony. That's why I wanted to bring the court -- the -- to come here.

See, the -- Judge, if you read my motion to dismiss, I have it in there. I didn't know that they didn't have records in Justice Cour .

Q All right.

A He told -- the oath -- Mr.(unintelligible), on that direct.

BY MR. CARPENTER: Objection, Your Honor.

BY THE COURT: Let's move along to something else. What was testified to in Justice Court apparently was not helpful. He's appealing a conviction from Justice Court.

The Circuit Judge then found the defendant guilty of Stalking, See Exhibit D-1 the circuit order. The defendant then filed this appeal to the Mississippi Court of Appeals..

SUMMARY OF ARGUMENT.

1. **THE DEFENDANT'S CONSTITUTIONAL RIGHT TO A JURY TRIAL WAS VIOLATED.**

The crime of stalking 97-3-107 **(See Exhibit "P" in a pamphlet form)** authorizes a maximum sentence of **one year,** the prosecutor and the trial judge were wrong in stating that it prescribed 6 months. A crime in which the maximum authorized sentence is more than six months as in Stalking 97-3-107 is entitled to jury trial because it qualifies as a serious crime as defined and explained by the United States Supreme court in ***Duncan v. Louisiana 391 U.S. 145.,*** Exhibit "R", and in ***Baldwin v. New York 399 U.S. 69. Exhibit "Q" See excerpt below.***

" The sixth amendment, as applied to the states via the fourteenth amendment, requires the defendant accused of serious crimes be afforded the right to trial by jury."

Duncan v. Louisiana. ***From Exhibit "R"***
U.S. Supreme Court.

" The question whether the possibility of a one year sentence is enough in itself to require the opportunity for jury trial . More specifically we have concluded that no offense can be deemed petty for the purposes of the right to jury trial where imprisonment for more than six months is authorized."

Balwin v. New York ***From Exhibit "Q".***

U.S. Supreme Court.

Cases appended and pertinent parts highlighted.

This was reiterated in ***Frank v. U.S. 395 U.S. 147 Exhibit "S" excerpt below***

" In ordinary criminal prosecutions, the severity of the penalty authorized not the penalty actually imposed is the relevant criterion."

Frank v. U.S. ***From exhibit "S"***
U.S. Supreme Court.

Finally in ***Blanton v. North las Vegas 489 U.S. 538 (1989).*** **Exhibit "T". Excerpt below.**

" Following this approach, our decision in Baldwin established that a defendant is entitled to a jury trial whenever the offense he is charged carries a maximum authorized prison term of greater than six months. The judiciary should not substitute its judgement as to seriousness for that of a legislature."

Blanton v. North Las Vegas ***From exhibit "T".***
U.S. Supreme Court.

Thus, the defendant respectfully states that the trial court deprived him of his due process right to a jury trial and thus committed a serious and harmful error at law. In ***Duncan v. Louisiana 391 U.S. 145 U.S.*** Supreme Court explained this harm as follows:

"A right to jury trial is granted to criminal defendants in order to prevent oppression by the government. Those who wrote our constitution knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to higher authority. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt overzealous prosecutor and against the compliant, biased, or eccentric judge."

Duncan v, Louisiana. ***From Exhibit "R".***
U.S. Supreme Court.

Wherefore the defendant respectfully and humbly requests that the Court of Appeals of the state of Mississippi **Reverse** the decission of the Circuit Court of Okitibbeha County.

2. The defendant's attorney's statement that the Supreme Court rulling was that a defendant's right to jury trial was curtailed if he was not going to be receive any imprisonment was wrong. It is the legislature i.e. the statute and not the Court that determines that. The defense lawyer was inneffective on this issue, regardless, the final decision rests with the court.

3. The defendant has the constitutionally protected right to telephone and come to his department to attend classes, consult members of the faculty, use the facilities open to students, and associate with fellow students, regardless of whether the accuser or anyone else likes it or not. There was no process or order which prohibited the defendant from making such calls or coming to his department when it is open to the students or the public. There was no testimony that the calls were abusive, obscene or that the defendant used fighting words when he came to the department, and there was no supporting evidence (let alone substantial) that the calls were directed at the accuser. The accuser herself testified in the justice court that none of the calls were directed at her ***See Exhibit M***, that she was concerned with the defendant saying nice things about her to other people in the office. ***See Exhibit N.*** All activities which the accuser complained about are protected by the first amendment to the United States Constitution which guarantees the defendant the right to free speech and to associate with his fellow students.

