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IN THE

# Supreme Court of Virginia

**RECORD NO. 161346**

DAVID STANLEY JAMES PIJOR,

*Appellant,*

v.

COMMONWEALTH OF VIRGINIA,

*Appellee.*

**OPENING BRIEF OF APPELLANT**

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## Assignments of Error

I. The Court of Appeals erred by affirming the trial court's ruling that the Commonwealth was not estopped from proving that, prior to February 4, 2014, Pijor had seen the dog or had received information regarding the whereabouts of the dog.

Preserved by Defendant's Motion in Limine, Appx. at 3-8, and oral argument, Appx. at 250-288.

II. The Court of Appeals erred by affirming the trial court's ruling which allowed the Commonwealth to prove that Pijor had seen the dog or received information about the dog's whereabouts by using evidence of estopped facts, including evidence contradicting the estopped fact that Pijor did not possess the dog between September 6, 2013, and February 4, 2014.

Preserved by Defendant's Motion in Limine, Appx. at 3-8, and oral argument, Appx. at 250-288.

III. The Court of Appeals erred by affirming the trial court's ruling that the perjury indictment for Pijor's testimony (that he had not seen the dog and had received no information regarding the whereabouts of the dog) was not barred by the collateral estoppel and double jeopardy components of the Fifth and Fourteenth Amendments of the United States Constitution and the corresponding provisions of the Constitution of Virginia.

Preserved by Defendant's Motion in Limine, Appx. at 3-8, and oral argument, Appx. at 250-288.

IV. The Court of Appeals erred by affirming the trial court's conclusion that the evidence was sufficient to find Pijor guilty of perjury because the evidence at trial was circumstantial, was consistent with innocence, and was insufficient to prove beyond a reasonable doubt that Pijor committed perjury.

Preserved by Defendant's Renewed Motion to Strike and closing argument, Appx. at 378-80, 397-429.

V. This Court should overturn the holding in Sevachko v. Commonwealth that a perjury prosecution is not estopped when the defendant is acquitted based on the defendant's testimony that his conduct was innocent.

Preserved by Va. S. Ct. R. 5:17(c)(1); Appellant's Petition for Appeal in the Court of Appeals of Virginia, p. 46, n. 16.

## Statement of the Case

On February 4, 2014, Pijor stood trial for the September 6, 2013, larceny of a dog belonging to his ex-girlfriend Kristy Gooch. The Commonwealth's theory in the larceny trial was that Pijor stole and continued to possess and conceal Gooch's dog up until the date of the trial. Appx. at 69-70, 222- 24, 240-41. During the dog larceny trial, Pijor testified in his own defense. Appx. at 168-204. The jury acquitted Pijor of larceny of the dog. Appx. at 245.

Subsequently, on multiple dates, Gooch observed a man she believed was Pijor walking with her dog. The police began surveilling Pijor and, on April 29, 2014, the police stopped Pijor's vehicle and found the dog in the vehicle with Pijor. Appx. at 307-311. The Commonwealth obtained two new indictments against Pijor, one for perjury and one for grand

larceny of the dog. Pijor moved to dismiss the new grand larceny indictment on the basis of double jeopardy. The trial court granted Pijor's motion to dismiss the second larceny prosecution, and the Court of Appeals affirmed the dismissal. See Commonwealth v. Pijor, Record No. 0043-15-4 (May 26, 2015) (unpublished).

The perjury indictment was tried on September 22, 2015. Prior to trial, Pijor moved in limine to dismiss the perjury indictment on the basis that Pijor's prior acquittal of larceny of the dog collaterally estopped the Commonwealth from prosecuting Pijor for perjury. Appx. at 250-288. The trial court granted the motion in part and denied the motion in part, permitting the Commonwealth to proceed in the perjury trial only upon the following testimony from Pijor's February 4, 2014, trial:

> Q: At any point in time have you received information on where Ben might be?
>
> A: No, I haven't.
>
> Q: And have you seen the dog since September the 6th?
>
> A: No.

Appx. at 287-88.

The trial court, sitting without a jury, concluded that both statements by Pijor were false and found him guilty of perjury. Appx. at 437.

## Statement of Facts

### I. Facts relevant to the sufficiency of the evidence of perjury.[1]

Viewed in the light most favorable to the Commonwealth, the evidence in the perjury trial established that that during his prior trial for larceny of the dog of Kristy Gooch, Pijor was administered the truthfulness oath and gave the following testimony at the larceny trial:

> Q: At any point in time have you received information on where Ben might be?
>
> A: No, I haven't.
>
> Q: And have you seen the dog since September the 6th?
>
> A: No.

Appx. at 480-81 (Commonwealth's Exhibit 2).

Kristy Gooch testified that she and Pijor had a romantic relationship that ended in 2011. Appx. at 317-18. The relationship between Gooch and Pijor after their romantic relationship ended was "very tense and very stressful." Gooch was "having trouble breaking away from that relationship" because Pijor insisted on continuing their relationship. They

[1] It is analytically important to separate the evidence in this case because only the evidence presented in the perjury trial is relevant to the sufficiency of the evidence, but the entire record of the February 4, 2014, larceny trial is relevant to the double jeopardy/collateral estoppel issues presented.

were occasionally in contact until September 6, 2013, when Gooch's dog, "Ben," went missing. Appx. at 318.

On February 9, 2014 (five days after Pijor's acquittal at the larceny trial), Gooch and her boyfriend Tam Nguyen saw a man in a hoodie walking a golden retriever near her home. The dog was carrying an orange Frisbee and had the same gait, color, and size as Gooch's dog. Gooch and Nguyen could not positively identify the man or the dog, but believed that it was Pijor and Ben. Appx. at 321, 327-28, 343. On March 1, 2014, Gooch and Nguyen again saw the same man walking the same dog, and again could not positively identify the man or the dog. Appx. at 328-29, 342.

On March 8, 2014, Gooch and Nguyen observed "the same man in the same hoodie with a golden retriever and an orange Frisbee." Gooch called out to the dog: "Ben, Ben." The dog immediately dropped the Frisbee and tried to pull toward Gooch. Appx. at 331-32, 337. On this occasion, Gooch and Nguyen were able to identify the man as Pijor and the dog as Ben. Appx. at 322-24, 331, 337. Pijor ran away with Ben. Appx. at 323.

Gooch reported each incident to Fairfax County Police Detective Jacqueline Smith. Appx. at 332-333. Smith obtained a warrant to install a GPS tracking system on Pijor's car, and installed the tracking unit on March

10, 2014, without Pijor's knowledge. Appx. at 307, 313. From March 10, 2014, to April 29, 2014, Pijor was tracked with GPS and was surveilled by police officers. Appx. at 314, 325.

