No. 95707-0

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

CITY OF SHORELINE,

Respondent

v.

SOLOMON MCLEMORE

Petitioners.

AMICI CURIAE MEMORANDUM OF THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON, WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, WASHINGTON DEFENDER ASSOCIATION, WASHINGTON IMMIGRANT SOLIDARITY NETWORK, AND ONE AMERICA IN SUPPORT OF RECONSIDERATION

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I. IDENTITY AND INTEREST OF AMICI CURIAE

The identity and interest of amici are set forth in the supplemental Amicus Motion accompanying this memorandum. Amici Washington Immigrant Solidarity Network (WAISN) and One America have joined in support of reconsideration because of the ruling's significant impact on organizations which provide know-your-rights information.

II. INTRODUCTION

> The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement![1]

This principle has always been viewed as summarizing a home's protection from warrantless entry by the police, yet it is cast in doubt by the Court's 4-4 ruling in this case. Must people in Washington now always "consent" to police entry into their homes because if they guess wrong about whether the police can legitimately break down the door, they are committing the crime of obstruction? The Court should grant reconsideration to remedy the radical departure from established law represented by the 4-4 ruling.

[1] This Court's quote from a 1763 speech given in Parliament by William Pitt, Earl of Chatham, in support of the Wash. Const. Art. 1, sec. 7, constitutional protection of a person's home, in *State v. Ferrier*, 136 Wn.2d 103, 112, n. 6, 960 P.2d 927 (1998).

III. RECONSIDERATION IS ESSENTIAL BASED ON THE SIGNIFICANT AND HARMFUL CONFUSION ABOUT CONSTITUTIONAL RIGHTS CAUSED BY THE 4-4 RULING IN THIS CASE

A. The Many Forms of Confusion Caused by the Ruling

Amici file this memorandum in support of Defendant/Appellant's Motion for Reconsideration pursuant to RAP 12.4(i), for the purpose of addressing the Court regarding the soundness of legal principles announced in the course of the opinion. Only eight justices participated in the opinion issued on April 18, 2019[2], and there was no majority opinion. Four justices in the "lead" opinion, applying a long line of Washington precedent, explained how serious constitutional violations occurred by convicting Defendant/Appellant of the crime of obstruction under RCW 9A.76.020, based on his asserting his right to not open the door to his home to police seeking entry without a warrant. However, the "dissenting" opinion asserted, for the first time in a Washington case and in contradiction to numerous authorities, that there is a legal duty in these circumstances to open the door to police[3] and that violation of that

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

[3] "McLemore did have a duty to comply with lawful police orders to open the door." *City of Shoreline v. McLemore*, __ Wn.2d __, 438 P.3d 1161 (2019) (Stevens, J., dissenting).

previously-non-existent duty subjects Washingtonians to arrest, prosecution, and conviction of a crime.

Instead of providing guidance about the legal rules applicable to this situation, the 4-4 ruling has created significant confusion. The harmful impact on the public as a result of this confusion is enormous. Amici provide information to thousands of people each year about their constitutional rights in interactions with the police, and the ruling now makes it impossible for them to offer accurate "know your rights" information. Courts, police, prosecutors, defense lawyers and their clients, immigration lawyers and their clients, people directly interacting with police and people observing police conduct (as in *E.J.J.*, *infra*), to name just a few of the impacted groups, must now all grapple with the confusion about Washington law regarding rights and duties in interactions with the police. And the consequences of guessing wrong about a person's legal duties in this situation are significant.

Past documented abuses of the obstruction law, including racial disparities, may increase in the wake of the confusion about the ruling. 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 (documenting the racial disparity associated with broad interpretation of our state's

obstruction laws); *State v. E.J.J.*, 183 Wn.2d 497, 509-511, 354 P.3d 815 (2015) (Madsen, J., concurring, suggesting an additional element of obstruction was necessary "because our system of justice cannot condone disparate treatment of the people we serve, based on race, through the use of obstruction statutes," and recognizing "the potential for abuse of the obstruction statute at issue here, particularly in communities where there exists tension with law enforcement and questions of excessive force, are real."). Reconsideration therefore should be granted, if only to provide much needed guidance about the law in the future.

