

## COMMENT

### A GAME OF HOLD'EM: CRITIQUING *UNITED STATES V.* *GABALDON'S* "ALL-IN" APPROACH TO FEDERAL KIDNAPPING

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#### INTRODUCTION

By 1932, kidnapping had become an epidemic in the United States.<sup>1</sup> During this time, "[r]uthless criminal bands" were able to achieve their aims of kidnapping, and yet protect themselves from liability due, primarily, to jurisdictional restrictions upon local authorities.<sup>2</sup> Against this backdrop, the Federal Kidnapping Act was enacted.<sup>3</sup> Passed in the wake of the abduction of the twenty-month old son of famous aviator Charles Lindbergh—and frequently called the "Lindbergh Law"<sup>4</sup>—the Act

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<sup>1</sup> See *Chatwin v. United States*, 326 U.S. 455, 462 (1946).

<sup>2</sup> See *id.* at 462–63 ("The procedure was simple—a man would be kidnapped in one State and whisked into another, and still another, his captors knowing full well that the police in the jurisdiction where the crime was committed had no authority as far as the State of confinement and concealment was concerned.") (quoting Hugh A. Fisher & Matthew F. McGuire, *Kidnapping and the So-Called Lindbergh Law*, 12 N.Y.U. L.Q. REV. 646, 653 (1935)); see also *United States v. Lentz*, 383 F.3d 191, 199 (4th Cir. 2004) (describing the perpetrators' motive to frustrate state jurisdictional boundaries).

<sup>3</sup> For the most recent incarnation of the Federal Kidnapping Act, see 18 U.S.C.A. § 1201(a) (West 2007).

<sup>4</sup> See Britenae M. Coates, Comment, *The Fourth Circuit's New Interpretation of the Federal Kidnapping Act in United States v. Wills and the Resulting Expansion of Federal Jurisdiction*, 80 N.C. L. REV. 2041, 2044 (2002).

was designed to “assist the states in stamping out this growing and sinister menace of kidnaping [sic] . . . .”<sup>5</sup>

The most recent version of the Federal Kidnapping Act, codified in 18 U.S.C.A. § 1201(a), provides in pertinent part that, assuming federal jurisdiction<sup>6</sup>:

Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person . . . shall be punished by imprisonment for any term of years or for life and, if the death of any person results, shall be punished by death or life imprisonment.<sup>7</sup>

Many circuits have interpreted this statute to require a showing that the victim was both “held against his or her will” and held “for some benefit to the captor.”<sup>8</sup> Courts face a variety of issues in a federal or state prosecution for kidnapping. One such question that frequently arises at both the federal and state level is the issue of whether a separate conviction for kidnapping should be allowed when the acts involved in the kidnapping are also involved in the commission of a separate crime of violence.<sup>9</sup>

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<sup>5</sup> *Chatwin*, 326 U.S. at 463.

<sup>6</sup> Under 18 U.S.C.A. § 1201(a), the kidnapping charge comes under federal jurisdiction in the following instances:

(1) [T]he person is willfully transported in interstate or foreign commerce, regardless of whether the person was alive when transported across a State boundary, or the offender travels in interstate or foreign commerce or uses the mail or any means, facility, or instrumentality of interstate or foreign commerce in committing or in furtherance of the commission of the offense; (2) any such act against the person is done within the special maritime and territorial jurisdiction of the United States; (3) any such act against the person is done within the special aircraft jurisdiction of the United States as defined in section 46501 of title 49; (4) the person is a foreign official, an internationally protected person, or an official guest as those terms are defined in section 1116(b) of this title; or (5) the person is among those officers and employees described in section 1114 of this title and any such act against the person is done while the person is engaged in, or on account of, the performance of official duties.

18 U.S.C.A. § 1201(a).

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

<sup>8</sup> *United States v. Gabaldon*, 389 F.3d 1090, 1094 (10th Cir. 2004) (citing *United States v. Walker*, 137 F.3d 1217, 1220 (10th Cir. 1998)) (setting forth the requirements for conviction under 18 U.S.C. § 1201(a)(1) in the Tenth Circuit); *see, e.g., United States v. Sarracino*, 131 F.3d 943, 947 (10th Cir. 1997) (finding the requirement that kidnapping be done for “ransom or reward or otherwise” is satisfied where “the kidnapers had some reason for the kidnapping which, to them, would be of some benefit”).

<sup>9</sup> *See, e.g., United States v. Etsitty*, 130 F.3d 420, 426–27 (9th Cir. 1997) (facing the issue of whether the defendant’s assault of two teenagers could also support a separate conviction of kidnapping); *United States v. Peden*, 961 F.2d 517, 522–23

The answer to this fact-based inquiry generally turns on the question of whether the kidnapping was merely incidental to the underlying offense.<sup>10</sup> If it was merely incidental, then courts typically have held that a separate charge of kidnapping was not justifiable.<sup>11</sup> The Tenth Circuit Court of Appeals recently addressed this very issue in *United States v. Gabaldon*.<sup>12</sup> *Gabaldon* exemplified a situation in which a separate charge for kidnapping was held to be appropriate, despite the acts constituting the alleged kidnapping also being involved in the battery and murder of the victim.<sup>13</sup>

I. *UNITED STATES V. GABALDON* MOVES “ALL-IN”  
WITH FEDERAL KIDNAPPING

In *Gabaldon*, the defendant, Frank Gabaldon—who had recently been convicted of second degree murder and kidnapping resulting in death—sought appeal of his kidnapping conviction.<sup>14</sup> On February 24, 2001, Gabaldon, “a large man at 6’ 3” and approximately 400 lbs.,” was riding in his car<sup>15</sup> around the town of Gallup, New Mexico, with his wife, Nicola, and friend, R.C. Begay.<sup>16</sup> Gabaldon had been consuming alcohol at the time.<sup>17</sup>

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(5th Cir. 1992) (confronting the issue of whether defendant’s sexual assault of his passenger could support an independent charge of kidnapping); *United States v. Howard*, 918 F.2d 1529, 1536–37 (11th Cir. 1990) (deciding whether the robbery of an undercover officer could also support a separate charge of kidnapping); *State v. Stouffer*, 721 A.2d 207, 211–15 (Md. 1998); *State v. Green*, 616 P.2d 628, 634–36 (Wash. 1980) (en banc) (determining whether separate convictions for kidnapping and murder could be supported by the facts of the case).

<sup>10</sup> See *Howard*, 918 F.2d at 1534; *State v. Logan*, 397 N.E.2d 1345, 1351–52 (Ohio 1979); *State v. Goodhue*, 833 A.2d 861, 864–65 (Vt. 2003); *Green*, 616 P.2d at 635; 3 WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* § 18.1(b), at 11–13 (2d ed. 2003); Frank J. Wozniak, Annotation, *Seizure or Detention for Purpose of Committing Rape, Robbery, or Other Offense as Constituting Separate Crime of Kidnapping*, 39 A.L.R.5th 283, 356 (1996).

<sup>11</sup> See, e.g., *Howard*, 918 F.2d at 1536–37; *State v. Vernon*, 867 P.2d 407, 411 (N.M. 1993) (analyzing whether moving a victim for the purpose of committing murder also constitutes kidnapping); *Logan*, 397 N.E.2d at 1351–52; *Goodhue*, 833 A.2d at 868–69.

<sup>12</sup> 389 F.3d 1090 (10th Cir. 2004).

<sup>13</sup> See *id.* at 1098.

<sup>14</sup> See *id.* at 1094.