On April 26, 2014, Nguyen observed Gooch's dog inside Pijor's vehicle at a shopping center. Appx. at 337. Gooch contacted Detective Smith about the incident at the shopping center, and Smith then surveilled Pijor's vehicle on April 29, 2014. Appx. at 307-309. Pijor entered his vehicle and drove a block from his residence. Smith approached Pijor's vehicle and discovered a dog, later identified as Ben, in the back seat of the vehicle. The back seat also contained a blanket covered in dog hair, a dog bowl, dog food, water, and a leash. Appx. at 310.

When questioned by Detective Smith, Pijor told Smith that he found the dog. When Smith asked Pijor when he found the dog, Pijor did not respond. Pijor then stated that he was the only person that looked for the dog and that he had put up flyers. Appx. at 310.

Pijor's father testified that Pijor was living with him at his home in Oakton, VA, for the entire period between September 6, 2013, and February 4, 2014. The Pijor home was four to six miles from the locations that Gooch claimed to have seen Pijor walking the dog. Pijor stayed with his father at least 90% of the time during that span and they saw each

other nearly every day. Appx. at 361-62. Pijor's father never saw Gooch's dog or an orange Frisbee during that time. Appx. at 363. Pijor's father testified that the Pijor family owns two dogs and therefore Pijor has dog food and leashes available to him. Appx. at 363-64. There was nothing indicating the presence of a dog in Pijor's car prior to February 4, 2014. Appx. at 364-65.

The trial court conducted its own examination of Pijor's father. In response to the Court's questions, Pijor's father testified that after Pijor was arrested, the two of them discussed the situation. Appx. at 370. During that discussion, Pijor did not tell his father specifically when he had found the dog but said it was "sometime before [his arrest on April 29, 2014]." Appx. at 371. Pijor told his father that Pijor kept looking for the dog after the larceny trial because he had raised the dog with Gooch when they lived together in Colorado. Pijor told his father that Pijor loved the dog and that the Gooches would not look for the dog because they believed that Pijor stole it. Pijor insisted to his father that he did not steal the dog. Appx. at 371-72. Pijor's father testified that he was not aware of any place that Pijor could have kept the dog from March 2014 until the dog was recovered by Detective Smith on April 29, 2014. Appx. at 372.

The defense introduced into evidence page 157, line 22, through page 158, line 7, of the transcript of Pijor's February 4, 2014, larceny trial. Appx. at 377-78. In that transcript, Pijor explained that he looked for the dog by visiting animal shelters and that he planned to distribute posters to publicize that the dog was missing, but that the police told him "it was not [his] place to put those posters up" and that he "was told not to. . .". Appx. at 482-83.

At the conclusion of all the evidence Pijor moved to strike, arguing that the perjury case was circumstantial and that a reasonable hypothesis of innocence existed because Pijor might have found the dog after February 4, 2014. The defense emphasized that there was credible evidence that Pijor was looking for the dog before and after his February 4, 2014, larceny trial. Pijor noted that there was no direct evidence proving that Pijor had seen the dog or had received any information about the dog between the day the dog went missing (September 6, 2013) until the day he testified in his larceny trial (February 4, 2014). The trial court denied Pijor's motion to strike. Appx. at 378-80.

The Commonwealth argued in closing that Pijor's theory of innocence was not reasonable because it was unbelievable that a dog with tags could be missing for nearly five months and that Pijor would be the person who

coincidentally found the dog sometime between February 4, 2014 and February 9, 2014. The Commonwealth claimed that Pijor had a "motive to hide Ben from Kristy, given the tumultuous end of their relationship." Appx. at 396-97. The Commonwealth concluded its argument by stating: "Every piece of evidence this court has heard points to the defendant having possession and knowledge of where that dog Ben is, long before that February 4th trial date, and that contradicts the testimony he gave in that trial." Appx. at 398.

Pijor argued that no direct evidence proved that Pijor had the dog before February 4, 2014. Pijor reasoned that because he might have gained possession of the dog at any time between September 6, 2013, and February 9, 2014, there was no basis – other than speculation – for the Court to conclude that Pijor gained possession prior to February 4, 2014. Consequently, the Commonwealth's evidence failed to exclude the reasonable theory of innocence that Pijor found the dog *after* February 4, 2014. Appx. at 399-429.

The Court made several important findings about the evidence during closing arguments. First, the trial Court found that it could not infer consciousness of guilt or any other incriminating conclusion from the fact that Pijor did not answer when Detective Smith asked Pijor when he found

the dog. Appx. at 388-89. Second, the trial court acknowledged that the stolen property inference did not apply to prove when the defendant came into possession of the property. Appx. at 351-52. Third, the trial court found that there was no evidence that Pijor took the dog out of town on the day it went missing. Appx. at 385. Fourth, the trial court found that even if Pijor lied to his father about when he found the dog, that lie did not add to the quantum of evidence indicating that Pijor was guilty in this case.[2] Appx. at 390-92.

The Commonwealth argued that the Court could infer that Pijor lied during his February 4, 2014, trial testimony because he was willing to lie to his father about when he found the dog. The Court ruled that such an inference was improper character evidence of propensity to lie. Appx. at 391-95.

Without explaining any other findings of fact, the trial Court found Pijor guilty of perjury with respect to both allegedly false answers given by Pijor during the larceny trial. Appx. at 433, 437.

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[2] The trial court's finding that no negative inference could be drawn from the allegation that Pijor lied to his father about when he found the dog is well-supported by the law. See Porter v. Commonwealth, 17 Va. App. 58, 63 (1993); Hyde v. Commonwealth, 217 Va. 950, 955 (1977).

## II. Facts relevant to collateral estoppel.

At the larceny trial, the Commonwealth established its theory of the case in its opening statement that Pijor stole the dog from the Gooches' home, and prevented its return by *continuing to possess and conceal Ben afterward*. Appx. at 69-70. The Commonwealth concluded its case by arguing the same theory in its closing statements. Appx. at 223-224, 240-241.

The Commonwealth presented the testimony of Kristy Gooch and her mother, Patti Gooch, to establish that on September 6, 2013, Pijor came to the Gooch residence uninvited and entered the house using a key that the Gooches kept hidden the yard. Pijor had not been invited to the Gooch residence in several years. Pijor entered the home and was seen walking through the house with Ben the dog. When Patti Gooch saw Pijor, she told him to leave and said that she was calling the police. Pijor left the house and drove away. Once Pijor left, Patti Gooch looked for Ben and Ben was gone. The Gooches never searched for Ben because they believed that Pijor "took him." Appx. at 132-33. This belief was rooted in the fact that, "in July or August" of 2013, Gooch's efforts to cut off contact with Pijor led Pijor to threaten Gooch, to wit: "karma took too long and that he would make

sure bad things would happen to me. And he said it would take a day to take away everything that I cared about." Appx. at 79.

