



**TOURO UNIVERSITY**  
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**Touro Law Review**

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Volume 21  
Number 1 *New York State Constitutional  
Decisions: 2004 Compilation*

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Article 7

December 2014

## **Appellate Division, Third Department, People v. Roberts**

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### **Recommended Citation**

Fitzgerald, Maureen (2014) "Appellate Division, Third Department, People v. Roberts," *Touro Law Review*. Vol. 21: No. 1, Article 7.

Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol21/iss1/7>

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**Appellate Division, Third Department, People v. Roberts**

**Cover Page Footnote**

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Fitzgerald: Due Process  
**SUPREME COURT OF NEW YORK,  
APPELLATE DIVISION, THIRD DEPARTMENT**

People v. Roberts<sup>1</sup> .  
(decided November 18, 2004)

The defendant, Ronald Roberts, was convicted of robbery in the first degree and was sentenced to twelve and a half to twenty-five years in prison.<sup>2</sup> Roberts appealed on several grounds. First, Roberts claimed that statements he made to a police officer prior to the arrival of defense counsel should have been suppressed.<sup>3</sup> However, the court held that the statements were spontaneous and therefore, were not subject to suppression.<sup>4</sup> Next, Roberts appealed the admission into evidence of a gun, which was found as a result of statements made in connection with a failed plea agreement.<sup>5</sup> Again, the court upheld the lower court's ruling that the gun be admitted into evidence since there was never any mention of prohibiting the derivative use of the gun at trial.<sup>6</sup> Roberts also argued that the lower court erred in limiting his cross-examination of an inmate to whom he allegedly confessed the robbery.<sup>7</sup> The court found that there was no error in limiting cross-examination of the inmate because Roberts' statements implicated Lloyd Kelone, who was also involved in the robbery.<sup>8</sup> The court concluded that the limitation was necessary in order to protect the

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<sup>1</sup> 784 N.Y.S.2d 692 (N.Y. App.Div. 2004).

<sup>2</sup> *Id.* at 693.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 694.

<sup>5</sup> *Id.*

<sup>6</sup> *Roberts*, 784 N.Y.S.2d at 694.

<sup>7</sup> *Id.* at 695.

rights of the codefendant.<sup>9</sup> Roberts also contended that he was denied effective assistance of counsel.<sup>10</sup> The court did not find merit in this claim because the attorney filed the necessary pretrial motion, advanced a viable theory of defense, “cross examined the People’s witnesses and drew attention to weaknesses in the prosecution’s case.”<sup>11</sup> Finally, Roberts claimed that as a result of prosecutorial misconduct, he was denied his constitutional right to a fair trial.<sup>12</sup> The court also rejected this argument and held that the prosecutor’s misconduct did not rise to a level so as to deny Roberts a fair trial.<sup>13</sup>

Roberts “was allegedly a planner and the driver in a scheme with several other individuals to rob an employee of the Vanilla Bean Baking Company” as the employee transported checks, receipts and cash from the company’s store in Albany to the store in the City of Troy.<sup>14</sup> One assailant approached the employee, who had her thirteen-year-old daughter with her, and unsuccessfully tried to grab the suitcase with the money, while another assailant approached her with a gun and grabbed the suitcase.<sup>15</sup> Both assailants fled in a car that was waiting for them at the scene.<sup>16</sup>

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Roberts*, 784 N.Y.S.2d at 695.

<sup>12</sup> *Id.* at 694; U.S. CONST. amend. V provides in pertinent part: “No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .”; N.Y. CONST. art. I, § 6 provides in pertinent part: “No person shall be deprived of life, liberty or property without due process of law.”

<sup>13</sup> *Roberts*, 784 N.Y.S.2d at 695.

<sup>14</sup> *Id.* at 693.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 693.

After a police investigation, it was discovered that Roberts' girlfriend worked at the Vanilla Bean Baking Company and that Roberts drove a car that matched the description of the get away vehicle.<sup>17</sup> Roberts was subsequently arrested and then made statements that implicated him in the robbery.<sup>18</sup> At trial Roberts, in connection with his claim that he was denied his constitutional right to a fair trial, alleged that the prosecutor had made inappropriate comments and attempted to elaborate upon the victim's fear during the opening statement.<sup>19</sup> At the close of trial, the jury returned a verdict of guilty on the charge of robbery in the first degree.<sup>20</sup>

In *Roberts*, the court found that the prosecutor's misconduct did not rise to such a level as to deprive the defendant of his constitutional right to a fair trial.<sup>21</sup> The court stated that "[r]eversal is warranted when a prosecutor's improprieties cause such substantial prejudice as to deny a defendant a fair trial."<sup>22</sup> In analyzing whether the prosecutor's conduct denied Roberts his right to a fair trial, the court scrutinized the conduct of the prosecutor and determined whether absent such conduct, the jury would have come to the same result.<sup>23</sup> In effect, the court looked at whether the prosecutor's conduct interfered with the jury's ability

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<sup>17</sup> *Id.* at 694.

