No. _____

In the Supreme Court of the United States

SOLOMON MCLEMORE,

Petitioner,

v.

CITY OF SHORELINE,

Respondent.

On Petition for a Writ of Certiorari to the Washington Supreme Court

PETITION FOR A WRIT OF CERTIORARI

Thomas E. Weaver
PO Box 1056
Bremerton, WA 98337
(360)792-9345
tweaver@tomweaverlaw.com

David C. Iannotti
Counsel of Record
STEWART MACNICHOLS HARMELL, INC. P.S.
655 West Smith Street, Suite 210
Kent, WA 98032
(253)859-8840
david@sbmhlaw.com

Counsel for Petitioner

QUESTION PRESENTED

In the middle of the night, police officers came to McLemore's home and banged on the door, demanding entry without a warrant to investigate a loud argument. McLemore told the officers to show him a warrant or leave. After fifteen minutes, the officers heard glass break and they entered the house pursuant to the community caretaking exception of the warrant requirement. The officers found no evidence of any crimes, but McLemore was arrested, charged and convicted of obstruction for passively refusing to open the door to his home. The Washington Supreme Court issued a split 4-4 opinion that affirmed the conviction and left Washington Law in conflict with precedent established by the United States Supreme Court, the Ninth Circuit Court of Appeals and every other State that has addressed the issue.

The question presented is:

Whether it is a violation of the Fourth Amendment for States to charge and convict a person of obstruction for passively refusing to open the door to their home when officers conduct a warrantless search based on an exception to the warrant requirement?

LIST OF PROCEEDINGS

1. **King County District Court, West Division, Shoreline Courthouse, State of Washington**
   City of Shoreline, Plaintiff, v. Solomon McLemore, Defendant, No. 616010940
   - 8/17/2016, Denied Motion to Dismiss. App. 43.
   - 9/27-29/2016, Jury Trial, guilty verdict.
   - 9/29/2016, Judgment and Sentence.

2. **Superior Court of the State of Washington in and for the County of King**
   City of Shoreline, Respondent, v. Solomon McLemore, Appellant, No. 16-1-07811-3 SEA
   - 6/2/2017, RALJ oral argument and decision affirming the conviction. App. 45.

3. **The Court of Appeals of the State of Washington, Division I**
   Solomon McLemore, Petitioner, v. City of Shoreline, Respondent, No. 77094-2-I
   - 11/28/2017, Denied review. App. 47.
   - 3/07/2018, Denied Motion to Modify. App. 55.

4. **The Supreme Court of the State of Washington**
   City of Shoreline, Respondent, v. Solomon McLemore, Petitioner, No. 95707-0
   - 10/18/2018, Oral Argument.
   - 4/18/2019, Opinion issued. App. 1
   - 4/19/2019, Order amending Opinion. App. 37.
   - 5/30/2019, Order amending Opinion. App. 39.
   - 5/30/2019, Order denying McLemore's Motion for Reconsideration. App. 41.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Constitutional Provisions

PETITION FOR A WRIT OF CERTIORARI

Solomon McLemore respectfully petitions this Court for a writ of certiorari to review the judgment of the Washington Supreme Court in this case.

OPINIONS BELOW

The split opinion of the Washington Supreme Court is published at *City of Shoreline v. McLemore,* 438 P.3d 1161 (Wash. 2019)*, as amended* (Apr. 19, 2019). App. 1. Amended by Court orders on April 19, 2019 and on May 30, 2019. App. 37; App. 39.

JURISDICTION

The Washington Supreme Court filed its orders denying motion for reconsideration and motion for clarification on May 30, 2019. App. 41. The instant Petition for Writ of Certiorari is filed within 90 days of that date. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section 1 of the Fourteenth Amendment of the United States Constitution provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Washington Revised Code § RCW 9A.76.020, provides, in pertinent part:

> A person is guilty of obstructing a law enforcement officer if the person willfully hinders, delays, or obstructs any law enforcement officer in the discharge of his or her official powers or duties…

