

NO. 98897-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE MATTER OF RECALL CHARGES AGAINST

CITY OF SEATTLE

MAYOR JENNY DURKAN

*Appellant.*

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Mary E. Roberts

MOTION TO SUPPLEMENT THE RECORD

WITH NEW EVIDENCE

PETITIONER ELLIOTT GRACE HARVEY

I. IDENTITY OF PETITIONER FOR MOTION

Petitioners were also Petitioners below, Elliott Grace Harvey, Alan L. Meekins, Jr., Courtney Scott, Leah Solomon, Charlie Stone, and Matthew Cromwell.

II. RELIEF SOUGHT

Petitioners asks this Court to permit them to supplement the record on appeal.

III. FACTS RELEVANT TO THIS MOTION.

Mayor Durkan has appealed the Superior Court’s finding that there was sufficient evidence to go to Seattle voters on the matter of the use of chemical crowd control agents. Respondents have cross-appealed as regards Charge C, which in part describes how police have deliberately targeted the press and street medics caring for the injured during protests, and failed to use required de-escalation techniques, thereby violating both their own rules and the law. Respondents have also appealed in part regarding Charge E, which referred to bystanders being injured by police.

Respondent/Cross-Appellants will be asking that a number of declarations filed in Superior Court be transmitted to the Supreme Court, but the declarations that are the subject of this motion did not exist prior to this case being appealed to the Supreme Court, so they could not be admitted below.

I. ARGUMENT

A. RAP 9.11(a) allows the appellate court to take additional evidence if:

(1) additional proof of facts is needed to fairly resolve the issues on review, (2) the additional evidence would probably change the decision being reviewed, (3) it is equitable to excuse a party's failure to present the evidence to the trial court, (4) the remedy available to a party through postjudgment motions in the trial court is inadequate or unnecessarily expensive, (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive, and (6) it would be inequitable to decide the case solely on the evidence already taken in the trial court.

1. Preliminarily, there is no need to send this case back to the Court below to take evidence, given that the evidence is in the form of Declarations and must be assumed to be true, on this Court's *de novo* review.

Per RAP 9.11(b), the Appellate Court will usually direct the court below to take the evidence, but that is unnecessary here. As the Court below correctly noted, the Court on a recall case should not weigh the evidence, but assume allegations by the Petitioners are true. RCW 29A.56.140. Moreover, review here in the Supreme Court is de novo. In re Recall of Telford, 166 Wn.2d 148, 154, 206 P.3d 1248 (2009).

Accordingly, given that the courts must assume the allegations are true, and can look at the facts completely afresh anyway, there is no need for the Court to remand to the Superior Court to look at new declarations. Thus we can go immediately to the considerations of RAP 9.11(a).

2. This case is continually evolving, so additional facts that show the continuing context can only make the outcome more accurate and fair.

The protests in Seattle have gone on for 84 days, as of this writing. Violence by SPD has been happening for 83 days, with only a few days here and there without some significant incident/s.

The violence became significantly worse on Saturday, July 25, so much so that Black Lives Matter of Seattle and the ACLU, along with other plaintiffs, filed for a contempt charge in federal court regarding SPD behavior on that day, initially filing 23 declarations in the Western District Court demonstrating case after case of frightening, malicious police during an especially long day of protests. Those initial declarations were filed below, and will be sent up to the Supreme Court shortly, but since that initial filing, the plaintiffs filed yet more declarations about that day on August 4, and Respondents/Cross-Appellants have obtained yet others, all of which are combined and appended to this motion.

Moreover, since the Seattle City Council voted to defund the SPD by 50% on August 10th, several commentators have noted that the violence has only increased. Matt “Spek” Watson compiled a thread of these on his Twitter feed as a demonstration.

<https://twitter.com/spekulation/status/1296147087373918208>

As the behavior of the Seattle Police continues to become yet more outrageous and dangerous, and Mayor Jenny Durkan continues to do little or nothing to affect such behavior, this recall case becomes more and more pressing to go before the voters. Thus, these declarations are likely to make the outcome more fair.

3. Only this Court can say whether the evidence is likely to change the decision, but the evolving and worsening conduct of the SPD, and the continued lack of control by the only elected official able to directly take control, is highly relevant – if it would potentially change the outcome, this Court should review it.

