

No. _____

In The
Supreme Court of the United States

HOWARD ALLEN GROFFEL,

Petitioner,

V.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of Virginia

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Groffel was convicted five times for transporting one firearm in violation of five separate protective orders. This case poses a clear question of law: Does the Double Jeopardy Clause permit Virginia to charge Groffel with five “status crimes”¹ even though he only committed one criminal act? The Virginia Court of Appeals and the Virginia Supreme Court believe the answer is yes. *See Groffel*, 70 Va. App. at 686, *aff'd*, 849 S.E.2d 905.

¹ Possession of a firearm while subject to a protective order is a status crime. ‘Status crimes’ prohibit certain classes of individuals from engaging in otherwise legal “action” because that class “ha[s] a ... personal condition” such as a felony, misdemeanor, or protective order. *See United States v. Cole*, 418 F.3d 592, 599 (6th Cir. 2005) (quoting *Black's Law Dictionary* 1410 (6th ed.1990)). *Groffel's* “protective order” statute is a classic example: It prohibits individuals with protective orders (the status) from engaging in otherwise legal action (purchasing or transporting a gun). *See, e.g.*, VA. CONST. ART. I, § 13 (permitting guns for law-abiding adults); VA. CODE ANN. § 18.2-308.1:4(A) (prohibiting certain status criminals from purchasing or transporting guns).

LIST OF ALL PROCEEDINGS

- *Commonwealth v. Groffel*, No. Cr17000100-12 through 16, New Kent Circuit Court. Judgment entered March 29, 2018.
- *Commonwealth v. Groffel*, No. 0485-18-2, Virginia Court of Appeals. Judgment entered Aug. 20, 2019.
- *Commonwealth v. Groffel*, No. 191360, Supreme Court of Virginia. Judgment entered Nov. 19, 2020.

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THE OPINIONS BELOW

The opinion of the Supreme Court of Virginia is published at 849 S.E.2d 905 (Va. 2020).

JURISDICTION

The Supreme Court of Virginia denied Groffel's appeal on November 19, 2020. App. 1. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The United States Constitution's Fifth Amendment provides, in part:

“No person shall . . . be subject for the same offence to be put in jeopardy of life or limb”

STATEMENT OF THE CASE

The underlying facts of the case are not in dispute. Groffel was subjected to five different protective orders. On April 25, 2017, Groffel was arrested after escaping custody when he was left unattended by law enforcement in an unrelated criminal matter. Groffel had a gun in his possession at the time of his arrest.

Groffel was subsequently charged with five counts of transporting a firearm while subject to a protective order and additional counts. All five counts were charged because of the single gun Groffel had in his possession at the time of his arrest. Groffel filed a motion to dismiss his indictment on the grounds that it violated his Fifth Amendment right to Double Jeopardy Protections. The trial court denied his motion.

Groffel was convicted on all five counts of transporting a firearm while subject to a protective order along with the other counts. He was sentenced to 60 months' imprisonment (12 on each count). Groffel appealed the decision and the Virginia Court of Appeals denied him relief. On November 19, 2020, the Virginia Supreme Court, in a 4-3 decision, denied Groffel relief.

SUMMARY OF ARGUMENT

Groffel's Double Jeopardy rights were violated when the trial court convicted and sentenced him for five offenses. Groffel was convicted of the exact same charge five times. The only act that caused him to be convicted of the five counts was his one possession of a single firearm when he was arrested.

REASONS FOR GRANTING THE PETITION

The lower courts need guidance on how to apply the Double Jeopardy Clause when a defendant's singular act causes him to be charged with the same offense in violation of multiple protective orders. The Fifth, Tenth, and Eleventh Circuits have each concluded that prosecutors cannot charge a defendant with multiple violations of 18 U.S.C. § 922(g) when the charges proceed from a single criminal act. Although that is a different statute than the one at issue in here, *Groffel* would have come out the other way under those circuits' precedents. Further, this Court has repeatedly directed lower courts to apply the rule of lenity when a statute does not clearly state "the unit of prosecution." *Bell v. United States*, 349 U.S. 81, 83 (1955); *accord Callanan v. United States*, 364 U.S. 587, 596 (1961). Here the Virginia Court of Appeals (and Virginia Supreme Court) acknowledged that the unit of prosecution "[wa]s ambiguous"—but they refused to apply lenity. *Groffel v. Commonwealth*, 70 Va. App. 681, 692 (2019), *aff'd*, 849 S.E.2d 905 (Va. 2020). That was an error; and it violates this Court's precedent.

This is a substantial issue for which this Court should provide guidance, as it concerns substantial rights of the accused, and can arise frequently.

ARGUMENT

Groffel was convicted of, *inter alia*, five counts of transporting a firearm while subject to a protective order, which states in part:

It is unlawful for any person who is subject to (i) a protective order entered pursuant to § 16.1–253.1, 16.1–253.4, 16.1–278.2, 16.1–279.1, 19.2–152.8, 19.2–152.9, or 19.2–152.10; (ii) an order issued pursuant to subsection B of § 20–103; (iii) an order entered pursuant to subsection D of § 18.2–60.3; (iv) a preliminary protective order entered pursuant to subsection F of § 16.1–253 where a petition alleging abuse or neglect has been filed; or (v) an order issued by a tribunal of another state, the United States or any of its territories, possessions, or commonwealths, or the District of Columbia pursuant to a statute that is substantially similar to those cited in clauses (i), (ii), (iii), or (iv) to purchase or transport any firearm while the order is in effect. . .