STATEMENT OF THE CASE

1. Three Shoreline police officers responded to a disturbance call, from an unknown bystander, near McLemore's residence. App. 3. When the officers arrived, they heard the sounds of an argument coming from an apartment above a dry cleaner's shop. *Id.* Police heard a woman shouting, "'[Y]ou can't leave me out here,'" "'I'm going to call the police,'" and "something along the lines of 'I'm

reconsidering our relationship'." *Id.* The officers knocked on the door of the apartment, rang the doorbell, announced they were Shoreline police, and demanded to be let in. *Id.* No one in the apartment replied, but the sounds of the argument stopped. *Id.* Using amplification and much profanity, the officers insisted they would break down the door if they were not let in. *Id.*

McLemore told the officers that they were okay, that he was recording the incident, and that they should leave if they did not have a warrant. App. 4-5, 20-21. At McLemore's insistence, the other adult occupant of the home confirmed that she was fine and that she also wanted the officers to leave. *Id.* There was no evidence that McLemore locked the door to exclude the officers, held it closed, physically resisted, or prevented any of the other occupants from opening the door. App. 4, 12 n.5., 19-20. At one point, McLemore even told the other adult occupant to speak with the officers and that she needed to be mad, but the officers still did not leave. App. 19-20 n.2. McLemore told her that he believed he would go to jail if they opened the door, even though they had done nothing wrong. *Id*.

After fifteen minutes of demanding entry, police heard the sound of breaking glass. App. 3-4, 28. At this point, the officers determined that they had an exception to the warrant requirement and broke down the door. *Id.* It was determined that the other occupants were ok, no one was injured and no other crimes had been committed. *Id.* Officers arrested McLemore for obstruction of a law enforcement officer under RCW 9A.76.020. No other charges were filed. *Id.*

2. Before trial, McLemore moved to dismiss the charge on the grounds that the city offered "no evidence that McLemore willfully hindered or delayed an officer's lawful investigation as the law does not require any duty of a person to act in a warrantless search of their residence" and that applying the obstructing statute in this manner infringed on his Fourth Amendment Right. App. 4. The Judge denied the motion, concluding that the charges were sustainable under *State v. Steen*, 265 P.3d 901 (Wash. Ct. App. 2011). *Id.;* App. 43. The judge also excluded any defense related to McLemore's assertion that the officers did not have the right to enter without a warrant. *Id.*

3. In closing argument, the City stressed that most of the elements were not in dispute. Instead, the "element that gets the bulk of the argument ... and the bulk of the scrutiny in this testimony was did the defendant willfully hinder or delay or obstruct the discharge of [officers'] duties." App. 5. The City characterized McLemore's refusal to open the door as a willful obstruction. *Id.* Defense counsel argued that "[it is] not McLemore's job to help" the police and that "he did nothing. He simply sat in his house." *Id.*

During deliberations, the jury sent out one question: "Does a person have the legal obligation to follow the police instructions, in this case?" *Id.* The Court responded, "[Y]ou have been provided with the law in this case in the jury instructions." *Id.* The instructions, including the instruction containing the elements for a conviction, mirrored the pattern jury instructions, and no specific instruction on a

citizen's obligation to open a door to a warrantless entry was included. *Id.* McLemore was convicted. *Id.*

4. McLemore appealed, first to the King County Superior Court, where he challenged the lower court ruling on Fourth Amendment grounds. The conviction was affirmed. App. 45.

5. The Washington Court of Appeals declined to accept review of this case and did not issue an opinion. App. 47; App. 45.

6. The Washington Supreme Court accepted review of this matter to address whether passively refusing an order to open the door to one's home during a warrantless search is obstructing. Only eight justices participated in the opinion issued on April 18, 2019[1], and there was no majority opinion.

The Washington Supreme Court initially issued a "lead" opinion, signed by four Justices, overturning the verdict, finding that "criminalizing the refusal to open one's own door to a warrantless entry would be enormously chilling and inconsistent with our deeply held constitutional values." App. 8. The Court also issued a "dissenting" opinion, signed by four Justices, concluding that the conviction should be affirmed. In its analysis the Court stated that "[s]ufficient evidence exists to support McLemore's conviction for obstruction based on his willful failure to obey a lawful order to open the door (or to allow [the other occupant] to open the door) in

[1] Amended April 19, 2019, to clarify that the effect of the 4-4 ruling was to uphold the lower courts' affirmance of the conviction. App. 37.

order for the officers to verify the safety of the occupants inside the home." App. 28.

