No. 95707-0

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

CITY OF SHORELINE,

Respondent

v.

SOLOMON MCLEMORE

Petitioners.

AMICI CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON, WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND WASHINGTON DEFENDER ASSOCIATION

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I. IDENTITY AND INTEREST OF AMICI CURIAE

The identity and interest of amicus American Civil Liberties Union of Washington (ACLU) was described in the amicus Motion previously filed in this case. A supplemental motion describing additional amici joining this brief will also be filed.

II. INTRODUCTION

Washington's obstruction statute, RCW 9A.76.020, makes it a crime to "willfully hinder[], delay[], or obstruct[] any law enforcement officer in the discharge of his or her official powers or duties." Construed broadly, this statute would criminalize any purposeful activity that inconveniences a police officer in the line of duty, including the exercise of a constitutional right. But this court has repeatedly limited the application of the statute so as to prevent that outcome. *State v. E.J.J*, 183 Wn.2d 497, 502, 354 P.3d 815 (2015) ("Washington courts have long limited the application of obstruction statutes, lest those statutes infringe on constitutionally protected activity"); *State v. Williams*, 171 Wn.2d 474, 485, 251 P.3d 877 (2011) ("in order to find obstruction statutes constitutional, appellate courts of this state have long required conduct" as opposed to pure speech). To date, this court has articulated two specific limits on RCW 9A.76.020: the statute may punish neither pure speech, *E.J.J.*, 183 Wn.2d at 503-04, nor the refusal to submit to questioning,

Williams, 171 Wn.2d at 484 (citing *State v. Contreras*, 92 Wn. App. 307, 316, 966 P.2d 915 (1998)), because these are constitutionally privileged activities immune from government sanction. The activity at issue in this case—an occupant's assertion of his rights and refusal to open his home to police officers demanding warrantless entry—is equally privileged. The court should interpret the obstruction statute so as not to encompass this assertion of a basic constitutional right.

III. STATEMENT OF THE CASE[1]

At around 2 a.m., two Shoreline police officers responded to a report of a loud argument coming from Solomon McLemore's apartment. When they arrived, the officers heard a woman yelling, "you can't leave me out here" and "I'm going to call the police." The officers could tell that the yelling was coming from a second floor balcony, but could not see what was happening on the balcony.

The officers went to the door of the apartment and began knocking, ringing the doorbell, and announcing their presence. They later testified they were concerned that the woman yelling from the balcony might be hurt. When the officers knocked, the arguing abruptly stopped, but the officers continued knocking, ringing, announcing their presence, and addressing the apartment's occupants through a patrol vehicle's public

[1] The facts discussed here are taken from the parties' briefs.

address system. After about twenty minutes, the officers twice heard the sound of glass breaking and called the Shoreline Fire Department to request help breaching the apartment door.

As the officers attempted forcible entry, McLemore began speaking with them through the closed door. McLemore told the officers that he did not have to let them in, that they were violating his civil rights, and that they needed a search warrant. At some point, the officers heard McLemore tell the woman inside to let the officers know that she was all right, which the woman did by calling to them from inside the apartment. When the officers finally broke through the door, they immediately arrested McLemore for obstruction.

McLemore was charged in King County District Court with obstructing a law enforcement officer in violation of RCW 9A.76.020. He moved to dismiss the charges, arguing that he could not be convicted simply for asserting constitutional protections against a warrantless search. The trial court denied the motion and, after the jury asked "Does a person have the legal obligation to follow the police instructions, in this case?," the jury convicted McLemore. This court granted review after the conviction was upheld in the RALJ appeal process.

IV. ARGUMENT

McLemore does not argue that the officers' warrantless entry to his apartment violated the protections afforded by the Fourth Amendment to the United States Constitution or article I, section 7 of the Washington Constitution. He concedes that the forcible entry was justified under the "community caretaking" exception to the warrant requirement.[2] But McLemore argues that the conduct for which he was prosecuted—his passive refusal to unlock his door and help officers accomplish a warrantless entry to his home—cannot constitute the crime of obstruction. This court should agree.