This Court recognized the importance of the issues at stake in this case in granting review. This Court has also repeatedly recognized the significant constitutional questions that arise in many obstruction cases. As the Court stated in *State v. E.J.J.*, 183 Wn.2d at 502, "Washington courts have long limited the application of obstruction statutes, lest those statutes infringe on constitutionally protected activity." *See also, State v. Williams,* 171 Wn.2d 474, 481, 251 P.3d 877 (2011). And this Court in *E.J.J.* and *Williams* recognized the harm inflicted on the public, and particularly people of color, when there is confusion in the law regarding asserting one's rights to the police. *See, e.g.*, Erin Murphy, Manufacturing Crime: Process, Pretext, and Criminal Justice, 97 Geo. L.J. 1435, 1449-52 (2009) (arrests for offenses like obstruction are often the result of law

enforcement frustration with people exercising their rights); Eric Nalder et al., *supra, 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 case is not about whether the police here had authority to make a warrantless entry into the home; throughout this case the parties have agreed the entry was lawful. The confusion, including on the part of the jury here, is whether there is a legal duty to open the door and a breach of that duty subjecting a person to criminal conviction for asserting the right to not open the door. During deliberations, the jury asked "Does a person have the legal obligation to follow the police instructions, in this case?" That is exactly the question that amici and all the people they provide information to are now asking, in light of the 4-4 ruling by the Court. More specifically, is there a duty to open the door to police in this situation, if so what legal authority is that duty based on, how are people supposed to know about the existence of the duty, and if they don't know about it, how can they be subject to criminal conviction for violation of that duty? *See McLemore,* 438 P.3d 1161, n.4, noting "this case does turn on when a person has a legal obligation to follow an officer's directions." *Cf., McLemore,* 438 P.3d 1161 (Stevens, J., dissenting); "McLemore *did* have the duty to comply with lawful police orders to open the door and

allow officers to verify Lisa's safety." [emphasis in original; no citation follows.] The lead opinion cites numerous Washington cases and authorities from all levels of courts around the country, including the United States Supreme Court, in support of the obstruction conviction here being unconstitutional,[4] while no citation is offered for the duty alleged to exist by the dissent. These questions left unanswered in this case all warrant reconsideration of the 4-4 ruling.

B. The Broad Impact of the Confusion Caused by the Ruling

Amici in this case all provide information about constitutional rights with respect to interactions with law enforcement officers, as part of their organizational missions. The Court should consider how the disarray created by the ruling will impact the broader communities who rely on receiving information about their rights from amici.

Amicus Washington Defender Association (WDA), and the hundreds of attorneys and clients served by them, are impacted by the ruling both in the criminal law and in the immigration law context. WDA is the voice of the public defense community and provides support for zealous and high quality legal representation by advocating for change, educating defenders, and collaborating with other justice system

[4] See the Amici Brief of ACLU et al. previously filed in this case, citing the wealth of authority supporting the defense position in this case, as well as *State v. Fede*, 237 N.J. 138, 202 A.3d 1281 (2019), cited in the lead opinion in *McLemore*.

stakeholders and the broader community to bring about just solutions. WDA is a non-profit association representing more than 25 public defender offices and over 1600 criminal defense attorneys, investigators, social workers and children's civil rights attorneys throughout the state of Washington. The public defenders that WDA serves represent a majority of indigent criminal defendants in the state. Many of those individuals may also be or have family members who are non-citizens. WDA and its members are committed to supporting and improving indigent defense and the lives of indigent defendants and their families.