4. The elements that the state must prove beyond reasonable doubt are **malice, substantial Emotional Distress, Wilfulness, criminal threat,** and that the **course of activity was not constitutionally protected.** The evidence must be substantial and specific and sufficient in proving each element beyond reasonable doubt, and not just talk about it.

a) There was no testimony that the course of activity was malicious at all, furthermore, Malice has been defined by the Supreme Court of Mississippi in ***Eckman v. Cooper Tire et al. 2003 - CA - 02223 - SCT.*** and in ***Hayden v. Foryt 407 So. 2d 539.***

b) Substantial Emotional Distress was not established and proven beyond reasonable doubt. The Supreme Court of Mississippi made it clear in ***Sidney Wong v. John Stripling et al. 94 - CA - 01095 - SCT.*** That Emotional Distress requires the course of conduct to be outrageous and extreme as a matter of law. There must be a clear proof of **substantial injury.** The course of activity was no where close to being outrageous and there was no proof of injury (Medical Report, etc). Infact there was evidence that she was normal, and not distressed. See Dr. Cathcart's testimony at page 44 of the Circuit court transcript.

c) The State did not establish and prove beyond reasonable doubt the inportant element of Wilful which the United States Supreme Court defined as one undertaken with bad purpose See ***Heikinen v. U.S. 355 U.S. 273, 279.*** In ***Ratzlaf v. U.S. 510 U.S. 135, 137 1994*** The Supreme Court of the United States stated that in order to establish a "Wilful" violation of a statute the Government must prove that the defendant was with knowledge that his conduct was unlawful. The defendant resided

in Mississippi for less than one year before the incident, and there was no evidence of any substance that demonstrates that he was aware that his course of activity was unlawful and unconstitutional. The defendant reiterates that his course of activity was lawful and constitutionally protected.

d) The Element of criminal threat as defined by the statute 97 - 3 - 107 was not established. The defendant never threatened the accuser. The accuser testified to that in the justice court. See exhibit

e) There was no testimony or evidence that demonstrates or proves beyond reasonable doubt that the defendant harrassed the accuser as specified in the statute. There were no specific date, time of any incidence given, due process requires such dates, times and place of each incident if any to be specified

ARGUMENT.

I. WHETHER THE TRIAL COURT ERRED BY DENYING THE DEFENDANT'S REQUEST FOR A JURY TRIAL, AND WHETHER SUCH DENIAL CONTRAVENES THE DECISSION OF THE *U.S. SUPREME COURT IN DUNCAN V. LOUISIANA, BALWIN V. NEW YORK, FRANK V. U.S., AND BLANTON V. CITY OF NORTH LAS VEGAS ?*

The trial court committed a reversible error when he denied the defendant's request for a jury trial. The motion / request for a jury trial was called up, and the prosecutor informed the trial judge that the statute authorized a maximum of six months, and the trial judge accepted that and ruled that there was no right to a jury. **See the transcript at page 4, from # 16 to 24.** Excerpt presented below. The rest is presented as ***exhibit "I"***

B: THE COURT Because I know like DUI first they've said you'r not entitled to a jury.

B: MR. CARPENTER: Doesn't carry over six months, Your Honor

B: THE COURT It doesn't carry over six months. And I'm not thinking about imposing over six months, even i I do find that he's been proven guilty beyond a reasonable doubt. I'm not going to

The statute on its face clearly authorized one year (1) imprisonment, See the copy of the statute in the record at page provided to the trial court by the defendant when he filed his motion to dismiss all charges against and which the court did not consult. A copy of the statute is presented to this court as ***exhibit "P"***.

Since the maximum sentence authorized by the legislature is one year, ***Statute 97 - 3- 107*** (Stalking) qualifies as a serious crime for the purpose of a jury trial. ***See Balwin v. New York, 399 U.S. 69***. Excerpt presented below, rest provided as ***exhibit "Q".***

> The question in this case is whether the possibility of a one-year sentence is enough in itself to require the opportunity for a jury trial. We hold that it is. More specifically, we have concluded that no offense can be deemed "petty" for purposes of the right to trial by jury where imprisonment for more than six months is authorized. 6

In **Duncan v. Louisiana 391 U.S. 145** the United States Supreme Court made it clear that the 6th amendment to the U.S. Constitution applies to the states via the 14th amendment and requires that defendants accused of serious crimes be afforded the right to jury trial. See excerpt below.

