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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 45

KIRK HANLEY,

Appellant.

20 Eagle Street
Albany, New York 12207
February 12, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA

Appearances:

MATTHEW L. MAZUR, ESQ.
DECHERT LLP
Attorneys for Appellant
1095 Avenue of the Americas
New York, NY 10036

GINA MIGNOLA, ADA
NEW YORK COUNTY DISTRICT ATTORNEY'S OFFICE
Attorneys for Respondent
One Hogan Place
New York, NY 10013

Karen Schiffmiller
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 45, People v.
2 Hanley.

3 Counsel, would you like any rebuttal time?

4 MR. MAZUR: Yes, two minutes, please, Your
5 Honor.

6 CHIEF JUDGE LIPPMAN: Sure, go ahead.

7 MR. MAZUR: Thank you. Good afternoon,
8 may it please the Court, my name is Matthew Mazur
9 from the Dechert law firm, of counsel to the Office
10 of the Appellate Defender, on behalf of the
11 Appellant Kirk Hanley.

12 JUDGE READ: Do we look at this as a
13 sentencing issue or as a sufficiency issue?

14 MR. MAZUR: Your Honor, it's closer to a
15 sentencing issue. It's emphatically - - -

16 JUDGE READ: Why is that?

17 MR. MAZUR: Well, it's emphatically not a
18 legal sufficiency issue. When a court enters
19 judgment on a kidnapping charge in violation of this
20 court's kidnapping merger doctrine, it is
21 essentially acting in excess of its jurisdiction.
22 The doctrine has two critical purposes.

23 CHIEF JUDGE LIPPMAN: Don't you have to
24 raise it? Don't you have to raise the merger
25 document at the time of the plea?

1 MR. MAZUR: Well, Your Honor, we are
2 asking this court to hold that when a court enters
3 judgment in violation of this court's kidnapping
4 merger doctrine, that it is an error that - - -
5 excuse me - - - does not require preservation with
6 an objection.

7 JUDGE GRAFFEO: You want to claim it's a
8 mode of proceedings error?

9 MR. MAZUR: Your Honor, it's an error that
10 affects the organization of the courts and the mode
11 of proceedings; that's correct.

12 CHIEF JUDGE LIPPMAN: Yeah, but even in
13 legal sufficiency you need to preserve.

14 MR. MAZUR: You absolutely do, and that's
15 why I say - - -

16 CHIEF JUDGE LIPPMAN: So how would you - -
17 - if you need to do it for legal sufficiency, how do
18 you not have to preserve here?

19 MR. MAZUR: Well, this doctrine serves a
20 different purpose. One purpose is to make sure that
21 a person is not sentenced for a kidnapping under
22 circumstances that the legislature didn't - - -

23 JUDGE PIGOTT: Yeah, but the problem with
24 that is that you - - - you got the pleading defense
25 lawyer, and the DA is there, and the judge is there.

1 They don't go into the facts like in a trial. This
2 - - - you know, the guy comes in and says I want to
3 plead to these and, you know, and we go through the
4 usual litany and it's over. And then you get up at
5 the Appellate Division, and said, well, when I pled
6 guilty, the fact of the matter was this and this,
7 and it wasn't brought to the attention of the
8 Supreme Court. It now is a mode of proceedings
9 error; you should reverse.

10 MR. MAZUR: Right. What Your Honor - - -
11 I think what you're - - -

12 JUDGE PIGOTT: We try to avoid that.

13 MR. MAZUR: Well, I think what you're
14 saying is right. You don't want to have a
15 sandbagging situation, but I think - - -

16 JUDGE PIGOTT: Even a - - - no, even an
17 innocent one.

18 MR. MAZUR: Well, that certainly didn't
19 happen here. But more importantly, this doctrine is
20 directed at the prosecution. What this court has
21 said is it's an aversion to overcharging by the
22 prosecution. It's supposed to be a deterrent to
23 charging kidnapping and the underlying crime.

24 JUDGE GRAFFEO: Tell me how the facts here
25 fit the merger doctrine, because if anything, it

1 appears that the reckless endangerment might merge
2 in the kidnapping. Reckless endangerment doesn't
3 have any element for restraint.

