

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

REPLY TO RESPONSE TO

MOTION TO SUPPLEMENT THE RECORD

WITH NEW EVIDENCE

PETITIONER ELLIOTT GRACE HARVEY

## I. ARGUMENT

- A. This new evidence would neither surprise the Mayor nor prevent her from responding.

Respondent/Cross-Appellants have long pointed out that this is a continually evolving situation. For example, in Declaration #3 to Submit New Evidence, filed in the Superior Court below (7/28/2020),

Respondent/Cross-Appellants noted:

The Petitioners submit these declarations for the Court's consideration to document the continued actions of the [Seattle Police Department] and the Mayor Durkan's sustained failure to intervene, which has now turned to efforts to prevent intervention.

These declarations highlight the pain and suffering of the people of Seattle that has been sustained over long periods of time and shows no end.

Declaration, p.1 (filed 7/28/2020, emphasis added).

The second sentence in Respondent/Cross-Appellants' Motion for an Expedited Ruling in the Superior Court began: "This recall case is an ever-evolving situation...." Motion, p.1 (filed 7/28/2020, emphasis added). Respondent/Cross-Appellants' Reply regarding the Emergency Motion for Expedited Review in this Court noted, "The horrifying tactics of SPD did not stop at the Mayor's first knowledge of SPD violence, but are ongoing...This situation is, very specifically, an emergency, deserving emergency treatment." Emergency Motion, p.3 (filed 8/12/2020, emphasis added).

Although the Mayor appears to claim in their response to have insufficient time to respond to the supplemental evidence, the Mayor does

not make this claim openly, nor does she claim “surprise.” She could not do either credibly.

It has already been noted that the Mayor has vast legal resources at her disposal to respond to this case. With her many attorneys, and their additional staff, she has the capacity necessary to respond to the new evidence.

The Mayor indubitably has knowledge of the activities laid out in the submitted declarations. They are unfolding under her authority, and are a foundational reason for the petition for recall. She is not surprised by the fact that SPD escalated in their violent attacks on protesters after the City Council voted to reduce the budget of the SPD in the remaining months of 2020. Her administration has continued to make efforts to protect the SPD from changes to policy that would restrict their actions, notably by using the 2012 Consent Decree that was created to address abuses by the SPD. This fact is why she does not openly argue “inability to respond” or “surprise,” but only implies them.

B. This evidence additionally supports the ruling below, and therefore should be considered by this Court under RAP 9.11(a).

The Mayor’s counsel argues that her “name is not mentioned” in the declarations submitted, and therefore such declarations should not be considered. This misses the “gravamen” of the complaint, as the Court below put it.

Analogously, the Mayor’s counsel claimed below that she had no duty to stop the SPD, even though she was the only elected official with exactly that right:

Charge B implies that under the various laws and constitutional provisions Petitioners identified, Mayor Durkan has a legal duty to unilaterally implement policies and safety measures for SPD. She does not. The Seattle City Charter states that the Chief of Police shall be the “chief peace officer of the City” and shall “maintain the peace and quiet of the City.” Charter, Article VI, Sec. 5. Pursuant to this authority, the Chief “shall manage the Police Department, and shall prescribe rules and regulations, consistent with law, for its government and control.” Id. at Sec. 4.

Motion for Reconsideration of Order on Petition to Determine Sufficiency of Recall Charges, p.9-10 (filed 7/14/2020, emphasis Mayor Durkan’s).

The Court saw through these obfuscations below. While noting that all the parties had been placed under tremendous strain by the passing of events, the judge found:

Mayor Durkan argues, as she did in the initial response to the petition, that she has no legal or constitutional duty to “prescribe policies and procedure for SPD.” The gravamen of the court’s ruling as summarized above is more broadly the alleged failure to protect the health and well-being of the community. The critical role of the Chief of Police in commanding her department does not vitiate the Mayor’s obligations.

Order Denying Motion for Reconsideration, at 3 (filed 7/29/2020, emphasis added).

Here, the Mayor claims that these affidavits do not name her, and therefore have nothing to do with this complaint against her. But again, this misses the gravamen of the Court’s ruling below – that the Mayor

continues to refuse to protect the health and well-being of the community from the abuse of the SPD. The affidavits are highly probative on this point.

In In re Recall of Feetham, 149 Wn.2d 860, 72 P.3d 741 (2003), this Court did note that additional evidence could be admitted at the Supreme Court level of a recall petition, but only if it met all 6 criteria of RAP 9.11(a). In Feetham, only one criterion was argued (whether the new facts would change the decision), and this Court found it inapplicable. The proposed new evidence contradicted the allegations in the Petition for Feetham's Recall, but the Court was required to assume the facts as presented in the Petition were true for purposes of review, therefore the new evidence could not change the opinion of the Feetham Court. Id.

Here, in contrast to Feetham, Respondent/Cross-Appellants argued all 6 criteria in their Motion. The new Declarations do continue to provide more evidence of both 1) the gravamen of Charge B and 2) the dismissed charges that should be reinstated and/or encompassed in the remaining charge. They show that Mayor Durkan continues to ignore the well-being of protestors and the public, who are under regular, malicious assault by SPD, with no effort to curtail them coming from the Mayor's office.

