IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

IN RE THE MATTER OF RECALL CHARGES AGAINST CITY OF SEATTLE MAYOR JENNY DURKAN (HARVEY)

NO. 20-2-10455-8 SEA

I. INTRODUCTION

The King County Prosecutor's Office petitioned the Court to determine the sufficiency of recall charges filed against City of Seattle Mayor Jenny Durkan and pursuant to RCW 29A.56.140, the Court scheduled a hearing regarding the sufficiency of the charges and the adequacy of the ballot synopsis. The petitioners, Elliott Harvey et al., submit this memorandum to the court to further support the recall charges.

II. SUMMARY OF CHARGES

Mayor Durkan endangered the peace and safety of the community and violated her duties under state and local laws and her oath to uphold the federal and state constitutions when she:

1. Issued a citywide curfew without sufficient notice for individuals to safely disperse;
2. Failed to institute new policies and safety measure for the Seattle Police Department for crowd control measures during a public health emergency;
3. Failed to enforce police officer compliance with the Seattle Municipal Code and the Seattle Police Manual;
4. Failed to protect freedom of speech and right to peaceful assembly;

5. Wrongfully subjected bystanders to chemical weapons and crowd control measures;
6. Allowed police to leak false information to the media about fabricated crimes and threats;
7. Issued an overbroad order prohibiting possession of certain items in areas of the City.

III. LEGAL SUFFICIENCY

As noted by the King County Prosecuting Attorney's office, this court does not act as a fact-finder in a recall case. As the Washington Supreme Court stated in In re Recall of West:

> [T]he role of courts in the recall process is highly limited, and it is not for us to decide whether the alleged facts are true or not. It is the voters, not the courts, who will ultimately act as the fact finders. RCW 29A.56.140; In re Recall of Kast, 144 Wn.2d 807, 813, 31 P.3d 677 (2001). We merely function as a gatekeeper to ensure that the recall process is not used to harass public officials by subjecting them to frivolous or unsubstantiated charges. Id. Accordingly, our role is limited to ensuring that only legally and factually sufficient charges go to the voters. Id.

155 Wn.2d 659, 662 (2005). Put another way, Washington courts should allow recall for cause, but free public officials from the harassment of a recall based on "frivolous charges or mere insinuations." Chandler v. Otto, 103 Wn.2d 268, 274, 693 P.2d 71 (1984). In this case, the charges brought against the Mayor are well beyond "frivolous charges or mere insinuations."

Moreover, petitioners have shown legal sufficiency by citing the relevant sections of the United States Constitution, the Washington State Constitution and RCW, the Seattle City Charter, and the Seattle Municipal Code, and by defining the related substantial conduct that amounts to misfeasance, malfeasance, or violation of oath of office. Particularly pertinent are:

1. US Const., Amends. 1, 4, and 14, applying Amends. 1 and 4 to the states, of special note are the rights of personal property and freedom against unreasonable

search and seizure, as well as the previously noted rights of freedom of speech, peaceful assembly, and due process of the law;

2. Washington Constitution, Art. 1, Sec. 3-5, 7, which echoes the US Const. and states in part, "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law;"
3. RCW 42.40.020(6)(a)(ii), (iiii), and (iv) defining, respectively, "improper governmental actions" as including an actions in "in violation of federal or state law or rule;" OR actions that create "substantial and specific danger to the public health or safety;" or an action "[w]hich is gross mismanagement;"
4. SMC 12A.12.020, which states, "[n]o such [public safety] order shall apply to a news reporter or other person observing or recording the events on behalf of the public press or news media[.]"

IV. FACTUAL SUFFICIENCY

The recall statutes do not require the petitioner to have firsthand knowledge of the facts underlying the charges but must demonstrate to the court that he or she knows of identifiable facts that support the charges. *In re Recall Charges Against Seattle School Dist. No. 1 Directors,* 162 Wn.2d 501, 509-10, 173 P.3d 265 (2007). Here, while petitioners do each have some personal knowledge of some portion of the facts, the illegal and unconstitutional acts taken by the Mayor were largely taken in full view of the City of Seattle, available for review via bystander cell phone video posted online, or in footage of press conferences held by the Mayor herself or the Seattle Police Department, or in the text and/or well-established timing of the Mayor's own emergency orders. Indeed, nearly any citizen in Seattle could have brought these

charges by merely having watched the news and viewed virtually any form of social media during late May and early June, in conjunction with reading the city's own press releases.

