

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK**

UNITED STATES OF AMERICA

VS.

JOHN MURTARI,

Defendant, pro se.

Criminal Action Nos:

5:07-CR-428 (DEP) & 5:07-
CR-406 (DEP)

NOTICE OF MOTION

PLEASE TAKE NOTICE, that upon the attached memo, and cover letter dated January, 25th 2008, exhibits, and upon all prior pleadings and proceedings heretofore had herein, a Motion will be made as follows:

DATE, PLACE AND TIME OF MOTION: In front of the Honorable US Magistrate David E. Peebles at the United States Courthouse in Syracuse, New York as soon as counsel can be heard.

TYPE OF MOTION: Defendant seeks an Order of the Court:

1. Vacating the prior order of the Court dated January 21, 2008
2. Vacating prior 'Conditional Release' orders issued in these matters.
3. Dismissing the charges pending in these matters.
4. An order granting the Defendant access & use of the CM/EF (**C**ase **M**anagement/**E**lectronic **C**ase **F**iling) system.

Dated: January 25, 2007

CC: Mr. Ken Moynihan's, Esq.

CC: Mr. Ransom Reynolds, Asst. US Attorney
PO Box 7198
100 South Clinton Street
Syracuse, New York 13261-7198

Respectfully submitted,

Attach:

A: Free speech/ types of forums

**B: Decision of US Magistrate DiBianco in
US v. Murtari**

**C: Federal Management Regulation,
Title 41, Subpart D-Occasional Use of
Public buildings, Part 102-74**

John Murtari, pro se
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Lyons, NY 14489
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This document contains both rationale and source document/case cite references to support granting of the attached Motion, dated January, 25, 2008.

1. Vacating the prior order of the Court dated January 21, 2008

The order should be vacated for one or more of the following reasons:

- The order is an unwarranted restriction of the free speech rights of the Defendant in an area well recognized as a 'public forum' (see Attachment A for brief summary of recognize forum types/restrictions), the front Plaza of the Hanley Federal Building. In all prior proceedings regarding the Defendant it has never been shown that he is a threat to the public, caused any disturbances, or interfered with building operation, or damaged any government property (in a recent trial Judge DiBianco found the defendant not guilty on two counts of 'damaging government property' by writing with chalk on the ground outside (see Attachment B)
- The order is vague and unclear in wording. Paragraph 3 requires the defendant to comply with 'applicable' permit requirements, and prior litigation in this matter included the testimony of the prior Federal Building Manager and appeared to make it clear the permit authority is based on the Federal Management Regulation, Title 41, Subpart D-Occasional Use of Public buildings, Part 102-74 (see Attachment C) and the GSA does not issue permits for purely 'free speech' activities. The permit rules limit themselves to establish, *"rules and regulations for the occasional use of public areas of public buildings for cultural, educational and recreational activities..."*

Paragraph 4; however, states the defendant is not prohibited from peaceful conduct (but seems to require no permit). He is also prohibited from associating with others which would appear to be an undue restraint on his activity. I have heard from two 'reasonable' people who have read the order and one told me, "you can't stand outside with your petition without a permit." While the other thought that would be okay.

- The order 'legislates' by actually extending the scope of GSA regulations by adding the word 'deface' to a regulation that only uses the word 'destroy'. (Attachment C) As a reasonable member of the public the Defendant does not object to Girl Scouts writing a hop-sotch game on the Federal Plaza, nor with its use for political purposes as he has done with a simple, non insulting or profane message.
- The order, in Paragraph 5, includes an 'absolute prohibition' of him entering the Federal Building on other than a Court appearance. It blocks his access to the Social Security Administration and other public services within the building. The Defendant is denigrated by these types of conditions that might be used to keep some type of 'crazy' away from the public.
- In an conduct motivated by a Civil Rights goal and conducted in a peaceful and nonthreatening manner – such an order serves to greatly increase penalties and may not be appropriate versus simple speedy-trial alternatives.