<sup>15</sup> *Id.* at 1093. Gabaldon occupied the front passenger seat of his 1996 Buick LeSabre. His wife, Nicola, was driving the car and R.C. Begay was in the backseat on the passenger’s side. *Id.*

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

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

During their drive, they met Deidre Dale and asked her if she wanted to “party” with them.<sup>18</sup> Dale, a sixteen year old Navajo Indian girl, agreed to join them, voluntarily got into the backseat of the car with Begay, and began to drink.<sup>19</sup> Sometime later,<sup>20</sup> “a dispute erupted in the back seat between Dale and Begay over Dale’s refusal to perform a sexual act on Begay.”<sup>21</sup>

It was at this time that Gabaldon instructed Begay to “hit that bitch.”<sup>22</sup> Gabaldon and Begay then beat Dale savagely, “striking [her] in the face and head.”<sup>23</sup> Although Dale screamed for her assailants to stop, she was ultimately beaten unconscious.<sup>24</sup> Gabaldon and Begay elected not to dump Dale out of the car immediately, as was originally decided,<sup>25</sup> “out of concern both that she would be discovered too quickly, and that Dale’s fingers, which had scratched Gabaldon during the struggle in the car, might have samples of Gabaldon’s DNA.”<sup>26</sup> Instead, they drove the “unconscious but still breathing [Dale] . . . through the town of Gallup and beyond toward a deserted spot on the Navajo Indian Reservation.”<sup>27</sup> During the drive, Begay, on Gabaldon’s instructions, began to strangle Dale until she “fell silent.”<sup>28</sup> This, however, was not the cause of death. “The only evidence of the [actual] cause of death, according to the government’s forensic pathologist, was blunt force trauma to the head” that Dale most likely suffered during the initial beating.<sup>29</sup>

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<sup>18</sup> *Id.*

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

<sup>20</sup> After picking up Dale, the group first went to a liquor store and purchased more liquor. *See id.*

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

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

<sup>23</sup> *Id.*

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

<sup>25</sup> *Id.* Originally, “after the beating was over,” Nicola was instructed to “pull the car over at a highway turn-off” because Gabaldon and Begay intended to leave Dale at that location, roughly a quarter mile from the road. *Id.* “Gabaldon and Begay pulled the unconscious Dale out of the car,” but immediately changed their minds and placed her back inside. *Id.*

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

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

<sup>28</sup> *Id.* At first, “Dale continued to make noises indicating she was still breathing” despite “Begay’s attempts to strangle her.” *Id.* Because of this, “Gabaldon instructed Begay in the proper technique.” *Id.*

<sup>29</sup> Petition for Writ of Certiorari at 8 n.3, *Gabaldon v. United States*, 544 U.S. 923 (2005) (No. 04-1111), 2005 WL 415080. The petition also noted that (1) “according to the government’s forensic pathologist,” Dale’s death was caused by blunt force trauma that “probably occurred while she was still actively drinking,”

Once Dale was no longer moving, Begay, again at the behest of Gabaldon, “remove[d] Dale’s clothes,” and “used a cigarette lighter . . . to burn [her] fingertips in the hopes that [it] would destroy any DNA evidence that might” connect Gabaldon to the crime.<sup>30</sup> When the trio finally arrived at “the Navajo Reservation, Begay and Nicola Gabaldon threw Dale’s body into a ravine, where she was” discovered a week later.<sup>31</sup> After a five-day jury trial, Gabaldon was convicted of second degree murder and kidnapping resulting in death under 18 U.S.C.A. § 1201(a)(2).<sup>32</sup>

On appeal, Gabaldon raised three distinct challenges to his conviction under section 1201 of the Federal Kidnapping Act: (1) “[w]hether Dale was held against her will,” (2) “[w]hether Gabaldon held Dale for a ‘benefit,’” and (3) “[w]hether Gabaldon’s confinement of Dale was merely incidental to her murder.”<sup>33</sup>

Gabaldon first challenged his conviction by arguing that—due to her voluntary entrance into the car—Dale was not held against her will.<sup>34</sup> Moreover, as Gabaldon saw it, once Dale was unconscious she could not have been held against her will because “she was no longer capable of formulating or expressing a will.”<sup>35</sup> The court first acknowledged this case as unique from ordinary kidnapping cases because of the unavailability of the victim’s testimony.<sup>36</sup> Faced with this problem, the court decreed that when victim testimony is unavailable and when the evidence

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(2) “[t]he initial beating occurred while Ms. Dale was drinking,” and (3) “[t]here was no credible evidence that Dale either drank any alcohol or regained consciousness after the initial beating.” *Id.* The *Gabaldon* court failed to state these points. In fact, the court’s opinion is quite misleading in that it gives the impression that the strangulation was the cause of Dale’s death. This deception sets the stage for questioning the rest of the Tenth Circuit’s rationale. How can one trust a court that cannot even get the facts correct?

<sup>30</sup> *Gabaldon*, 389 F.3d at 1093.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 1094.

<sup>33</sup> *Id.* at 1095–98 (noting these as the three issues the court dealt with in reviewing Gabaldon’s kidnapping conviction).

<sup>34</sup> *Id.* at 1095.

<sup>35</sup> *Id.*

<sup>36</sup> “In an ordinary kidnapping case where the victim is able and willing to testify as to his or her consent at trial, testimony that ‘he or she was transported involuntarily is . . . normally sufficient to support a jury finding that the victim was in fact transported involuntarily.’” *Id.* (quoting *United States v. Hernandez-Orozco*, 151 F.3d 866, 869 (8th Cir. 1998)).

at trial indicates that “the victim’s ability to form or express a desire to leave” was feloniously interfered with, a “jury could rationally conclude that the victim was being held” against his or her will.<sup>37</sup> Turning to the facts of the case, the Tenth Circuit found that because the evidence established that Dale was beaten unconscious while sitting in Gabaldon’s car, “[i]t would have been entirely reasonable on this basis alone for the jury to have concluded that Dale would have withdrawn any previous consent to stay.”<sup>38</sup> Therefore, the court found that Dale was indeed held by Gabaldon against her will.<sup>39</sup>

Gabaldon next argued that the trial evidence was insufficient to conclude that Dale was held for a benefit.<sup>40</sup> In reviewing this challenge, the court first recognized that under circuit case law, “cases interpreting the statutory requirement that the victim be held ‘for ransom or reward or otherwise,’ . . . have repeatedly observed that the statute demands only that the holding . . . fulfill some ‘purpose desired by the captor.’ ”<sup>41</sup> Based on this principle, the court held that Gabaldon did sufficiently benefit from transporting Dale.<sup>42</sup> By moving her into his vehicle, Gabaldon was provided with greater secrecy in disposing of her,<sup>43</sup> and was given a chance to destroy evidence that would incriminate him.<sup>44</sup>

In his final challenge, Gabaldon—relying heavily on the Third Circuit’s decision in *Government of the Virgin Islands v. Berry*<sup>45</sup>—argued that the evidence presented in his trial “failed to

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.* The court also recognized further evidence that Dale was held against her will, namely that “Dale resisted her assailants and shouted for them to stop beating her before she was rendered unconscious.” *Id.*

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

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* (emphasis added) (quoting *United States v. Sarracino*, 131 F.3d 943, 947 (10th Cir. 1997)).

<sup>42</sup> *Id.* at 1096.

<sup>43</sup> “Gabaldon decided not to leave Dale where he and Begay first took her out of the car out of fear that Dale would be found too quickly.” *Id.*

<sup>44</sup> The court held that:

Keeping Dale in the car also gave Gabaldon the opportunity not only to kill her, thereby eliminating the possibility that she would identify him as one of her assailants in the initial beating, but also to try to eliminate evidence tying him to the battery and subsequent murder by having Begay burn Dale’s fingers to destroy any of Gabaldon’s DNA that might have been deposited there.

*Id.*

<sup>45</sup> 604 F.2d 221 (3d Cir. 1979).

show that Dale's confinement was anything more than a merely incidental part of her murder."<sup>46</sup> In its analysis of this issue, the court began by taking a more in depth look at the *Berry* decision.<sup>47</sup> First, it considered the policy behind *Berry*,<sup>48</sup> as well as the four factor test adopted in that decision for distinguishing among crimes for which a separate kidnapping charge is justified.<sup>49</sup> Next, the court, while acknowledging that the *Berry* test had not been widely adopted by other circuits,<sup>50</sup> also recognized that "[w]here, as here, the statute requires only that a seizure or restraint take place within the special territorial jurisdiction of the United States, the difficulty highlighted by the *Berry* court is more likely to arise."<sup>51</sup> Though it commended the *Berry* test, the court decided that it was unnecessary to adopt it.<sup>52</sup> As the Tenth Circuit saw it, a separate crime of kidnapping was clearly established regardless of the test's adoption; it reasoned that Gabaldon had conceded to holding Dale longer than was necessary to murder her when, in his brief, he stated that he and Begay drove around "deciding what to do with her."<sup>53</sup> Furthermore, sufficient evidence was presented to support the conclusion that "Gabaldon decided to continue transporting the unconscious and battered Dale in his car, not just because he

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<sup>46</sup> *Gabaldon*, 389 F.3d at 1096.