The next day, the Court issued an order amending the two opinions, indicating that the Court was divided and the verdict was affirmed. *App 37.*

7. The Washington Supreme Court denied McLemore's Motion for Reconsideration and amended the opinion a second time. App. 41; App. 39.

REASONS FOR GRANTING THE PETITION

I. The Washington Supreme Court decision infringes on the Fourth Amendment and conflicts with federal precedent.

The issue raised before the Washington Supreme Court was whether a homeowner has an obligation to assist police during a warrantless search and whether it is obstructing to refuse to assist. The Court split four to four in its ruling in this case, affirming McLemore's conviction for obstructing.

The decision asserted, for the first time in a Washington case and in contradiction to authority from this Court, the Ninth Circuit, and every other State that has addressed the issue, that there is a legal duty in these circumstances to open the door to police and that violation of that previously-non-existent duty subjects Washingtonians to arrest, prosecution, and conviction of a crime. It held that "[w]hen a law enforcement officer tells a person to 'put your hands up' or 'open the door,' the willful

refusal to obey this command constitutes conduct – and such conduct violates RCW 9A.76.020 [the obstructing statute]." App. 35.

The decision significantly diverges from federal law by requiring occupants of a home to open their homes to the police regardless of whether there is a warrant or not. It does not include any analysis in regards to the United States Supreme Court precedent or the Ninth Circuit Court of Appeals precedent on the issue. Nor does the decision give any explanation as to why it ignores the federal case law.

Washington's Obstruction statute infringes on the Fourth Amendment right to privacy. The Fourth Amendment is enforceable against the States through the Fourteenth Amendment. *Camara v. Mun. Court of City & Cty. of San Francisco*, 387 U.S. 523, 528 (1967); *Ker v. State of Cal.*, 374 U.S. 23, 30 (1963). Washington cannot impose greater restrictions on federal Constitutional rights. *Ex parte Commonwealth of Virginia*, 100 U.S. 339, 346 (1879). Section One of the Fourteenth Amendment states, in part, that "[n]o State shall make or enforce a law which shall abridge the privileges or immunities of citizens of the United States, . . . nor deny to any person within its jurisdiction the equal protection of the laws."

It is undeniable that McLemore had an expectation of privacy in his home under both the United States and Washington Constitutions. McLemore passively attempted to exercise those rights during a warrantless search. He demanded that the officers show him a warrant or leave. He did

not lock the door or hold it shut to exclude the officers, he did not physically resist the officers, and he did not prevent the other occupant from opening the door. While the search may have eventually been justified, federal case law makes it clear that a person should not be punished for relying on that expectation of privacy when officers do not have a warrant.

This Court should grant Certiorari to correct the Washington Supreme Court decision and to establish a clear precedent that individuals cannot be punished for attempting to passively exercise their Fourth Amendment right to privacy during a warrantless search. This is true even in the event the officers are executing a search based on an exception to the warrant requirement. As explained below, the harmful impact on the public as a result of this confusion is enormous.

A. The Washington Supreme Court decision conflicts with long-standing precedent from this Court.

The long-standing position has been that a person does not need to open their home to police or even answer the door for police unless they have a warrant. Nearly seventy years ago, this Court held that the right to privacy "holds too high a place in our system of laws to" allow "criminal punishment on one who does nothing more" than make verbal protests and refuse to unlock her door. *District of Columbia v. Little*, 339 U.S. 1, 7 (1950). Little protested the right of an inspector to enter her private home. She neither used or threatened use of force, she simply did not unlock the door. *Id.* at 5-6.

This Court stated that "even if the Health Officer had a lawful right to inspect the premises without a warrant, we are persuaded that respondent's statements to the officer were not an 'interference' that made her guilty". *Id.* at 4. Additionally, this Court recognized the importance of objecting to warrantless entry, noting that had Little failed to object, she might have waived her constitutional objections. *Id.* at 7.