Pijor called his father to testify that Pijor was staying at his father's house for most of the time between September 6, 2013, and the trial, and that Pijor's father never saw Ben during that time. Pijor's father also testified that he observed Pijor's efforts to locate Ben the dog, which Pijor undertook because the Gooches assumed that Pijor had Ben. Appx. at 165-66.

The only other defense witness was Pijor. Pijor admitted that he entered the Gooch home without permission and that Patti Gooch told him to leave because she was calling the police. Pijor further admitted that the dog followed him out of the Gooch home and to the edge of the Gooch property, where Pijor left the dog and drove away. Pijor testified that Ben would run after people and other animals, and that Ben had run away in the past. Pijor insisted that he "hadn't even known [Ben] was missing" until he was contacted by the police, and that he "repeatedly visited the Fairfax County animal shelter ... [and] prepared posters" in order to find Ben, and that he was admonished by police "[t]hat it was ... not [his place] to do so." Pijor ended his testimony by stating that he had not seen Ben or received

information about Ben's whereabouts since September 6th. Appx. at 175-78.

On cross-examination the Commonwealth attacked Pijor's testimony about the last time he saw Ben and his alleged search efforts. First, the Commonwealth asked why Pijor did not attempt to put Ben back in the house as he was leaving. Pijor explained that it was basically "impossible" because of how they exited the house, because of the excited mood Ben was in, and because Pijor's overriding concern was to "leave as quickly as possible" after Patti Gooch ordered him to leave and stated that she was calling the police. Appx. at 198-201. The Commonwealth also attacked Pijor's testimony that he had a pre-planned trip to Ocean City on September 6th and Pijor's assertion that he had turned his phone off during the trip in the hope that "cooler heads would prevail if [he] let this misunderstanding subside." Appx. at 201-203. Pijor explained that he offered to return immediately to prove that he did not have the dog and to assist in the search, but that the police told him that his return would not prove anything and that he "should stay away." Appx. at 203-04.

The jury instructions in the larceny trial specifically directed the jury in its credibility determinations to consider whether any witness had committed perjury:

> [Y]ou are the judges of . . . the credibility of the witnesses.... You may consider . . . *whether they have knowingly testified untruthfully as to any material fact in the case….*[3] From these things and all the other circumstances of the case, you may determine which witnesses are . . . believable and weigh their testimony accordingly.

Appx. at 21516 (emphasis added). During closing arguments, the Commonwealth specifically applied that instruction to Pijor's account of Ben's disappearance:

> He's already admitted to you that the dog left with him. It's up for you to decide what happens to that dog. Whether you believe in fact that Defendant's testimony that he left the dog at the edge of the property and then the dog just simply vanished. *The Commonwealth certainly submits that that was incredible testimony . . . .*

Appx. at 220-21 (emphasis added). The Commonwealth then asserted that the *only* reasonable theory was that Pijor stole Ben and prevented Ben's return. Appx. at 223-24, 240-41.

Like the Commonwealth, Pijor's attorney began her discussion of the evidence by arguing that: "you have to decide who was telling you the truth here today, [Pijor or Gooch] . . . ." Appx. at 227. Next, Pijor's attorney extensively discussed the credibility of Pijor's account in contrast to the

[3] The italicized statement contains all of the elements of perjury. See Va. Code § 18.2-434.

Commonwealth's witnesses. Appx. at 227-34. The jury acquitted Pijor. Appx. at 243-45.

During the perjury trial, the Commonwealth's evidence that Pijor had seen the dog or received information regarding its whereabouts consisted entirely of evidence showing that Pijor possessed Ben *after* his testimony at the larceny trial. The Commonwealth opened its case by asserting that the trial court should "infer from his possession of the dog four days after the trial that he was in possession of the dog at the time of trial." Appx. at 280. The Commonwealth closed its perjury case by arguing that it had proven the falsity of Pijor's testimony because "every piece of evidence that the court has heard points to the defendant having possession and knowledge of where that dog Ben is long before the February 4th trial date. . . ." Appx. at 398.

## Argument

### I. The evidence was insufficient as a matter of law to prove beyond a reasonable doubt that Pijor committed perjury.

#### A. Standard of review

Whenever an appellant challenges the sufficiency of the evidence, the court "must view all the evidence in the light most favorable to the Commonwealth and accord to the evidence all reasonable inferences fairly

deducible therefrom." Traverso v. Commonwealth, 6 Va. App. 172, 176 (1988). However, whether a criminal conviction is supported by evidence sufficient to prove guilt beyond a reasonable doubt is not a question of fact but one of law." Bridgeman v. Commonwealth, 3 Va. App. 523, 528 (1986). Questions of law are reviewed *de novo* on appeal. Lawlor v. Commonwealth, 285 Va. 187, 240 (2013). The trial court's findings of fact are binding on appeal unless "plainly wrong or without evidence to support" them. Grattan v. Commonwealth, 278 Va. 602, 617 (2009).

**B. The evidence was insufficient to prove beyond a reasonable doubt that Pijor saw the dog or received information about the dog's whereabouts prior to his testimony at the larceny trial.**

The Commonwealth's evidence was insufficient to prove beyond a reasonable doubt that Pijor had seen the dog or received information about the dog's whereabouts prior to his testimony on February 4, 2014. This Court recently reiterated the standard of reasonable doubt in wholly circumstantial cases:

> When we review the sufficiency of circumstantial evidence necessary to sustain a conviction we have said that: If the proof relied upon by the Commonwealth is wholly circumstantial, … then to establish guilt beyond a reasonable doubt all necessary circumstances proved must be consistent with guilt and inconsistent with innocence. They must overcome the presumption of innocence and exclude all reasonable conclusions

> inconsistent with that of guilt. To accomplish that, the chain of necessary circumstances must be unbroken and the evidence as a whole must satisfy the guarded judgment that both the *corpus delicti* and the criminal agency of the accused have been proved to the exclusion of any other rational hypothesis of innocence and to a moral certainty.

Wright v. Commonwealth, 292 Va. 386, 396 (2016) (citations omitted).

"[T]he evidence, viewed in the light most favorable to the Commonwealth, must go further than to create a mere suspicion or *probability* or guilt…." Stamper v. Commonwealth, 220 Va. 260, 272 (1979) (emphasis added).