<sup>47</sup> *Id.* at 1096–97. For a full length discussion of the facts of *Berry*, see *infra* notes 56–67 and accompanying text.

<sup>48</sup> "The concern motivating . . . the *Berry* court . . . was that a too-literal application of the kidnapping statute would permit overzealous prosecutors to charge those suspected of relatively minor crimes involving some degree of restraint or asportation with the much more serious crime of kidnapping." *Gabaldon*, 389 F.3d at 1096 (citing *Berry*, 604 F.2d at 226–27).

<sup>49</sup> *Id.* at 1096–97. The four factors adopted by the *Berry* court were as follows:

- (1) the duration of the detention or asportation;
- (2) whether the detention or asportation occurred during the commission of a separate offense;
- (3) whether the detention or asportation which occurred is inherent in the separate offense; and
- (4) whether the asportation or detention created a significant danger to the victim independent of that posed by the separate offense.

*Berry*, 604 F.2d at 227.

<sup>50</sup> As the court saw it, a possible explanation for this lack of adoption may be the fact that most federal kidnapping cases involved the transportation of an abducted person, which was criminalized under 18 U.S.C.A. § 1201(a)(1) (West 2007). "An abduction or seizure that involves enough distance traveled and time elapsed in order for the captor and the victim to cross state lines will generally constitute a bona fide kidnapping." *Gabaldon*, 389 F.3d at 1097.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *See id.* at 1097–98.

wanted to kill her, but because he wanted to avoid arrest and prosecution on battery charges.”<sup>54</sup> Thus, Gabaldon’s confinement of Dale was not merely “incidental” to her murder.<sup>55</sup>

On the surface, *Gabaldon* appears to be just another run-of-the-mill decision in which a court, examining the factual record, determined the propriety of a separate kidnapping charge based on whether the acts constituting the alleged kidnapping were merely incidental to the underlying offense. When one examines the case more closely, however, it becomes clear that an injustice was done. Had the court properly adopted and applied the *Berry* test, it would have concluded that Gabaldon’s conviction for kidnapping under 18 U.S.C.A. § 1201(a)(2) was entirely unjustified.

This Comment argues that had the Tenth Circuit applied the four factor *Berry* analysis to the facts of this case, it would have had no choice but to overturn Gabaldon’s kidnapping conviction. It begins by taking a more in-depth look at the *Berry* decision, focusing particularly on the four factor test that was created, the policy behind this test, and the extent of its acceptance at both the federal and state level. It subsequently asserts that the *Gabaldon* court erred in failing to adopt this test. This Comment then applies the four prongs of the *Berry* test to *Gabaldon*’s factual record in order to show that, had the Tenth Circuit adopted and applied the test, Gabaldon’s kidnapping conviction would have been properly rejected. Finally, this Comment suggests two additions to the *Berry* test that would augment its value as well as lead to its broader adoption in both federal and state jurisdictions.

## II. *BERRY* AND BEYOND: A FRESH LOOK AT ANALYZING WHETHER A SEPARATE CONVICTION FOR KIDNAPPING IS APPROPRIATE

*Government of the Virgin Islands v. Berry*<sup>56</sup> began as any other case addressing the issue of divisibility of crimes.<sup>57</sup> *Berry*, however, ultimately revolutionized this analysis in the kidnapping context. In *Berry*, the defendants, Berry and Brignoni, sought appeal of their kidnapping convictions under

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<sup>54</sup> *Id.* at 1098.

<sup>55</sup> *Id.*

<sup>56</sup> 604 F.2d 221 (3d Cir. 1979).

<sup>57</sup> See discussion *supra* notes 9–11 and accompanying text.

the Virgin Islands' kidnapping statute.<sup>58</sup> On March 8, 1978, Warren Berry gave his childhood friend Raul Morales, who had recently quit his job, \$375 and a pound of marijuana.<sup>59</sup> Instead of selling the marijuana and repaying Berry, Morales spent the money on personal items and old debts.<sup>60</sup> The next day, Berry and Brignoni went looking for Morales and eventually found him at a local bar.<sup>61</sup> Morales borrowed money from third parties and partially repaid his debt.<sup>62</sup> Nevertheless, the defendants drove Morales to the beach,<sup>63</sup> where they forced him to disrobe and enter the water, informing him that if he did not pay by the next day, he would be killed.<sup>64</sup> After arriving home,<sup>65</sup> Morales contacted the police.<sup>66</sup> On the way back to the beach, Morales and the two detectives with whom he traveled discovered his clothes in the middle of the street, but his wallet, which had contained fifty dollars, was missing.<sup>67</sup>

In evaluating whether or not a separate crime of kidnapping was justified, the *Berry* court first observed that the “principal danger of overzealous enforcement of kidnapping statutes is that persons who have committed such substantive crimes as robbery or assault—which inherently involve the temporary detention or seizure of the victim—will suffer the far greater penalties prescribed by the kidnapping statutes.”<sup>68</sup> Based on the policy of

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<sup>58</sup> *Berry*, 604 F.2d at 223–24. The Virgin Islands' kidnapping statute provided that:

Any person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any individual by any means whatsoever with intent to hold or detain, or who holds or detains, such individual for ransom, reward or to commit extortion or to exact from any person or entity any money or valuable thing, or any person who kidnaps or carries away any individual to commit robbery, or any person who aids or abets any such act, is guilty of kidnapping for ransom and shall be imprisoned for life.

*Id.* at 224 (quoting V.I. CODE ANN. tit. 14, § 1052 (1978)).

<sup>59</sup> *Id.* at 222.

<sup>60</sup> *Id.* (noting that Morales had sold about \$400 worth of Berry's marijuana).

<sup>61</sup> *Id.*

<sup>62</sup> Morales was able to borrow \$35 from a friend of his named Freston, as well as \$100 from his brother, which he used to partially pay back Berry. *Id.* at 222–23.

<sup>63</sup> *Id.* at 223.

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

<sup>65</sup> After leaving the beach, Morales was able to flag down a vehicle and get a ride back to his home. *Id.*

<sup>66</sup> *Id.*

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

<sup>68</sup> *Id.* at 226. “The inequity inherent in permitting kidnapping prosecutions of those who in reality committed lesser or different offenses, of which temporary

“constru[ing] the kidnapping statutes so as ‘to prevent gross distortion of lesser crimes into a much more serious crime,’” the Third Circuit created a four-factor test to be used in deciding whether or not a separate kidnapping conviction is appropriate.<sup>69</sup> The factors are (1) the duration of detention,<sup>70</sup> (2) whether the detention occurred during the commission of a separate offense,<sup>71</sup> (3) whether the detention which occurred is inherent in the separate offense,<sup>72</sup> and (4) whether the detention created a significant danger to the victim independent of that posed by the separate offense.<sup>73</sup> The court then applied these factors to the factual record.<sup>74</sup> Two possible time frames that could potentially support the kidnapping conviction were recognized: (1) Morales’s confinement during the robbery and assault on the beach and (2) his transportation to the beach.<sup>75</sup> With regard to Morales’s confinement during the robbery, the court held that it could not constitute kidnapping both because it occurred during the commission of the separate offenses of assault and robbery, and because it was no greater than the confinement naturally inherent in these crimes.<sup>76</sup> Similarly, in assessing Morales’s ride to the beach, the Third Circuit found that this could not comprise kidnapping because—although not disclosed in the record—“the duration of the ride was apparently quite brief”<sup>77</sup> and there was no evidence that “the brief ride created any appreciable risk of

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seizure or detention played an incidental part, figured prominently in the decisions of numerous state courts to limit severely the scope of their state kidnapping statutes.” *Id.*; see also MODEL PENAL CODE § 212.1 cmt. 2, at 220–22 (Official Draft and Revised Comments 1980) (as adopted in 1962).

