No. 19-202

In The
Supreme Court of the United States

SOLOMON McLEMORE,

Petitioner,

v.

CITY OF SHORELINE, WASHINGTON,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Washington

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

City of Shoreline, Washington

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QUESTION PRESENTED

Does the Fourth Amendment to the United States Constitution protect Defendant Solomon McLemore from prosecution for controlling, restricting and hindering King County Sheriff deputies' contact with McLemore's partner, Lisa Janson, during a domestic violence investigation at the couple's home?

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On April 18, 2019, the Washington State Supreme Court released two plurality opinions that each garnered four votes. *City of Shoreline v. McLemore*, No. 95707-0, slip op. (April 18, 2019). (Petitioner's Appendix A). On April 19, 2019 and May 30, 2019, the Washington Supreme Court amended the plurality opinions to the current published versions, *City of Shoreline v. McLemore*, 193 Wn.2d 225, 438 P.3d 1161 (2019). (Pet. App. B; Pet. App. C). Neither opinion is controlling precedent under Washington law. *State v. Johnson*, 173 Wn.2d 895, 904, 270 P.3d 591 (2012) ("plurality has little precedential value and is not binding").

JURISDICTION

Respondent City of Shoreline agrees with Petitioner's jurisdictional statement.

COUNTERSTATEMENT OF THE CASE

This case began with a 911 call at two in the morning. The caller reported a loud argument with a man and woman screaming near an apartment complex in Shoreline, Washington, a suburb north of Seattle. (Pet. App. 2). When King County deputies Andrew Boyer, Ben Emmons, and Jeremy Dallon responded, the caller met them at the scene and pointed to an apartment above a dry cleaners. The panicked yelling came from that area.

The deputies immediately heard a woman's voice coming from above and behind the dry cleaners, yelling in distress:

> "You can't leave me out here."
>
> "I'm going to call 911 or call the police."
>
> "Let me go."
>
> "I'm reconsidering our relationship."

(Pet. App. 47). Deputy Emmons heard the woman scream that she wanted to leave. The officers followed the woman's voice, located the apartment, found the street level door leading to the apartment, and began knocking loudly and ringing the doorbell.

> All went silent. (Pet. App. 18).
>
> After eight minutes of knocking, ringing, and announcing, one officer shined a spotlight on the apartment balcony. For the next eight minutes or so, the officer spoke through a public address system, repeating that he was with Shoreline Police and that he needed to speak with the occupants to make sure everything was okay.

(Pet. App. 48). Still no response.

The deputies then heard glass shattering – coming from the same location as the woman's voice. Approximately 40 seconds later they heard more glass shattering from the same place. Concerned the woman or others in the apartment had been harmed, the deputies needed to break down the door and enter immediately.

Because the heavy security door opened outward, the officers could not breach it with the tools they had on hand. (Pet. App. 28). They used what they had, a pickax, and called the Shoreline Fire Department to bring specialized tools to pry it open. (Pet. App. 28).

After chipping a small hole in the door, the officers could see a man inside, Defendant Solomon McLemore. (Pet. App. 48). The deputies repeatedly asked McLemore to let them see the woman in the apartment, talk to her, and make sure she was unharmed. McLemore refused, telling the officers to go away. (Pet. App. 21).

The officers insisted on seeing the woman to ensure she was safe. McLemore continued to refuse and then left to speak with the woman, Lisa Janson. McLemore coached Ms. Janson on how to behave, what to say to the deputies, and what actions she could and could not take. Ms. Janson did as McLemore directed, telling the deputies through the closed door that she was okay and that she had a baby in her arms.

This made the officers more concerned for her safety.

> Deputy Dallon testified that Lisa "sounded like she had been crying. . . . [I]t didn't sound like a calm, normal individual." CP at 331. He explained, "[McLemore] saying tell them you're okay seemed very coercive"; officers "have the legal obligation to investigate to make sure that someone who needs help isn't being prevented from getting help because of various reasons." Id. On cross examination, McLemore

> grudgingly acknowledged that he told Lisa she needed to talk to the police and she needed to act mad. CP at 440. He also told her that if she opened the door and went outside, he was going to jail. CP at 441.

(Pet. App. 20, n.2). Throughout the incident, Defendant controlled Ms. Janson's contact and interaction with the officers.