<sup>18</sup> *Roberts*, 784 N.Y.S.2d at 694. After Roberts inquired about a plea deal, he stated "[a]ll I did was drive. No one could say I did anything else. It wasn't right, that little girl was there." *Id.*

<sup>19</sup> *Id.* at 695.

<sup>20</sup> *Id.* at 693.

<sup>21</sup> *Id.* at 695.

<sup>22</sup> *Id.* at 694.

to evaluate the evidence presented. In addition, the court looked at whether the trial court “took appropriate action to dilute the effect of the conduct.”<sup>24</sup> The court stated that at trial the prosecutor’s efforts to “unduly expound on the victim’s fear in her opening statement was cut short by a sustained objection.”<sup>25</sup> Also, the court examined statements made during the prosecutor’s opening statement and explained that while “inartful,” the statements were an attempt to inform the jury of the type of testimony that it would hear during trial.<sup>26</sup> The court concluded that when viewing these statements singularly or cumulatively, they did not rise to such a level as to deprive the defendant of a fair trial.<sup>27</sup>

The United States Supreme Court decision of *Berger v. United States* set forth the standards which courts use to evaluate whether prosecutorial misconduct has effectively denied the defendant of his constitutional right to a fair trial.<sup>28</sup> In *Berger*, the defendant was charged with having conspired, along with seven other people, to produce counterfeit notes.<sup>29</sup> At trial, the prosecutor was guilty of misconduct in his cross-examination of a witness and in his argument to the jury.<sup>30</sup> One of the issues on appeal was whether the misconduct by the prosecutor was so

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<sup>23</sup> *Roberts*, 784 N.Y.S.2d at 694.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 695.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Berger v. United States*, 295 U.S. 78, 89 (1935).

<sup>29</sup> *Id.* at 79.

<sup>30</sup> *Id.* at 80.

severe as to deny the defendant his right to a fair trial.<sup>31</sup> After reviewing the lengthy cross-examination, the Court concluded that the “prosecuting attorney’s argument to the jury was undignified and intemperate, containing improper insinuations and assertions calculated to mislead the jury.”<sup>32</sup> The Court took issue with the fact that the prosecutor, throughout his cross-examination of a witness, made insinuations and improper suggestions that asserted personal knowledge.<sup>33</sup> Most influential to the Court’s conclusion was the fact that the case against the defendant was weak.<sup>34</sup> The Court stated that if the case against the defendant had been stronger, the Court might have come to a different decision.<sup>35</sup> In addition to the strength of the case against the defendant, the Court looked to the nature of the misconduct and its effect upon the jury.<sup>36</sup> The Court combined these considerations and found that the severity and the persistence of the prosecutor’s misconduct, combined with the relative strength or weakness of the case against the defendant, effected the integrity of the trial, thereby denying the defendant his due process right to a fair trial.<sup>37</sup>

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<sup>31</sup> *Id.* at 80-81.

<sup>32</sup> *Id.* at 85.

<sup>33</sup> *Berger*, 295 U.S. at 88.

<sup>34</sup> *Id.* (“The court below said that the case against *Berger* was not strong; and from a careful examination of the record we agree.”).

<sup>35</sup> *Id.* at 89 (“If the case against *Berger* had been strong, or, as some courts have said, the evidence of his guilt ‘overwhelming,’ a different conclusion might be reached.”).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* “Moreover, we have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential.” *Id.*

The Court's evaluation of the severity and repetitive nature of the prosecutor's misconduct in *Berger* is reflected in the analysis in *Roberts*. As in *Berger*, the court in *Roberts* looked to the severity and the persistence of the prosecutor's misconduct.<sup>38</sup> The court found that while the prosecutor's conduct "pushed the bounds of propriety," when looked at either cumulatively or singularly, it did not "rise to the level of reversible error."<sup>39</sup>

Moreover, in coming to its conclusion, the court in *Roberts* cited previous New York cases that dealt with the issue of prosecutor misconduct.<sup>40</sup> In *People v. Calabria*, the defendant, who at trial was found guilty of robbery in the first degree and burglary in the second degree,<sup>41</sup> claimed that the prosecutor's conduct throughout the trial denied him his right to a fair trial.<sup>42</sup> The court agreed and found that "the prosecutor's conduct throughout the trial cumulatively denied defendant the right to a fair trial."<sup>43</sup> When evaluating the prosecutor's conduct, the court noted that the prosecutor disregarded a pretrial ruling.<sup>44</sup> Under the ruling, the defendant was not required to provide the prosecutor with photographs from a police lineup, yet the prosecutor asked for a copy of the photographs in front of the jury.<sup>45</sup> The court also noted that the defense felt "compelled to introduce the photographs