<sup>69</sup> See *Berry*, 604 F.2d at 226–27 (quoting *People v. Miles*, 23 N.Y.2d 527, 540, 245 N.E.2d 688, 695, 297 N.Y.S.2d 913, 922 (1969)).

<sup>70</sup> *Id.* at 227.

<sup>71</sup> *Id.*

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

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

<sup>74</sup> See *id.* 227–29.

<sup>75</sup> See *id.* at 227–28.

<sup>76</sup> See *id.* at 228. The court reasoned that some limited confinement or asportation was necessarily implicit in both these violent crimes because during a robbery, it is common for the victim to be confined or moved a short distance while the robber takes his money, and similarly, during an assault, it is “virtually inevitable that . . . the victim will be confined for a brief period or moved for a short distance.” *Id.*

<sup>77</sup> *Id.* The *Berry* court reasoned that the ride was “quite brief” because the government, in its appellate brief, conceded that the drive was not of “particularly long duration.” See *id.* (quoting Brief for Appellee at 22, *Gov’t of the Virgin Is. v. Berry*, 604 F.2d 221 (3d Cir. 1979) (No. 78–2046)).

injury to Morales.”<sup>78</sup> Thus, the defendants’ kidnapping convictions were not justified.<sup>79</sup> Furthermore, the court’s analysis demonstrates that not all four factors need to be satisfied in order to quash a separate kidnapping conviction. The court analyzed Morales’s confinement on the beach under only the second and third prongs of the test, and analyzed his confinement en route to the beach with reference to only the first and fourth factors.<sup>80</sup>

The four factor analysis promulgated in *Berry* has been accepted in other federal circuits. *United States v. Howard*<sup>81</sup> provides one such example.<sup>82</sup> In *Howard*, the defendants sought to overturn their conviction under 18 U.S.C.A. § 1201.<sup>83</sup> The case involved a failed attempt by the defendants to force an undercover agent into their van and to rob him during a prearranged drug transaction.<sup>84</sup> The officer resisted, pulled out his own gun, and yelled “[p]olice!”<sup>85</sup> The defendants were eventually arrested as they attempted to flee the scene.<sup>86</sup>

The defendants challenged their convictions on the grounds that the attempted seizure was merely incidental to the

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<sup>78</sup> *Id.* at 229.

<sup>79</sup> *See id.*

<sup>80</sup> *See id.* at 227–29.

<sup>81</sup> 918 F.2d 1529 (11th Cir. 1990).

<sup>82</sup> For an additional example of the acceptance of the *Berry* factors at the federal level, see *United States v. Peden*, 961 F.2d 517 (5th Cir. 1992). In *Peden*, the defendant sexually assaulted a female passenger whom he had lured into his vehicle under the false pretenses of going to a Wendy’s restaurant. *Id.* at 519. Though they declined to explicitly adopt the *Berry* test, the court nonetheless utilized the *Berry* factors to reach the conclusion that the separate charge for kidnapping was more than justified. *Id.* at 522. The court reasoned that the detention involved in the case went beyond that inherent in the rape because Peden transported the victim a significant distance before raping her. *Id.* Furthermore, the victim remained in great fear even after the rape because Peden “opened the glove compartment in an unsuccessful search for ‘something bad.’” *Id.* Thus, the detention was not merely incidental to the underlying offense of rape. *Id.* at 523; *see also* *United States v. Atkinson*, 916 F. Supp. 959, 966 (D.S.D. 1996) (stating its desire to apply the *Berry* test to the facts of the case but being unable to do so due to binding Eight Circuit precedent).

<sup>83</sup> *Howard*, 918 F.2d at 1531. The defendants in this case were convicted under 18 U.S.C.A. § 1201(a)(5). *Id.* at 1532.

<sup>84</sup> *Id.* at 1531–32. The undercover agent, Agent Cleveland, had agreed to purchase five kilograms of cocaine from the defendants for approximately \$90,000. *Id.* at 1531.

<sup>85</sup> *Id.* at 1532.

<sup>86</sup> *Id.*

attempted robbery.<sup>87</sup> In considering this challenge, the Eleventh Circuit adopted the *Berry* test to decide the propriety of the separate kidnapping conviction because the *Berry* analysis “recognize[d] the difference between kidnapping and lesser offenses and because it propose[d] a viable test to distinguish them.”<sup>88</sup> Applying the four factor test to the facts, the Eleventh Circuit invalidated the attempted kidnapping convictions, finding insufficient evidence to conclude that the defendants intended to detain the officer longer than was necessary solely to commit the robbery.<sup>89</sup>

*Berry* has also been widely accepted on the state level, evident from cases such as *Hoyt v. Commonwealth*.<sup>90</sup> In *Hoyt*, the defendant robbed a gas station.<sup>91</sup> During the incident—which lasted only five minutes—Hoyt instructed one of the employees in the store, Marquelle Riddick, to “give [him] the money.”<sup>92</sup> In response, Riddick walked ten feet to the cash register, placed the money in a bag, and handed it to Hoyt, who then left the store.<sup>93</sup>

In reviewing Hoyt’s appeal of his abduction conviction,<sup>94</sup> the court—reasoning that “kidnapping and abduction statutes do not apply where the kidnapping or abduction is merely an incident of another crime”<sup>95</sup>—recognized that “*Berry* . . . represent[ed] one of

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<sup>87</sup> *Id.* at 1534.

<sup>88</sup> *Id.* at 1536 (electing to adopt the *Berry* test despite the factual dissimilarities between the two cases).

<sup>89</sup> *See id.* at 1536–37.

<sup>90</sup> 605 S.E.2d 755 (Va. Ct. App. 2004); *see also* *People v. Moreland*, 686 N.E.2d 597 (Ill. App. Ct. 1997). In *Moreland*, the defendant sexually assaulted, beat, and ultimately murdered a female partygoer who allegedly stole drugs from him and his companions. *Id.* at 599. The court reviewed the kidnapping conviction using the *Berry* test, which Illinois “employs . . . to decide whether an act of detention or asportation is incidental to another crime or will support an independent charge of kidnapping.” *Id.* at 600–01. Once the *Berry* factors were applied, the court reasoned that the kidnapping was not incidental to the murder because the victim’s detention began prior to the murder. *Id.* at 601. Furthermore, the victim was driven across state lines for twenty-five miles, and the detention created significant dangers independent of the murder. *Id.*

<sup>91</sup> *Hoyt*, 605 S.E.2d at 755–56. The defendant entered the store on October 10, 2001 at 11:00 p.m. *Id.*

<sup>92</sup> *Id.* at 756.

<sup>93</sup> *Id.*

<sup>94</sup> Hoyt was convicted of abduction in violation of title 18.2, section 47(A) of the Virginia Code. *Id.* Abduction and kidnapping are seen as the same offense under the statute. *Id.*

<sup>95</sup> *Id.* at 757.

the few decisions to harmonize the case law into a single, multi-factorial test . . . [for] determining whether or not an abduction or kidnapping is incidental to another crime.”<sup>96</sup> The opinion then applied the *Berry* factors and overturned the abduction conviction, rationalizing that by detaining the victims for only five minutes, the defendant did not expose them to any significantly independent danger.<sup>97</sup> Thus, the detention was merely incidental to the robbery and could not support a separate conviction for abduction.<sup>98</sup>

When one examines all of these cases, it is apparent that the policy underlying the *Berry* decision<sup>99</sup> still applies. Failure to recognize this policy leads to an injustice: persons committing minor offenses involving minimal restraint being sentenced to life imprisonment under the various kidnapping statutes. It is difficult to understand why such policy concerns are any less applicable within the jurisdiction of the Tenth Circuit. That *Gabaldon* involved a cold-blooded murder rather than a minor assault<sup>100</sup> does not yield an opposite conclusion; construing “kidnapping statutes so as ‘to prevent gross distortion of lesser crimes into . . . much more serious crime[s]’ ” remains an important consideration.<sup>101</sup> Therefore, the *Gabaldon* court erred by not adopting the *Berry* test, and—more than likely—ensured that the *Berry* court’s worst fears will eventually be realized in the Tenth Circuit.