> Because "a general grant of jury trial for serious offenses is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants," the Sixth Amendment provision is binding on the States through the due process clause of the Fourteenth Amendment. 49 But

The U.S. Supreme went further to state the harm that would occur if one is denied the right to jury trial. The exact statement of the United States Supreme Court is presented below, the rest of Duncan v. Louisiana is provided as ***exhibit "R"***.

> "The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt overzealous prosecutor and against the compliant, biased, or eccentric judge. . . . [T]

United States Supreme Court made it clear in ***Frank v. U.S. 395 U.S. 147*** that in criminal Prosecution, the relevant criterion is the severity of the penalty authorized by the legislature and not the penalty actually imposed. **Excerpt is presented below, the rest is provided as exhibit *"S"***

> In ordinary criminal prosecutions, the severity of the penalty authorized, not the penalty actually imposed, is the relevant criterion. In such cases, the legislature has included within the definition of the crime itself a judgment about the seriousness of the offense. See Duncan v. Louisiana, supra, at 162, n. 35. But a person may be found in contempt of court for a great many different types of offenses, ranging from disrespect for the court to acts otherwise criminal. Congress, perhaps in recognition of the scope of criminal contempt, has authorized courts to impose penalties but has not placed any specific limits on their discretion; it has not categorized contempts as "serious" or "petty." 18 U.S.C. 401, 402. 1 Accordingly, this Court has held

Finally, in ***Blanton v. North Las Vegas 489 U.S. 538 (1989),*** the United States made it clear that a defendant is entitled to a jury trial whenever the offense he is charged carries a maximum authorized prison term of greater than six months. It also stated that the judiciary should not substitute its judgement as to seriousness for that of the legislature. See excerpt below, the rest is provided as ***exhibit "T"*** .

> also Duncan, supra, at 159. In fixing the maximum penalty for a crime, a legislature "include[s] within the definition of the crime itself a judgment about the seriousness of the offense." Frank, supra, at 149. The judiciary should not substitute its judgment as to seriousness for that of a legislature, which is "far better equipped to perform the task, and [is] likewise more responsive to changes in attitude and more amenable to the [489 U.S. 538, 542] recognition and correction of their misperceptions in this respect." Landry v. Hoepfner, 840 F.2d 1201, 1209 (CA5 1988) (en banc), cert. pending, No. 88-5043.

Wherefore, on the basis of the above United States Supreme Court decissions the defendant respectfully and humbly requests that the Court of Appeals for the State of Mississippi **Reverse** the decission of the Okitibbeha Circuit Court Starkville Mississippi whose decission denied the defendant the right to a jury trial.

II. WHETHER THE DEFENSE COUNSEL'S FAILURE TO PRESENT A COHERENT AND CORRECT ARGUMENT WITH RESPECT TO THE DEFENDANT'S MOTION FOR A JURY TRIAL CONSTITUTE INNEFFECTIVE COUNSEL REPRESENTATION.

The defendant's attorney's statement that he thought that the Supreme Court rulling was that a defendant's right to jury trial was curtailed if he was not going to receive imprisonment was wrong. It is the length of imprisonment authorized by the Statute that is used and not the penalty actually imposed.. See ***Frank v. U.S. 395 U.S. 145***. Thus, he was not effective on this issue Nevertheless, the final decission rested with the circuit court judge.

III. WHETHER THE DEFENDANT AS A DOCTORAL STUDENT AT MISSISSIPPI STATE UNIVERSITY HAD THE CONSTITUTIONALLY PROTECTED RIGHT TO MAKE TELEPHONE CALLS TO AND COME TO HIS ACADEMIC DEPARTMENT TO ATTEND CLASSES, USE FACILITIES OPEN TO STUDENTS, CONSULT WITH MEMBERS OF THE FACULTY, ASSOCIATE AND HOLD ORAL DISCUSSIONS WITH FELLOW STUDENTS AT A TIME WHEN HIS ACADEMIC DEPARTMENT WAS OPEN TO THE PUBLIC (ABSENT ANY PROCESS / ORDER PROHIBITING HIM FROM DOING SO) ?

The defendant has the constitutionally protected right to make telephone calls to his academic department and come there to attend classes, consult with members of the faculty, use facilities that are open to students, associate with other fellow students, and speaking freely with them. The accuser's entire testimony was summarized in the transcript on page 15 at number 1, the accuser stated that the defendant was trying to get her attention by holding conversation with others loudly and saying to those people that she was a nice person, and such expression by the defendant was making her uncomfortable. See below.