4 MR. MAZUR: Your Honor, it's - - - what
5 it's focused on is - - -

6 JUDGE GRAFFEO: So they - - - it doesn't -
7 - - you know, the elements of the crimes here are
8 not - - - are not lining up.

9 MR. MAZUR: It's - - -

10 JUDGE GRAFFEO: He did restrain this
11 woman. He did abduct her; he held the gun to her
12 head. That's not - - -

13 MR. MAZUR: Your Honor, it's the same
14 conduct. What the kidnapping merger doctrine looks
15 at is the conduct of the underlying offense and the
16 conduct of the restraint. And here I would submit
17 that of the factors this court has identified to
18 identify a kidnapping, none of them are present and
19 couldn't be present, even if there would have been a
20 trial.

21 We know they didn't leave the room. It
22 was - - -

23 CHIEF JUDGE LIPPMAN: Well, what do we do
24 now when - - - let's say you're right. It wasn't
25 raised to the judge. What happens now?

1 MR. MAZUR: Your Honor, the proper remedy
2 is dismissal of the kidnapping charge. It was
3 barred by this court's - - -

4 CHIEF JUDGE LIPPMAN: Why is that the
5 proper remedy rather than sending it to the AD to
6 take a look at if they want to?

7 MR. MAZUR: Well, Your Honor, I think that
8 they - - -

9 CHIEF JUDGE LIPPMAN: Why would dismissal
10 be the proper remedy?

11 MR. MAZUR: Well, because that's the
12 remedy for when a court enters judgment on a
13 kidnapping charge that merges with another charge;
14 it's dismissal.

15 JUDGE SMITH: I - - - I - - - I think the
16 question the chief is asking is should we re - - -
17 assume we agree with you on the reviewability,
18 should we reach the underlying issue or should we
19 remit it to the Appellate Division to look at?

20 MR. MAZUR: Well, I think the court could
21 do either. I think that if the court were to
22 determine that this is an error that's not forfeited
23 by a guilty plea, as we're asking, then the court
24 could remit to the Appellate Division and say, you
25 were wrong about that; now consider the error. But

1 I think the court can also decide the issue on the
2 same record that the Appellate Division would have,
3 which is sufficient to show - - - there was no
4 asportation; there was no concealment.

5 JUDGE PIGOTT: Is a 440 another option?

6 MR. MAZUR: For ineffective assistance of
7 counsel, Your Honor? Is that - - -

8 JUDGE PIGOTT: To vacate the plea, saying
9 it's not knowing - - -

10 MR. MAZUR: I think - - - I think it could
11 be a ground. I'd have to reexamine all the
12 categories of 440. It's - - - the reason I
13 mentioned ineffective assistance of counsel is
14 because that's a constitutional error that I know
15 you can raise under 440. I think there probably - -
16 - there could be a 440 in this situation - - -

17 JUDGE PIGOTT: Wouldn't that flesh it out
18 a whole lot better than - - - you know, we're trying
19 - - - we're trying to think about what the judge
20 must have been thinking at the time that the
21 original sentence was imposed.

22 MR. MAZUR: Your Honor, I think that would
23 be an exceedingly inefficient way of going about it,
24 to have a collateral proceeding when it's clear on
25 appeal - - - and my client did not waive his right

1 to appeal - - - it's clear on appeal that there are
2 no set of facts that could prove a separate
3 kidnapping. If you look at the - - -

4 JUDGE SMITH: Do you say this is like
5 Plunkett?

6 MR. MAZUR: It is like Plunkett, Your
7 Honor. And in fact, it's not in my brief, but I
8 looked at the Bill of Particulars which is on page 9
9 of the appendix on the train up here. The time of
10 the offense is 2:45, and the time of the arrest is
11 2:48. This was three minutes between offense and
12 arrest.

13 JUDGE SMITH: Well, but - - - but a kid -
14 - - yeah. But - - - but it was very brief hostage
15 taking, but it was a hostage taking, wasn't it?