This Court will review the case de novo, so only this Court will determine whether the new facts will have an impact on its decision. But given their extreme relevance to the safety of Seattle citizens, and their extreme relevance to the questions before this Court, Respondent/Cross-Appellants argue this Court should at least review them for whether they will find them helpful to their decision.

4. It is equitable to excuse Respondents' failure to introduce these below, because these events had not occurred prior to the case below, and/or the declarations did not exist.

The Superior Court's first ruling on this matter was July 10, 2020. See Order on Petition to Determine Sufficiency of Recall Charges and Adequacy of Ballot Synopsis. None of the events discussed in these declarations had occurred before that ruling.

Respondents/Cross-Appellants filed a declaration to supplement the record on July 28, 2020, the day after the first set of Declarations was filed by Black Lives Matter of Seattle/King County, et al, and the Superior Court made its ruling on the Mayor's Motion for Reconsideration on July 29, 2020, not mentioning the additional declarations. See Order on Motion for Reconsideration.

The additional declarations from the Black Lives Matter case were filed on August 4, so were not available below. The additional declarations collected since by Respondents/Cross-Appellants focus on either 1) July 25, or 2) dates in August, so would not have been reasonably available before the Superior Court ruled below. Given this timing, it is reasonable to excuse the failure to put such evidence before the Superior Court.

5. Both a) the remedy available to a Petitioners through postjudgment motions in the trial court is inadequate or unnecessarily expensive, and (b) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive.

Considerations (4) and (5) from RAP 9.11 overlap significantly, so they are review together here. This is a recall case, which is supposed to be one of the faster types of cases, in order for it to have real meaning, where an official only has a certain amount of time in office anyway. See RCW 29A.56.270. The Mayor, moreover, is known to have remarkably deep pockets, and she could drag this case out as long as she would like from a financial standpoint. Whereas Petitioners, being mere citizens of Seattle, have significantly fewer resources when exercising their constitutional right of recall. Moreover, given that the situation is constantly evolving (growing worse, in fact), and given that this Court's review is de novo anyway, the delay of sending the case back, merely to review the same evidence on the inevitable duplicated appeal would be absurd, and not serve justice.

6. It would be inequitable to decide the case solely on the evidence already taken in the trial court.

As stated before, the situation continues to grow worse for both the protesters and bystanders in Seattle. Most of the declarations sought to be entered herein were filed in federal court on August 4, 2020, so Appellants/Cross-Respondents believe that the Mayor's legal team will already be intimately familiar with them and not be surprised by any allegations therein. Moreover, assuming Mayor Durkan is being briefed on the activities by SPD and is continuing to monitor the media, either herself or through her employees/attorneys, it seems unlikely that any of this information is new whatsoever.

Given that the behavior of SPD has only worsened, and that the Mayor has continued to do nothing to stop it, restricting the Respondents/Cross-Appellants from pointing out newer, even more extreme activities of the same type would only restrict their constitutional right of recall and would not serve the citizens of Seattle, nor those of the Washington State. For the above reasons, this Court should admit these new declarations.

B. The declarations delivered are relevant to the issues currently before the Court.

A very summary of the declarations follows, outlining in each case why the declaration is relevant to this Court's consideration of the facts.

1. The following are declarations filed on August 4, 2020, in the *Black Lives Matter of King County, et al*, case.

*The Declaration of Dwayne Linde* is directly on point to **Charge B** and **Charge E**, as the declarant was a local resident with asthma who has been badly sickened and his life endangered by the use of tear gas in the area. Mr. Linde only protested one time, but the tear gas has seeped into his home on multiple occasions and caused potentially deadly asthma attacks. Mr. Linde's declaration is therefore especially relevant to Count E.

*The Declaration of Philip Chinn* is relevant to **Charge C**, as the declarant describes attacks on legal observers that are nearly identical to the attacks on press and medical personnel alleged by cross-respondents. Declarant is the President of the National Lawyer's Guild in Seattle. These attacks happened on July 7, July 8, and July 25.

*The Declaration of Katherine Conroy* is relevant to **charge B**, as it shows SPD's ongoing use of chemical weapons and prohibited projectile weapons on peaceful protesters, on July 25, 2020.

*The Declaration of Mary Eileen Hood*, is relevant to **Charge B**, as it shows general knowledge of the dangers of tear gas and pepper spray, and thus implies the Mayor's knowledge that the use of tear gas and other chemical weapons during a pandemic was a reckless and terrible idea. It also shows the reckless and unlawful use of the gases on peaceful protesters on July 25, which is also highly relevant to **Charge B**. Ms.