King County Prosecuting Attorney notes that in *In re Recall Charges of Davis*, the petitioner's reliance on newspaper reports was insufficient to find knowledge. 164 Wn.2d 361, 369, 193 P.3d 98 (2008). The *Davis* Court also noted that while articles alone would not prove knowledge, a petitioner's review of internet chats that had been published in a newspaper was sufficient, as it was a review of a primary source. *Id*. (citing *In re Recall of West*, 155 Wn.2d 659, 666 n.3, 121 P.2d 1190 (2005)). Therefore, if documents are published by the media which directly evidence the misfeasance or malfeasance, this may suffice to establish the petitioners' personal knowledge.

Here, the petitioners do have particularized knowledge themselves, but moreover, in 2020, there are a plethora of primary sources that can be found online that are the equivalent of the internet chats in *West*, in the form of cell phone videos that appear routinely on social media, especially in cases such as this. In this case, on-the-ground video after video after video showed extreme behavior by SPD officers, including unprovoked attacks on peaceful protesters and apparent deliberate attacks on the press. Video after video shows the entirety of the area around the East Precinct covered in tear gas, protesters retreating.

First-hand accounts, often published online by persons known directly by petitioners, described not just one, but multiple attacks on medical aid stations on different nights, destruction of medical supplies, delays for street medics trying to take the injured to local hospitals, and other such distressing behavior. This behavior delayed medical care in multiple situations, including one where a 21-year-old woman struck by a stun grenade in the chest lost life signs multiple times and was admitted to Harborview Hospital in critical condition. The

woman was clearly seen in video recording to be making no violent moves or even moving forward, nor is she in a crowd, but clearly viewable in a small group of 3-4 people standing still. Nonetheless, the shot that hit her in the chest was taken from only about 20' away.

Finally, much of the asserted conduct is simply uncontroverted, such as the text and timing of the Mayor's emergency orders, or the fact that the SPD told the press repeatedly about extreme acts by protestors, seemingly designed to incite anger against the protesters, that later they admitted they had zero evidence for — and yet still later, they repeated these same lies on national media.

A recall petition need not show criminal intent in the traditional sense, but the petitioners must show some "intent to commit an unlawful act." *In re Recall of Wade*, 115 Wn.2d 544, 549, 799 P.2d 1179 (1990). Thus a petitioner cannot allege an act that does not violate any known statute. *In re Recall of Bolt*, 177 Wn.2d 168, 298 P.3d 710 (2013) The petitioner in *Bolt* could point to no specific statute violated by a mayor's purchase of used equipment for the town without advance authorization. Nor can a petitioner succeed at recall when the acts appear to be a "simple mistake." *In re Recall of Pearsall-Stipek*, 141 Wn.2d at 779, where Pierce County Auditor did not state that she had been at school in 1950, but said "'51, '52, '53, and '54" the Supreme Court found it likely to be a "simple mistake". The *Pearsall-Stipek* additionally found that when the Auditor falsely claimed to have received a college degree shortly after the oath to be truthful was given there was sufficient evidence to infer intent.

As with the oath that reminded Auditor Pearsall-Stipek of "her legal obligation to tell the truth", if a person warns a public official that they are violating the law, and the public official proceeds, this action should show willful intent to violate that law. *In re Recall of Sandhaus*, 134 Wn.2d 662, 671, 953 P.2d 82 (1998) (evidence of willfulness sufficient on violation of RCW

36.40.130 because the prosecutor continued overspending after the Board and auditor warned him not to do so).

Petitioners can meet their burden to show Mayor Durkan's willingness to violate protesters' and other citizens' rights by pointing the Court to:

1. The specific background of the Mayor
2. The extremely public debate over her inactions and actions during the crisis, including censure from the City Counsel;
3. The fact that individuals who are aware of the natural consequences of their actions intend them.

Jenny Durkan was admitted to the Washington State Bar Association in 1986 and served as the District Attorney for the Western District of Washington from 2009 to 2014. Mayor Durkan has had every opportunity to become thoroughly aware of the laws and ordinances that govern the State of Washington and the City of Seattle, as well as the 2012 Consent Decree for the Seattle Police Department while under D.A. Jenny Durkan's oversight. This awareness will be far greater than that of an ordinary person or even that of former Seattle Mayors. The Court has shown sufficiency for intent by inference when willfulness is combined with evidence that there is warning against such actions. Where Mayor Durkan can be shown to act intentionally in acts that are clear to the Court as unlawful, and where Mayor Durkan was sufficiently notified of the current danger of her actions or of the unlawful acts of subordinates, it can easily be inferred that Mayor Durkan intentionally acted unlawfully.