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<sup>38</sup> *Roberts*, 784 N.Y.S.2d 692, 695.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 694 (citing *People v. Calabria*, 727 N.E.2d 1245 (N.Y. 2000); *People v. Tarantola*, 577 N.Y.S.2d 686 (N.Y. App. Div. 1991)).

<sup>41</sup> *Calabria*, 727 N.E.2d at 1247.

<sup>42</sup> *Id.* at 1246.

<sup>43</sup> *Id.* at 1247.

<sup>44</sup> *Id.*



into evidence,” even though the court had ruled prior to trial that the defendant was not required to provide the photographs.<sup>46</sup> The prosecutor, even after the court admonished him for his conduct, then implied during his summation that “defendant intentionally withheld the photos of the lineup from the jury.”<sup>47</sup> Additionally, the court examined the prosecutor’s disregard for defendant’s election not to exercise his constitutional right to testify in his own defense, and remarked that “the defendant had no choice, but to testify in his defense.”<sup>48</sup> Finally, the court found that the prosecutor “exceeded the bounds of fair advocacy when he noted that the alleged drug dealing of defendant’s parents ‘made the cover of the Post’ and displayed a copy of that newspaper.”<sup>49</sup> The court found that that act, alone, prejudiced the defendant by “deliberately incorporating into the trial matters not admitted into evidence.”<sup>50</sup>

The court in *Calabria*, when evaluating the evidence of the prosecutor’s misconduct, also examined whether the trial court’s efforts at curing the misstatements were effective, and implied that such measures were not.<sup>51</sup> Particularly relevant to the court’s holding was the fact that the prosecutor persistently disregarded

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<sup>45</sup> *Id.*

<sup>46</sup> *Calabria*, 727 N.E.2d at 1247.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Calabria*, 727 N.E.2d at 1248. (“A court’s instructions to a jury to disregard matters improperly brought to their attention cannot ‘always assure elimination of the harm already occasioned.’”) (citations omitted).

the court's warnings and instructions throughout the trial.<sup>52</sup> The court looked to whether or not such misconduct interfered with the presentation of the evidence and the jury's role, thereby "sidetracking the jury from its ultimate responsibility—determining facts relevant to guilt or innocence."<sup>53</sup> On the other hand, the questionable conduct of the prosecutor in *Roberts* did not appear to be as frequent as it was in *Calabria*. In addition, unlike in *Calabria*, the court in *Roberts* implied that the curative measures by the court in sustaining an objection during the prosecutor's opening statement were effective.<sup>54</sup> In light of these differences, the court in *Roberts* did not deal with conduct that was as egregious or severe as the conduct in *Calabria*.

Also cited in the court's decision was the 1991 case, *People v. Tarantola*.<sup>55</sup> In *Tarantola* the defendant was convicted of rape in the first degree and sexual abuse in the first degree.<sup>56</sup> On appeal, the defendant argued that the "cumulative effect of comments made by the prosecutor on summation deprived defendant of his right to a fair trial."<sup>57</sup> The court ruled in favor of the defendant, and found that the statements did deprive the defendant of his right to a fair trial.<sup>58</sup> The court noted that during summation, the

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<sup>52</sup> *Id.* (explaining that "the prosecutor *persistently* disregarded the trial court's rulings.") (emphasis added).

<sup>53</sup> *Id.* at 1248 (citing *People v. Alicea*, 338 N.E.2d 625 (N.Y. 1975)).

<sup>54</sup> *Roberts*, 784 N.Y.S.2d at 695 (stating that the prosecutor's efforts "to unduly expound on the victim's fear in her opening statement was cut short by a sustained objection.").

<sup>55</sup> *Id.* (citing *People v. Tarantola*, 577 N.Y.S.2d 686 (N.Y. App. Div. 1991)).