The Commonwealth's evidence in this case merely established inadequate statistical probability. The evidence at the perjury trial was that the dog "went missing" on September 6, 2013. [4] Appx. at 319. No direct evidence was offered to prove that Pijor saw the dog or received information about its whereabouts prior to his testimony on February 4, 2014. The Commonwealth acknowledged that its evidence was entirely circumstantial. Appx. at 260. The trial court found that because the dog had not been proven stolen, the "recent possession" larceny inference did not apply in this case to prove that Pijor had the dog before February 4,

[4] Dogs obviously differ from inanimate property because they move of their own volition and are commonly known to cause themselves to go missing. This was Pijor's defense theory in the original larceny trial. The judge at the perjury trial ruled that the Commonwealth was barred by collateral estoppel from proving during the perjury trial that Pijor stole the dog.

2014. Appx. at 351-52; See Gravely v. Commonwealth, 86 Va. 396, 401 (1889) (Commonwealth must prove theft to rely upon the inference that the possessor of a stolen object was the thief).

For these reasons, the Commonwealth's case relied solely upon the theory that Pijor *found* the dog sometime between when it went missing on September 6, 2013, and when Pijor was seen in possession of it on February 9, 2014. During its opening statement the Commonwealth affirmed that it would ask "the court to infer from [Pijor's] possession of the dog four days after the trial that he was in possession of the dog at the time of trial." Appx. at 280.[5] The Commonwealth asserted this theory again during its closing statement. Appx. at 381. The trial court offered no other explanation for its eventual conclusion that Pijor was guilty of perjury.

The question of the sufficiency of the evidence in this case boils down to whether proof that the defendant possessed an object on "day six" proves beyond a reasonable doubt that the defendant possessed the same object on or before "day one." Without evidence that the object was stolen - and the accompanying inference that the possessor of a stolen object is the thief - the answer is plainly "no."

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[5] The Commonwealth also stated this position during argument of Pijor's motion in limine. Appx. at 260.

The Court's conclusion that Pijor found the dog *before* February 4th rather than *after* February 4th was utter speculation. The fact that there are many more days before February 4th than after it does not amount to evidence which "excludes all reasonable conclusions inconsistent with that of guilt," nor is such evidence "consistent with guilt and inconsistent with innocence." Wright, 292 Va. at 396. Rather, the evidence merely established statistical probability below the threshold necessary to exclude a reasonable theory of innocence.

A reasonable hypothesis of innocence existed and flowed from the evidence: Pijor renewed his search after his acquittal and found the dog. No evidence, direct or circumstantial, showed when Pijor came into possession of the dog. The dog at issue in this case knew Pijor and it is reasonable to infer that the dog would have responded to Pijor's scent and call. The evidence at trial showed that Pijor searched for the dog, even though he was told not to by the police.

In this case, "the circumstances of motive, *time*, place, means, and conduct [did not] all concur to form an *unbroken* chain which links the defendant to the crime beyond a reasonable doubt." Bishop v. Commonwealth, 227 Va. 164, 169 (1984) (emphasis added). Therefore,

the trial court impermissibly speculated to reach its conclusion that Pijor committed perjury.[6]

## II. The trial court erred by ruling that the perjury indictment was not barred by the collateral estoppel component of the Fifth Amendment.

### A. Standard of review

Fifth Amendment double jeopardy claims based on the doctrine of collateral estoppel are mixed questions of law and fact which are reviewed *de novo* on appeal. Commonwealth v. Davis, 290 Va. 362, 368-69 (2015). This Court is "bound by the underlying factual issues as determined by the fact finder unless they are plainly wrong or unsupported by the evidence." Id. "When a defendant seeks to invoke collateral estoppel, he or she bears 'the burden of proving that the precise issue or question he seeks to

[6] Pijor's conduct in keeping the dog until April 29, 2014, and possibly misleading others about that fact does not contribute to the quantum of evidence regarding when he came into possession of the dog. See, e.g., Littlejohn v. Commonwealth, 24 Va. App. 401, 409-14 (1997) (reversing defendant's conviction as principal in the second degree to murder because the evidence of the defendant's evasive conduct after his co-defendant committed murder did not establish guilt and ultimately required the jury to speculate about whether the defendant knew that his co-defendant was going to commit murder before the murder happened.).

preclude was raised and determined in the first action.'" Id. (citing Clodfelter v. Commonwealth, 218 Va. 98, 106 (1977)).

**B. The perjury prosecution violated the collateral estoppel bar.**

"In a criminal context, collateral estoppel is the doctrine of issue preclusion based upon the Fifth Amendment's protection against double jeopardy, which has been recognized as a constitutional guarantee applicable to state prosecutions." Davis, 290 Va. at 369. Collateral estoppel does more than just bar a second prosecution of the same offense. When the Commonwealth attempts a second prosecution by charging a different offense, collateral estoppel also "protects the accused from attempts to relitigate the facts underlying a prior acquittal." Simon v. Commonwealth, 220 Va. 412, 415-16 (1979) (quoting Brown v. Ohio, 432 U.S. 161, 165 (1977)). Thus, "an acquittal in a prior trial preclude[s] the Commonwealth from offering evidence in a subsequent trial upon *any* issue of fact which had been necessarily decided by the acquittal." Rhodes v. Commonwealth, 223 Va. 743, 749 (1982) (emphasis added). "The Fifth Amendment, as interpreted in Ashe v. Swenson, bars relitigation of an issue already decided, *no matter how much additional evidence the government may wish to introduce at a second proceeding*." United States

v. Castillo-Basa, 483 F.3d 890, 903 (9th Cir. 2007) (emphasis added) (citing Harris v. Washington, 404 U.S. 55, 56-57 (1971) (rejecting the government's argument that re-trial was permissible because the first jury did not hear all of the available evidence that would be presented to the second jury).

For collateral estoppel to apply "the following requirements must be met: (1) the parties to the two proceedings must be the same, (2) the issue of fact sought to be litigated must have been actually litigated in the prior proceeding, (3) the issue of fact must have been essential to the prior judgment, and (4) the prior proceeding must have resulted in a valid, final judgment against the party against whom the doctrine is sought to be applied." Glasco v. Ballard, 249 Va. 61, 64 (1995). In this case the parties are the same and there is a valid, final prior judgment against the Commonwealth from the February 4, 2014, larceny trial. Requirements 1 and 4 are therefore met.

With respect to element 2, a factual issue is "actually litigated" for the purposes of collateral estoppel so long as one party puts the matter at issue with supporting evidence. TransDulles Ctr. v. Sharma, 252 Va. 20, 22-23 (1996). Collateral estoppel applies to a fact even if the opposing party makes no effort to contest it. Id. at 24 (Holding that a default

judgment was sufficient to establish collateral estoppel because the plaintiff presented evidence on the issue in the first trial, and concluding that "[w]e disagree with the tenant's argument that before an issue may be "actually litigated" in a court proceeding, the defendant must personally appear at the hearing and contest the matter."). Therefore, all of the factual matters that Pijor sought to preclude at the perjury trial were "actually litigated" at the prior larceny trial.