With the fire department's help, the deputies broke open the door and ran upstairs to check on Ms. Janson and her baby. They finally discovered no one was injured or needed immediate aid and then arrested McLemore for interfering with their ability to confirm Ms. Janson and her baby's safety. The City of Shoreline charged Defendant with one count of obstructing a law enforcement officer under Revised Code of Washington (RCW) 9A.76.020.

Defendant McLemore stood trial before a Washington court of limited jurisdiction, the King County District Court. (Pet. App. 43). There, a six-person jury unanimously convicted Defendant on one count of Obstruction, a Gross Misdemeanor. (Pet. App. 43). He appealed under Washington's Rules of Appeal of Decisions of Courts of Limited Jurisdiction (RALJ) to the King County Superior Court, which affirmed his conviction. (Pet. App. 45). Defendant then sought discretionary review in the Washington Court of Appeals, Division I. A court commissioner denied review, concluding "there was evidence from which a rational trier of fact could find beyond a reasonable doubt that he hindered, delayed or obstructed the officers in

performance of their community caretaking function." (Pet. App. 54). The Court of Appeals denied McLemore's motion to modify the commissioner's ruling. (Pet. App. 55).

Finally, McLemore successfully petitioned the Washington State Supreme Court for review. On October 18, 2018, the Court held oral argument, announcing at the beginning that one of the Justices had an emergency and recused herself from the case. (https://www.tvw.org/watch/?clientID=9375922947&eventID=2018101060&autoStartStream=true). An eight-justice panel heard argument and conferenced on the appeal.

On April 18, 2019, the Court released its decision. A four-person plurality led by Justice Steven Gonzales wanted to reverse McLemore's conviction and overrule a Washington Court of Appeals' decision, *State v. Steen*, 164 Wn. App. 789, 265 P.3d 901 (2011) that upheld a similar conviction. (Pet. App. 15). A four-person plurality led by Justice Debra Stephens would instead uphold the conviction, concluding that McLemore interfered with the officers' "statutory duty to verify Lisa's safety as part of their community caretaking responsibility." (Pet. App. 21).

As originally published, Justice Gonzales' opinion was designated "lead" and Justice Stephens' a "dissent." (Pet. App. 17). But because neither opinion garnered a majority, the conviction could not be overturned, and the opinions were not binding precedent under Washington law. The next day, April 19, 2019, the Court

amended Justice Gonzales' plurality opinion to remove its conclusion and substitute the following:

> We in the lead opinion would hold the city presented insufficient evidence to sustain McLemore's conviction and remand to the trial court for further proceedings consistent with this opinion. However, we recognize this opinion has garnered only four signatures. "Therefore, there being no majority for the reversal of the judgment of the trial court, it necessarily stands affirmed, and the order of this court is that the judgment appealed from be and it is hereby affirmed." *Peterson v. City of Tacoma,* 139 Wash. 313, 313, 246 P. 944 (1926).

(Pet. App. 37–38). The Court later amended Justice Stephens' opinion to note that the Court affirmed Defendant's conviction.

Defendant McLemore now petitions this Court for review of the plurality opinions.

REASONS FOR DENYING THE PETITION

The City of Shoreline respectfully requests this Court to deny Defendant McLemore's Petition for Certiorari for three reasons. First, the Washington Supreme Court's plurality opinions are not binding and therefore cannot conflict with existing caselaw. Second, substantial evidence established that Defendant McLemore interfered with Lisa Janson's access to law

enforcement during an emergent domestic violence investigation. And third, the Fourth Amendment does not excuse Defendant's purposeful interference or protect it from prosecution.

Simply put, this case has unique procedural and evidentiary factors that make it inappropriate for Supreme Court review.

I. The Washington Supreme Court's Non-Binding Plurality Opinions Did Not "Decide An Important Question Of Federal Law."

Under Supreme Court Rule 10, this Court may grant certiorari when a state court "has decided an important federal question" that either conflicts with existing caselaw or should be settled by the Court. (Rule 10(b)-(c)). Here, there is no precedential decision. A plurality opinion is not binding under Washington State or federal law. "A plurality opinion has limited precedential value and is not binding on the courts." *In re Isadore*, 151 Wn.2d 294, 302, 88 P.3d 390 (2004); *Neil v. Biggers*, 409 U.S. 188, 192, 93 S. Ct. 375, 379, 34 L. Ed. 2d 401 (1972) ("nor is an affirmance by an equally divided Court entitled to precedential weight").