Va. Code § 18.2-308.1:4.

The rule created in *Blockburger v. United States* is that the Double Jeopardy Clause of the Fifth Amendment is violated when a defendant is charged with multiple crimes that have the same elements for a single transaction. 284 U.S. 299, 304 (1932). The only way the same elements test does not apply is if the legislature clearly intended for a single action to be punished multiple ways. *Whalen v.*

United States, 445 U.S. 684, 693 (1980) (“where the offenses are the same under that test, cumulative sentences are not permitted, unless elsewhere specifically authorized by Congress”).

Va. Code § 18.2-308.1:4 makes it unlawful for a person subjected to a protective order issued under numerous circumstances to be able to transport any firearm. The Virginia Legislature found that people who fell under these circumstances were considered too dangerous to purchase or transport a firearm.

The Fourth Circuit has extended Double Jeopardy protections over individuals who may be disqualified from possessing a firearm in multiple ways but commit a single offense. *See United States v. Dunford*, 148 F.3d 385, 388-89 (4th Cir. 1998). The class of people who are disqualified in Virginia from transporting a firearm are those subject to a protective order. Each individual protective order disqualified Groffel from possessing a firearm.

The Virginia Court’s reading of the statute runs in contrast with its own logic. *See Groffel v. Commonwealth*, 70 Va. App. 681, 690-91 (Va. Ct. App. 2019). The Virginia Court of Appeals states that:

While the United States Congress chose to prohibit these categories of individuals from having access to firearms by

grouping them together in a subsection as a single “possession” offense, the Virginia legislature enacted separate statutes to restrict access, possession, and transportation of firearms for certain groups. This distinction signifies the Virginia General Assembly’s conclusion that the different groups of individuals under restrictions are dissimilar and subject to different limitations as well as penalties. As a result of this contrast between the federal and state law, the federal cases interpreting 18 U.S.C. § 922(g) are inapposite to application of Code § 18.2-308.1:4.

Id.

The Court reasoned that the legislature intended the five protective order to be able to stack for a single act because the class of individuals who are excluded from “possessing”, or “transporting firearms” is broken into separate statutes. *See Id.* The Virginia Court of Appeals ruled this way to distinguish itself from the *Dunford* framework. *See Id.*

The Virginia Court of Appeals may be correct that the legislature intended for a person to be subjected to multiple penalties for a violation of different disqualifying offenses, such as “possession”, and “transportation of firearms”. *See Id.* The Virginia Court of Appeals fails to show how this legislative intent applies when a person is subjected to multiple charges of *only* “transporting” arising out of a single incident. *See Id.*

Virginia's reasoning runs straight in opposition with Illinois' reading of a similar statute. In *People v. Carter*, the Illinois Supreme Court read any ambiguity in the statute in favor of the defendant. 213 Ill.2d 295, 302-03 (2004). *Carter* was subsequently overturned after the Illinois Legislative body amended the law. *People v. Almond*, 32 N.E.3d 535, 542-43 (Ill. 2015). The language added in the Illinois statute was “[t]he possession of each firearm or firearm ammunition of this Section constitutes a single and separate violation.” Id.; 720 ILCS 5/24–1.1(e) (West 2008). There is no other explicit legislative intent like this present in the Virginia Statute.

There are other states who have ruled on this issue differently.² It would be beneficial to State Courts to have guidance on how specific the legislature must be in order to allow crimes to stack. The lack of guidance on this specific issue has led to some confusion in the Virginia Supreme Court. This confusion is evidenced by the fact that three out of the seven Virginia Supreme Court justices thought that Double Jeopardy had been violated in Groffel's case. Additionally, other

² See generally *Groffel v. Commonwealth*, 70 Va. App. 681 (Va. Ct. App. 2019); *People v. Almond*, 32 N.E.3d 535 (Ill. 2015); *Melton v. State*, 379 Md. 471 (2004).

Circuits in addition to the Fourth Circuit follow the rule that a single act does not allow for multiple punishments for multiple disqualifying acts.³ Guidance from this Court is especially relevant because of the nature of protective orders. Similarly to Groffel, many people can be subjected to multiple protective orders. For example a person not only can be subjected to a protective order for an ex-wife but also to any children from that union. The likelihood of a person being subjected to multiple protective orders is high; thus it is of the utmost importance for State and Federal Courts to have specific guidance on this issue.

CONCLUSION

The petition for writ of certiorari should be granted.

³ See *United States v. Richardson*, 439 F.3d 421 (8th Cir. 2006); *United States v. Johnson*, 130 F.3d 1420, 1425–26 (10th Cir.1997), *petition for cert. filed* (April 1, 1998) (No. 97–8558); *United States v. Munoz–Romo*, 989 F.2d 757, 759–60 (5th Cir.1993); *United States v. Grinkiewicz*, 873 F.2d 253, 254 (11th Cir. 1989), *United States v. Winchester*, 916 F.2d 601, 605–08 (11th Cir.1990).

Respectfully submitted,

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