### III. WHEN THE *BERRY* TEST IS APPLIED, THE RATIONALE OF THE TENTH CIRCUIT CRUMBLES LIKE A HOUSE OF CARDS

This section refutes the Tenth Circuit’s contention that, had the *Berry* test been adopted, the separate kidnapping conviction would have nonetheless been established.<sup>102</sup> On the contrary, when *Berry* is applied to *Gabaldon*’s facts, it is painstakingly clear that the conviction should not have been upheld. As a

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<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 757–58.

<sup>98</sup> *Id.* at 759.

<sup>99</sup> See *supra* notes 68–69 and accompanying text.

<sup>100</sup> For a full description of the facts present in the *Gabaldon* case, see *supra* Part II.

<sup>101</sup> *Gov’t of the Virgin Is. v. Berry*, 604 F.2d 221, 226–27 (3d Cir. 1979) (quoting *People v. Miles*, 23 N.Y.2d 527, 540, 245 N.E.2d 688, 695, 297 N.Y.S.2d 913, 922 (1969)); see also *supra* text accompanying note 69.

<sup>102</sup> See *supra* text accompanying notes 53–54.

preliminary matter, the possible time frames during which a possible “kidnapping” could have taken place must be established. First, because it is well-settled that section 1201 of the Federal Kidnapping Act requires the victim to be held against his or her will,<sup>103</sup> Dale’s voluntary entrance into the car and subsequent time therein prior to the initial beating<sup>104</sup> cannot constitute a kidnapping. On a similar note, any transportation of Dale that occurred after her death cannot comprise kidnapping because it is well established that one cannot kidnap a dead body.<sup>105</sup>

This part of the analysis, however, is problematic because the exact time of Dale’s death was never established.<sup>106</sup> All that was proven was that her death was caused by blunt force trauma to the head, likely inflicted during the initial beating.<sup>107</sup> It is unknown whether she died in the car while Begay was attempting to strangle her,<sup>108</sup> or whether death occurred later in the trip. Therefore, for the purposes of this analysis, each factor of the *Berry* test will be applied, when necessary, by first assuming that Dale died in the car while Begay attempted strangulation, then by assuming that death occurred at some later point in time. Thus, there are two possible time frames during which the “kidnapping” could have occurred: (1) Dale’s confinement during her initial beating,<sup>109</sup> and (2) Dale’s transportation in the backseat of Gabaldon’s car prior to her death.<sup>110</sup> Each *Berry* factor will be applied to these two time frames to gauge whether a separate conviction for kidnapping was potentially warranted. This Comment now proceeds to the application of the four *Berry* factors.

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<sup>103</sup> See *supra* note 8 and accompanying text.

<sup>104</sup> See *supra* text accompanying note 19.

<sup>105</sup> See *State v. Stouffer*, 721 A.2d 207, 211 (Md. 1998) (“[O]ne may not be convicted of kidnapping for carrying around a corpse.”).

<sup>106</sup> See *United States v. Gabaldon*, 389 F.3d 1090, 1093–94 (10th Cir. 2004) (failing to state the specific time of Dale’s death).

<sup>107</sup> See *supra* note 29 and accompanying text.

<sup>108</sup> See *supra* note 28 and accompanying text.

<sup>109</sup> See *supra* text accompanying notes 22–24.

<sup>110</sup> See *supra* text accompanying note 27.

A. *The Duration of the Detention*

The first *Berry* factor to be considered is the duration of Dale's detention.<sup>111</sup> Federal and state courts have held that a separate conviction for kidnapping may lie if the duration lasted for an "appreciable" or "substantial" period.<sup>112</sup> While there is not a great deal of clarity as to how much time constitutes an "appreciable" or "substantial" period, courts have consistently found this requirement satisfied when the confinement or asportation lasted for ninety, sixty, or even thirty minutes.<sup>113</sup> On the other hand, courts have regularly held that a separate conviction for kidnapping may not be justifiable when the confinement or asportation is brief and only lasts a few minutes.<sup>114</sup>

When these principles are applied to the facts of the *Gabaldon* case, it is apparent that Dale was not held for a "substantial" period of time. First, her confinement during the initial beating did not even rise to the level of "appreciable." While its exact length was not established, one can infer from the language of the decision that, at most, only a few minutes elapsed between the commencement of the beating and the moment at which Dale was knocked unconscious.<sup>115</sup> It would not

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<sup>111</sup> See *supra* notes 69–70 and accompanying text.

<sup>112</sup> See, e.g., *Chatwin v. United States*, 326 U.S. 455, 460 (1946); *United States v. Etsitty*, 140 F.3d 1274, 1275 (9th Cir. 1997) (per curiam); *Gov't of the Virgin Is. v. Berry*, 604 F.2d 221, 228 (3d Cir. 1979) (noting that Morales' transportation was not for a substantial period); *State v. LaFrance*, 569 A.2d 1308, 1311 (N.J. 1990); MODEL PENAL CODE § 212.1 (Official Draft and Revised Comments 1980) (as adopted in 1962); see also *People v. Moreland*, 686 N.E.2d 597, 601 (Ill. App. Ct. 1997) (holding that because the victim was transported twenty-five miles, the victim's confinement was for a substantial period).

<sup>113</sup> See, e.g., *LaFrance*, 569 A.2d at 1312–13 (holding that a jury could rationally conclude that a thirty-minute confinement could constitute a substantial period); *Commonwealth v. Hook*, 512 A.2d 718, 720 (Pa. Super. Ct. 1986) (holding that a confinement for one hour was sufficient to establish that the victim was held for a substantial period); *State v. Estes*, 418 A.2d 1108, 1113 (Me. 1980) (holding that a confinement of ninety minutes more than satisfied the requirement that the victim be held for a substantial period); 3 LAFAVE, *supra* note 10, § 18.1(c), at 17–18.

<sup>114</sup> See, e.g., *Gov't of the Virgin Is. v. Ventura*, 775 F.2d 92, 98 (3d Cir. 1985) (noting that the asportation involved in the case was of short duration because it only lasted a few minutes); *Berry*, 604 F.2d at 228 (holding that, although the exact time of the drive was not disclosed, the brief transportation of the victim did not constitute a holding for a substantial period); *Hoyt v. Commonwealth*, 605 S.E.2d 755, 758 (Va. Ct. App. 2004) (holding that the duration of the detention was slight because it only lasted no more than five minutes).

<sup>115</sup> See *United States v. Gabaldon*, 389 F.2d 1090, 1093 (10th Cir. 2004).

have taken Gabaldon and Begay—two fully grown men—very long to beat an unsuspecting Dale into unconsciousness; thus, it cannot be said that her confinement during the beating was for an “appreciable” or “substantial” period of time.

Turning to Dale’s transportation between loss of consciousness and death, the question of whether the confinement was for a substantial period is more difficult. The record establishes that once Dale was placed, unconscious, in the backseat of Gabaldon’s car, she was driven through the town of Gallup to the Navajo Reservation, where her body was dumped into a ravine.<sup>116</sup> Thus, the question of whether this confinement’s length was “substantial” depends on how long it would take to drive through the town of Gallup. Gallup, New Mexico, is only 13.35 square miles in total area.<sup>117</sup> Therefore, driving the speed limit,<sup>118</sup> it would not take more than ten minutes to drive through the entire town. Dale’s death was caused by blunt force trauma suffered during the initial beating,<sup>119</sup> but exactly when her death occurred is unknown.<sup>120</sup> Yet based on the distance traveled, regardless of whether death occurred during the attempted strangulation or not until some later time, Dale would have been transported for no more than ten minutes before her death. Thus, the confinement implicated in this case was nothing like that which courts have generally found to comprise a “substantial” period.<sup>121</sup> In fact, Dale’s transportation mirrors that experienced by the *Berry* victim.<sup>122</sup> Just as in *Berry*, though the actual length of the drive was not disclosed, it appeared to be “quite brief.”<sup>123</sup> In view of these facts, Gabaldon’s kidnapping conviction cannot be justified on the basis of length of confinement.