A. Washington Appears to Be the Only Jurisdiction in Which an Individual Can Be Convicted for Peacefully Refusing a Warrantless Home Intrusion

This Court should reverse McLemore's obstruction conviction because it makes a person's assertion of their rights a crime, contrary to ample precedent; to the extent Washington case law disagrees, it cannot stand. To deny McLemore's motion for discretionary review, the Court of Appeals relied exclusively on *State v. Steen*, 164 Wn. App. 789, 265 P.3d 901 (2011). Shoreline v. McLemore, No. 77094-2-I, Order Denying

[2] *See State v. Schultz*, 170 Wn.2d 746, 754-55, 248 P.3d 484 (2011) (officers may invade constitutionally protected privacy interests when (1) they subjectively believe that a specific person or property likely needs assistance for health or safety reasons; (2) that belief is objectively reasonable; (3) there is a reasonable basis to associate the need for assistance with the place being searched; (4) there is an imminent threat of substantial injury to persons or property; and (5) the claimed emergency is not mere pretext for a search).

Discretionary Review (November 29, 2017) at 4-5. In *Steen*, a divided Division Two panel held that a person may be convicted of obstruction for failing to comply when officers, with no warrant, demand that he *exit* his home. 164 Wn. App. at 802. In the present case the court went even further, ruling that McLemore could be convicted of obstruction for failing to open his door and allow officers with no warrant to *enter*. *Compare* Order Denying Discretionary Review at 5 (concluding that McLemore committed obstruction by "refus[ing] to open the door to allow the officers to check on the wellbeing of the occupants") *with Steen*, 164 Wn. App. at 802 & n.9 (holding that obstruction statute covers defendant's refusal to exit residence, but distinguishing case in which officers demand warrantless entry). Thus, as applied by the court of appeals in this case, *Steen* makes it a crime to peacefully assert Fourth Amendment and article I, section 7 protections against warrantless intrusions into the home. Washington appears to be alone in applying an obstruction statute this way. Amici are aware of no case, from any jurisdiction, holding that a resident can commit obstruction merely by refusing to acquiesce when an officer demands warrantless entry to a home.[3] And numerous courts have

[3] The City asserts that other jurisdictions "authorize criminal convictions for refusing to admit police officers when the emergency or exigency exception to the warrant applies." Supp. Br. of Resp. at 20-22. But none of the cases it cites support this principle; instead, all involve forcible resistance as a dispositive factor. *State v. Line*, 121 Haw. 74, 87-88, 214 P.3d 613 (2009) (defendant's conduct not constitutionally privileged when she

reached the opposite conclusion, including where exigent circumstances or community caretaking excused the lack of a warrant.

In *New Jersey v. Berlow*, 284 N.J. Super. 356, 360-65, 665 A.2d 404 (1995), the court held that, even if police suspect that a gravely injured person is inside a residence, federal and state constitutional protections bar the prosecution of an occupant for closing and locking the door in response to officers' request to enter. The court explained that it made no difference whether an exception to the warrant requirement in fact applied:

> to require citizens to yield to police demands for entry into private dwellings in all circumstances would unfairly relegate the exercise of their constitutional right to an after-the-fact judicial process and would place upon them an undue burden to undertake litigation in order to seek redress. To qualify the exercise of a Fourth Amendment right in that fashion would essentially eviscerate the purpose of that amendment, which is to stop governmental intrusion at the door.

Id. at 364.

