

DISTRICT COURT OF THE STATE OF NEW YORK  
COUNTY OF Nassau, Part 5

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THE PEOPLE OF THE STATE OF NEW YORK

AFFIRMATION IN  
OPPOSITION

- against -

Dkt.# 0000000

Hon. Judge O'Brien

XXXXXXXXXXXXXXXXXXXXXXXXXXXX

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STATE OF NEW YORK     )  
  ) ss.:  
COUNTY OF NASSAU     )

**MICHAELANGELO MATERA**, Esq., being duly sworn, deposes and says:

That I am an attorney admitted to practice law in the State of New York, and a member of the law firm of MATERA & BRATKOVSKY, LLP, attorneys for the defendant in connection with the above-captioned action and, as such, am fully familiar with the proceedings therein;

That this Affidavit is submitted in opposition to the Motion filed by the People for an order consolidating the defendant's case with two other individuals' cases for trial.

That the sources of your affirmant's information and belief are the Court records, the records on file in my office, official reports and records, discussions with the Assistant District Attorney and Police Department, and conversations had with the defendant as well as Mr. Mossoroffo and Ms. Magriz.

In their Motion papers, the People argue that the three cases should be joined for trial due to the fact that, "proof against the [defendants] will be supplied by the same evidence [and that as a result] separate trials are completely unwarranted." (See, People's Affirmation at p.3) In

support, the People cite to several cases however, a careful review of the People's own cases reveals that these matters are not properly joinable and must proceed to trial separately.

In order for defendants to be tried jointly, all of the offenses charged must be common to all defendants. (CPL §100.15(2); *See also*, People v. Tejada, 180 Misc.2d 228) In the instant matter, that simply is not the case. As stated in the People's papers, Wallaska Mossoroffo is charged with Assault in the third degree, Resisting Arrest, Harassment and Obstruction of Governmental Administration. The other two defendants are each charged with Resisting Arrest and Obstruction of Governmental Administration. Initially, it should be noted that as to xxxxxxxxxx, the charges of Resisting and Obstruction cannot both survive as the facts alleged only make out resisting. Unlike the charges against the other two defendants which allege that they attempted to prevent the officers from placing xxxxxxxx under arrest, there is no such claim that xxxxxx attempted to prevent the arrests of the other two.

Additionally, these charges are specific to each defendant alone and are not part of the same transaction. It is alleged that each defendant resisted but there is no indication that one had anything to do with the others' resisting. Most importantly however is the fact that each of the defendants are not charged with the same crimes. As previously mentioned, although Carmine and Ana are charged with the same crimes, xxxxxx stands accused of having committed two additional crimes. As a result, the defendants could not possibly stand trial jointly. (People v. Spencer, 67 AD2d 867, 867-868; People v. Minor, 49 AD2d 828)

An additional argument against trying the defendants jointly is that it would have the affect of xxxxxxxx being unable to call Carmine and Ana to testify, something which she is absolutely planning on doing, as they would have no choice, were they to be tried jointly, but to assert their 5<sup>th</sup> Amendment Right Against Self Incrimination. Case law is clear that upon a

showing of the need for a codefendant's testimony, it would be an abuse of discretion to order a joint trial. (United States v. Gleason, 259 F.Supp. 282 [SDNY]; People v. Owens, 22 NY2d 93; People v. Bornholdt, 33 NY2d 75; People v. Wang, 140 AD2d 567) Courts have further stated that, "To require a defendant to be tried jointly with his codefendants whose interests are adverse to his and whom he wishes to call as witnesses to exculpate him or, if they refuse to testify, to comment upon such refusal, denies defendant a fair trial." (People v. Matonti, 53 AD2d 1022, 1022; People v. La Ruffa, 2 AD2d 765; People v. Hannon, 50 Misc2d 297, 302; United States v. Echeles, 352 F2d 892, 898; De Luna v. United States, 308 F2d 140, 141)

As previously mentioned, in the instant matter xxxxxxxx absolutely intends to call the other two defendants to testify on her behalf and offer exculpatory evidence. Based upon discussions that I have had with my client as well as with the other two defendants and their attorneys, I can represent to the Court that they are willing to testify and that they will testify that xxxxxxxx never kicked the officer. In fact the People are clearly aware of this fact and mentioned as much to Your Honor at the July 24<sup>th</sup> court appearance during a bench conference and that is the precise reason that they have filed the instant Motion – in an attempt to prevent the codefendants from testifying. However, I have spoken with counsel for the other defendants and they have confirmed that they will not commit to having their clients testify at the time of trial and may very well have them assert their Fifth Amendment Right. That being the case, these matters cannot be joined for trial.

Thus, for both reasons argued herein, it is clear that the three cases in issue cannot be consolidated.

**WHEREFORE**, it is requested that the People's Motion be denied, together with such other and further relief which, as to this Court, may seem just and proper.

DATED: August 4, 2003  
Mineola, New York

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MICHAELANGELO MATERA

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