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<sup>116</sup> *Id.*

<sup>117</sup> U.S. CENSUS BUREAU, CENSUS 2000 SUMMARY FILE 1: NEW MEXICO (2000), [http://factfinder.census.gov/servlet/GCTTable?-geo\\_id=04000US35&-mt\\_name=DEC\\_2000\\_SF1\\_U\\_GCTPH1R\\_ST7S&-ds\\_name=DEC\\_2000\\_SF1\\_U](http://factfinder.census.gov/servlet/GCTTable?-geo_id=04000US35&-mt_name=DEC_2000_SF1_U_GCTPH1R_ST7S&-ds_name=DEC_2000_SF1_U).

<sup>118</sup> See Nat’l Motorists Ass’n, State Speed Limit Information, <http://www.motorists.com/issues/speed/StateSpeeds.html> (last visited Feb. 27, 2007) (noting that in New Mexico the Interstate speed limit is seventy-five miles per hour and the speed limit on other primary roads is sixty-five miles per hour).

<sup>119</sup> See *supra* note 29 and accompanying text.

<sup>120</sup> See *supra* notes 106–08 and accompanying text.

<sup>121</sup> See *supra* note 113 and accompanying text.

<sup>122</sup> See *Gov’t of the Virgin Is. v. Berry*, 604 F.2d 221, 223 (3d Cir. 1979).

<sup>123</sup> See *id.* at 228.

*B. Whether the Detention or Asportation Occurred During the Commission of a Separate Offense*

The next *Berry* factor asks whether the detention or asportation occurred during the commission of a separate offense.<sup>124</sup> Although its parameters are also somewhat unclear, the underlying concept is more self-explanatory. Courts seem to view as dispositive whether a “holding” transpired simultaneously with the occurrence of the separate offense.<sup>125</sup> For example, a court will likely not find a “holding” during the commission of a separate offense when a victim is thrown in a trunk while still alive and transported into another state before being shot to death.<sup>126</sup> If, however, a victim is confined only during the time in which he is also being robbed and/or assaulted, the court will likely hold that the detention or asportation did occur during the commission of those separate offenses.<sup>127</sup> Based on these illustrations, it is clear that Dale’s confinement during the initial beating transpired during the commission of a separate offense. During this time frame, Dale was confined in Gabaldon’s automobile only while he and Begay were assaulting her and inflicting the injuries that would ultimately cause her death.<sup>128</sup> Thus, the kidnapping conviction is not justified based on this time frame.

Analysis of Dale’s transportation to the Navajo Reservation prior to her death does not produce such an obvious result. On the one hand, it can easily be argued that this transportation did not occur while a separate offense was being committed.<sup>129</sup> There is, however, an argument that the detention and asportation did occur during the commission of a separate offense. As defined by New Mexico state law, a conviction for first or second degree murder requires the death of the victim.<sup>130</sup> An attempt,

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<sup>124</sup> See *supra* note 71 and accompanying text.

<sup>125</sup> See, e.g., *United States v. Howard*, 918 F.2d 1529, 1536 (11th Cir. 1990); *Berry*, 604 F.2d at 227–28; *Hoyt v. Commonwealth*, 605 S.E.2d 755, 758 (Va. Ct. App. 2004); *State v. Vladovic*, 662 P.2d 853, 865 (Wash. 1983) (Utter, J., dissenting).

<sup>126</sup> See *People v. Moreland*, 686 N.E.2d 597, 599–601 (Ill. App. Ct. 1997).

<sup>127</sup> See *Berry*, 604 F.2d at 227–28.

<sup>128</sup> See *supra* notes 22–24, 29 and accompanying text.

<sup>129</sup> Before continuing, it is important to recall that this one particular prong alone is not determinative of whether a separate conviction for kidnapping is justified. See *supra* note 80 and accompanying text.

<sup>130</sup> N.M. STAT. § 30–2–1 (2003). Section 30–2–1(A) provides in pertinent part that “[m]urder in the first degree is the *killing* of one human being by another without lawful justification or excuse, by any of the means with which *death* may be

meanwhile, “consists of an overt act in furtherance of and with intent to commit a felony and tending but failing to effect its commission.”<sup>131</sup> Thus, the difference between committing murder and attempting murder is whether or not the victim dies.<sup>132</sup> Since a murder does not technically occur until death, the period of time between infliction of a fatal injury and actual death of a victim represents a time frame during which the murder is still being committed. A similar view was taken in *State v. Green*,<sup>133</sup> a case that very much mirrors *Gabaldon*. *Green* involved the transportation of a murder victim after fatal wounds had already been inflicted, but prior to the victim’s actual death.<sup>134</sup> In considering whether *Green*’s kidnapping conviction was justifiable, the court held that the victim’s movement prior to her death was “an integral part of[,] and not independent of[,] the underlying homicide.”<sup>135</sup> Therefore, *Green* stands for the proposition that transportation of a victim after infliction of fatal wounds—but prior to actual death—transpires *during* the commission of a victim’s murder. Under this theory, Dale’s murder, which began when she suffered the fatal injuries inflicted during the initial beating,<sup>136</sup> was not realized until her death. Regardless of whether Dale’s death occurred while Begay attempted strangulation or at some later time, her detention and

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caused.” *Id.* (emphasis added). Furthermore, section 30–2–1(B) provides:

Unless he is acting upon sufficient provocation, upon a sudden quarrel or in the heat of passion, a person who *kills* another human being without lawful justification or excuse commits murder in the second degree if in performing the acts which cause the *death* he knows that such acts create a strong probability of *death* or great bodily harm to that individual or another.

*Id.* (emphasis added).

<sup>131</sup> *Id.* § 30–28–1.

<sup>132</sup> For example, suppose that A stabs both B and C in the chest. Also, suppose that B dies from his wounds and C does not. It will likely be undisputed that A is guilty of the murder of B and the attempted murder of C. It will also be relatively undisputed that the only difference between these two crimes is that B died and C did not. Thus, B’s murder was not accomplished until she died. If she had not died, A would only have been guilty of attempted murder. It was an attempted murder until B died.

<sup>133</sup> 616 P.2d 628 (Wash. 1980) (en banc).

<sup>134</sup> See *id.* at 633–34. In *Green*, the defendant stabbed his eight and a half year old victim and then dragged her twenty to fifty feet to an exterior loading dock. *Id.* at 633. The victim was still alive when *Green* began dragging her, evidenced by her continued screaming, but died moments later. *Id.*

<sup>135</sup> *Id.* at 635.

<sup>136</sup> See *supra* note 29 and accompanying text.

asportation in Gabaldon's car<sup>137</sup> would have transpired during the commission of the separate offense of murder. It is thus submitted that Gabaldon's kidnapping conviction cannot be justified under the "separate offense" factor of *Berry*.

*C. Whether the Detention or Asportation Which Occurred Is Inherent in the Separate Offense*

The third prong of the *Berry* test requires one to determine whether the detention or asportation was inherent in the separate offense.<sup>138</sup> This analysis is not unique and has been used by numerous courts to gauge whether an alleged kidnapping is merely incidental to a separate offense.<sup>139</sup> Courts ordinarily rule that a detention or asportation is inherent in a separate crime if it is essential to the commission of that offense.<sup>140</sup> While *Berry* supports this assertion, it also provides a more lenient analysis than customarily used by other courts. According to *Berry*, detention or asportation involved in an alleged kidnapping may be deemed inherent to a separate offense if "[n]ecessarily implicit in . . . these [separate] crimes is some limited confinement or asportation,"<sup>141</sup> and if the detention or asportation involved is of a type that commonly occurs during the commission of these separate crimes.<sup>142</sup>

Turning to the facts of *Gabaldon*, Dale's confinement during the initial beating was clearly inherent in the murder. "[T]he infliction of a fatal wound is the ultimate form of 'restraint' because it obviously 'restrict[s] a person's movements . . . in a manner which interferes substantially with [the person's]

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<sup>137</sup> See *supra* notes 25–27 and accompanying text.

<sup>138</sup> See *supra* note 72 and accompanying text.