So he would come to my office pretty frequently and attempt to get my attention, although other students -- there was four of us in the office. He would attempt to offer get my attention, and it was bothersome.

Q And how would he attempt to get your attention?

A Talking loudly to them about me, or saying something about me, how -- my personality, and I'm a nice girl, and just really being -- just making me uncomfortable.

Although the above statement by the accuser is unsupported and uncorroborated it is a constitutionally protected course of activity. The accuser's entire testimony is devoid of a date, time, and place of any incidence that would qualify as stalking. There was no allegation of assault or physical abuse, as a matter of fact the accuser testified that she was never hit by the defendant. See the transcript at page 22 at number 10 . There was no statement or allegation that the defendant sought sexual favors from the accuser or any other type of favors or used threats of any type. The accuser specifically made it clear that this case is not about sexual harrassment and that there was no sexual harrassment or demand for sex. See the transcript at page 26 number 1 - 8 . The bottomline is that the defendant's actions as alleged by the accuser were not criminal and were all constitutionally protected by the ***first, 13th, 14th and other amendments.*** The first amendment protects the defendant's freedom of association and freedom to speak, the 13th amendment is implemented through the ***Civil Right Acts of 1991,*** which provides the defendant the right to make and enforce contracts

including all rights and priviledges that come with such contractual agreement. Mississippi State University provides for freedom of inquiry and expression and considers that as fundamental to a University and to a democratic soceity. ***See excerpt below, rest is provided as exhibit "U".***

Academic Freedom and Responsibility - Freedom of inquiry and expression is fundamental to the idea of a university and to a democratic society. Mississippi State affirms this principle and vigorously defends it. At the same time, faculty are obligated to exercise good judgment, to maintain the highest professional and personal standards of intellectual integrity, and to ensure that the free exchange of ideas is marked by both accuracy and relevance of information to the subjects or issues under consideration. Mississippi State recognizes the value of diverse opinions in decision making and pursues its mission in an atmosphere of shared governance and open communication. Faculty and staff are involved in policy formulation and in imple-

There is no substantial evidence that the defendant's speeches if any at all were defamatory, obscene, or of fighting words. All persons have the constitutional right to be angry or happy, as long as they do not commit any crimes during the process.

IV. WHETHER THE FOLLOWING ELEMENTS AS DEFINED AND EXPLAINED IN THE PREVIOUS DECISSIONS OF THE UNITED STATES AND STATE OF MISSISSIPPI SUPREME COURTS WERE ESTABLISHED AND PROVEN BEYOND REASONABLE DOUBT.

a) The necessary element of Substantial Emotional Distress ?

b) The necessary element of Malice ?

c) The necessary element of "Wilful" ?

d) The element of criminal threat ?

e) Harrassment ?

The issues presented here are the the important and necessary elements that the state must establish and prove beyond reasonable doubt. This is not a sexual abuse case, rape or sexual harrassment case. The accuser herself made this point clear See the transcript on page at number below. Therefore, evidence must be substantial, any unsupported and uncorroborated testimony is insufficient See ***Flanagan v. State. 605 So 2d 753, 758 (Miss 1992).*** Due process requires the State to prove each element with substantial evidence, not by mere unsupported, uncorroborated non substantive testimony.

1. **SUBSTANTIAL EMOTIONAL DISTRESS :** In ***Sidney Wong v. John Stripling et al. 94 - CA- 01095 - SCT.*** (Emphasis). The Supreme Court of the State of Mississippi in order for one to prevail in a claim of emotional Distress the course of conduct complained about must be outrageous and extreme, and **there must be clear proof of injury as a matter of law.** The Statute 97 - 3- 107 (Stalking) requires the emotional Distress to be substantial (a lot more). The Mississippi Supreme Court went on to explain that it is not enough to allege or claim emotional distress. The Supreme Court citing the Restatement of Torts sec. 46. Made it clear that mere ***insults, threats, annoyances, petty oppression or other trivialities*** do not qualify as outrageous conduct. The Restatement as taken from Wong v. Stripling et al is presented on the next page, the rest is provided as ***exhibit "V"*** .

¶ 46. Nevertheless, the court is correct in its conclusion that the conduct here at issue does not rise to
the level of willful, wanton, malicious, or intentional wrong sufficient to evoke outrage or revulsion.
The
Restatement (Second) of Torts § 46 Cmt. d
provides as follows:

Extreme and outrageous conduct: The cases thus far decided have found liability only where the
defendant's conduct has been extreme and outrageous. It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by " malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim " Outrageous!"