Similarly, in *Ballew v. State*, 245 Ga. App. 842, 842-43, 538 S.E.2d 902 (2000) *overruled on other grounds in Stryker v. State*, 297 Ga. App. 493, 495 n.1, 677 S.E.2d 680 (2009), officers investigating a 911

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braced herself against door and then assaulted officers once they broke through); *State v. Wiedenheft*, 136 Idaho 14, 27 P.3d 873 (2001) (defendant committed obstruction when she struck two police officers with her door); *Dolson v. United States*, 948 A.2d 1193, 1202 (D.C. Cir. 2008) (even if closing and locking gate does not constitute obstruction, holding it closed against officers attempting entry can support conviction).

report of a knife fight arrived at a residence and found a man disheveled, a woman bleeding, and blood at various locations around yard. The officers requested to search inside the home for another, possibly injured, person and the man refused. *Id*. The appellate court held that the man could not be charged with obstruction for this refusal because "[c]ertainly the assertion of one's constitutional rights cannot be an obstruction of an officer, or every assertion of such rights would lead to obstruction charges." *Id*. at 843. *See also Harris v. State*, 314 Ga. App. 816, 821, 726 S.E.2d 455 (2012) (citing *Ballew*, 245 Ga. App. at 843) (obstruction statute would be invalid if it allowed defendant to be "arrested for peaceably asserting his constitutional rights as he understood those rights").

Likewise, in *United States v. Prescott*, 581 F.2d 1343, 1346-47 (9th Cir. 1978), officers demanded entry to an apartment where they believed a mail fraud suspect had fled. The apartment's occupant refused, asked officers whether they had a warrant (they did not), and locked her door. *Id*. The Ninth Circuit held that, even if exigent circumstances justified the officers' warrantless entry to her home, evidence that the defendant "passively assert[ed]" her Fourth Amendment right to refuse could not be used against her at trial for assisting a federal offender: "passive refusal to consent to a warrantless search is privileged conduct

which cannot be considered as evidence of criminal wrongdoing." *Id*. at 1351. The court noted that forcible resistance might yield a different result, but it concluded that locking the door to one's home was constitutionally protected activity. *Id*.[4]

Further supporting the reasons this Court should follow the above precedent, and limit or overrule *Steen*, it is well established that article I, section 7 provides even stronger protections against government intrusion into a residence than the Fourth Amendment does. *State v. Eisfeldt*, 163 Wn.2d 628, 635-36, 185 P.3d 580 (2008). And this court has also held that article I, section 7 provides greater protection in the context of the obstruction statute. *Williams*, 171 Wn.2d at 484 ("[a]lthough we have expressed concerns about obstruction statutes predicated on speech based on the Fourth Amendment of the United States Constitution, article I, section 7 of the Washington Constitution provides even greater protection from governmental intrusions"). In light of these stronger protections, it makes no sense that Washington would be the only jurisdiction in which

[4] The City contends that *Prescott* and *Berlow* "involved . . . circumstances in which no exception to the warrant requirement existed." Supp. Br. of Resp. at 15-16. This is misleading. In *Prescott*, the court remanded with instructions to suppress evidence of the defendant's refusal *whether or not an exception justified warrantless entry*, holding that the refusal was privileged in either case. *Prescott*, 581 F.2d at 1351. In *Berlow*, the court agreed that police lacked "probable cause," but found the entry justified under an "emergency aid" exception. *Berlow*, 284 N. J. Super. at 361 (internal quotations omitted). The City does not address the Georgia cases.

citizens may be prosecuted merely for failing to yield when law enforcement demands warrantless entry to their homes.

Yet that is exactly what the court of appeals concluded in this case. Order Denying Discretionary Review at 5 (acknowledging that McLemore's argument "arguably raises a significant issue of constitutional law," but concluding that it is foreclosed by *Steen*); *Steen*, 164 Wn. App. at 802 n.9 (acknowledging that authority from other jurisdictions uniformly protects "refusing to answer police knocks at the door," but concluding with no explanation that "[w]e have reviewed [those] cases and do not find them persuasive"). This court should correct that error by holding that Washington's obstruction statute does not criminalize the peaceful refusal to open one's home when police demand warrantless entry.