A primary purpose of WDA is to improve the administration of justice and stimulate efforts to remedy inadequacies in substantive and procedural law that contribute to injustice. For many years WDA has provided extensive technical assistance to public defenders on both criminal and immigration related matters. For example, in 2018 WDA's team of criminal defense and immigration resource attorneys provided technical assistance on more than 5100 criminal cases involving indigent defendants in every county in the state. The Felony and Misdemeanor Resource Project provided case consultation on more than 1600 cases, and WDA's Immigration Project provided case consultations to defenders representing non-citizen clients in more than 3200 cases.

The impact of the divided ruling on amicus ACLU-WA's know-your-rights work is also sizeable. For decades, ACLU-WA has been publishing materials informing the public of their rights in interacting with the police. The materials are posted online, and therefore available to any Internet user. The materials are also disseminated in wallet card form throughout the year, as well as by request at events throughout the state; there were requests for distribution of such materials at nearly 100 events in the past 12 months alone. Recipients of the materials include students at all levels of schools, churches, libraries, government offices, hospitals, large festivals and community events, private clubs, and immigrant rights organizations.

Like WDA, WACDL has an interest in being able to advise its members and their clients what the status of the law is, and the ruling makes it impossible to perform this function. Amicus WAISN also frequently engages in know-your-rights work. It is a grassroots coalition made up of over 100 immigrant and refugee rights organizations and individuals in Washington. It has always understood that people had the right to not let law enforcement enter their homes without a judicial warrant. However, if asserting this right would now subject people to a charge for obstruction, it puts them in a terribly unjust position.

The information provided by amici in all the foregoing contexts is now cast in doubt. The number of impacted people is reason enough for the Court to grant reconsideration and provide clarity about a person's right to assert their rights to police. People all over Washington need to know if they can say no when law enforcement come to their homes without a warrant. This constitutional right is especially important to non-citizens and their families. There are disproportionate consequences for undocumented individuals who if charged with obstruction are an enforcement priority for deportation. The equally divided ruling of the Court in this case will also result in significant increases in litigation and cost.

The disarray caused by the ruling impacts not only many people's rights but also the status of the law itself. The "rule" approved by the case, as well as the validity of other Washington case law, is unknown. The "lead" opinion has a lengthy discussion of *State v. Steen*, 164 Wn.App. 789, 818-19, 265 P.3d 901 (2011) (a 2-1 ruling with the dissenting judge presciently warning "citizens are now guilty of obstructing justice every time they refuse to assist the police in performing their community caretaking function. This simply cannot be the state of the law."). But while the "lead" opinion correctly concludes *Steen* "is

inconsistent with Washington law and is overruled," Slip Opinion at 16, the lack of a majority vote leaves the status of *Steen* unclear.[5]

IV. CONCLUSION

Neither the lead opinion nor the dissent in this case changes the fact that "As a modern society, we condemn domestic violence and have vested police with the power and duty to investigate and to intervene." But the divided ruling in this case will have harmful impacts far beyond the individual case before the Court, as described above. Reconsideration to clarify the rights and duties of Washington residents is justified and should be granted.

RESPECTFULLY SUBMITTED this 8th day of May 2019.

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[5] On May 6, 2019, the City of Shoreline filed a motion to clarify, asking the Court to clarify that *Steen* has not been overruled.

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PROOF OF SERVICE

I hereby certify under penalty of perjury of the laws of the state of Washington that on the 8th day of May 2019, a copy of the foregoing *AMICI CURIAE MEMORANDUM OF THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON, WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, WASHINGTON DEFENDER ASSOCIATION, WASHINGTON IMMIGRANT SOLIDARITY NETWORK, AND ONE AMERICA IN SUPPORT OF RECONSIDERATION* was electronically served upon counsel of record:

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DATED this 8th day of May 2019.

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Comments:

Attached are the Supplemental Motion For Leave to File Amici Curiae Memorandum and Amici Curiae Memorandum of the ACLU, WACDL, WDA, WISN and One America in Support of Reconsideration

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