16 MR. MAZUR: Your Honor, I think it could
17 be categorized that way and I think my client even
18 used those words in the ambulance about what he did.

19 JUDGE SMITH: Well, when you grab somebody
20 by the hair, and say I'm going to kill her unless
21 you do X, it sure sounds like hostage taking to me.

22 MR. MAZUR: Your Honor, I think it's
23 susceptible to that categorization. It doesn't make
24 it a separate kidnapping. It is - - -

25 CHIEF JUDGE LIPPMAN: Is it - - - is it

1 the time that you're arguing, that the time is so
2 brief, is that why it - - - from your perspective?

3 MR. MAZUR: Your Honor, the three factors
4 are: there's no movement of the person to another
5 place, there's no asportation, there's no
6 concealment in a room where nobody can find her, and
7 there's no lengthy abduction. The time is relevant.

8 JUDGE SMITH: Well, why is that - - - it
9 sounds like you're arguing sufficiency of the
10 evidence rather than merger.

11 MR. MAZUR: There - - - it absolutely is
12 sufficient under the kidnapping statute. The way
13 that the kidnapping statute is written, if you
14 detain - - - if you restrain somebody's freedom of
15 movement at the point of a gun - - -

16 JUDGE SMITH: But you're - - - but you're
17 saying - - - you're saying - - - you're saying he
18 only did it a little bit and for a moment.

19 MR. MAZUR: I'm saying that's one thing
20 and I'm also saying it's the exact same conduct that
21 constituted reckless endangerment.

22 CHIEF JUDGE LIPPMAN: Do we know enough
23 here to make this decision when it wasn't raised at
24 the time and - - -

25 MR. MAZUR: Your Honor, you do.

1 CHIEF JUDGE LIPPMAN: - - - do we know
2 enough of whether it is or is not kidnapping?

3 MR. MAZUR: In this case, you do, Your
4 Honor. There really is no possibility. There are
5 no hidden facts here that could transform this into
6 a separate kidnapping. And to be clear, the
7 evidence is sufficient under the statute the way
8 it's written. It's just a violation of this court's
9 doctrine.

10 JUDGE SMITH: Suppose - - - suppose he had
11 - - - suppose he never grabs the woman. He just
12 takes out his loaded gun, waves it around and
13 threatens to shoot everybody in the place. That's
14 reckless endangerment, isn't it, or at least as much
15 reckless endangerment as what happened here.

16 MR. MAZUR: It could be. It's not - - -

17 JUDGE SMITH: And then he grab - - - then
18 he grabs her. You're saying he's committed no new
19 crime?

20 MR. MAZUR: Your Honor, it's obviously a
21 different case. The way it was charged here is that
22 there is the same conduct was the kidnapping and the
23 reckless endangerment. I - - - on a different case,
24 they might charge reckless endangerment of all the
25 people in the room - - -

1 JUDGE SMITH: I guess I'm suggesting that
2 maybe it's not the same conduct. Maybe - - - maybe
3 the use of the gun is the reckless endangerment and
4 the grabbing by the hair is the kidnapping and that
5 they're both separate.

6 MR. MAZUR: I don't - - -

7 JUDGE GRAFFEO: Weren't there - - -
8 weren't there other employees of the school that
9 were still in the room?

10 MR. MAZUR: Your Honor, there were other
11 people in the room, and I don't believe there's any
12 evidence in the record that those other people were
13 endangered. But even if they were, that's not what
14 was charged. If the People charged he recklessly
15 endangered other people in the room - - -

16 JUDGE GRAFFEO: I thought some ran out of
17 the room, and some, kind of, tried to hide.

18 MR. MAZUR: Your Honor, the prosecutor has
19 put in a lot of different documents that describe
20 the offense. But I don't think it matters who ran
21 out of the room, who tried to hide. The charge is
22 he recklessly endangered another person, singular.
23 This is the way it was charged, which is the same
24 conduct was the reckless endangerment and the
25 kidnapping. And under those circumstances, you

1 can't be convicted of - - -

2 JUDGE GRAFFEO: Wasn't the merger doctrine
3 more or less aimed at charges of kidnapping where
4 the risk of harm was not as severe as in this - - -
5 as the threat in this case?