B. Limiting the Obstruction Statute In the Manner McLemore Suggests is Consistent with the Canon of Constitutional Avoidance and Furthers Sound Policy Concerns

As noted above, Washington courts have repeatedly limited the application of the obstruction statute so as to avoid criminalizing constitutionally protected activity. *Williams*, 171 Wn.2d at 478-83 (tracing history of Washington's obstruction statute and opinions narrowing its scope). Those limits reflect both principles of constitutional avoidance and sound policy concerns. *Id*. at 485-86:

> appellate courts . . . have long required conduct [for prosecution under the obstruction statute] not only because of concern that criminalizing pure speech would implicate freedom of speech [but also] . . . because of further concerns that law enforcement officers, without probable cause or even reasonable suspicion . . . may engage citizens in conversation, arrest them for obstruction based on false statements, and then search incident to arrest.

In this case, both constitutional avoidance and policy concerns support the construction of RCW 9A.76.020 that McLemore advances: the statute does not criminalize an occupant's assertion of his rights and corresponding failure to help officers effect a warrantless intrusion into a private residence.

1. The Limiting Construction that McLemore Proposes Preserves the Obstruction Statute's Constitutionality

A court's fundamental purpose in construing a statute is to carry out the legislature's intent. *State v. Bigsby*, 189 Wn.2d 210, 216, 399 P.3d 540 (2017). Where possible, however, courts construe statutes so as to preserve their constitutionality. *Jones v. United States*, 529 U.S. 848, 851, 120 S. Ct. 1904, 146 L. Ed. 2d 902 (2000); *Williams*, 171 Wn.2d at 476-77 (citing *PRP of Matteson*, 142 Wn.2d 298, 307, 12 P.3d 585 (2000)). The latter rule frequently comes into play where obstruction statutes are concerned because, by their nature, these statutes regulate private citizens' interaction with law enforcement (or government agents more generally) in broad, generic terms. Thus, courts all over the country have applied

limiting constructions to these laws, interpreting them so as not to sweep up constitutionally privileged activity. *E.g., District of Columbia v. Little*, 339 U.S. 1, 6-7, 70 S. Ct. 468, 94 L. Ed. 2d 599 (1950) (applying principle of constitutional avoidance; construing statute that penalized "interfering with or preventing" a health inspection so as not to encompass defendant's refusal to unlock her door and consent to warrantless entry); *State v. Krawsky*, 426 N.W.2d 875, 877-78 (Minn. 1988) (saving obstruction statute from overbreadth by construing it to penalize only "intentional physical obstruction or interference"); *Harris v. State*, 314 Ga. App. 816, 817-21, 726 S.E.2d 455 (2012) (construing obstruction statute so as to avoid constitutional questions arising where defendant was prosecuted for refusing to answer officers' questions); *City of Columbus v. Michel*, 55 Ohio App. 2d 46, 47-48, 378 N.E.2d 1077 (1978) (construing obstruction statute criminalizing "any act which hampers or impedes a public official in the performance of a lawful duty" so as not to penalize omission, such as failure to open door upon officer's command). As discussed above, where the privacy of the home is at stake, courts have uniformly held that the crime of obstruction does not encompass acts such as closing a door, locking a door, or refusing to unlock a door. *E.g.*, *Little*, 339 U.S. at 6-7 (statute does not reach refusal to unlock door to residence upon officer's command); *Prescott*, 581 F.2d at 1346-47, 1350-53 (statute does not reach

act of locking door to residence in response to officers' repeated demand for entry); *Beckom v. Georgia*, 286 Ga. App. 38, 41-42, 648 S.E.2d 656 (2007) (even court that affirmed obstruction convictions for flight or lying to officers would not permit obstruction charge for mere refusal to open the door of a residence); *Berlow*, 284 N.J. Super. at 364 (statute does not reach act of closing and locking the door to residence in response to officers' demand for entry).

