

STATE OF NEW YORK  
LYONS VILLAGE COURT – COUNTY OF WAYNE

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The People of the State of New York

vs

Attorney Affirmation  
In Support of Motion

John Murtari,

Defendant

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Denise R. Munson, Esq., being duly sworn, deposes and says:

1. I am an attorney admitted to practice in the State of New York, and I am the attorney for John Murtari in the herein action, and as such am fully familiar with the facts and circumstances of this case.
2. I make this Affirmation in support of Defendant’s motion to dismiss the four (4) Criminal Informations against him for Making Graffiti, a violation of Section 145.60(2) of the New York State Penal Law.
3. Penal Law Section 145.60(2) provides in pertinent part:  
“No person shall make graffiti of any type on any building, public or private, or any other property real or personal owned by any person, firm or corporation or any public agency or instrumentality, without the express permission of the owner or operator of said property”.
4. The definition section of Making Graffiti, found in Section 145.60 (1) of New York State Penal Law, provides as follows:  
“For purposes of this section, the term “Graffiti” shall mean the etching, painting, covering, drawing upon or otherwise placing of a mark upon public or private property with intent to damage such property”.
5. In the herein matter, the Defendant was charged with four (4) separate Informations alleging violations of Penal Law, all arising from four (4) separate incidents wherein Defendant was accused of violating of Section 145.60 (2) of the New York State Penal Law. Each of the Criminal Informations make the same allegations with the following language:  
“that at the above date, time and location, the Defendant did make graffiti with chalk by writing on the Wayne County Court House without express permission.....”
6. At no place on any of the Criminal Informations with which the Defendant was served, does the accusatory instrument indicate that the Defendant intended to damage the Courthouse, or any portion thereof. Intent to damage is a required element for the creation of Graffiti, pursuant to New York State Penal Law.
7. Case Law tends to support this analysis. For example, in MacKinney v Nielsen 69 F3d 1002 (1995), a Defendant was accused of violating a California Statute by using chalk to write on a sidewalk. In addition to finding that the Defendant was arrested without Probable Cause, the Court stated that “there is no evidence that the sidewalk was ‘damaged’. No reasonable person could think that writing with chalk would damage a sidewalk”.

8. In People v Wallender 27AD 3D 955 (3<sup>rd</sup> Dept, 2006), the Court found that where a jury acquitted the Defendant of Graffiti but convicted him of Criminal Mischief, the Criminal Mischief charge could not stand, and was overturned. Their reasoning was that if there was no intent for a Graffiti charge, there could not possibly be any intent for a Criminal Mischief charge. The conviction was overturned.
9. In People v Stockwell 18MISC 3D 1145 (a), 2008 WL623727 (2008), the Court expounded upon the issue of “damages”, as required for the crime of Criminal Mischief under New York State Penal Law Section 145. According to the Court “while no statutory definition of ‘damages’ is provided, it is commonly recognized that the term contemplates “injury or harm to property that lowers its value or involves loss of its efficiency” quoting People v Collins 288 AD 2d 756, 733 NYS 2d 289 (3<sup>rd</sup> Dept, 2001). In Stockwell, the homeowner painted the side of the fence that faced his property because the look of the fence was unpleasant to him. The Court found that there was no damage, as the painting of the fence improved its appearance.
10. In United States v Murtari F Supp. 2D, 2007 WL3046746 (NDNY), the Court dealt with the issue of defacement versus damage, and found that the two things are not the same. Furthermore, the Court found that writing with chalk did not damage the property in question. The Court cited People v Collins 288 AD 2D 756, 733 NYS 2D 289 (3<sup>rd</sup> Dept, 2001), and indicated that although there is no statutory definition of damage, the term “contemplates injury or harm to property that decreases its value or involves loss of efficiency”. The Court noted that ‘defacement’ was not necessarily the same as “damage”, and further the Court noted that the New York Legislature has chosen, unlike other jurisdictions, to use the words “intent to damage”, and not “defacement”. The Court stated “it is clear that although Defendant intended to write in chalk on the plaza, he did not intend to ‘damage’ the surface. United States v Murtari at \_\_\_\_\_.”
11. In the present case, the Defendant has been charged with four (4) Misdemeanors of Making Graffiti. The statutory definition of graffiti involves intent to damage. No damage is alleged. In fact, using children’s sidewalk chalk has been found, in previous cases, as indicated above, not to exhibit intent to damage. Sidewalk chalk washes off in the rain. If squirted with a hose, it would likely dissipate. Had the Defendant wanted to damage the property, he certainly could have used other substances, such as permanent marker or paint or another substance that would be difficult to remove. No such substances were used in the case herein.
12. Based upon the failure of the Informations to allege intention to damage, as well as the failure of any possible proof on this issue due to the nature of the medium used by the Defendant (chalk), it is hereby requested that the herein Actions be dismissed as failing to allege a proper Cause of Action, and in the Interest of Justice.

Dated \_\_\_\_\_

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Denise R. Munson, Esq.

Sworn to before me this  
\_\_\_\_\_ day of \_\_\_\_\_ 2010

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Notary Public