The question at issue in this appeal is element 3 of the collateral estoppel test. The question of whether a fact was "essential to the judgment" is more commonly referred to in the case law as whether the fact was "necessarily decided" by the factfinder in the prior case. The protection of collateral estoppel extends to any fact necessarily decided in the prior trial, regardless of whether the factual issue was an element of the previously acquitted offense or of the new offense. See Rhodes, 223 Va. at 749; Simon, 220 Va. at 417 ("We conclude that, under the weight of authority and the principles set forth in Ashe, the Commonwealth is barred from introducing evidence to prove an offense for which a defendant has been previously acquitted, even though the facts necessarily resolved in the acquittal are not dispositive of an element of the offense charged in the second trial."); Castillo-Basa, 483 F.3d at 900 n.7 (stating that it does not

"follow, as a matter of logic, that when an issue is *not* an element of an offense, then that issue was *not* necessarily decided . . . . [w]e have often held that an issue was 'necessarily decided' at a trial even when the issue was not an element of the offense in question.").

In Ashe v. Swenson, the United States Supreme Court explained how appellate courts must view the record of a general verdict of acquittal in a criminal case to determine what facts were "necessarily decided:"

> The rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration. The inquiry must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings. Any test more technically restricted would, of course, simply amount to a rejection of the rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal.

397 U.S. 436, 444 (1970).

Viewed under the controlling legal standard, the trial record of Pijor's larceny acquittal establishes that the jury necessarily decided five distinct facts, relevant here, in Pijor's favor.

### 1. The larceny jury necessarily decided that Pijor testified truthfully during the larceny trial.

No jury would have acquitted Pijor of the dog larceny unless it believed his testimony. Prior to his explanation, the evidence of his guilt was overwhelming: on September 6, 2013, Pijor entered the Gooch home uninvited using a key that Pijor knew the Gooches kept hidden in the yard; Pijor was seen by Patti Gooch walking through the house and toward the exit with the dog immediately before it went missing; and, according to the Gooches, Pijor had a motive to take the dog because he had vowed to "make sure bad things would happen to [Gooch]" and to "take away everything [Gooch] care[d] about." Appx. at 79. Pijor admitted during his testimony in the larceny trial that the dog followed him out of the house. Viewed with "realism and rationality," Ashe, 397 U.S. at 444, the record establishes that Pijor's acquittal depended upon the jury crediting his innocent explanation that he left the dog on the edge of the property and that Pijor had not seen the dog since then. If the jury had not believed Pijor's testimony, then the only rational inference for the jury to make was

that Pijor had lied to conceal his guilt. See Covil v. Commonwealth, 268 Va. 692, 695-96 (2004).[7]

Any other theory of why Pijor was acquitted in the larceny trial is "hypertechnical" and "[un]realistic," and must be disregarded by this Court's analysis of the collateral estoppel issue. Ashe, 397 U.S. at 444. Consequently, the larceny jury necessarily decided that Pijor's testimony was truthful.

United States v. Nash is strikingly similar to Pijor's case. 447 F.2d 1382, 1385 (4th Cir. 1971). Nash was accused of mail theft. The government's key evidence was three 25-cent coins that had been marked and placed in an envelope at the post office. The marked coins were found in Nash's possession shortly after she accessed the mailbox and investigators found the relevant parcel missing from the mailbox. Nash testified that she did not steal the parcel that contained the coins. Nash

[7] "The inference of guilty knowledge arising from an accused's possession of recently stolen property may be repelled by a credible explanation, but the trier of fact is under no obligation to accept an account it finds unworthy of belief. In cases of this kind, when a defendant's 'hypothesis of innocence" is rejected as unreasonable, evidence of his possession of recently stolen goods is sufficient to support a conviction. *Further, a fact-finder, having rejected a defendant's attempted explanation as untrue, may draw the reasonable inference that his explanation was made falsely in an effort to conceal his guilt.*" (emphasis added).

claimed that she had obtained the coins from a change-making machine in the post office. The Fourth Circuit held that the jury's acquittal of Nash necessarily decided that her explanation was truthful, and the subsequent perjury prosecution was therefore estopped:

> Following the prescriptions of Sealfon and Ashe, we conclude that the jury in the first case undoubtedly passed upon the believability of Estelle Nash's statements made under oath. The jury may have been in error, but certainly it appraised the defendant's credibility. It is inconceivable that there would have been an acquittal if the jury had not accorded truth to her testimony.
>
> Of course, the Government did not have to prove that Nash had not obtained the coins [from a change machine] as she explained, but it did have the burden of establishing that she had taken the letter containing the coins from the mail. The change machine explanation was part of her defense and had to be weighed by the jury. Consequently, it cannot have been simply a collateral issue. While she was under no obligation to prove that the coins had not come from the mail box, still when her story was adduced, it created a conflict with the Government's proof. There were but two conflicting explanations of her possession to be considered. Thus, the jury "necessarily" had to pass upon the truthfulness of her account. The issue was "crucial" and once adjudicated, its redetermination in a trial for [perjury] is estopped.

Id.

The importance of Nash's testimony in her larceny trial is analogous to the importance of Pijor's testimony in his larceny trial. Both were the sole explanations of innocence against the allegation that each defendant stole and *continued to possess* the stolen property. Thus, in both cases, the

Defendant's explanation created a binary conflict with the prosecution's case, and undoubtedly had to be credited by the jury as true in order to reach a verdict of acquittal.

Pijor's perjury trial judge denied the collateral estoppel motion based on the "hypothetical[ ]" scenario that the jury possibly could have acquitted Pijor even if it thought "the day before the testimony at the trial, the dog could have wandered onto [Pijor's] property and [Pijor] saw the dog, and then lied in court about not having seen the dog." Appx. at 277. Such "hypertechnical" analysis is precisely what Ashe forbids because it takes an unrealistic view of how the acquitting jury viewed the evidence and what the jury necessarily decided. Ashe, 397 U.S. at 444. Moreover, the evidence at Pijor's perjury trial did not stay within the narrow confines of the trial court's hypertechnical theory, thus requiring reversal of the conviction.

Under similar circumstances, the Supreme Court of Illinois emphasized that the Fifth Amendment's protection cannot be so easily evaded:

> The State seeks to elude [the estoppel argument] but it is on a ground that we consider unrealistic and hypertechnical. The State speculates that the trial court at the burglary trial may have considered that the defendant did in fact enter the Marshall garage, but formed an intent to commit a theft only after he had entered. Thus, it is contended that the defendant technically was not guilty of

> burglary but collateral estoppel is not available to him as a bar to prosecution for perjury. This reasoning is forced. As [Ashe] observed . . . [t]he inquiry must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings.