Hood's declaration is also another example of a person injured especially by the chemical weapons because of her asthma, making her situation modestly relevant to **Charge E**.

*The Declaration of Stephen Lagree* is relevant to **Charge B** and Charge C, as it shows the police deliberately violating the TRO, which required that police not attack peaceful protesters.

*The Declaration of John Mitchell* is relevant to **Charge B** as it shows both use of chemical weapons, and also **Charge C**, as it shows the targeting of media by the SPD.

*The Declaration of Dominic Thomas* is relevant to **Charge B**, as it shows the recent use of pepper spray, and fairly severe injuries from police violence on July 25 and how the level of police violence continues to increase under Mayor Durkan.

*The Declaration of Yvette Sierra-Vignau* is relevant to **Count B**, as she was the victim of gassing, but also **Count C**, as she wound up being targeted for giving medical assistance to other protesters on both June 1, 2020, and again on July 25, 2020. Ms. Sierra-Vignau also saw the SPD targeting media on July 25, creating further relevance to **Count C**. Ms. Sierra-Vignau also reports ongoing medical conditions that may be the result of having been exposed to chemical weapons.

*The Declaration of Carolyn Sterner* is relevant to **Charge B**, as Ms. Sterner describes severe attacks with tear gas and ballistic weapons on July 25th, that have left her unable to hear to this date. She also describes

deliberate attacks on medics on that same date, which is relevant to **Charge C**.

*The Declaration of Seth Kramer* is relevant to **Charge B**, as Mr. Kramer is a researcher in the field of protests and violence, and nonetheless found the level of violence, including explosives and chemical weapons, greater than he had ever seen before on July 25. Mr. Kramer was also seriously injured.

*The Declaration of Ryan Whitney* is relevant to **Charge B** and **Charge C**, as Mr. Whitney reports that he saw SPD aggressively attacking protesters, including actions that appeared retaliatory, such as targeting volunteers who were helping the protestors escape the chaos after they had been injured. One of the people attempting to help an injured volunteer, and apparently being attacked for it, was declarant himself.

2. The following are declarations newly collected by Respondents/Cross Appellants and filed today, with this Court.

*Declaration of Kylie Aude* is relevant to **Charge C**, the deliberate targeting of medics and to **Charge E**, the effect of police misbehavior on bystanders. Ms. Aude is a veteran and was trained as a combat lifesaver. On August 15, 2020, a day she was not protesting or planning to provide medical aid, she visited the protesters in Cal Anderson Park. Some of the protesters were gathered around a man who had been gravely injured. Ms. Aude attempted to give assistance, but was repeatedly prevented from taking the man to the hospital by an SPD officer. As Ms. Aude became

frustrated, the situation escalated, and Ms. Aude was arrested. It is unknown what became of the injured man.

*Declaration of “Jaylin Doe”* is relevant to **Charge C** as it demonstrates the SPD targeting of attacks on people like medics, who are protecting the protesters. Ms. Doe is a member of “Car Brigade,” a group that, like “Bike Brigade” helps protesters by protecting them from drivers attempting to hurt or kill them, or simply being inattentive. On August 14, Ms. Doe was protecting a group of protesters when police smashed her car window and arrested her. Police were not wearing masks at the time, and thereby may have exposed her to COVID-19.

*Declaration of Stephanie Miller* is relevant to **Charge B** as she was deliberately targeted with pepper spray in an egregious manner on July 25, and still suffers from the trauma and the gas’s effects.

*The Declaration of John Alan Moore* is highly relevant to Charge C, as Mr. Moore is an EMT who often worked as a medic. He speaks about the pattern of targeting and how medics often changes the symbols on their clothing because the SPD targeting of medics was so severe. He also speaks of the targeting of legal observers by the SPD.

*The Letter from National Lawyer’s Guild* was collected from their public website. It further describes the targeting of legal observers, which is relevant to **Count C** by its nature, but unlike the Declaration of Mr. Chinn, the letter discussed activities through August 16, 2020.

*The Declaration of Emma Wilson* is relevant to **Charge B** because it discusses the indiscriminate use of violence and chemical weapons on July 25.

II. CONCLUSION

Petitioners request the Supreme Court allow them to supplement the record with these Declarations, which detail additional viewpoints on the behavior of SPD over the past few weeks, long after the filing of charges.

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Elliott Grace Harvey