2. Vacating prior 'Conditional Release' orders issued in these matters.

- The defendant is certainly not a 'flight risk' or a 'danger to the community'. He is also to be presumed innocent while waiting for trial. Past litigation in this matter has shown in two different trials that the Defendant was found not guilty of some of the charges against him and others have been completely dismissed.
- These orders were based on an over broad stay-away order that made it criminal behavior to quietly stand in front of the Federal Building holding a picture of parents & children and asking Senator Clinton for help.
- Standard Federal Conditional release terms included mandate a violation has occurred if the Defendant violates any State law. Unfortunately, because of child support matters the Defendant, at present, is in the uncomfortable position of driving with a suspended license. He has no spouse, brothers, or sisters and lives alone in a small town. His work is in Baldwinsville and there are no alternate means to get there. Beyond a restricted 'work' license, simple matters of home maintenance, shopping, etc... require driving.

3. Dismissing the charges pending in these matters.

- For all the reasons prior stated the pending two charges, that would find 'Criminal contempt' to quietly stand in front of the Federal Building, should be dismissed.

4. An order granting the Defendant access & use of the CM/EF (Case Management Electronic Case Filing) system.

- At the Court web site the system is presented as a wonderful, time saving, and more effective method for managing and filing Court documents.
<http://www.nynd.uscourts.gov/cmecf/>

I quite agree. I assume the Courts should be equally accessible to everyone and to restrict such access only to Members of the Bar is an unfair limitation in my ability to conduct an effective defense as a 'pro se' litigant.

Attachment A: Discussion of law regarding free speech/restrictions.

taken from:

http://ogc.arizona.edu/white_paper_sja_first_amendment_free_speech_and_assembly.htm

The Public Forum Doctrine

The First Amendment to the United States Constitution reads that "Congress shall make no law...abridging the freedom of speech...." The Fourteenth Amendment makes this prohibition also applicable to the States. The United States Supreme Court has stated that "the constitutional guarantee of free speech is a guarantee only against abridgement by government, federal or state." Thus the First Amendment=s protections apply when the Federal or State governments regulate speech and expression on public property.

I. Permissible Government Restrictions on the Content of Speech

The First Amendment does not protect speech or expression that harms the health, safety, or welfare of persons in the community. As a result, content regulation or restriction of speech is permissible to stop: (a) incitements (provocation to engage in immediate violence); (b) fighting words (confrontational words or threats likely to lead to immediate fighting); (c) obscenity (appeals to carnal interests; clearly offensive, and without redeeming social value); (d) defamation (falsehoods that harm someone); (e) commercial speech (false or misleading); and (f) speech by public employees (matters not of public concern).

II. Classification of Public Property

1. Open Public Forum: State property that has traditionally been open to the public for speech, assembly and debate. Public forum property has traditionally included public streets, sidewalks, parks and city squares.

2. Closed Non-Public Forum: State buildings and property that are not by tradition or designation open for public communication, but are used for business, education or other devoted purposes. The State may reserve non-public property for its intended purpose, so long as the regulation of speech is reasonable and not an effort to suppress a particular viewpoint. Examples of non-public forums include courthouses, jails, government offices, city halls and public schools. While State property that is a non-public forum is required to be open for its devoted purposes, it is not required to be open to the public for other expressive purposes....

3. Limited Public Forum: Government property that is not required to be open to the public for expressive purposes, but which the State has intentionally designated as open for: (a) all expressive activities; (b) only certain speakers; or (c) the discussion of only certain topics. Although there is no legal requirement to open school facilities up to uses other than for normal educational and administrative functions, as a practical matter almost all Universities designate some non-public property for free speech and expressive uses. See, e.g., UA=s Policy and Regulations Governing the Use of the Campus. Examples of such designations include University facilities opened for meetings of student groups or other organizations, and the designation of the Mall as Afree speech@ and Areserved@ areas.

Once the State opens non-public property to the public for expressive activity, then such property becomes a limited public forum open for such designated uses.