The liability clearly does not extend to mere insults indignities, threats, annoyances, petty oppression, or other trivialities. The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where someone's feelings are hurt.

2. **MALICE:** In ***Hayden v. Foryt, 407 So. 2d 535, 536 (Miss. 1981).,*** and in ***Walter Eckman v. Cooper Tire and Rubber Company et al. 2003 - CA - 02223 - SCT.*** the Supreme Court of Mississippi stated clearly that the fact that expressions are angry and intemperate is not enough, the proof must go further to show that they are malicious. Ecerpt from this case is presented below the rest is provided as ***exhibit "X"***. Clearly the essential element of Malice was not established or proven beyond reasonable doubt. This Court further stated that if the defendant honestly believed the plaintiff's conduct to be such as he described it, the mere fact that he used strong words in describing it is no evidence of malice. *Id.* at 539. The fact that the expressions are angry and intemperate is not enough; the proof must go further and show that they are malicious. *Id.*

3. **WILFUL:** In other to establish a Wilful violation of a Statute the state must prove beyond reasonable doubt that the defendant was with knowledge that his conduct was unlawful and was undertaken with a bad purpose. See ***Silasie Bryan v. U.S.*** ***(Supreme Court 1998)*** and ***Ratzlaf v. U.S. 510 U.S. 135, 137 (1994).*** Excerpt presented below

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(a) When used in the criminal context, a "willful" act is generally one undertaken with a "bad purpose." See, e.g., Heikkinen v. United States, 355 U.S. 273, 279 . In other words, to establish a "willful" violation of a statute, the Government must prove that the defendant acted with knowledge that his conduct was unlawful. Ratzlaf v. United States , 510 U.S. 135, 137

4. **CRIMINAL THREAT:** No Criminal threat alleged, or established. The defendant did not threaten the accuser See exhibit accuser's testimony in the justice Court.

HARASSMENT: There was no harassment, the accuser did not testify to any specific activity that would qualify as a harrassment. The state did not specify any time, date, and place where an activity which constitutes a harrassment occurred. Again this is not a child abuse, or sexual abuse, or sexual case, it is a Stalking case which requires the State to present strong substantial evidence to support the accuser's testimony and then use the evidence to try and prove their case beyond reasonable doubt. None of the two other witnesses presented by the state, saw or observed a harassment, and they testified to that. See the transcript from justice Court presented next page. In a criminal proceeding the burden of proof is on the state.

V. WHETHER THE ACCUSER'S "I DON'T RECALL" AND SUDDEN LOSS OF MEMORY WITH RESPECT TO HER PREVIOUS TESTIMONY UNDER OATH IN THE JUSTICE COURT WHICH WAS INCONSISTENT WITH HER TESTIMONY IN THE IN THE CIRCUIT COURT MADE HER (THE ACCUSER) UNAVAILABLE FOR CROSS EXAMINATION AND THUS DEPRIVED THE DEFENDANT OF HIS SIXTH AMENDMENT RIGHT TO CONFRONT THE WITNESS AGAINST HIM ESPECIALLY WHEN SUCH TESTIMONY WAS USED BY THE PROSECUTION IN DIRECT EXAMINATION IN THE CIRCUIT COURT ?

In ***Hansen v. State 592 So. 2d 114, 133 (miss1991)*** and in ***94 - KA - 00569 COA,*** the Mississippi Supreme Court and Mississippi Court of Appeals respectvilly ruled that

"the general rule is that the prosecution may not use against the defendant the statement of a non-testifying witness."

On cross examination by the defendant's attorney (Farrow) she could not remember her testimony in the Justice Court . See the circuit court transcript at page 31 Line 1 - 16 , (presented below) Thus, she was not available or if she was her testimony is that of a non-testifying witness and such testimony should not have been used against the defendant.

LATEISHA CLAUDE WILLIAMS - CROSS-EXAMINATION 31

Court in this matter when Mr. Ude was found guilty of stalking you?

A Yes.

Q Do you recall at that hearing saying that you and Mr. Ude did go out to restaurants several times?

A I don't recall.

Q Like out to dinner? Do you recall that?

A I don't recall.

Q But you may have testified to that at the hearing in Justice Court?

A I don't remember today. On this day, I don't remember.

Q And do you remember testifying in Justice Court that you did come over to his apartment and pick him up several times, not just once?

A I don't remember.

