

IN THE SUPREME COURT OF THE UNITED STATES

No. 16-1348

MICHAEL N. CURRIER, PETITIONER

v.

COMMONWEALTH OF VIRGINIA

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

MOTION OF THE UNITED STATES FOR LEAVE TO
PARTICIPATE IN ORAL ARGUMENT AS AMICUS CURIAE
AND FOR DIVIDED ARGUMENT

Pursuant to Rules 28.4 and 28.7 of the Rules of this Court, the Solicitor General, on behalf of the United States, respectfully moves that the United States be granted leave to participate in oral argument in this case as amicus curiae supporting respondent and that the United States be allowed ten minutes of argument time. Respondent has agreed to cede ten minutes of argument time to the United States and therefore consents to this motion.

1. This case involves whether a defendant who voluntarily consents to severance of multiple charges that are based on the same set of facts into separate trials may invoke the Double Jeopardy Clause of the Fifth Amendment to the United States

Constitution to bar or limit the evidence presented at the second proceeding. Following a break-in at a residence during which a large gun safe was stolen, petitioner was charged with breaking and entering, larceny, and possession of a firearm following a felony conviction, in violation of Virginia law. Pursuant to Virginia court rules, petitioner and the Commonwealth agreed to sever the felon-in-possession charge from the other charges. Petitioner was acquitted of breaking and entering and larceny at his first trial. Before trial on the felon-in-possession charge began, petitioner contended that the issue-preclusion component of the Double Jeopardy Clause, which generally prohibits the prosecution from relitigating an issue of ultimate fact decided in the defendant's favor at a prior trial, either precluded his second trial entirely, or prohibited the Commonwealth from introducing certain evidence at that trial. The trial court disagreed, and petitioner was convicted of the felon-in-possession offense at his second trial. The Virginia appellate courts affirmed.

The United States has filed a brief as amicus curiae supporting respondent. The brief argues that when a defendant voluntarily consents to a second trial, he cannot invoke the issue-preclusion component of the Double Jeopardy Clause to bar or limit the evidence presented at that proceeding. That is because the Double Jeopardy Clause guards against government oppression, but does not relieve a defendant of the consequences of his own

voluntary litigation choices. When a defendant agrees to severance of multiple charges based on a single set of facts into separate trials, he necessarily consents to factually overlapping trials that may yield inconsistent verdicts.

2. The United States has a substantial interest in this case. The Court's resolution of the question presented will bear on similar claims in federal prosecutions. See Fed. R. Crim. P. 14(a) (permitting severance of counts against a single defendant into separate trials where joinder of the offenses would be prejudicial to the defendant or the government). The United States has participated in oral argument as amicus curiae in cases involving the proper interpretation of the Double Jeopardy Clause of the Fifth Amendment. See, e.g., Puerto Rico v. Sanchez Valle, No. 15-108; Evans v. Michigan, No. 11-1327; Smith v. Massachusetts, No. 03-8661; Price v. Vincent, No. 02-524; Sattazahn v. Pennsylvania, No. 01-7574. The government therefore believes that participation in oral argument by the United States would materially assist the Court in its consideration of this case.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

JANUARY 2018