III. Limits on the Exercise of Free Speech and Assembly Based Upon Forum Type

1. Public Forum: Expressive activity in an open public forum may not be suppressed, controlled or excluded unless it is necessary to achieve a compelling government interest, and is narrowly drawn to achieve that end. A compelling government interest means an interest of the greatest importance, such as protecting the health, safety and welfare of the community. However, reasonable **time, place and manner restrictions** may be used if applied neutrally to all similarly situated parties.

2. Limited Public Forum: A University setting most often fits into this category because it contains public buildings and property whose primary purpose is to provide education, but is often designated to allow access to the public at times when the property is not being used for its primary purpose. The uses of the property may be limited to those designated by policy, and reasonable **time, place and manner restrictions** may be imposed, but each must be exercised neutrally among similarly situated persons.

3. Non-Public Forum: The government may impose reasonable content-based restrictions on expressive activity in non-public forums in light of the function and purpose of the property. Some government buildings may have portions designated as limited public forums, such as meeting rooms, while other portions remain non-public forums such as areas that are used for internal business, and are not generally open to the public. A non-public forum may be reserved for its intended purpose as long as the regulation on speech is reasonable in light of the function of the property, and not an effort to suppress expression merely because public officials oppose the speaker's viewpoint.

Attachment B: Decision of US Magistrate DiBianco in US v. Murtari (5:07-CR-387, dated October 16th, 2007)

Please reference PDF file for the full decision:

http://www.akidsright.org/clinton/chalk_decision.pdf

In support of his first argument, defendant cites *Mackinney v. Nielsen*, 69 F.3d 1002 (9th Cir. 1995). The court in *Mackinney* stated that “[n]o reasonable person could think that writing with chalk would damage a sidewalk.” *Id.* at 1005.

plaza was “defaced” by the use of chalk. As stated above, the regulation does not prevent “defacing” property, and it has been held in various cases that defacing and damaging are not necessarily the same. It is clear that although defendant intended to write in chalk on the plaza, he did not intend to “damage” the surface. Therefore, this court finds that defendant did *not* violate 41 C.F.R. § 102-74.380(b) on either August 30 or September 4, 2007.

Attachment C: Federal Management Regulation, Title 41, Subpart D-Occasional Use of Public buildings, Part 102-74

excerpts taken from:

http://www.access.gpo.gov/nara/cfr/waisidx_07/41cfr102-74_07.html

Subpart D—Occasional Use of Public Buildings

§ 102-74.460 What is the scope of this subpart?

This subpart establishes rules and regulations for the occasional use of public areas of public buildings for cultural, educational and recreational activities as provided by 40 U.S.C. 581(h)(2).

APPLICATION FOR PERMIT

§ 102-74.465 Is a person or organization that wishes to use a public area required to apply for a permit from a Federal agency?

Yes, any person or organization wishing to use a public area must file an application for a permit from the Federal agency buildings manager.

PRESERVATION OF PROPERTY

§ 102-74.380 What is the policy concerning the preservation of property?

All persons entering in or on Federal property are prohibited from—

- (a) Improperly disposing of rubbish on property;
- (b) Willfully destroying or damaging property;
- (c) Stealing property;
- (d) Creating any hazard on property to persons or things; or
- (e) Throwing articles of any kind from or at a building or climbing upon statues, fountains or any part of the building.

DISTURBANCES

§ 102-74.390 What is the policy concerning disturbances?

All persons entering in or on Federal property are prohibited from loitering, exhibiting disorderly conduct or exhibiting other conduct on property that—

- (a) Creates loud or unusual noise or a nuisance;
- (b) Unreasonably obstructs the usual use of entrances, foyers, lobbies, corridors, offices, elevators, stairways, or parking lots;
- (c) Otherwise impedes or disrupts the performance of official duties by Government employees; or
- (d) Prevents the general public from obtaining the administrative services provided on the property in a timely manner.

PENALTIES

§ 102-74.450 What are the penalties for violating any rule or regulation in this subpart?

A person found guilty of violating any rule or regulation in this subpart while on any property under the charge and control of GSA shall be fined under title 18 of the United States Code, imprisoned for not more than 30 days, or both.