People v. Ward, 381 N.E.2d 256, 72 Ill.2d 379, 386 (Ill. 1978) (internal citations and quotations omitted). See also Johnson v. Estelle, 506 F.2d 347, 352 (5th Cir. 1975) (noting that, typically, "ingenious semantic puzzles and fantastic hypotheticals emanate from the supplications of defendants," but "fantastic hypotheticals introduced by the state to avoid the defense of double jeopardy are subject to a different ["rational jury"] standard.").

For these reasons, the truthfulness of Pijor's testimony was necessarily decided by the larceny trial jury, and the trial court erred by concluding that the truthfulness of Pijor's testimony was not an estopped fact.

**2. The larceny jury necessarily decided that Pijor did not steal the dog.**

This issue has not, so far, been disputed by the Commonwealth, and the trial court concluded that the Commonwealth was estopped by Pijor's prior acquittal from proving during the perjury trial that Pijor stole the dog.

### 3. The larceny jury necessarily decided that Pijor did not possess the dog prior to his testimony at the larceny trial.

In the larceny trial, the Commonwealth's sole theory was that Pijor stole *and continued to possess the dog* from the time it went missing until he testified on February 4, 2014. Pijor's continuing possession of the dog was essential to the Commonwealth's theory in the larceny trial because (1) it explained why the dog had not returned to its owners and (2) it rebutted Pijor's explanation that the dog must have gotten lost on its own.

"[L]arceny is a continuing offense." Moehring v. Commonwealth, 223 Va. 564, 568 (1982). The evidence proved that Pijor knew the dog, that Pijor knew that the dog's owners wanted the dog returned, and that Pijor knew that the owners believed that Pijor stole the dog. The evidence further showed that Pijor had a motive to steal the dog because he had vowed to take away everything that Gooch cared about. The evidence showed that Pijor had the means to steal the dog because he entered the Gooch home without permission using a hidden key that he knew about from his time dating Kristy Gooch. Finally, the evidence showed that **only** Pijor had the opportunity to steal the dog because Patti Gooch testified that she saw Pijor in her house with the dog just moments before it went missing. Pijor admitted that the dog accompanied him to the edge of the

Gooches' property. Pijor did not assert that he had a claim of right to the dog, or that he otherwise lawfully possessed it.

Based on this trial record, no rational jury would acquit Pijor if the jury believed that Pijor possessed the dog at any time between September 6, 2013, and his testimony on February 4, 2014.[8] Such possession by Pijor was the essence of the Commonwealth's case, and this Court must consider the issue of collateral estoppel in light of the theories of the case presented by both parties. See Wheatley, 286 F.2d at 520-21 ("It follows by the government's interpretation of its own case that the receipt of money from the named bootleggers was a vital part of each crime charged and a necessary proof in the successful prosecution of each case. The issue cannot be re-tried as a perjury. . . ."); McDonald v. Wainwright, 493 F.2d 204, 206 (5th Cir. 1974) (government's proposed alternative basis for defendant's acquittal was unrealistic, especially in light of the fact that "the state did not try its case on that theory.").

The Commonwealth essentially put on a "dog-napping" case. By acquitting Pijor of larceny the jury *necessarily decided* that Pijor did not

[8] See Commonwealth v. Pijor, 2015 Va. App. Lexis 178 at *7-8, Rec. No. 0043-14-4 (May 26, 2015) (discussing this specific larceny) (quoting Hope v. Commonwealth, 10 Va. App. 381, 387 (1990) and Dunlavey v. Commonwealth, 184 Va. 521, 525 (1945)).

possess the dog between September 6, 2013, and February 4, 2014. The Commonwealth was therefore barred from proving in the perjury trial that Pijor possessed the dog prior to his testimony on February 4, 2014.

**4. The larceny jury necessarily decided that Pijor had not seen the dog and that Pijor had not received any information about the dog's whereabouts prior to his testimony at the larceny trial.**

The issue of whether Pijor had seen the dog or knew its whereabouts was litigated and decided in the larceny trial. Viewed in the context of the entire trial record, Pijor's testimony that he had not seen the dog and had no information regarding its whereabouts was plainly meant to rebut the theory, advanced by the Commonwealth in its opening statement, that Pijor continued to possess the dog up to the date of the trial. This issue was important enough to the outcome of the trial that Pijor offered the testimony of his father to establish that the dog had not been on the Pijor property where they both lived.

There are three conceivable theories that could explain how Pijor might have seen the dog or learned of its whereabouts between September 6, 2013, and the date of his testimony. The first theory is that Pijor stole the dog. At the perjury trial, the trial court ruled that this theory was barred by collateral estoppel.

The second theory is that someone else stole the dog and showed the dog to Pijor or told him about it. That theory has never been suggested by the Commonwealth or anyone else, because no one else had a motive or opportunity to take the dog under the facts of this case. This theory is so implausible as to be a "hypertechnical" theory barred from consideration by Ashe. 397 U.S. at 444.

The third and final theory is that the dog went missing and Pijor found the dog sometime before the larceny trial, kept it, and hid it from his family and the Gooch family. In that case, a "rational" jury would have concluded that Pijor was guilty of larceny because he would have taken and carried away the dog, and continued to possess it with the intent to permanently deprive the owner. Under any "realis[tic] and rational" view of the evidence at the larceny trial, the jury's verdict precluded relitigation of these facts and Pijor's conviction must be vacated. Id.

## III. Application of collateral estoppel and Sevachko v. Commonwealth.

The trial court's rulings were based primarily on its reading of Sevachko v. Commonwealth, 35 Va. App. 346 (2001) (en banc). Sevachko made two legal determinations that are significant to this case. First, Sevachko held that in the perjury trial of an acquittee, the Commonwealth

is barred from attempting to prove a fact necessarily decided by the prior acquittal. Id. at 354. That holding is consistent with every legal authority to address the point, but the trial court erred in its application of this principle by allowing the Commonwealth to introduce evidence that relitigated estopped facts.

Second, Sevachko implicitly held that collateral estoppel never bars the prosecution of a prior acquittee for perjury, even if the prior factfinder necessarily decided that the defendant's testimony was truthful. As illustrated below, this holding of Sevachko is contrary to the great weight of authority.

### A. The trial court erred by refusing to dismiss the perjury indictment because the Commonwealth's case merely relitigated estopped facts.

In Sevachko, the defendant was charged with driving on a suspended license and testified at his trial that he was not driving on the offense date because he was having his car repaired. He was acquitted. The government subsequently received evidence that Sevachko had told his former attorney that he drove on the offense date, and that he intended to falsely testify about that fact at trial. Id. at 351-52. The government indicted Sevachko for perjury. During the perjury trial the Commonwealth offered three pieces of evidence: (1) a police officer testified that he

observed Sevachko driving; (2) Sevachko's former attorney testified that Sevachko told her that he was driving on the date of offense; and, (3) Sevachko's former attorney testified that Sevachko said that he intended to testify falsely that he did not drive. Id. at 351-52, 354.