6 MR. MAZUR: Oh, I don't think so. I mean,
7 if you read some of the earlier - - -

8 JUDGE GRAFFEO: You know, for instance, we
9 have all those parental cases where the noncustodial
10 parent, that type - - - that type of thing.

11 MR. MAZUR: Yes, but the kidnapping merger
12 doctrine was developed in the context of rapes and
13 robberies and crimes like that, which are very
14 dangerous and people got hurt. But when the - - -
15 when the restraint was just incidental to those
16 other horrible crimes, the kidnapping can be - - -
17 had to be dismissed.

18 CHIEF JUDGE LIPPMAN: Okay, counsel,
19 you'll have your - - -

20 JUDGE GRAFFEO: Restraint is not - - -

21 CHIEF JUDGE LIPPMAN: I'm sorry, Judge
22 Graffeo.

23 JUDGE GRAFFEO: Restraint is not
24 incidental in reckless endangerment. That's the
25 problem. You don't need any restraint in reckless

1 endangerment.

2 MR. MAZUR: You don't, but that was the
3 conduct here. When you look at the conduct here - -
4 - you don't need restraint in a robbery, either, or
5 a sexual assault, either. It's - - - you need it,
6 because you look at the conduct underlying both of
7 the charges.

8 CHIEF JUDGE LIPPMAN: Okay, counsel.

9 MR. MAZUR: Thank you.

10 CHIEF JUDGE LIPPMAN: Thank you, counsel.
11 Counsel?

12 MS. MIGNOLA: Yes, may it please the
13 Court, I'm Gina Mignola for the People. And - - -

14 CHIEF JUDGE LIPPMAN: Counsel there's no -
15 - - there's no trial here. How do we know that
16 there's enough to show kidnapping?

17 MS. MIGNOLA: Well, there's enough to show
18 kidnapping, because the defendant confessed that he
19 was guilty of that crime. But you're right,
20 absolutely one hundred percent right. And I'm
21 rather enjoying hearing Mr. Mayer (sic) say - - -
22 Mr. Mazur say that a collateral proceeding now is
23 something that's inefficient, because it all could
24 have been solved if he had raised this claim before
25 the trial court.

1 Just like when you adjudicate suppression
2 claims, you can have an entire trial and a trial
3 with lots - - - a lot of evidence is presented - - -

4 CHIEF JUDGE LIPPMAN: Well, assume - - -
5 assume he should have.

6 MS. MIGNOLA: - - - but you can't review a
7 suppression claim based on that.

8 CHIEF JUDGE LIPPMAN: Assume he should
9 have.

10 MS. MIGNOLA: Right, he should have.

11 CHIEF JUDGE LIPPMAN: Why shouldn't we - -
12 -

13 MS. MIGNOLA: There's no evidence.

14 CHIEF JUDGE LIPPMAN: Why shouldn't we
15 send it back to the AD now and let them take a look?

16 MS. MIGNOLA: Because you can't - - - it's
17 not the AD. These kinds of factually based claims
18 have to be presented to a court with the power to
19 find facts. People have to be given an opportunity
20 to present all the facts, all the available facts
21 that speak to this particular issue.

22 CHIEF JUDGE LIPPMAN: But you think we
23 have - - -

24 MS. MIGNOLA: And we were denied that
25 opportunity.

1 CHIEF JUDGE LIPPMAN: But you think we
2 have enough information to determine this, right?

3 MS. MIGNOLA: No, it's not information;
4 it's facts. All the facts, circumstances and
5 evidence, if the facts are disputed.