Moreover, the actions by the Mayor and the police chief were ones that shocked the city of Seattle — multiple parties called upon the mayor to limit the police use of force, to deescalate the violence by police, and specifically to stop using tear gas during the COVID-19 global

pandemic, one of the hotspots of which was in Seattle. Multiple members of the Seattle City Council called on the Mayor to stop the police behavior on June 1,[1] (video shows child who was pepper-sprayed and then Councilmembers Mosqueda, Herbold, Morales, Gonzáles, and Sawant speaking about the violent police response, which was to protests regarding police violence). Mariko Lockhart, the Mayor's own hand-picked director of the Seattle Office for Civil Rights, described in an open letter how she had been at the protests and had been terrified for her safety because of the police behavior.[2]

The Mayor had ample additional notice of how the police violence was affecting citizens. Citizens both involved and not involved in the protests described how they suffered during a public comment period to the Public Safety Committee. Azoulai, Daniel, Public comment, City of Seattle Public Safety and Human Services Committee Meeting, Jun 3, 2020, attached as Exhibit 17. Moreover, the letter signed by 1,300 medical providers explaining the recklessness of use of tear gas on the protesters in the middle of a respiratory pandemic was released on June 5, while the SPD continued to deploy chemical weapons.

Indeed, the Mayor and police chief acknowledged these pleas on June 7, when they announced a 30-day moratorium on the use of teargas, but police sprayed protesters with pepper spray the very next day, and then deployed tear gas again the day following, with consent of Chief Best. Continuing with these activities, despite hearing from many, many persons who opposed them on the grounds of their clear threat to public health and safety, and because they violated civil rights, shows the presence of intent.

[1] S*eattle city council members criticize police response to protests,* Kiro 7, Jun 1, 2020, kiro7.com/news/local/seattle-city-council-members-criticize-police-response-protests/RD5J3MQDQFDR7I56KJA2QOJTUQ/.

[2] See Exhibit 1 of Perez declaration, filed in *Black Lives Matter v. City of Seattle* (Case #2:20-cv-00887-RAJ, filed in the Western Washington District Court, BLM seeking and receiving a TRO against the use of teargas and other measures).

Finally, Washington law presumes that people of ordinary intelligence know the natural consequences of their own acts. *See, e.g*, WPIC 6.25. This is so presumed that no instruction is usually given for this, although either party may argue the point in the form of permissible intent in closing.

Mayor Durkan is under no disability that prohibits her from seeing or understanding the consequences of her actions. She could understand that a curfew signed at 5pm, which also went into effect at 5pm, would affect thousands of people in the streets of downtown Seattle who, at that point, had no knowledge that they would be in violation of the curfew. She could understand that an overbroad order regarding possessions, including the possession of "rocks, bottles, pipes,...light bulbs,...skateboards,...dimensional lumber with a dimension greater than ½ inch," and so on, would put virtually every citizen of Seattle in violation of its terms, and therefore subject any citizen potentially to arrest. She could understand that in these polarized times, describing the protester occupied area as a lawless zone where protesters were committing rape and extortion against ordinary residents would inflame many people against the protesters, and that some of these angry citizens might be moved to "take back" the zone from the protesters. These are simply the ordinary, predictable consequences of what she and the SPD did.

V. DISCRETIONARY ACTS

When under a proclamation of civil emergency, the Mayor of the City of Seattle is afforded the authority to issue certain orders. SMC 10.20.020. There are 14 specific orders that the Mayor may issue, as well as an allowance for "[s]uch other orders as are imminently necessary for the protection of life and property." The SMC and any other applicable ordinance

does not subsequently allow elected officials, to violate governing laws of the State of Washington and the United States Constitution.

The case for charges against Mayor Durkan has shown a clear and manifestly unreasonable abuse of discretion through violation of oath of office. This is especially clear when the Mayor's actions, and that of the Mayor's police force, violated First Amendment rights to free speech and peaceful assembly. A judge in the Western District Court of Washington recently found, most significantly, that the Seattle Police Department "used less-lethal weapons disproportionately and without provocation." Further, the Court agreed that in the SPD's use of force against peaceful protesters, a "'substantial or motivating purpose' of the force was Plaintiffs' exercise of their First Amendment rights." *Black Lives Matter v. City of Seattle.*

VI. ACTIONS OF A SUBORDINATE

In Recall of Reed, 156 Wn.2d 53, 58, 124 P.3d 279 (2005) has been cited by the King County Prosecuting Attorney as it pertains to the culpability and recall of an elected official for the "act of a subordinate done without the official's knowledge or discretion." *Reed* specifically cites *In re Morrisette*, 110 Wn. 2d 933, 936 (Wash. 1988), in which the Court draws a distinction between the principle of tort law where the officer would be "legally responsible for the actions of his subordinates" and instances where subordinates act "without the official's knowledge or direction." Petitioners in the case of recall of Mayor Durkan contend that an official may be subject to recall for unlawful actions of subordinates when they are clearly known and when the official elects to allow them to continue when there exists ample opportunity to prevent those actions.