Sevachko held that although collateral estoppel generally bars re-litigation of an issue of fact "determined by a valid and final judgment," the doctrine "does not, however, operate to preclude a party from proving the elements of a cause of action or offense by other evidence independent of the fact which the party is collaterally estopped from proving." Id. at 352. As a result, the Commonwealth was estopped from proving that Sevachko had driven on the date of offense. Id. at 351-54. But, Sevachko's perjury indictment was not inherently precluded by his prior acquittal "because the Commonwealth [wa]s not collaterally estopped from proving that Sevachko perjured himself in the prior proceeding as to . . . facts *other than* that he was driving on th[at] date," such as Sevachko's "alibi." Id. at 350-54 (emphasis added).

Thus, Sevachko could be prosecuted for perjury because his statement that he intended to commit perjury was independent evidence that did not seek to prove that he actually drove. Id. at 350, 352, 357-58 (repeatedly stating this essential premise). The Court of Appeals reversed

the conviction because the trial court erred by allowing the government to introduce the police officer's testimony showing that Sevachko actually drove, which impermissibly relitigated the estopped fact that Sevachko did not drive, which was necessarily decided by the first jury. Id. at 350, 354.

Pijor's perjury conviction must be vacated for the same reason as Sevachko's: in both cases the Commonwealth introduced evidence to prove an estopped fact. The Commonwealth violated the collateral estoppel bar in Pijor's perjury trial because the Commonwealth sought to establish the falsity of Pijor's testimony solely by evidence that Pijor stole the dog or that Pijor possessed it prior to his testimony in the larceny trial. The Commonwealth asserted this theory of the case during the motion in limine, Appx. at 260-61, during it opening statement, Appx. at 280,[9] and twice during its closing argument, Appx. at 381, 398.[10] But, as discussed *supra*, the Commonwealth was estopped from relitigating those facts.

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[9] "THE COURT: And . . . you'll be asking the court to infer from his possession of the dog four days after the trial that he was in possession of the dog at the time of trial.

[THE COMMONWEALTH]: Correct . . . ."

[10] "[E]very piece of evidence that the court has heard points to the defendant having possession and knowledge of where that dog Ben is long before the February 4th trial date. . . ."

By convicting Pijor of perjury the trial court necessarily rejected as "unreasonable" Pijor's defense that he found the dog. If it is unreasonable to believe that Pijor found the dog, then the only basis for the Court's verdict is the conclusion that Pijor stole the dog and retained possession of the dog until his testimony at the larceny trial. The collateral estoppel component of Double Jeopardy barred the Commonwealth from proving those facts, and barred the trial court from finding those facts. Therefore, Pijor's perjury conviction must be vacated.

If the trial court's verdict does *not* rest on the theory that Pijor stole the dog, then it must rest on the theory that Pijor found the dog. And, if Pijor found the dog, then his theory of innocence at trial - that he found the dog after his acquittal at the larceny trial - is not unreasonable, and the conviction must be reversed because the evidence did not exclude every reasonable theory of innocence. See Part I, *supra*.

Finally, the perjury prosecution was barred because, as explained *supra*, Pijor's claims that he did not see the dog and did not know its whereabouts were estopped facts, and the Commonwealth was barred from proving them false. Because those facts were the only testimony at issue in the perjury trial, the trial court erred by refusing to dismiss the indictment.

**B. Sevachko v. Commonwealth wrongly decided that the Commonwealth may try an acquitted defendant for perjury even if the first trial necessarily decided that the defendant's testimony was truthful.**

In Slayton v Commonwealth, 185 Va. 371 (1946), this Court held that collateral estoppel could not be used to bar a perjury conviction. The Court's rationale was that collateral estoppel was not a constitutional right but was instead a matter of "public policy." The Court concluded that public policy could not tolerate the use of collateral estoppel as a shield from a perjury prosecution. Id. at 383. At the time of its decision, Slayton's view of collateral estoppel as a non-constitutional public policy matter was accurate, and the Court was entitled to impose its preferred policy as "the law." The cases from other jurisdictions cited with approval by Slayton used the same reasoning. See Jay v. State, 73 So. 137 (1916); People v. Niles, 300 Ill. 458 (1921).

Slayton's reasoning is no longer sound because the United States Supreme Court recognized in Ashe that collateral estoppel is a component of the Fifth Amendment's protection against double jeopardy. Because collateral estoppel is presently a matter of constitutional command rather than discretionary public policy, Slayton is no longer good law. It is for this reason that the en banc opinion in Sevachko neglects any mention Slayton.

The three-judge panel decision in Sevachko went further: the panel discussed Slayton, concluded that Ashe controlled the issue instead, and held that the perjury prosecution was barred altogether because the truthfulness of Sevachko's trial testimony was a necessarily decided fact of the first trial in that case. Sevachko v. Commonwealth, 32 Va. App. 561, 563-65 (2000). The cases from other jurisdictions that were relied upon by Slayton to justify its holding have likewise been disavowed by those states. For example, Illinois has overruled People v. Niles for this reason See e.g. People v. Ward, 381 N.E. 2d. 256, 259, 72 Ill.2d 379, 385 (Ill. 1978); People v. Shlensky, 454 N.E.2d 1103, 1106, 118 Ill.App.3d 243, 247 (Ill. App. 1983).

Sevachko is the only published Virginia appellate opinion to address this issue since collateral estoppel was recognized as a component of the Double Jeopardy Clause. On this point, Sevachko held:

> In the trial for driving on a suspended license, the fact about which Sevachko allegedly testified falsely was that he was not driving on the offense date. The dissenters reason that any evidence which proved that Sevachko testified falsely as to that fact must necessarily prove, at least by implication, that he was driving on the offense date -- the very fact the Commonwealth is estopped from relitigating. However, that reasoning by the dissenters would preclude every perjury prosecution against a former defendant who was acquitted and who testified falsely about an element of the Commonwealth's case. That

> application of the doctrine of collateral estoppel would, on the other hand, not preclude a perjury prosecution against a defendant who had testified falsely but had been convicted. The doctrine of collateral estoppel is neither that restrictive nor should it be applied in a manner to reach such an anomalous result.

35 Va. App. at 353.

The Sevachko majority fundamentally misunderstood and misapplied the collateral estoppel bar. To begin with, it is not "anomalous" that collateral estoppel would bar the perjury prosecution of an acquitted defendant, but not a convicted defendant. Rather, that is precisely how collateral estoppel works: it protects the winner of a prior trial, but not the loser. Therefore, it is Sevachko's application of collateral estoppel that is "anomalous." See United States v. Panetta, 436 F. Supp. 114, 121-22 (E.D. Pa. 1977) (denying collateral estoppel motion of previously *convicted* defendant and explaining precisely why the rule is different for previously *acquitted* defendants).