In his Petition, Defendant McLemore claims that the Washington Supreme Court,

> 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-nonexistent duty subjects Washingtonians to arrest, prosecution, and conviction of a crime.

(Pet. at 6). There are several problems with this sweeping statement, and it misstates the rationale of the plurality opinions. But the glaring flaw is that the Washington Supreme Court made no such decision. Because neither the "lead" or "dissent" opinion garnered a majority, the Washington court has not issued a binding ruling. There is no precedential or even persuasive value to the evenly divided court's opinions. *State v. Johnson*, 173 Wn.2d 895, 904, 270 P.3d 591 (2012) ("little precedential value and . . . not binding").

The Washington Supreme Court affirmed Defendant's conviction by default – because a majority did not vote to reverse, the trial court's judgment is automatically affirmed. *Peterson v. City of Tacoma*, 139 Wash. 313, 313, 246 P. 944 (1926) ("there being no majority for the reversal of the judgment of the trial court, it necessarily stands affirmed"). This Court applies the same rule to its decisions. *Etting v. U.S. Bank*, 24 U.S. 59, 78, 6 L. Ed. 419 (1826) ("the principles of law which have been argued cannot be settled; but the judgment is affirmed, the Court being divided in opinion upon it") (Marshall, C.J.). Although there is a final Washington judgment, there is no Washington precedent to review.

This creates unique problems for Defendant's Petition. If this Court grants Certiorari, which decision does it review? Defendant implies that the "dissenting"

plurality is the relevant opinion, but it has no more weight than the "lead" opinion that supports his position. The City has failed to find any reported decision from this Court that has reviewed a state court's plurality opinion, let alone two from the same court.

The plurality opinions disagree on fundamental questions of fact, including the basis for the jury's verdict. Justice Gonzales concluded "our review of the record leaves us with an abiding concern the jury could have convicted on speech alone." (Pet. App. 15). On the other hand, Justice Stephens found the verdict "rests not on pure speech or mere inaction but on [McLemore's] willful conduct that hindered, delayed, or obstructed law enforcement in the discharge of their official duties." (Pet. App. 17). If it grants Defendant's Petition, this Court must decide the basis of the jury's verdict – with no binding Washington State court decision as guidance. As Rule 10 advises, "a petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings." Defendant's Petition invites the Court to reweigh the facts in deciding why the jury found obstruction.

Given the unique difficulties in reviewing two plurality opinions from the same court on the same case, this Court appropriately denies the Petition for Certiorari.

II. Defendant McLemore Overstates His Passivity.

The King County District Court jury convicted Defendant McLemore of a Gross Misdemeanor for obstructing law enforcement officers. Under RCW 9A.76.020:

> 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. . . .

(RCW 9A.76.020). Defendant concedes that the responding officers had a duty to ensure Ms. Janson and her baby were safe. (Pet. at 8) ("search may have eventually been justified"). Furthermore, both plurality opinions confirmed that the King County deputies had compelling reasons to act immediately. "It is undisputed that the officers here responded appropriately and lawfully to a potential domestic violence situation in which both Lisa and the child reasonably appeared in immediate danger." (Pet. App. 6) (Gonzales, J.); (Pet. App. 20) (Stephens, J.) ("officers make clear that they are giving a lawful order to open the door so they can verify the safety of the occupants inside").

The Washington Legislature requires law enforcement officers to act promptly on allegations of domestic violence and take those charges seriously. RCW 10.99.030 ("the primary duty of peace officers, when responding to a domestic violence situation, is to enforce the laws allegedly violated and to protect the

complaining party"). Washington State caselaw reinforces this duty to investigate domestic violence and act quickly to protect victims.

> Domestic violence presents unique challenges for law enforcement. Domestic violence situations can be volatile and quickly escalate into significant injury. Domestic violence often, if not usually, occurs within the privacy of a home. Our legislature has recognized that the risk of repeated and escalating acts of violence is greater in the domestic context. RCW 10.99.040(2)(a). The legislature has sought to provide "maximum protection" to victims of domestic violence through a policy of early intervention. RCW 10.99.010. The Court of Appeals has recognized that "[p]olice officers responding to a domestic violence report have a duty to ensure the present and continued safety and well-being of the occupants." *State v. Raines*, 55 Wn. App. 459, 465, 778 P.2d 538 1989).

State v. Schultz, 170 Wn.2d 746, 755, 248 P.3d 484 (2011).