<sup>56</sup> *Tarantola*, 577 N.Y.S.2d at 687.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

prosecutor repeatedly referred to evidence of the defendant's other criminal acts in order to infer that the defendant had a propensity to commit the crime in question.<sup>59</sup> In addition, the prosecutor made inappropriate comments during the trial such as referring to the defendant's testimony as "garbage."<sup>60</sup> Furthermore, the prosecutor made an "emotional appeal" to the jury when he stated "[i]f your heart didn't go out to a father who has a right to protect and worry about his sixteen year old child, then maybe I made a mistake in jury selection here."<sup>61</sup> Finally, the court explained that the prosecutor "flagrantly misstated" the defendant's testimony when the prosecutor stated that the defendant testified that the sixteen year old girl was "all over" him and practically begged him to have sex.<sup>62</sup> The court concluded that there was nothing in the record of defendant's testimony that supported the prosecutor's version.<sup>63</sup> The court stated, as did the *Calabria* court, that it looks at the frequency of the conduct throughout the trial, whether the trial court took action to "dilute" the effect of such conduct, and whether such action was effective.<sup>64</sup> When evaluating these considerations, the court looks at whether the conduct was so egregious as to have denied the defendant due process of law.<sup>65</sup> Under these facts the court found that the prosecutor's conduct was so egregious that it effectively denied the defendant due process of

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<sup>59</sup> *Id.* at 687-88.

<sup>60</sup> *Id.* at 688.

<sup>61</sup> *Tarantola*, 577 N.Y.S.2d at 688.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

law.<sup>66</sup> The court explained that absent such conduct, the result might not have been the same; therefore, in the interest of giving the defendant a fair trial, the court reversed the judgment and remitted for a new trial.<sup>67</sup>

The conduct in *Tarantola* is distinguishable from *Roberts* because in *Roberts*, the prosecutor did not repeat such misconduct as often as the prosecutor in *Tarantola*.<sup>68</sup> In addition, in *Tarantola* the court did not take measures to cure the misconduct of the prosecutor.<sup>69</sup> On the other hand, the court in *Roberts* sustained an objection to an improper comment made during the opening statement.<sup>70</sup> Again, given the difference in severity and effect of the prosecutor's misconduct in *Tarantola*, the court distinguished the conduct in *Roberts* and held that in this case, the conduct was not as egregious as *Tarantola*.

The New York decisions cited by the court in *Roberts* also reflect an adherence to the standards set forth in *Berger*. In *Calabria*, the court relied upon the persistence of the prosecutor's misconduct, and the effect that such conduct had on the jury and their perception of the defendant.<sup>71</sup> The court described the prosecution as disregarding the court's rulings and deliberately

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<sup>65</sup> *Id.*

<sup>66</sup> *Tarantola*, 577 N.Y.S.2d at 688.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* ("Here, as can be seen, the conduct was severe and frequent.").

<sup>69</sup> *Id.* ("Additionally, County Court took no action concerning the remarks of the prosecutor.").

<sup>70</sup> *Roberts*, 784 N.Y.S.2d at 695.

<sup>71</sup> *People v. Calabria*, 727 N.E.2d 1245, 1248 (N.Y. 2000).

prejudicing the defendant in the eyes of the jury.<sup>72</sup> Moreover, as did the Court in *Berger*, the court in *Calabria* found persuasive that the misconduct had a “cumulative” effect on the jury and was described by the court as “persistent.”<sup>73</sup>

In *Tarantola*, the court looked to similar considerations. The court went through a laundry list of misconduct by the prosecutor in order to illustrate the frequency of such behavior.<sup>74</sup> In particular, the court in *Tarantola* looked to the severity of the misconduct and asserted that the prosecutor “flagrantly misstated defendant’s testimony.”<sup>75</sup> The court portrayed the prosecutor as having “impermissibly characterized the defendant’s testimony as garbage.”<sup>76</sup> The court’s description of the prosecutor’s conduct demonstrates that the court found such conduct to be severe.

While the analysis in New York is similar to that adopted by the Supreme Court in *Berger*, the courts in New York have expanded upon this analysis by articulating additional considerations. First, the courts in New York have taken into consideration the effect that the prosecutor’s misconduct had on the defense’s presentation of the evidence and trial strategy.<sup>77</sup> This was not a factor discussed in *Berger*. In *Calabria*, the court took notice of the fact that as a result of the prosecutor’s misconduct,

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<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Tarantola*, 577 N.Y.S.2d at 687-88.

<sup>75</sup> *Id.* at 688.