VI. WHETHER THE CRIME OF STALKING WAS ESTABLISHED AND PROVEN BEYOND REASONALE DOUBT WHERE THERE WAS NO SUBSTANTIAL AND INDEPENDENT EVIDENCE (TAPES, VIDEO, EYE WITNESS TO A CRIME, ETC) PRESENTED AT TRIAL ? AND WHETHER THE DEFENDANT'S RIGHT TO SPEEDY TRIAL WAS VIOLATED.

In a criminal proceeding like this one, the burden of proof is on the State. The due process of the 14th amendment requires that the evidence used against a defendant be compelling specific, strong and substantial. Unsupported and uncorroborated testimony with respect to each element in a case is insufficient. See ***Flanagan v. State. 605 So. 2d 753, 758 (Miss 1992).*** No one testified that they observed or saw the defendant harass or stalk the accuser, the Mississippi State University Police officer (Police Officer) testified in the Justice Court that he did not uncover a stalking or a harassment incidence. The State did not present him as a witness in the Circuit Court. The only eye witness to the event of September 2004 Mr Srikanth Subramania was also not presented as a witness because his testimony contradicted the accuser's. The state chose those that have personal interest in the outcome of the case to come to court to simply recount some of the stories that the accuser told them. None of them observed a harassment or stalking.

The sixth amendment right to Speedy Trial does apply to Appeals de novo. The 270 days requirement started running when the appeal was filed. The delay was the state's fault.

VII. WHETHER THE TRIAL COURT ERRED BY DISALLOWING THE PRIOR TESTIMONY OF UNAVAILABLE EYE WITNESS AND THE SUBSEQUENT STATEMENT BY THE TRIAL COURT THAT THE PRIOR TESTIMONY OF AVAILABLE AND UNAVAILABLE WITNESSES WOULD NOT BE HELPFUL TO THE DEFENDANT IN HIS COURT (CIRCUIT COURT) SINCE IT DID NOT HELP THE DEFENDANT IN THE LOWER COURT (JUSTICE COURT) ?

The trial court committed a reversible error by not permitting the defendant to use previous testimony of an eye witness and that of the accuser. The Supreme Court of the United States made it clear in ***Mattox v. United States 156 U.S. 237 (1895)*** that admission of the prior testimony of an unavailable witness is permitted. This was reiterated in ***California v. Green 399 U.S. 149 (1970).*** The purpose of a de novo appeal is to try the case anew, and previous testimony made by witnesses under oath can be used by the defendant to defend himself. Statement made by the trial court that since the previous statement was not helpful in preventing conviction it would not be useful in the circuit court violates the defendant's due process right to appeal and to a fair hearing and depicts prejudice. The presclusion of the previous testimony of the accuser in the justice court and the testimony of Subramania violated due process and denies the defendant the right to use such statement to show inconsistencies in the accuser.s testimony.

CONCLUSION.

The Okitibbeha circuit court clearly committed a reversible error by denying the defendant his sixth amendment right to a jury trial. The Statute 97-3-107 (Stalking) carries a maximum punishment of 1 year inprisonment plus fines, and thus qualifies as a serious crime. The U.S. Supreme court made it clear in the cases cited by the defendant that decision on what constitutes a serious or petty is to be made by the legislature and is shown on the face of the statute as in this case. The defendant has the constitutionally protected right to come to his department and associate with others including the accuser as long no threats, fighting words, or physical abuse were used. The transcript is devoid of any criminal course of conduct, and the necessary elements were not established let alone proven beyond reasonable doubt. Finally, it is obvious that the verdict reached by the circuit court is not supported by the evidence. It is a well established fact that in Mississippi, the unsupported, uncorroborated testimony of the accuser is insufficient, and that the evidence must be strong and substantial. In this case there is no evidence suggesting that the defendant violated any laws. The accuser says one thing on direct, then contradicts it on cross examination.

Wherefore, the defendant respectfully and humbly request that Mississippi Court of Appeals Reverse the decission of Okitibbeha Circuit Court.

7/19/07

Bart Vela

7/23/07

Bart Vela

CERTIFICATE OF SERVICE.

Bart Ude.
Appellant
v. Case No. 2007 - KM - 00268 - COA.

State of Mississippi.
Appellee.

TO: Clerk's Office,

Dear Madam / Sir,

The defendant / Appellant in the above captioned matter hereby states that he served a copy of his brief to the Appellee at the address below and by first class mail.

MS attorney General's Office
P.o. Box 220
Jackson, MS 39205.

Gartin Justice Building
450 High Street
Jackson, MS 39201.

7/23/07
Date.

Bart Ude
Appellant.