More importantly, Sevachko failed to address head-on the question of whether a prior verdict may necessarily decide the factual question of whether the defendant's testimony was truthful, thus barring the government from relitigating the defendant's truthfulness in a later perjury trial. "It is well settled in Virginia that whenever a witness testifies, his or

her credibility becomes an issue." Hughes v. Commonwealth, 39 Va. App. 448, 462 (2002).

> [C]onflicts in evidence present factual questions that are to be resolved by the trial court which must evaluate the credibility of the witnesses, resolve the conflicts in their testimony and weigh the evidence as a whole. Thus, the credibility of the witnesses and the weight accorded their testimony are matters solely for the fact finder who has the opportunity of seeing and hearing the witnesses. And, in its role of judging witness credibility, the fact finder is entitled to disbelieve the self-serving testimony of the accused and to conclude that the accused is lying to conceal his guilt.

Aldridge v. Commonwealth, 44 Va. App. 618, 638-39 (2004) (internal citations omitted) (emphasis added); see also Covil, 268 Va. at 695-96.

Sevachko's flawed reasoning makes it a legal outlier. The prevailing view among the legal authorities is that the truthfulness of testimony is a fact than can be necessarily decided like any other, and the issue of the defendant's truthfulness is necessarily decided if the defendant's acquittal necessarily hinged on the jury believing the defendant's testimony. See Sevachko, 35 Va. App. at 358 (Bumgardner, J., and three others dissenting from en banc decision); Nash, 447 F.2d at 1385 (4th Cir.); Castillo-Basa, 483 F.3d at 899-900 & n.6 (9th Cir.); Wilkinson v. Gingrich, 806 F.3d 511, 517 (9th Cir. 2015); Wheatly v. United States, 286 F.2d 519 (10th Cir. 1961); Ehrlich v. United States, 145 F.2d 693 (5th Cir. 1944); United States

v. Hernandez, 572 F.2d 218, 222 (9th Cir. 1978) ("Hernandez' explanation of his time spent with Martinez alone was part of his defense and it had to be weighed by the jury. His explanation cannot have been simply a collateral issue. The court was required to resolve the conflicting explanations as part of its decision upon the motion for judgment of acquittal in the first trial. Thus, the court "necessarily" had to pass upon the truthfulness of his account."); United States v. Whitaker, 702 F.2d 901, 903-06 (11th Cir. 1983); United States v. Plaster, 16 F. Supp. 2d 667 (W.D. Va. 1998); United States v. Robinson, 418 F. Supp. 121, 125-26 (D. Md. 1976); United States v. Drevetzki, 338 F. Supp. 403, 407 (N.D. Ill. 1972); Commonwealth v. Hude, 425 A.2d 313 (Pa. 1980); Myers v. State, 470 A.2d 355, 357, 57 Md. App. 325, 329-30 (Md. App. 1984) ("the trier of fact, in acquitting the defendant, relied on the truth of the defendant's testimony.... In the perjury trial, the jury was similarly required to assess the veracity of the defendant's testimony . . . . It therefore becomes apparent that the jury verdict in the perjury trial necessarily depended on the resolution of the same issue which had been tested and found in favor of the defendant when he was acquitted at the theft trial."); People v. Buie, 337 N.W.2d 305, 307, 126 Mich. App. 39, 45-46 (Mich. App. 1983) ("we believe that the jury, in acquitting defendant must have believed

defendant's testimony. . . . This alibi was the defendant's primary defense. . . . Moreover, the prosecutor told the jury, in his rebuttal argument, that defendant's only defense was his alibi."); People v. Ward, 381 N.E.2d 256, 259, 72 Ill.2d 379, 385 (Ill. 1978) ("The indictment charging perjury must be considered as really an effort to relitigate the burglary charge when examined, as the law requires, with realism and not in a hypertechnical sense."); People v. Shlensky, 454 N.E.2d 1103, 1106, 118 Ill.App.3d 243, 247 (Ill. App. 1983) (perjury indictment barred by collateral estoppel because "the indictments charging Shlensky with perjury . . . must be construed as indirect attempts to relitigate the drug-related charge."); State v. Conway, 661 P.2d 1355, 1357-58 (Okla. Ct. App. 1983) (Brett, J. dissenting). Cf. United States v. Brown, 547 F.2d 438, 442 (8th Cir. 1977) (acquittal in perjury trial barred subsequent prosecution for conspiracy to commit robbery where the jury's acquittal necessarily decided that the defendant was truthful when he said that he never discussed a robbery with the alleged co-conspirator); United States v. Haines, 485 F.2d 564, 565-66 (7th Cir. 1973) (acknowledging that the subsequent perjury prosecution would be barred by prior acquittal if the record demonstrated which issue was necessarily decided, but concluding that the record did *not*

conclusively show what issue was decided by the jury); United States v. Tramunti, 500 F.2d 1334, 1347-49 (2nd Cir. 1974) (same as Haines).

Our constitutional system guarantees the collateral estoppel protection of the Fifth Amendment regardless of whether the government has regrets about a jury's assessment of the defendant's credibility. Nash, 447 F.2d at 1385 ("The jury may have been in error, but certainly it appraised the defendant's credibility. It is inconceivable that there would have been an acquittal if the jury had not according truth to her testimony."). The jury necessarily decided that Pijor was truthful when he testified at the larceny trial. The Commonwealth was barred from relitigating the truthfulness of his prior testimony. Because untruthfulness was an essential element of the perjury offense, Pijor's conviction violated the collateral estoppel bar of the Fifth Amendment, and Sevachko v. Commonwealth was wrongly decided.

## CONCLUSION

WHEREFORE, appellant respectfully requests this Honorable Court to vacate the conviction in this matter, and dismiss the indictment or provide such other relief as appropriate.

## Certificate

I, Patrick M. Blanch, certify as follows in compliance with Rule 5:26:

(a) The appellant's name and address are:

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(b) Counsel for Appellant is:

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(c) The Appellee is the Commonwealth of Virginia. Counsel for Appellee is:

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(d) On May 26, 2017, three copies of this Brief were delivered to:

Patricia L. Harrington, Clerk of Court
Supreme Court of Virginia
100 North Ninth Street

5th Floor
Richmond, VA 23219-1315

One copy of this Brief was emailed to opposing counsel.

(e) Counsel for Appellant is retained.

(f) This Brief contains 44 pages, excluding the cover page, tables, and certificate.

Respectfully submitted,

DAVID STANLEY JAMES PIJOR
By Counsel

*Patrick M. Blanch /s/*
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