Moreover, the timing of decisions by the Mayor was important to the Court below – the Court limited the language of the language of the charge, so that it did not include the initial uses of tear gas on protestors:

The Recall Petitioners further allege that Mayor Durkan knowingly allowed SPD officers to continue to use

chemical crowd control agents over many days without concern for the health and well-being of the community, constituting misfeasance, malfeasance, violation of oath of office. Any alleged failure of Mayor Durkan to prohibit use of chemical crowd control agents by SPD based on the early conduct before she can be said to have been aware, are legally and factually insufficient. To the extent the allegations pertain to failure to step in to stop the use of chemical crowd control agents after Mayor Durkan is alleged to have become aware of and opposed to their alleged use on peaceful protesters as a means of crowd control, such allegations are legally and factually sufficient to go forward.

Order on Petition to Determine Sufficiency of Recall Charges, p. 4-5 (filed 7/10/2020, emphases added).

Insofar as the new information helps this Court determine whether the Superior Court correctly judged that Mayor Durkan should have been aware at some point that they were being used against peaceful protesters, and that they might be dangerous for people to have significant exposure to, during the COVID-19 pandemic, they are highly relevant to this appeal.

If the Mayor does not wish the continued assaults on people by SPD to be used as new evidence against her, perhaps she should make some effort to stop these events. As Respondents/Cross-Appellants have noted over and over, she is the only elected official who can. In fact, when other elected officials – the City Council – did what little they could, by attempting to restrict funding instead of direct control (direct control is in no way authorized for the City Council under the Seattle Charter), the

Mayor vetoed the new budget, and similarly sent back the Council's Ordinance banning crowd control weapons unsigned.

This court reviews the superior court decision in the recall action de novo, In re Recall of Ward, 175 Wn.2d 429, 435, 282 P.3d 1093 (2012) (citing In re Recall of Telford, 166 Wn.2d 148, 154, 206 P.3d 1248 (2009)), but will “affirm the trial court's factual conclusions so long as substantial evidence exists supporting the trial court's conclusions.” In re Recall of Harrison, 144 Wn.2d 583, 587, 30 P.3d 474 (2001) (citing Miller v. City of Tacoma, 138 Wn.2d 318, 323, 979 P.2d 429 (1999)).

This Court will have to determine whether “substantial evidence exists” for the Court's ruling, but given that - unlike other defendants - the Mayor is currently continuing this activity unabated, there is no reason to not present the information about this continuing offense. Moreover, there insofar as the other charges continue to be an ongoing issue in Seattle, they are relevant as well.

The Mayor continues to not just stand aside, but openly support the SPD in their unjust assaults on Seattle citizens with her vetoes and lawsuits. The fact that there is so much evidence of continuing SPD assaults is her own responsibility, and she should not be sheltered from the evidence of them by any Court.

C. While all the Declarations are relevant, some are especially so.

If this Court is concerned with the Appellant's ability to respond to the new evidence, Respondent/Cross-Appellants do note in fairness

provide more new information than others. There are already 20 declarations in the record from the general assaults on the weekend of July 25, all of which support **Charge B**.

But, for example, the *Linde* declaration involves a resident with asthma who was not protesting but who was nonetheless repeatedly hurt by the use of tear gas in his own home. This is clearly quite relevant to **Charge E**.

The *Chinn* declaration, the *Mitchell* declaration, the *Sierra-Vignau* declaration, the *Stern* declaration, the *Whitney* declaration, the *Aude* declaration, and the *Moore* declaration are all relevant to SPD attacks on protected groups: legal observers, medical personnel/ people assisting the injured, and the press, and are thus especially relevant to **Charge C**.

At minimum, these declarations should be admitted, as they are extremely probative on these matters. Remanding to the trial court merely to have it accept the very same declarations, which under the law, must be assumed to be true for purposes of sufficiency, would only delay this just resolution of this case further for no reason.

D. Petitioners assume the Mayor concedes that the affidavits filed on Tuesday, July 28, which referred to the assaults on protesters that Saturday, July 25, were timely filed.

Given that the Mayor complains that some of declarations referring to July 25, 2020, were not signed until early August, and this makes them untimely in the Mayor's view, Respondent/Cross-Appellants assume the Mayor would concede that the declarations filed on Tuesday, July 28,

discussing the incidents of July 25, were filed in a timely manner. These declarations were filed in this Superior Court case the same calendar day they were filed in federal court in the Black Lives Matter of Seattle/King County case.

## II. CONCLUSION

Petitioners request the Supreme Court allow them to supplement the record with the Declarations submitted with Respondent/Cross-Appellant's Motion, which detail additional witness experiences regarding the behavior of SPD over the past few weeks, long after the filing of charges. The evidence is highly relevant to Mayor Durkan's continued unwillingness to take control of SPD and stop the violence, and are further relevant to charges that were dismissed by the court below, and insofar as they might change the outcome of this case and meet the other criteria of RAP 9.11(a), they should be considered by this Court in the interest of justice.

DATED this 27th day of August, 2020.



By Elliott Grace Harvey