<sup>139</sup> See *United States v. Peden*, 961 F.2d 517, 522 (5th Cir. 1992); *United States v. Howard*, 918 F.2d 1529, 1536 (11th Cir. 1990); *Gov't of the Virgin Is. v. Berry*, 604 F.2d 221, 227 (3d Cir. 1979); *People v. Moreland*, 686 N.E.2d 597, 600–01 (Ill. App. Ct. 1997); *State v. Stouffer*, 721 A.2d 207, 215 (Md. 1998); *State v. Goodhue*, 833 A.2d 861, 868 (Vt. 2003); *Hoyt v. Commonwealth*, 605 S.E.2d 755, 757–58 (Va. Ct. App. 2004); 3 LAFAVE, *supra* note 10, § 18.1(b), at 11.

<sup>140</sup> See *Peden*, 961 F.2d at 522; *People v. Thomas*, 516 N.E.2d 901, 906 (Ill. App. Ct. 1987); *Stouffer*, 721 A.2d at 213, 215; *Hoyt*, 605 S.E.2d at 758; 3 LAFAVE, *supra* note 10, § 18.1(b), at 11.

<sup>141</sup> *Berry*, 604 F.2d at 228.

<sup>142</sup> See *id.* The *Berry* court reasoned that "[d]uring a robbery, it is common for the victim to be confined while the robber takes his money, or to be moved a short distance so as to be secluded from public view." *Id.* Likewise, "it is virtually inevitable that during an assault, the victim will be confined for a brief period or moved for a short distance." *Id.*

liberty.’”<sup>143</sup> Because no murder can take place without the infliction of fatal wounds, some form of restraint or confinement is implicit in every murder. Given that, in the forensic pathologist’s opinion, Dale’s fatal wounds were inflicted during the initial beating,<sup>144</sup> the confinement she experienced during that beating was no more than that which was inherent in her murder.

This analysis becomes significantly more difficult when one examines Dale’s transportation prior to her death.<sup>145</sup> There is, however, still an strong argument that this transportation may have been inherent in her murder. *Berry* establishes that an asportation may be considered inherent in a separate crime if it is of a type that normally occurs during the commission of that crime.<sup>146</sup> Moreover, it is common knowledge that during the commission of a murder, the wrongdoer often transports the victim after the fatal wounds are inflicted in order to discard the body. Thus, because of its high frequency of occurrence, one could reason that transporting a murder victim after the infliction of fatal wounds is inherent in a typical murder.<sup>147</sup> This type of transportation does not normally raise a kidnapping issue because the person is already dead and, as stated above, one cannot kidnap a dead body.<sup>148</sup> The *Gabaldon* case, however, involved the transportation of a murder victim after fatal wounds had been inflicted, but *before* actual death had occurred.<sup>149</sup> Yet, this difference should not change the inherent character of this type of transportation. To consider distinct the transportation of

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<sup>143</sup> *State v. Green*, 616 P.2d 628, 636 (Wash. 1980) (en banc) (alteration in original) (quoting WASH. REV. CODE. ANN. § 9A.40.010(1) (West 1980)).

<sup>144</sup> See *supra* note 29 and accompanying text.

<sup>145</sup> There are some cases such as *People v. Moreland*, 686 N.E.2d 597 (Ill. App. Ct. 1997), that have specifically held that transporting a victim is not inherent in the offense of murder. *Moreland*, however, involved the transportation of a murder victim prior to the infliction of the fatal wounds. *Id.* at 599. It is clear that transportation such as this would not be inherent in the offense of murder. *Gabaldon*, however, is distinguishable from cases like *Moreland* because it involved transportation of a murder victim after the fatal wounds had been inflicted. Thus, precedents such as *Moreland* do not preclude a finding that Dale’s transportation may have been inherent in her murder.

<sup>146</sup> See *supra* note 142 and accompanying text.

<sup>147</sup> See, e.g., *Green*, 616 P.2d at 635 (holding that the movement of a victim after the fatal wounds were inflicted, but prior to actual death, was “an integral part . . . of the underlying homicide”).

<sup>148</sup> See *supra* note 105 and accompanying text.

<sup>149</sup> See *supra* notes 15–31 and accompanying text.

a victim who has already died from that of a victim who is yet to die creates a situation in which the actual time of death becomes the dispositive factor as to the propriety of a separate kidnapping conviction. This means that had Gabaldon waited until Dale actually died before traveling to the Navajo Reservation, no kidnapping would have occurred. It seems counterintuitive to treat these two situations as distinct.<sup>150</sup> In order to avoid this result, transportation of a murder victim that transpires subsequent to the infliction of the fatal wounds, but prior to actual death, should be treated equally to transportation that occurs after death. Viewed in this light, Dale's transportation prior to her death was inherent in her murder, and thus, Gabaldon's kidnapping conviction would fail the third prong of the *Berry* test.

It is also significant that the court rationalized that Gabaldon's kidnapping conviction was justified, in part, because the victim's transportation was designed "to avoid [the defendant's] arrest and prosecution on battery charges."<sup>151</sup> In holding as such, the Tenth Circuit aligned itself with those courts finding that a separate conviction for kidnapping may exist when detention or restraint "substantially lessens the risk of detection" of the underlying offense.<sup>152</sup> There are two reasons, however, why this rationale is flawed. First, numerous courts have not adopted this so-called "lessen the risk of detection" standard.<sup>153</sup>

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<sup>150</sup> For example, consider a person (A) who stabs two people (B and C) in the chest. A plans to dump the bodies and throws both in the trunk in order to transport them. B had died immediately after being stabbed, but C does not die until a few minutes into the trip. We know that A is not guilty of kidnapping B because one cannot kidnap a dead body. Also, suppose that because C was still alive when the transportation started, A is convicted of kidnapping and murdering C. This seems quite unjust. A's actions toward B and C were exactly the same, and to allow a separate charge of kidnapping for C's murder simply because he survived a few more minutes than B does not make sense.

<sup>151</sup> *United States v. Gabaldon*, 389 F.3d 1090, 1098 (10th Cir. 2004).

<sup>152</sup> *See State v. Buggs*, 547 P.2d 720, 731 (Kan. 1976); *see also Messer v. Roberts*, 74 F.3d 1009, 1014 (10th Cir. 1996) (applying Kansas state law); *Howard v. Nelson*, 980 F. Supp. 381, 385 (D. Kan. 1997); MODEL PENAL CODE § 212.1 cmt. 2, at 222 (Official Draft and Revised Comments 1980) (as adopted in 1962); 3 LAFAYETTE, *supra* note 10, § 18.1(d), at 19–20.

<sup>153</sup> *See, e.g., State v. Stouffer*, 721 A.2d 207, 213–14 (Md. 1997) (holding that if the confinement or movement is undertaken solely to facilitate the commission of the another crime, the court will likely reverse the kidnapping conviction as merely incidental); *State v. Logan*, 397 N.E.2d 1345, 1351–52 (Ohio 1979) (holding that the kidnapping conviction should not be upheld because the restraint and movement of the victim had no significance apart from facilitating the rape).

In fact, the Supreme Court of New Mexico—the state in which the facts of *Gabaldon* transpired—even voiced complete disagreement with the logic of this view.<sup>154</sup> Second, kidnappings justified under this standard generally have involved attempts to reduce the risk of detection *while committing* the underlying crime, not to reduce detection of a crime already accomplished.<sup>155</sup> Gabaldon transported Dale to avoid detection of an already completed crime. Had he transported the victim to a more remote location prior to beating her in the hopes that it would be less likely for someone to witness him committing the battery, a different result would have been warranted. Yet, this is not what occurred, and, as such, these facts fail the third prong of the *Berry* test.

*D. Whether the Asportation or Detention Created a Significant Danger to the Victim Independent of That Posed by the Separate Offense*

Our analysis turns now to the final prong of the *Berry* test. Many courts stress that, when determining if a separate conviction for kidnapping is appropriate, it is crucial to consider whether the asportation or detention created a “significant” danger to the victim “independent” of that posed by the separate offense.<sup>156</sup> A significant and independent danger is borne from

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<sup>154</sup> See *State v. Vernon*, 867 P.2d 407, 411 (N.M. 1993) (holding that though “Vernon took Stevens to a more remote location to facilitate the murder . . . the movement was [still] merely incidental to the murder”). As the court saw it, the movement was merely incidental because “no ‘service’ is performed by the victim of a shooting . . . because the victim does not confer any independent assistance or benefit to the perpetrator of the crime.” *Id.*; see also *State v. Baca*, 902 P.2d 65, 75 (N.M. 1995).