Limiting the statute's scope in this way preserves its consistency with Fourth Amendment and article I, section 7 protections. Under both article I, section 7, and the Fourth Amendment, an individual's right to privacy is strongest at home, so that "'the closer officers come to intrusion into a dwelling, the greater the constitutional protection.'" *State v. Ferrier*, 136 Wn.2d 103, 112, 960 P.2d 927 (1998) (citing, *inter alia*, *State v. Young*, 123 Wn.2d 173, 185, 867 P.2d 593 (1994)). Consistent with this strong protection of a person's home is the requirement—subject to only a few limited exceptions—that law enforcement obtain a warrant before entering a private residence. *Eisfeldt*, 163 Wn.2d at 635; *Kyllo v. United States*, 533 U.S. 27, 31, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001). While the warrant requirement applies more broadly under article I, section 7 than under the Fourth Amendment, *Eisfeldt*, 163 Wn.2d at 636-38, it is fundamental to both state and federal constitutional privacy protections.

Indeed, the United States Supreme Court recently held that police do not create an exigency (triggering the exclusionary rule) by knocking and loudly announcing their presence at a private home, *because the occupants may always refuse a request for warrantless entry*:

> When law enforcement officers who are not armed with a warrant knock on a door, . . . the occupant has no obligation to open the door or to speak. . . . 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. Occupants who choose not to stand on their constitutional rights but instead elect to attempt to destroy evidence have only themselves to blame for the warrantless exigent-circumstances search that may ensue.

Kentucky v. King, 563 U.S. 452, 456, 469-70, 131 S. Ct. 1849, 179 L. Ed. 2d 865 (2011). This decision rests on the premise that citizens know, and must either assert or forfeit, their right against warrantless intrusions into the home. In this case, that is exactly what McLemore did. It is fundamentally unfair—and unconstitutional—to hold that this is both McLemore's right and a crime punishable by law.

2. The Limiting Construction that McLemore Proposes Furthers Sound Policy; the State's Proposed Construction Creates Considerable Policy Problems

The lower courts invited confusion and harm when they concluded that McLemore's right to peaceably refuse warrantless entry depended on whether a warrant exception—in this case community caretaking—in fact

applied. Order Denying Discretionary Review at 4. It is not the after-the-fact existence of a warrant exception, but instead the defendant's use of force at the time that is dispositive of obstruction, even where officers *incorrectly* assert an exception to the warrant requirement. *State v. Holman*, 103 Wn.2d 426, 429-31, 693 P.2d 89 (1985) (although officer's warrantless arrest of son on suspicion of theft was unconstitutional, father could still be charged with obstructing for wielding a crowbar to try to prevent son's arrest). *See also State v. Crawley*, 187 N.J. 440, 457-60, 901 A.2d 924 (2006) (discussing policy reasons for permitting obstruction conviction of suspect who fled scene of illegal stop). The same logic should apply when police correctly assert an exception to the warrant requirement. People are prohibited from using force to resist, but should not be required to *assume* a warrant exception applies and willingly submit. *Berlow*, 284 N.J. Super. at 364 (individuals must be able to refuse warrantless entry before it occurs, not wait for vindication by court after-the-fact). Indeed, some of the City's briefing appears to concede this point.[5]

While the line between criminal conduct and protected assertion of one's rights must be drawn somewhere, it must give fair warning of what

[5] The City's theory is not entirely clear. It both acknowledges the right to passively refuse entry, but also argues that the duty to acquiesce should depend on the existence of an exception to the warrant requirement. See Supp. Br. of Resp. at 10 & n.3, and 11-16.

conduct is a criminal and cannot be drawn to retroactively create an affirmative duty to assist law enforcement in effecting a warrantless entry to a home. *See City of Middleburg Heights v. Theiss*, 28 Ohio App. 3d 1, 4-5, 501 N.E.2d 1226 (1985) (although violence against officers after they enter is clearly not privileged, "there exists at least some limited right to resist entrance, such as locking or closing the door or physically placing one's self in the officer's way"). Blurring the line, as occurred here, creates serious policy problems in addition to the constitutional problems described above. Expansion of the obstruction statute will have a chilling effect upon citizens' invocation of their constitutional rights, will expand the power of law enforcement beyond what is constitutionally permissible, and will perpetuate racial disparity that our State has already recognized is currently present in police practices and their enforcement of the statute itself.