Seventeen years later, this Court held that a defendant could not constitutionally be convicted for refusing to allow warrantless inspection. *Camara*, 387 U.S. at 540. Camara refused to allow inspectors into his home without a warrant. *Id.* at 525. This Court analyzed whether administrative inspections of homes fell under the protection of the Fourth Amendment. *Id.* at 538-539. After finding that they did, this Court also held that Camara had a constitutional right to demand a warrant and could not be convicted for refusing to consent to inspection. *Id.* at 540.

In light of this long-standing precedent, it is unsurprising that this Court recently treated as a verity that a person cannot constitutionally be convicted for refusing to allow officers into their home during a warrantless search. *Kentucky v. King*, 563 U.S. 452, 469–70 (2011)("When law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do. And whether the person who knocks on the door and requests the opportunity to speak is a police officer or a private citizen, the occupant has no obligation to open the door or to speak.").

In *King*, this Court examined whether Officers created exigent circumstances by following a suspected drug dealer to an apartment and banging on the door. *King*, 563 U.S. at 455-456. This Court declined to answer whether exigent circumstances actually existed and left that to the Kentucky Supreme Court and lower courts. *Id*. at 470. However, this Court did determine that regardless of whether there are exigent circumstances or not, an "occupant has no obligation to open the door or to speak." *King*, 563 U.S. at 469-470.

The decision by the Washington Supreme Court to affirm McLemore's conviction is in direct conflict with decisions of this Court without explanation or analysis as to why it ignores precedent.

B. The Washington Supreme Court decision conflicts with the Ninth Circuit Court of Appeals.

The Washington Supreme Court decision is in conflict with the Ninth Circuit Court, which held that a citizen's "passive refusal to consent to a warrantless search is privileged conduct which cannot be considered as evidence of criminal wrongdoing" because to hold otherwise would be to impose "an unfair and impermissible burden" on "the assertion of a constitutional right." *United States v. Prescott*, 581 F.2d 1343, 1351 (9th Cir. 1978) (citing *Camara,* 387 U.S. 523, (1967) and *Little*, 339 U.S. 1 (1950)).

Prescott was the neighbor of a suspect involved in a mail fraud scheme. *Id.* at 1346. The officers

believed that the suspect was located in Prescott's apartment. *Id.* Prescott lied to the officers by telling them the suspect was not in the apartment. *Id.* The officers demanded entry and Prescott refused. *Id*. at 1347. The officers then forced entry into the house, finding the suspect. *Id*. Prescott was charged with a crime for not allowing the officers to enter. *Id.*

The Ninth Circuit overturned the conviction. *Id.* The Court specifically addressed the logic behind not criminalizing this behavior. It stated that a person "need not try to ascertain whether, in a particular case, the absence of a warrant is excused. He is not required to surrender his Fourth Amendment protection on the say so of the officer. The Amendment gives him a constitutional right to refuse to consent to entry and search. His asserting it cannot be a crime. Nor can it be evidence of a crime." *Id.* The decision of the Washington Supreme Court is in direct conflict with the Ninth Circuit precedent.

C. The Washington Supreme Court decision conflicts with other states that have addressed this issue.

The vast majority of other state courts that have addressed this issue have, using the precedent discussed above, held that there is no obligation to open a home to an officer's warrantless demand for entry. The city of Columbus prosecuted a man who refused to open his door for officers responding to a potential domestic violence call. *City of Columbus v. Michel*, 378 N.E.2d 1077, 1078 (Ohio Ct. App. 1978). Officers spoke with the person who made the call, saw broken glass, knocked for 7 to 10 minutes, and

told the occupants to either let them in or have their door broken down. *Id.* at 1077-1078. The Court noted that the officers were "justified in breaking open the door of the apartment to determine whether anyone was injured in the apartment." *Id.* But the "defendant's failure to open the door to the apartment is not made a crime" under the ordinance. *Id.*