<sup>76</sup> *Id.*

<sup>77</sup> *See Calabria*, 727 N.E.2d at 1247 (evaluating the effect that the prosecutor’s disregard for a pretrial ruling had on the defense’s trial strategy).

the defendant was forced to produce evidence that he otherwise would not have been required to.<sup>78</sup>

Next, New York courts have considered the effectiveness of the court's efforts to dilute or cure the effect the prosecutor's conduct would potentially have on the jury.<sup>79</sup> In *Tarantola*, the court placed great emphasis on the fact that the court made no effort to dilute the effect of the prosecutor's conduct,<sup>80</sup> while the *Roberts* court took notice of the fact that the prosecutor's statements were cut short by a sustained objection.<sup>81</sup> Furthermore, in *Calabria*, the court rejected the argument by the prosecution that "the court's prompt curative instruction eliminated the prejudicial effect of any misconduct."<sup>82</sup>

Finally, the approach taken by the New York courts and the Supreme Court in *Berger* differ in that the New York courts have placed less emphasis on the case *against* the defendant when evaluating whether the prosecutorial misconduct prejudiced the defendant.<sup>83</sup> While this was a factor that weighed heavily on the *Berger* Court's decision, some courts in New York have expressly rejected this consideration. In *People v. Alicea*, the Court of Appeals emphatically stated that "[t]his court will continue to

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<sup>78</sup> *Id.* By asking the defendant for a copy of a photograph that was ruled inadmissible in a pretrial ruling, the defense "felt compelled to introduce the photographs into evidence." *Id.*

<sup>79</sup> *Tarantola*, 577 N.Y.S.2d at 688.

<sup>80</sup> *Id.*

<sup>81</sup> *People v. Roberts*, 784 N.Y.S.2d 692, 695 (N.Y. App. Div. 2004).

<sup>82</sup> *Calabria*, 727 N.E.2d at 1248.

<sup>83</sup> *See People v. Alicea*, 338 N.E.2d 625, 628 (N.Y. 1975) (explaining that the court rejected the notion that courts should place less emphasis on the question

abide by its determination not to accept the proffered doctrine which we have expressly renounced three times: 'that the fundamentals of fair trial need not be respected if the proof persuades us of a defendant's guilt.' <sup>84</sup>

While subsequent cases in New York, including *Roberts*, do consider whether the conviction would have been achieved regardless of the misconduct,<sup>85</sup> the courts do not expressly focus on the case *against* the defendant. Yet in *Berger*, the consideration of the case against the defendant was so important that the Court went so far as to state that if the case against Berger had been stronger, their outcome in the case might have been different.<sup>86</sup> Thus, while the considerations of the case against the defendant were a key factor in the analysis in *Berger*, the courts in New York do not view the case against the defendant as dispositive of the issue of whether a substantial right of the defendant had been affected.<sup>87</sup>

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of whether the defendant had a fair trial, if it appears from the proof produced at trial that the defendant was guilty).

<sup>84</sup> *Id.* Accordingly, the court in *Alicia*, in finding in favor of the defendant, declined to accept the prosecutor's argument that regardless of the misconduct, it appeared that the defendant committed the crime. *Id.*

<sup>85</sup> See *Tarantola*, 577 N.Y.S.2d at 688 (explaining that, in addition to considerations of the severity of the prosecutor's misconduct, the fact that "[w]hile there clearly was sufficient evidence to support the convictions it was not overwhelming" and therefore, it cannot be said that the result would have been the same absent the prosecutor's misconduct).

<sup>86</sup> *Berger v. United States*, 295 U.S. 78, 89 (1935).

<sup>87</sup> See *Roberts*, 784 N.Y.S.2d at 694 (explaining that whether or not a prosecutor's improprieties cause substantial prejudice to the defendant so as to deny the defendant a fair trial turns on several factors, including "the severity and frequency of the conduct, whether the trial court took appropriate action to dilute the effect of the conduct *and* whether, from a review of the evidence, it can be said that the result would have been the same absent such conduct.") (emphasis added) (quoting *Tarantola*, 577 N.Y.S.2d at 688).

In conclusion, whether misconduct by the prosecution substantially affected the rights of the defendant so as to deny the defendant his due process right to a fair trial depends upon the nature and severity of the prosecutor's conduct, and its effect on the jury. In the New York and federal courts, the factors evaluated in making such a determination are largely the same. In general, courts look at the frequency of the misconduct throughout the trial and its cumulative effect on the jury. However, New York courts have both expanded upon the framework set forth by the Supreme Court, and shifted the focus of its analysis. First, the efforts of the court to dilute such misconduct, and the effectiveness of such efforts are considered.<sup>88</sup> Next, the effect of the misconduct on the presentation of the defendant's case, both from an evidentiary and strategic standpoint, is considered.<sup>89</sup> Finally, the courts in New York do not rely solely on the merits of the case against the defendant when concluding that a substantive right has been affected by prosecutorial misconduct.<sup>90</sup>

*Maureen Fitzgerald*

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<sup>88</sup> *Id.*

<sup>89</sup> *Calabria*, 727 N.E.2d at 1247.

<sup>90</sup> *Roberts*, 784 N.Y.S.2d at 694.