As to the chilling effect problem, the lower courts created a legal duty punishable as a crime in conflict with the ordinary person's understanding of the right to refuse police entry into their home absent a warrant. *See State v. D.E.D.*, 200 Wn. App. 484, 494, 402 P.3d 851 (2017) ("obstructing statute [involves] determin[ing] if the defendant had any obligation to cooperate with the officer"); *Silverman v. United State*s, 365 U.S. 505, 511, 81 S.Ct. 679, 5 L.Ed.2d 734 (1961) (right to retreat

into one's own home and be free from unreasonable governmental intrusion); *Kyllo*, 533 U.S. at 34 (interior of the home is "the prototypical and hence most commonly litigated area of protected privacy …."); *E.J.J.*, 183 Wn.2d at 528 (González, J., concurring) (defendant had a right to observe the police "especially from inside his own home".) As the dissenting judge in *Steen* noted, "Our exigent circumstances jurisprudence has never required affirmative action on the part of citizens, whether they are suspected of criminal activity or not." 164 Wn. App. at 818 (Quinn-Brintall, J., dissenting).

If the public (and organizations like the ACLU which publish "know your rights" materials) are confused as to whether they can be convicted of obstruction for refusing to open the door during a warrantless search, or for opening the door as was the case in *E.J.J.*, then the chilling effect on asserting their rights is clear. The courts will have approved a serious erosion of constitutional privacy protections and the deeply rooted sanctity for the home enshrined in them. Other constitutional rights will be in jeopardy as well. Applying the same reasoning as the lower courts here, obstruction could encompass: a) police interrogating a potential suspect in a murder case and, after giving Miranda[6] warnings and having the suspect assert the right to silence or right to counsel, demanding to

[6] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966).

know where the victim's body was hidden, claiming the delay from rights assertion was obstruction; or b) when a person refused police warrantless demands to provide a password to unlock their phone. This Court should make clear that assertion of one's rights cannot constitute the crime of obstruction.

Second, allowing Mr. McLemore's conviction to stand will dramatically expand police power, enabling arrests of individuals who have committed no criminal offense but reasonably believed they could assert their rights, and exacerbating racial disparities. *See Williams*, 171 Wn.2d at 485-86 ("conduct" requirement for obstruction arrest stems in part from concerns about expanding police arrest authority.) As the Court observed in *Williams* and *E.J.J.*, obstruction charges are already particularly susceptible to pretextual prosecutions and overreaching by law enforcement. *See, e.g.*, Erin Murphy, Manufacturing Crime: Process, Pretext, and Criminal Justice, 97 Geo. L.J. 1435, 1442-46 (2009). Indeed, recent scholarship indicates that arrests for such crimes are often the result of law enforcement frustration with people exercising their rights. *Id*. at 1449-52; see also *Norwell v. Cincinnati*, 414 U.S. 14, 16, 94 S. Ct. 187, 38 L. Ed. 2d 170 (1973) (police officer arrested the defendant for "annoying [him]" by declining to answer questions). Moreover, the racial disparity associated with broad interpretation of our state's obstruction laws is well

documented. Eric Nalder et al., Blacks Are Arrested On "Contempt Of Cop" Charge At Higher Rates, Seattle P-I, Feb. 28, 2008, available at http://www.seattlepi.com/local/353020_obstructmain28.asp; *E.J.J.*, 183 Wn.2d at 509-511 (Madsen, J., concurring) (noting the "alarming statistics" regarding Seattle police use of obstruction charges when interacting with people of color). This Court's guidance establishing the lawful bounds of obstruction is needed to reduce these harms, as well as guide law enforcement, prosecutors, courts, and ordinary people concerned with their rights.

Finally, contrary to the suppression cases cited by the City, the fact that police were concerned with domestic violence does not justify the obstruction conviction here. Exceptions to the warrant requirement, such as exigent circumstances or community caretaking or others, are available to the police to protect domestic violence victims. An overexpansive definition of obstruction, however, violates the constitution while failing to protect victims.

RESPECTFULLY SUBMITTED this 14th day of September, 2018.

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