In *New Jersey v. Berlow*, 665 A.2d 404, 362-364 (N.J. Super. Ct. Law Div. 1995), the Court reversed a conviction for obstruction on Fourth Amendment grounds where the defendant slammed and locked his door in response to the police's demand for entry. (Here, by contrast, McLemore simply did not open his door and demanded the police obtain a warrant). The Court expressly held that "[o]ne cannot be punished" for obstruction "for passively asserting" one's Fourth Amendment right to deny entry. *Id.* at 364. More recently, the New Jersey Supreme Court, on almost identical facts, unanimously held failure to act was not obstruction. *New Jersey v. Fede*, 202 A.3d 1281 (N.J. 2019).

Other state courts have persuasively held likewise. See, e.g., *Ohio v. Howard*, 600 N.E.2d 809, 816-817 (Ohio Ct. App. 1991) ("Appellant's assertion of his constitutional right to refuse to consent to the entry and search cannot be a crime and cannot be used as evidence against him for purpose of establishing the elements of obstruction of justice. Courts disapprove of penalties imposed for exercising constitutional rights."); *Illinois v. Hilgenberg*, 585 N.E.2d 180, 185 (Ill. App. Ct. 1991) (holding that the defendant had a Fourth Amendment right to refuse entry requested by police

and that "the assertion of that right does not constitute a crime"); *Strange v. Tuscaloosa*, 652 So.2d 773, 776 (Ala. Crim. App. 1994)(holding that defendant's actions to prohibit a warrantless entry and search "cannot subject her to a criminal conviction").

See also, e.g., *Beckom v. Georgia*, 648 S.E.2d 656, 659-660 (Ga. App. Ct. 2007)(holding that refusal to answer police's knocking on door, ringing of doorbell, and phone calls is not obstruction); *Adewale v. Whalen*, 21 F. Supp. 2d 1006, 1011 n.4 (D. Minn. 1998) (holding that refusing to open the door for police is not obstruction); *Arizona v. Stevens,* 267 P.3d 1203, 1208 (2012)(one cannot be convicted of passively refusing entry into a home).

In contrast, the few states that have affirmed convictions for obstructing have done so on the ground that the defendant did more than passively resist entry. In *Hawai'i v. Line*, the defendant physically struggled with officers, ripping their clothing. 214 P.3d 613 (Haw. 2009). In *Dolson v. United States*, the Court stressed that "one has a Fourth Amendment right to deny police officers and other government officials a warrantless entry into one's home, and thus one's assertion of this right cannot serve as the basis for a criminal conviction or evidence of a crime." 948 A.2d 1193, 1201 (D.C. 2008) (citing *Camara*, 387 U.S. at 540; *Little*, 339 U.S. at 7; *Prescott*, 581 F.2d at 1350-51). The Court declined to extend that principle to locking and holding a gate closed against an officer in pursuit. *Id.* at 1202.

D. The Washington Supreme Court decision conflicts with federal precedent because the decision ignores the chilling effect it has on the Fourth Amendment.

The Washington Supreme Court decision affirming the conviction does not address the federal precedent and does not address the chilling effect this decision has on the individual exercise of Fourth Amendment Right. The decision takes the position that the Fourth Amendment only applies to whether the government has authority to enter a home. It holds that as soon as the officer has the authority to enter the home, pursuant to a warrant or warrant exception, the Fourth Amendment does not protect a person's attempt to exercise that Right. The decision states that "McLemore's conduct cannot be excused on the basis of a nonexistent privacy right. His right to deny the officers entry to his home necessarily yields to valid authority of law, under a warrant exception just as surely as under a warrant... But regardless of whether individuals are in a home, in a vehicle, or on the street, once they receive a lawful order from law enforcement, they have a statutory duty to comply." App. 32.

The problem with this analysis is it ignores the chilling effect this type of decision has on people exercising their Fourth Amendment Right when officers come to their door without a warrant. This is specifically what the federal precedent, discussed above, addresses and why every other State has ruled consistently with that precedent. Criminalizing the act of exercising a Fourth

Amendment Right when officers conduct a warrantless search creates a situation where a person is scared to exercise that Right because the law requires they assume officers have the authority to enter their home. As discussed in more detail below, the impact of this decision on the Fourth Amendment is significant.