6 CHIEF JUDGE LIPPMAN: You think we have
7 enough facts to determine this, right?

8 MS. MIGNOLA: No, I don't think you know
9 all of the facts - - - we certainly - - -

10 CHIEF JUDGE LIPPMAN: So why shouldn't we
11 send it to the AD to take a look at it?

12 MS. MIGNOLA: Because again, in my
13 opinion, if it were to be litigated at all, it
14 should have been litigated before - - -

15 JUDGE READ: It should have been
16 preserved.

17 MS. MIGNOLA: It should have been
18 preserved. And in fact, this court has already said
19 in People v. Grega, this court held, specifically,
20 that a claim that's sounding in the kidnapping
21 merger judicial doctrine, it must be preserved. And
22 I just want to make the point that this court made
23 that ruling as it was - - -

24 JUDGE SMITH: You're not only saying - - -
25 you're going - - - you're not saying just lack of

1 preservation, you're saying forfeiture.

2 MS. MIGNOLA: I'm saying it's also
3 forfeited by his guilty plea. He admitted he was
4 actually - - -

5 CHIEF JUDGE LIPPMAN: What did he admit -
6 - -

7 MS. MIGNOLA: - - - guilty of that crime.

8 CHIEF JUDGE LIPPMAN: What did he admit at
9 the plea?

10 MS. MIGNOLA: Much of the - - -

11 CHIEF JUDGE LIPPMAN: And how does it
12 affect whether it's forfeiture?

13 MS. MIGNOLA: Well, he admitted that he
14 was guilty of that crime. So, he admitted that he
15 abducted a woman and held her.

16 CHIEF JUDGE LIPPMAN: Okay.

17 MS. MIGNOLA: So he admitted that factual
18 portion, but as you know from your holding in
19 Goldstein, it's not just enough to admit specific
20 facts that speak to elements of a crime, because the
21 purpose of the plea colloquy has to do with is his
22 plea - - - is his decision to plead guilty a knowing
23 and voluntary one?

24 CHIEF JUDGE LIPPMAN: Well, what about - -
25 - well, what about - - -

1 MS. MIGNOLA: It's not a substitute for
2 evidence that speaks to a particular issue.

3 CHIEF JUDGE LIPPMAN: Counsel, what about
4 the factual underpinnings of kidnapping?

5 MS. MIGNOLA: The - - -

6 CHIEF JUDGE LIPPMAN: What - - - what - -
7 - what did he admit to in the plea?

8 MS. MIGNOLA: Yes, he admitted to the fact
9 that he held a woman at gunpoint, that he grabbed
10 her, that he held her, that he abducted her. That's
11 what he admitted to. But that cannot be the
12 totality of facts available to adjudicate - - -
13 properly to adjudicate a claim of kidnapping merger.
14 That can't possibly be it.

15 And I think that Judge Graffeo, I want to
16 say, is completely correct when she says that this
17 is all in the context in which reckless endangerment
18 does not have any element or any aspect to it of
19 restraint. So it cannot be said that anyone was in
20 a position to think that kidnapping should factually
21 merge with a crime that doesn't take as its element
22 any aspect of restraint.

23 In other words, when you have a robbery or
24 a rape or even some assaults, the legislature
25 defined those crimes to include the idea, and to be

1 subsumed in them, the idea that while you're - - -
2 this is a holdup; give me your money. That victim
3 would be temporarily or to some extent restrained.
4 And so - - -

5 JUDGE SMITH: That would usually be true,
6 but it's not essential, is it? You could imagine a
7 robbery with no restraint.

8 MS. MIGNOLA: Exactly, and that's why it's
9 a factual issue. Not all kidnappings are
10 automatically subsumed into and merged - - -
11 factually merged - - - with every robbery or every
12 rape or every assault. Like legal sufficiency - - -

13 CHIEF JUDGE LIPPMAN: But weren't they
14 dealing with what the legislature intended? What
15 kind of conduct and what kind of penalty they
16 intended, right?

17 MS. MIGNOLA: I'm sorry; say the first
18 part - - -

19 CHIEF JUDGE LIPPMAN: But aren't we really
20 dealing with what the legislature intended in terms
21 of what's a serious crime and the kind of punishment
22 that one would get to it, rather than if it's really
23 more akin to the lessers?

24 MS. MIGNOLA: Well, it's - - - but in
25 order to assess what the legislature intend, you

1 really have to look at the specific conduct that was
2 committed here, and you can't evaluate that in a
3 situation in which it was never litigated.

