THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of General Sessions

R. Keith Kelly, Circuit Court Judge

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SC Court of Appeals

Case No. 2016-GS-42-0169
Appellate Case No: 2016-001651

The State, County of Spartanburg,

Respondent,

v.

Danny Vega,

Appellant.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

Did the Court below err by failing to grant directed verdict when no evidence even alleged of central element of the offense in violation of the appellant's right to due process?

STATEMENT OF THE CASE

On January 20, 2016, an indictment was issued for appellant Danny Vega (hereinafter "Mr. Vega"). The matter was tried under a charge of violation of *Transportation of a Child under 16 years of Age/Custody Order* on July 14, 2016. Mr. Vega entered a plea of Not Guilty to this charge.

At both the close of the prosecution's case and again at the close of defendant's case, defendant's trial counsel moved for directed verdict in this matter.

At the conclusion of trial Mr. Vega was convicted on the aforementioned charge and sentenced to three years incarceration. On July 14, 2016 Notice of Appeal was submitted in this matter.

This appeal follows.

ARGUMENTS

I. BECAUSE EACH ELEMENT OF A CRIMINAL OFFENSE MUST BE PROVEN BEYOND A REASONABLE DOUBT, THE TRIAL COURT ERRED FAILED TO GRANT DIRECTED VERDICT WHEN PROSECTUION FAILED TO EVEN ALLEGE THE ELEMENT OF TAKING OR TRANSPORTING.

The Constitution prohibits the criminal conviction of any person except upon proof of guilt beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970).

The standard of proof beyond a reasonable doubt, said the Court, "plays a vital role in the American scheme of criminal procedure," because it operates to give "concrete substance" to the presumption of innocence, to ensure against unjust convictions, and to reduce the risk of factual error in a criminal proceeding. 397 U. S., at 363. At the same time, by impressing upon the factfinder the need to reach a subjective state of near certitude of the guilt of the accused, the standard symbolizes the significance that our society attaches to the criminal sanction and thus to liberty itself. *Id.,* at 372 (Harlan, J., concurring).

“It is axiomatic that a conviction upon a charge not made or upon a charge not tried constitutes a denial of due process. *Cole v. Arkansas*, 333 U.S. 196, 201; *Presnell v. Georgia*, 439 U.S. 14. These standards no more than reflect a broader premise that has never been doubted in our constitutional system: that a person cannot incur the loss of liberty for an offense without notice and a meaningful opportunity to defend. E. g., *Hovey v. Elliott*, 167 U.S. 409, 416-420. Cf. *Boddie v. Connecticut*, 401 U.S. 371, 377-379. A meaningful opportunity to defend, if not the right to a trial itself, presumes as well that a total want of evidence to support a charge will conclude the case in favor of the accused. Accordingly, we held in the Thompson case that a conviction based upon a record wholly devoid of any relevant evidence of a crucial element of

the offense charged is constitutionally infirm. See also *Vachon v. New Hampshire*, 414 U.S. 478; *Adderley v. Florida*, 385 U.S. 39; *Gregory v. Chicago*, 394 U.S. 111; *Douglas v. Buder,* 412 U.S. 430. The "no evidence" doctrine of *Thompson v. Louis*ville, 362 U.S. 199, thus secures to an accused the most elemental of due process rights: freedom from a wholly arbitrary deprivation of liberty." *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781 (1979)

The Court in *Thompson* explicitly stated that the due process right at issue did not concern a question of evidentiary "sufficiency." 362 U. S., at 199. The right established in *In re Winship*, however, clearly stands on a different footing. *Winship* involved an adjudication of juvenile delinquency made by a judge under a state statute providing that the prosecution must prove the conduct charged as delinquent which in *Winship* would have been a criminal offense if engaged in by an adult by a preponderance of the evidence. Applying that standard, the judge was satisfied that the juvenile was "guilty," but he noted that the result might well have been different under a standard of proof beyond a reasonable doubt. In short, the record in *Winship* was not totally devoid of evidence of guilt.