Defendant McLemore willfully interfered with and hindered the deputies' performance of this vital responsibility. He blocked the officers from contacting Ms. Janson, observing her condition, and most importantly, speaking with her outside of McLemore's control. Substantial evidence at trial proved that Defendant: (1) refused to let officers see Ms. Janson; (2) instructed her to tell officers she was "okay"; (3) told her to act mad; and (4) threatened her that

she would go to jail if she opened the door. (Pet. App. 20 n.2). This is not simply passively refusing to unlock the door. Defendant McLemore actively inhibited and interfered with Ms. Janson's ability to contact and speak freely with investigating officers.

Well-trained officers should never accept an aggressor's assurance that his or her victim is fine and does not want to talk. "When a peace officer responds to a domestic violence call, the officer shall advise victims of all reasonable means to prevent further abuse, including advising each person of the availability of a shelter or other services in the community, and giving each person immediate notice of the legal rights and remedies available." RCW 10.99.030(4). The deputies here could not just go away simply because McLemore asserted everything is fine. *Donaldson v. City of Seattle*, 65 Wn. App. 661, 667, 831 P.2d 1098 (1992), *opinion corrected* (July 1, 1992) ("the Domestic Violence Prevention Act (DVPA), amending RCW 10.99, imposes a duty on the City to protect victims of domestic violence"). Defendant McLemore was anything but passive.

III. The Fourth Amendment Does Not Protect Defendant McLemore's Interference.

The cornerstone of Defendant McLemore's argument is that the Fourth Amendment protects him from prosecution for all his actions in his home.

> 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.

(Pet. at 7–8) (emphasis added). The City strongly disputes the italicized assertion, and as shown in the preceding section, substantial evidence proves the opposite: McLemore controlled Ms. Janson's actions and responses.

Defendant's argument has the virtue of simplicity. According to him, once he crosses the threshold of his apartment, the Fourth Amendment protects all his actions from scrutiny or prosecution.

There are at least two flaws with Defendant's claim. First, the Fourth Amendment does not insulate him from liability for interfering with Ms. Janson's choices and actions. Second, the exigent – often life or death – circumstances of the community caretaking function give law enforcement the power to prevent or interrupt domestic violence.

"This country witnesses more than a million acts of domestic violence, and hundreds of deaths from

domestic violence each year." *United States v. Castleman*, 572 U.S. 157, 159–60, 134 S. Ct. 1405, 1408, 188 L. Ed. 2d 426 (2014). An aggressor cannot set up a violent, dangerous confrontation only to claim "passive" resistance to an officer's reasonable commands. "Acts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions." *Giles v. California*, 554 U.S. 353, 377, 128 S. Ct. 2678, 2693, 171 L. Ed. 2d 488 (2008).

In his Petition, Defendant McLemore claims "a person does not need to open their home to police or even answer the door for police unless they have a warrant." (Pet. at 8). Yet the three Supreme Court opinions Defendant cites do not excuse Defendant's interference. None involve an aggressor preventing law enforcement from contacting and protecting a potential victim.

In the first case, *District of Columbia v. Little*, 39 U.S. 1, 70 S. Ct. 468, 94 L. Ed. 599 (1950), this Court concluded under District of Columbia law that refusing to unlock a door for a health inspector is not interference. "[E]ven 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 of a misdemeanor under the controlling District law." *Little*, 339 U.S. at 4.

The Court did not conclude the Fourth Amendment protected all resistance to a lawful search. Instead, "the word 'interfere' in this regulation cannot fairly be interpreted to encompass respondent's failure to unlock her door and her remonstrances on constitutional grounds." *Little*, 339 U.S. at 6–7. And Ms. Little did not interfere with another resident's ability to talk to the investigators.

Next, in *Camara v. Mun. Court of City & Cty. of San Francisco*, 387 U.S. 523, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967), this Court held that administrative inspections of homes and businesses are searches subject to the Fourth Amendment. "If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant." *Camara*, 387 U.S. at 539. Because San Francisco housing inspectors failed to get a warrant after three unsuccessful attempts to obtain consent to search, the Court vacated Roland Camara's citation for refusing to allow inspection of his apartment.

> There was no emergency demanding immediate access; in fact, the inspectors made three trips to the building in an attempt to obtain appellant's consent to search. Yet no warrant was obtained and thus appellant was unable to verify either the need for or the appropriate limits of the inspection.
>
> * * *
>
> Assuming the facts to be as the parties have alleged, we therefore conclude that appellant had a constitutional right to insist that the

> inspectors obtain a warrant to search and that appellant may not constitutionally be convicted for refusing to consent to the inspection.