4 And I want to make the point, too, that
5 when a claim is withheld from the trial court or the
6 plea court, the way it was here, that has real
7 consequences. It prevents, of course, the People
8 from presenting the full and complete evidence that
9 speaks to the subject, but it also prevents the
10 court from make - - - doing its function as a finder
11 of fact.

12 That's a very important function and that
13 court was taken out of the process, essentially, and
14 not allowed to perform its function. And I think
15 that that has a devastating effect on the
16 administration of justice. Also - - -

17 JUDGE PIGOTT: The argument - - - the
18 argument that your opponent is making in that regard
19 is that the People overcharged. That, you know,
20 they could have picked one or the other here. They
21 could have picked whatever charges they chose, but
22 by overcharging they have merged the elements of one
23 into the other, as a result of which, this guy's
24 going to be doing, I guess, fifteen years.

25 MS. MIGNOLA: In the context in which a

1 person, as Judge Graffeo said, in the context in
2 which a person is grabbed, held at gunpoint, taken
3 as a hostage - - -

4 JUDGE PIGOTT: No, no, I understand all
5 that.

6 MS. MIGNOLA: No case has ever suggested -
7 - -

8 JUDGE PIGOTT: I hadn't got to my question
9 yet, which would have been an interesting one, but
10 if you want to finish, go ahead.

11 MS. MIGNOLA: But no case has ever
12 suggested that that is not a kidnapping. What - - -

13 CHIEF JUDGE LIPPMAN: Counsel, the judge
14 has a question for you.

15 MS. MIGNOLA: I'm sorry. But I wanted to
16 address his other question - - -

17 CHIEF JUDGE LIPPMAN: Counsel, let the
18 judge ask his question.

19 MS. MIGNOLA: You're right. I'm sorry,
20 please go ahead.

21 CHIEF JUDGE LIPPMAN: Judge, do you want
22 to ask a question.

23 JUDGE PIGOTT: No, please go ahead, that's
24 fine.

25 MS. MIGNOLA: I'm speaking to your

1 question about overcharging. In the context in
2 which no case has ever held or suggested that that
3 conduct is either not kidnapping or that it would
4 merge with some other crime like reckless
5 endangerment. No, that's never been held. So no
6 one at the time viewed it or sought to even try to
7 test the water that that would be considered upon
8 the merge.

9 JUDGE SMITH: Would it - - - would it be a
10 different case - - - would it be a different case,
11 if the People had given a bill of particulars which
12 pinned them down to a theory on which we could
13 either say merger or no merger?

14 MS. MIGNOLA: No. Like suppression
15 claims, like insanity claims, like any claim that is
16 involved in the defense, it has to be presented.

17 JUDGE SMITH: What about - - - what about
18 Plunkett?

19 MS. MIGNOLA: Plunkett is a very specific
20 situation in which there's no theory in which teeth
21 can be used to, you know, make out the elements of
22 the crime.

23 JUDGE SMITH: Okay, he's - - - he's saying
24 - - -

25 MS. MIGNOLA: No, but there are certain -

1 - -

2 JUDGE SMITH: He's saying, maybe wrongly,
3 that there's no theory on which a mome - - - a five-
4 second grabbing of someone in the course of waving a
5 gun around, can be anything but merged into reckless
6 endangerment. If he's right, can we review it?

7 MS. MIGNOLA: No, because we certainly
8 don't know that it was one second, five seconds,
9 three minutes, ten minutes, fifteen minutes. We
10 don't know what the facts are.

11 JUDGE SMITH: And if we did? But if we
12 did, that would do it.

13 MS. MIGNOLA: You need to know all - - -

14 JUDGE SMITH: In other words, if the
15 People had pinned them down to a five-second - - -

16 MS. MIGNOLA: No, because - - -

17 JUDGE SMITH: - - - pinned themselves down
18 to a five second detention?

19 MS. MIGNOLA: Well, Judge, I feel very
20 strongly here that there's - - - it's a totality of
21 circumstances. It isn't just how many minutes. It
22 isn't just is it asportation. It isn't just was she
23 held as a shield against the police to thwart
24 capture. That's very significant.