The constitutional problem addressed in *Winship* was thus distinct from the stark problem of arbitrariness presented in *Thompson v. Louis*ville. In *Winship*, the Court held for the first time that the Due Process Clause of the Fourteenth Amendment protects a defendant in a criminal case against conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." 397 U. S., at 364. In so holding, the Court emphasized that proof beyond a reasonable doubt has traditionally been regarded as the decisive

difference between criminal culpability and civil liability. *Id.,* at 358-362. See *Davis v. United States*, 160 U.S. 469; *Brinegar v. United States*, 338 U.S. 160, 174; *Leland v. Oregon*, 343 U.S. 790; *Cf. Woodby v. INS*, 385 U.S. 276, 285.

"The constitutional standard recognized in *Winship* was expressly phrased as one that protects an accused against a conviction except on 'proof beyond a reasonable doubt . . . .' In subsequent cases discussing the reasonable-doubt standard, we have never departed from this definition of the rule or from the *Winship* understanding of the central purposes it serves. See, e. g., *Ivan V. v. City of New York*, 407 U.S. 203, 204; *Lego v. Twomey*, 404 U.S. 477, 486-487; *Mullaney v. Wilbur*, 421 U.S. 684; *Patterson v. New York*, 432 U.S. 197; *Cool v. United States*, 409 U.S. 100, 104. In short, *Winship* presupposes as an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of **every** element of the offense." *Jackson* at 315. (emphasis added)

"After *Winship* the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. But this inquiry does not require a court to 'ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt.' *Woodby v. INS*, 385 U. S., at 282 (emphasis added). Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See *Johnson v. Louisiana*, 406 U. S.,

at 362. This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution. The criterion thus impinges upon "jury" discretion only to the extent necessary to guarantee the fundamental protection of due process of law." *Jackson* at 318-19

In the present case, the statute Mr. Vega is alleged to have violated is S.C. Code Annotated § 16-17-495 (A)(1). As charged to the jury in this matter § 16-17-495 (A)(1) reads "When a court of competent jurisdiction in this state or another state is awarded custody of a child under the age of sixteen years, or when custody of a child under sixteen years is established pursuant to statute, it is unlawful for a person with the intent to violate the court order to take or transport, or cause to be taken or transported, the child from the legal custodian for the purpose of concealing the child or circumventing or avoiding the custody order or statue." See Trial Transcript, p173, line 20 – p174, line 3.

The unlawful act explicitly stated in the statute is specifically the taking, transporting, or causing to be taken or transported, of the child in question. This taking or transporting is not merely an element of the offense, it is the central act which is the basis of the offense. Without this taking or transporting or causing the same, this offense has not been committed.

The prosecution presented testamentary evidence that the child was taken and transported by Ms. Liddy. The prosecution's witnesses explicitly testified that they discovered the child in Mr. Vega's presence, but equally explicitly testified that they did not see how the child arrived,

nor did the prosecution present any evidence that Mr. Vega caused the taking or transportation of the child. Trial Transcript p. 68, line 16 – p. 95, line 16; p. 95, line 22 – p. 109, line 19; p115, line 2 – p. 121, line 23; p. 150, line 6 – p 155, line 13. Nowhere in the evidence in this case is it even alleged that Mr. Vega took or transported the child.

"That the *Thompson* 'no evidence' rule is simply inadequate to protect against misapplications of the constitutional standard of reasonable doubt is readily apparent. '[A] mere modicum of evidence may satisfy a `no evidence' standard . . . .' *Jacobellis v. Ohio*, 378 U.S. 184, 202 (Warren, C. J., dissenting). Any evidence that is relevant that has any tendency to make the existence of an element of a crime slightly more probable than it would be without the evidence...could be deemed a 'mere modicum.' But it could not seriously be argued that such a 'modicum' of evidence could by itself rationally support a conviction beyond a reasonable doubt. The *Thompson* doctrine simply fails to supply a workable or even a predictable standard for determining whether the due process command of *Winship* has been honored." *Jackson* at 320

In the present case not even a 'modicum' of evidence was presented as to the element of taking or transporting. No evidence was presented, further taking or transporting was not even alleged except in the closing statement of the prosecutor. See Trial Transcript p. 166, lines 2-11.