II. The issue is important because Washington's law creates a situation where residents have to open their homes to the police regardless of whether there is a warrant or risk criminal prosecution.

The issue as to whether it is obstructing to passively refuse to open a door to a person's home during a warrantless search is of significant importance. McLemore's case demonstrates exactly how Washington's law impacts a person's Fourth Amendment right. The officers demanded entry with no warrant or warrant exception for fifteen minutes, yelling profanity and issuing orders for McLemore to speak to the officers and open the door. Absent a warrant, an ordinary person without legal training would have no ability to know whether the officer's demand to open the door is based upon lawful authority and whether failing to answer the door and speak to the police is obstructing.

There is no requirement for an officer to inform the occupant of a home that they have authority to search the home during a warrantless search. When an officer comes to a person's home and demands entry or demands to speak with the occupants, there is no way for the occupants to determine if the officer is acting pursuant to a warrant exception. A

homeowner has no way to distinguish between demands made during a warrantless search with an exception and demands made without an exception.

During a warrant search, police officers are required by both federal law, F.R.Cr.P. 41(f)(1)(C) and Washington Law, CrR 2.3(d) or CrRLJ 2.3(d) to provide a physical copy of the search warrant to the occupants, if present. The primary purpose of this rule is to "head off breaches of the peace by dispelling any suspicion that the search is illegitimate." *United States v. Gantt*, 194 F.2d 987, 992 (9th Cir. 1999), *overruled on other grounds, United States v. W.R. Grace,* 526 F.2d 499 (2008). During a warrantless search, occupants have no such assurance that the search is legitimate and are left to guess as to its legality.

The obstructing statute does not require the government prove that a defendant knew the officers had authority to enter the home. It only requires the government to prove that a person willfully hindered or delayed by not obeying an order. Under such a requirement, Counsel would have to recommend that occupants open their home to police every time police come to their door, thereby making the Fourth Amendment nearly obsolete as to one's home.

The issue is even further complicated considering that the Washington obstructing statute requires that police officers be performing their "official duties" at the time of the obstruction. But as anyone who has ever studied Fourth Amendment jurisprudence can attest, determining the legality of a warrantless entry into a residence frequently turns on the interpretation of minute factual details

properly analyzed in the light of often contradictory court decisions. It is unreasonable to expect ordinary homeowners to apprehend the nuances of search and seizure law sufficient to determine the legality of police demands.

But it is not just ordinary homeowners who must make these judgment calls. As Mr. McLemore's case illustrates, it is also jurors who must do so. After the trial court precluded argument on the legality of the entry, the jury sent a note to the judge asking, "Does a person have the legal obligation to follow the police instructions, in this case?" The trial court declined to answer the question, leaving it for the jury to guess at what point McLemore's passive refusal to open the door turned into obstructing.

If the Washington Supreme Court decision is allowed to stand, Counsel will be required to advise their clients and the community to answer and open their door whenever police demand entry, regardless of whether the entry is lawful, or they risk being convicted of obstructing. It is imperative that this Court make clear that passive resistance to a warrantless entry into one's home is not criminal, so law abiding citizens can act in accordance with the law. Ordinary citizens, not to mention courts, police, prosecutors, jurors, defense lawyers, immigration lawyers, must now all grapple with whether they are required to open the door to their homes to the government where there is no assurance via a warrant that such an entry is authorized. The consequences of guessing wrong about a person's legal duties in this situation are significant and may result in a criminal conviction, as was the case for Solomon McLemore.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted and the decision of the Washington Supreme Court reversed.

Respectfully submitted,

David C. Iannotti
Counsel of Record
STEWART MACNICHOLS
HARMELL, INC. P.S.
655 West Smith Street,
Suite 210
Kent, WA 98032
(253)859-8840
david@sbmhlaw.com

Thomas E. Weaver
PO Box 1056
Bremerton, WA 98337
(360)792-9345
tweaver@tomweaverlaw.com

Counsel for Petitioner

AUGUST 13, 2019