25 JUDGE SMITH: Well, you would - - -

1 MS. MIGNOLA: What - - - which way is
2 more?

3 JUDGE SMITH: Are you saying that it's
4 impossible, even hypothetically, to imagine a set of
5 stipulated facts that would be a merger as a matter
6 of law?

7 MS. MIGNOLA: I'm saying that these - - -

8 JUDGE SMITH: How about yes or no to that
9 one?

10 MS. MIGNOLA: I can imagine all kind of
11 facts. I feel that it's unfair to pin us down to -
12 - -

13 JUDGE SMITH: No. I didn't get my yes or
14 no, did I?

15 MS. MIGNOLA: I don't feel that that's - -
16 - but that's the wrong way to look at it. Can you
17 imagine a set of facts that were conceded that would
18 - - - where it would merge? This isn't it. This
19 isn't it.

20 CHIEF JUDGE LIPPMAN: Counsel, but aren't
21 you really having it both ways here, that you're
22 saying that it can't be, and yet they should have
23 raised it, and it was - - - no one could go into it,
24 because they didn't raise it?

25 MS. MIGNOLA: I'm saying on the limited

1 amount - - -

2 CHIEF JUDGE LIPPMAN: Are you having it
3 both ways?

4 MS. MIGNOLA: No, I'm saying that on the
5 limited amount of information we know, no one had a
6 reason to believe that the crime properly would
7 merge - - - that the kidnapping would merge into
8 reckless endangerment. No one thought that and no
9 one took that - - - no one had a reason to believe
10 that that was a legitimate concern.

11 And had that been raised - - - there's
12 another very important aspect that I wanted to
13 address, which is that - - - the fact that trial
14 court could have taken action to remedy that. If
15 the trial court had had an opportunity to look at
16 the facts and circumstances and say, you know what?
17 I'm not convinced that it merges, but I'm going to
18 fix it and make sure that that's not a problem. I'm
19 going to dismiss the kidnapping charges, get rid of
20 the - - -

21 CHIEF JUDGE LIPPMAN: Yeah, but you're
22 acknowledging that there's very limited information
23 here, and yet you're - - -

24 MS. MIGNOLA: But he could addressed - - -

25 CHIEF JUDGE LIPPMAN: - - - and yet you're

1 very certain that that limited information is enough
2 to justify your position on the kidnapping.

3 MS. MIGNOLA: No, what I'm saying is that
4 had it been presented to a trial court, he would
5 have looked into it.

6 CHIEF JUDGE LIPPMAN: I understand.

7 MS. MIGNOLA: That's what - - - that's
8 what motion practice is all about. That's what CPL
9 210 provides for. A defendant can make a motion to
10 dismiss the charge, because it can't legally stand
11 for a particular reason. That's, I think, 210,
12 subdivision - - - I'll give it to you - - -
13 210.20(h). And you can have a hearing; you can have
14 a proceeding. People would file papers; we'd make
15 allegations; they would make counter allegations.
16 The judge would make findings of fact, and he could
17 fashion an appropriate remedy.

18 CHIEF JUDGE LIPPMAN: Why couldn't he - -
19 - why can't - - - why can't the Appellate Division
20 take a look at this issue now?

21 MS. MIGNOLA: Because you skipped a level.
22 You skipped a critical level where there's a fact-
23 finding process. We didn't present any facts. When
24 do we - - - when do we get to come in and present
25 facts?