Such closing statements are not evidence.

"The *Winship* doctrine requires more than simply a trial ritual. A doctrine establishing so fundamental a substantive constitutional standard must also require that the factfinder will rationally apply that standard to the facts in evidence. A 'reasonable doubt,' at a minimum, is one based upon 'reason.' Yet a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt, and the same may be

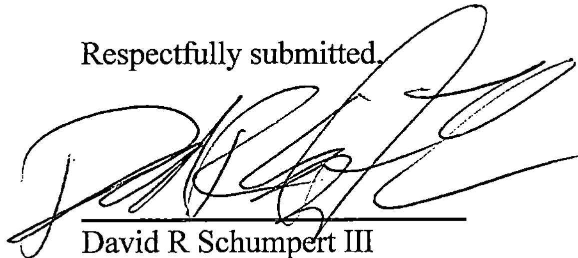
said of a trial judge sitting as a jury. In a federal trial, such an occurrence has traditionally been deemed to require reversal of the conviction. *Glasser v. United States*, 315 U.S. 60, 80; *Bronston v. United States*, 409 U.S. 352. See also, e. g., *Curley v. United States*, 81 U. S. App. D. C. 389, 392-393, 160 F.2d 229, 232-233. Under *Winship*, which established proof beyond a reasonable doubt as an essential of Fourteenth Amendment due process, it follows that when such a conviction occurs in a state trial, it cannot constitutionally stand." *Jackson* at 317

In the present case, Mr. Vega's conviction does not reach the standard required under the *Winship* doctrine. The element of taking or transporting was not even alleged in evidence, and further none of the prosecution witnesses testified as to the element of taking or transporting. With no evidence whatsoever of the element of taking or transporting it would be impossible for a rational trier of fact to conclude that the element of taking or transporting had been proven beyond a reasonable doubt. As such, per the Court's finding in *Jackson*, this conviction "cannot constitutionally stand" *Jackson* at 317.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court and dismiss all charges against Mr. Vega.

Respectfully submitted,



February 17, 2017

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The State, County of Spartanburg, Respondent,

v.

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CERTIFICATE OF SERVICE

I, David R Schumpert III, one of the attorneys for the Appellant in the above-styled action or an employee thereof, do hereby certify that I have served counsel below by depositing a copy of in the United States Certified Mail, postage prepaid, on February 17.2017, with the following documents:

1) **Initial Brief of Appellant;**
2) **Appellant's Designation of Matter to Be Included in Record on Appeal; and**
3) **Motion Requesting Permission to File Outside of Deadlines**

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RE: State of South Carolina, County of Spartanburg vs. Danny Vega,
Appellate Case Number: 2016-001651
General Session Case: 2016-GS-42-0169

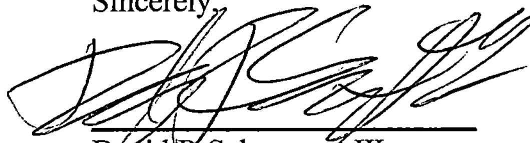
Dear Ms. Kitchings:

Enclosed for filing please find original and copies of the following documents:

1) **Initial Brief of Appellant;**
2) **Appellant's Designation of Matter to Be Included in Record on Appeal;** and
3) **Motion Requesting Permission to File Outside of Deadlines**

Please return any extra clocked copies to me in the included stamped, self-addressed envelope.

Sincerely,



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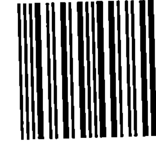

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