VII. ADDITIONAL EVENTS FOR THE CONSIDERATION OF THE COURT

In the case of charge (6) against Mayor Durkan for disinformation perpetrated by subordinates, the petitioners alleged that the false statements made by the police department leadership would weaponize outside forces against the people of Seattle and particularly those protesting police use of force. Petitioners demonstrated public response to this disinformation through tweets from Donald Trump and an event created to "Retake The Seattle Occupation Zone For America."

In the days following the petitioners' filing of their statement of charges on June 15, 2020, many news articles represented the protester occupied area in Capitol Hill as a "lawless state" without police or emergency services. Multiple separate shootings then occurred in this same area over the course of nine days, some fatal. Most significantly, in the very early morning following the holiday Juneteenth, June 19, 2020, while celebrations for the historically significant day continued, two victims were shot by assailants, one dying shortly thereafter. A news article and statement from the second victim, DeJuan Young, described the events:[3]

> "[F]our men approached him, called him a racial slur and shot him. 'I'm positive this was a hate crime,' Young said. 'When he shot me, the recoil and the surprise pushed me on top of the hood of the vehicle. At that time, he stood over top of me and continued to shoot. And I tried to block myself.' "

Seattle Police Department officials that report directly to Mayor Durkan clearly and effectively perpetrated lies. These lies purported that the protestor occupied area in the Capitol Hill neighborhood had significantly higher instances of crime("tripled"), and suggested that the

[3] *Man shot near CHOP says protesters saved his life, blasts police response,* King %, Jun 24, 2020, king5.com/article/news/local/chop-shooting-victim-calls-out-police-for-not-responding-fast-enough/281-388ad6ca-e616-41c7-990e-ea12c3036ca2.

higher crime rates were a result of the protesters. It was then made thoroughly clear that Police would not respond to the scene, and as further nights of violence occurred, the SPD made good on this claim.

This action goes far beyond making a statement that laws will not be enforced. The SPD instead clearly expressed and then demonstrated that they would not be present —let alone enforce the law— in the occupied area. Then, in the days following acts of gun violence and casualties, the police showed that they would not, in fact, return to the scene, and neither would emergency services. The City of Seattle and its police force announced to the world with authority that there was a place within its borders where one could go to commit hate crimes against the people there and you would not be stopped. When those racially motivated crimes were committed, the city made no widely visible move to suggest that any further hate crimes would not be tolerated, and then the targeted acts continued on multiple nights. An ordinary person would not find it difficult to see the natural consequences that will arise from loudly announcing the existence of an area without law enforcement. This action was a veritable request to anyone willing to conduct their own law enforcement when it was made clear that a) there is crime, and b) the police aren't responding.

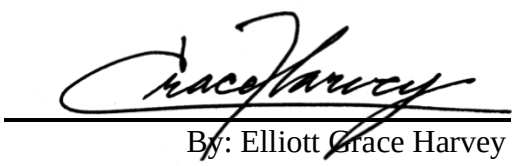
The City of Seattle, Mayor Durkan, and Chief of Police Carmen Best, when prevented by the courts from perpetrating violence against peaceful protestors, weaponized the public against the protesters with deadly force. There was no evidence that it was necessary to share unsubstantiated claims with the press, there is no reason to believe that it was necessary to make it clear to the public that the police are not entering certain parts of the city, and subsequently these actions resulted in deadly violence against members of the public that Mayor Durkan has a duty to protect. The petitioners maintain that there is a natural cause an effect that can be

anticipated from the actions of Mayor Durkan and her subordinates, bordering on a proverbial blank check to conduct crimes. This potential outcome should have been obvious to the Mayor and measures taken to mitigate the effects. If the natural consequences of her actions were not clear to the Mayor, the voters of Seattle should be afforded the opportunity to re-access her fitness for the office of Mayor.

VIII. CONCLUSION

The foregoing has been submitted by the petitioners, Elliott G. Harvey et al., to further support the sufficiency of recall charges in the case of Mayor Jenny Durkan. Petitioners ask the Court to consider the recent loss of life and violations of liberty as a significant reason for the voters of Seattle to be allowed the opportunity to recall their Mayor.

Respectfully submitted the 30th day of June, 2020.



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