1 JUDGE SMITH: You're saying the Appellate
2 Division doesn't have any more record than we do?

3 MS. MIGNOLA: No. There's no record to
4 adjudicate. And in the interest of efficiency which
5 seems to be at issue now, it should have been done
6 in the first instance - - -

7 CHIEF JUDGE LIPPMAN: But you think - - -

8 MS. MIGNOLA: - - - and it wasn't.

9 CHIEF JUDGE LIPPMAN: But do you think we
10 could take a look at it and have enough information
11 to make a decision?

12 MS. MIGNOLA: Only if you rule in our
13 favor.

14 CHIEF JUDGE LIPPMAN: Okay, that's what I
15 thought; okay.

16 MS. MIGNOLA: You can't rule against us.
17 You can't hold it against us - - -

18 CHIEF JUDGE LIPPMAN: Okay.

19 MS. MIGNOLA: - - - that the facts weren't
20 presented.

21 CHIEF JUDGE LIPPMAN: Thanks, counsel.

22 MS. MIGNOLA: Your Honor, we're going to
23 ask you to affirm the conviction. Thank you.

24 CHIEF JUDGE LIPPMAN: Appreciate it.
25 Appreciate it.

1 Okay, counsel, rebuttal.

2 MR. MAZUR: Your Honor, it is always the
3 case in a mode of proceedings error that if the
4 defendant had raised the issue they might have been
5 able to correct it. If you see eleven people in the
6 jury box, you could have raised the issue, and they
7 could have corrected it.

8 JUDGE SMITH: But that's - - - that's why
9 we avoid mode of proceedings errors like the plague,
10 though, isn't it?

11 MR. MAZUR: Well, it's - - - but here - -
12 -

13 JUDGE GRAFFEO: And haven't all - - - I
14 think all four Appellate Divisions here have case
15 law indicating you need to preserve a merger
16 doctrine issue.

17 MR. MAZUR: They have not - - - we're
18 asking this court to hold for the first time that
19 this is a mode of proceedings error.

20 CHIEF JUDGE LIPPMAN: Counsel, assuming
21 it's not a mode of proceedings error, where do we
22 go?

23 MR. MAZUR: If this court thinks that it's
24 not a mode of proceeding error - - -

25 CHIEF JUDGE LIPPMAN: Yes.

1 MR. MAZUR: - - - but that it could be
2 raised after a guilty plea - - -

3 CHIEF JUDGE LIPPMAN: Yes.

4 MR. MAZUR: - - - the court could send it
5 back to the Appellate Division for a consideration
6 of the merits of the claim.

7 And if I could just say, for a moment,
8 about the record. It is fair to lay this at the
9 feet of the prosecution, when the whole purpose of
10 the merger doctrine is to deter them from charging
11 kidnapping in circumstances like this.

12 JUDGE PIGOTT: Yeah, but I get - - -

13 MR. MAZUR: And - - -

14 JUDGE PIGOTT: No, go ahead, speak. I'm
15 used to it now; go ahead.

16 MR. MAZUR: No, I - - - I didn't mean to
17 at all - - -

18 JUDGE PIGOTT: I was interrupting you,
19 please finish.

20 MR. MAZUR: And also the record in this
21 case is crystal clear in the way that it has to be.
22 That the conduct was simultaneous. It was the same
23 conduct that underlies both offenses. And the
24 record doesn't admit of the possibility that there
25 was any asportation, concealment, lengthy detention,

1 egregious, you know - - -

2 CHIEF JUDGE LIPPMAN: So let me ask you a
3 question. You both feel we have enough information
4 to deal with this or to send it to the Appellate
5 Division for them to deal with it, right?

6 MR. MAZUR: Your Honor, I certainly feel
7 that way. That the record here is sufficient - - -
8 it may not be every case where there's a guilty
9 plea. But in this case there certainly is. We even
10 have materials outside of the record in the People's
11 appendix in the form of a letter to the parole
12 board. We know what happened here. There's no
13 debate about it. We may disagree about whether it
14 was the product of a mental illness or a criminal
15 mind. But we don't have any dispute about the
16 conduct and that is what a kidnapping merger claim
17 is about. It's the conduct and whether the conduct
18 merges.

19 CHIEF JUDGE LIPPMAN: Okay, counsel.

20 MR. MAZUR: Thank you very much.

21 CHIEF JUDGE LIPPMAN: Thank you both,
22 appreciate it.

23 (Court is adjourned)

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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Kirk Hanley, No. 45 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

Address of Agency: 700 West 192nd Street
Suite # 607
New York, NY 10040

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