Camara, 387 U.S. at 540. Here, there was an emergency, and unlike Mr. Camara, Defendant McLemore interfered with another person's access to law enforcement and protection.

Finally, in *Kentucky v. King*, 563 U.S. 452, 131 S. Ct. 1849, 179 L. Ed. 2d 865 (2011), this Court held that where "the police did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment, warrantless entry to prevent the destruction of evidence is reasonable and thus allowed." *King*, 563 U.S. at 462. Defendant McLemore relies on the Court's description of an officer's ability to knock on a door and talk to whomever answers.

> 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. Cf. *Florida v. Royer*, 460 U.S. 491, 497–498, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983) ("[H]e may decline to listen to the questions at all and may go on his way"). When the police knock on a door but the occupants choose not to respond or to speak, "the investigation will have reached a conspicuously low point," and

> the occupants "will have the kind of warning that even the most elaborate security system cannot provide." *Chambers*, 395 F.3d, at 577 (Sutton, J., dissenting). And even if an occupant chooses to open the door and speak with the officers, the occupant need not allow the officers to enter the premises and may refuse to answer any questions at any time.

King, 563 U.S. at 469–70.

The Court's description of a typical interaction does not protect Defendant McLemore's actions here. Although they did not have a warrant, the King County deputies had the right to forcibly enter the couple's home to ensure Ms. Janson and her baby were safe. "[L]aw enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403, 126 S. Ct. 1943, 1947, 164 L. Ed. 2d 650 (2006). This was an emergency and might have involved life-threatening consequences. Nothing in *King* entitles Defendant McLemore to control and restrict Ms. Janson's access to law enforcement or the officers' statutory duty to confirm she was safe.

The second flaw in Defendant's argument is that the Fourth Amendment does not allow a perpetrator to create a violent situation at home and then "passively" prevent law enforcement from protecting the occupants. The Fourth Amendment protects Defendant McLemore's reasonable expectation of privacy in his home. It does not provide blanket protection for

everything he does there. For this reason, the Ninth Circuit's decision in *United States v. Prescott*, 581 F.2d 1343 (9th Cir. 1978) does not excuse Defendant's willful interference.

> Had Prescott forcibly resisted the entry into her apartment, we might have a different case. *We express no opinion on that question*. We only hold that her passive refusal to consent to a warrantless search is privileged conduct which cannot be considered as evidence of criminal wrongdoing.

Prescott, 581 F.2d at 1351 (emphasis added). McLemore forcibly resisted Ms. Janson speaking with King County deputies and forcibly resisted the officers ensuring her safety. This is far more than passively refusing to consent to a warrantless search.

The imminent threat of domestic violence requires police to enter a home regardless of the owner's consent.

> The question whether the police might lawfully enter over objection in order to provide any protection that might be reasonable is easily answered yes. See 4 LaFave § 8.3(d), at 161 ("[E]ven when . . . two persons quite clearly have equal rights in the place, as where two individuals are sharing an apartment on an equal basis, there may nonetheless sometimes exist a basis for giving greater recognition to the interests of one over the other. . . . [W]here the defendant has victimized the third-party . . . the emergency nature of the situation is such that the third-party

> consent should validate a warrantless search despite defendant's objections" (internal quotation marks omitted; third omission in original)).

Georgia v. Randolph, 547 U.S. 103, 118, 126 S. Ct. 1515, 1525–26, 164 L. Ed. 2d 208 (2006). Ms. Janson had a right to speak with the King County deputies and open the door for them. By coercing her and controlling her access, Defendant McLemore violated Washington State law, interfering with an emergent investigation of domestic violence. The Fourth Amendment does not justify his actions or insulate them from prosecution.

CONCLUSION

The evenly split decision from the Washington State Supreme Court does not warrant further review. The two plurality decisions are not binding and cannot create a conflict with existing law. They are not precedent for future courts. Affirming Defendant Solomon McLemore's conviction is appropriate both procedurally and on the substantial evidence proving his active interference with the King County Sheriff's investigation of domestic violence.

The City of Shoreline respectfully requests this Court to deny Defendant McLemore's Petition for Certiorari.

DATED this 15th day of November, 2019.

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