<sup>155</sup> See, e.g., *State v. Alires*, 792 P.2d 1019, 1022 (Kan. 1990) (concluding that the defendant committed kidnapping when he forced the victim of a convenience store robbery out of the store *to conceal the fact that a robbery was in progress*); *State v. Turbeville*, 686 P.2d 138, 145 (Kan. 1984) (finding that a kidnapping occurred when the defendant moved victims from the front display area of the store to an office in the rear of the store *before committing attempted murder*); *Buggs*, 547 P.2d at 731–32 (holding that the defendant had committed a kidnapping when he forced the victim from public view, to the interior of the store prior to committing robbery and rape).

<sup>156</sup> See, e.g., *United States v. Peden*, 961 F.2d 517, 522 (5th Cir. 1992); *United States v. Howard*, 918 F.2d 1529, 1535–37 (11th Cir. 1990); *Gov’t of the Virgin Is. v. Ventura*, 775 F.2d 92, 98 (3d Cir. 1985); *Gov’t of the Virgin Is. v. Berry*, 604 F.2d 221, 227 (3d Cir. 1979); *People v. Moreland*, 686 N.E.2d 597, 600–01 (Ill. App. Ct. 1997); *People v. Thomas*, 516 N.E.2d 901, 905–06 (Ill. App. Ct. 1987); *Stouffer*, 721 A.2d at 215; *State v. Goodhue*, 833 A.2d 861, 865–66 (Vt. 2003); *Hoyt v.*

an “increase in the risk that the victim may suffer significant physical injuries over and above those to which a victim of the underlying crime is normally exposed.”<sup>157</sup> For example, an independently significant danger may arise when a rapist drags his victim through the bushes—while carrying a gun—because it creates a risk of significant injury to the victim beyond that normally suffered during a rape.<sup>158</sup> This type of situation, however, is distinguishable from the facts of *Gabaldon*. Dale’s confinement and asportation did not create a significant danger independent of that posed by the beating she had already suffered. Having previously established that Dale’s confinement during the initial beating occurred during the commission of the separate offense of battery,<sup>159</sup> no additional risk of physical injury to Dale was created. In other words, Dale was not exposed to any threat of harm beyond that implicit in the beating she was already suffering.

There is a similar result when considering Dale’s asportation in Gabaldon’s car prior to her death. By the time Gabaldon began transporting Dale to the Navajo Reservation, he and Begay had already inflicted the fatal wounds that would ultimately cause her death.<sup>160</sup> There is no harm or injury that one can suffer that is more profound than losing one’s life. Therefore, nothing could happen to Dale after the initial beating that could expose her to greater harm or physical injury beyond that which she had already suffered. Dale was unfortunately doomed to die, and regardless of when her actual death occurred,<sup>161</sup> she was never exposed to any significant danger independent of that posed by the initial beating. Thus, Gabaldon’s kidnapping conviction fails this final prong of the *Berry* test.

After applying the four *Berry* factors to the facts of *Gabaldon*, it is indisputable that the Tenth Circuit erred not only in failing to adopt the *Berry* test,<sup>162</sup> but also in concluding that,

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Commonwealth, 605 S.E.2d 755, 757–58 (Va. Ct. App. 2004).

<sup>157</sup> *People v. Timmons*, 482 P.2d 648, 650 (Cal. 1971); *see also Berry*, 604 F.2d at 229 (holding that a separate conviction of kidnapping could not be established because the brief ride did not create “any appreciable risk of injury to Morales”).

<sup>158</sup> *See Ventura*, 775 F.2d at 98–99.

<sup>159</sup> *See discussion supra* Part IV.B.

<sup>160</sup> *See supra* notes 20–29 and accompanying text.

<sup>161</sup> *See supra* notes 106–08 and accompanying text.

<sup>162</sup> *See supra* notes 99–101 and accompanying text.

had it adopted *Berry's* rationale, the defendant's separate conviction for kidnapping would nonetheless have been established.<sup>163</sup> Dale's confinement during the initial beating fails all four prongs because it was short in duration, occurred during the commission of a separate offense, was of a type inherent in that separate offense, and did not create a significantly independent danger to Dale.<sup>164</sup> Similarly, Dale's transportation prior to her death does not survive the *Berry* analysis. It clearly fails the first and fourth prongs of the test,<sup>165</sup> and a strong argument also exists that it fails the second and third prongs.<sup>166</sup> Thus, contrary to the assumption of the *Gabaldon* court, had the *Berry* test been adopted, *Gabaldon's* separate conviction for kidnapping would not have been upheld.

#### IV. UPPING THE ANTE: STRENGTHENING *BERRY* WITH TWO ADDITIONAL FACTORS

This section recognizes that “[t]he *Berry* test has not been widely adopted by [the] Circuits”<sup>167</sup> and proposes two additional prongs that will strengthen its conceptual foundation and will, hopefully, better effectuate its acceptance among both federal and state courts. The first prong is a determination of whether the defendant possessed a separate motive to commit the alleged kidnapping. By examining the mental state of the defendant to determine whether or not he had a separate motive to kidnap the victim, one can avoid situations in which a person committing a minor offense is incorrectly charged and convicted of the more serious offense of kidnapping, because it will be established that the defendant actually sought to kidnap the victim. This type of analysis is not novel and is evident in the Ohio Supreme Court's decision in *State v. Logan*.<sup>168</sup> According to *Logan*, “[w]here an individual's immediate motive involves the commission of one offense, but in the course of committing that crime he . . . commit[s] another, then he may well possess but a single animus, and in that event may be convicted of only one crime.”<sup>169</sup>

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<sup>163</sup> See *supra* notes 53–54 and accompanying text.

<sup>164</sup> See discussion *supra* Part IV.

<sup>165</sup> See discussion *supra* Part IV.A, IV.D.

<sup>166</sup> See discussion *supra* Part IV.B–C.

<sup>167</sup> *United States v. Gabaldon*, 389 F.3d 1090, 1097 (10th Cir. 2004).

<sup>168</sup> 397 N.E.2d 1345 (Ohio 1979).

<sup>169</sup> *Id.* at 1349.

On the other hand, a person who, for example, “restrains his intended rape victim for several days prior to perpetrating the rape, or who transports her out of the state or across the state while intermittently raping her, may well be considered to have a separate animus as to each of the offenses of kidnapping and rape.”<sup>170</sup> This stems from a separate intention by the perpetrator to kidnap the victim, beyond the intention simply to commit rape.<sup>171</sup> In other words, the wrongdoer purposely entertained the desire to kidnap the victim independent from purposely raping her. When this analysis is applied to the facts of *Gabaldon*, the kidnapping conviction is unsustainable. One can infer that Gabaldon manifested three distinct intentions: (1) to batter and murder Deirdre Dale,<sup>172</sup> (2) to destroy any evidence that he was involved in her death,<sup>173</sup> and (3) to discard her body.<sup>174</sup> Using common sense, it is evident that each intention is of the type routinely entertained during many conventional murders and does not support the inference that Gabaldon manifested a separate intention to kidnap Dale. Gabaldon never purposely sought to kidnap Dale independent of his intentions to beat her, to destroy evidence, and to transport her body. Therefore, under this additional prong, Gabaldon’s kidnapping conviction fails once again.

The second proposed factor asks whether a defendant subjected the victim to a change of environment. This type of analysis is relevant in determining whether a separate conviction for kidnapping is justifiable because “unless the victim is removed from the environment where he is found, the consequences of the movement itself to the victim are not independently significant . . . [and] does not manifest the commission of a separate crime.”<sup>175</sup> For example, it would be difficult to find that a separate crime of kidnapping occurred if a rape victim was not moved at all, or if a victim was only moved from one open area to another open area merely a few feet away.

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<sup>170</sup> *Id.* at 1350.

<sup>171</sup> *See id.* at 1349–50.

<sup>172</sup> *See supra* notes 22–24, 28 and accompanying text.

<sup>173</sup> *See supra* note 30 and accompanying text.

<sup>174</sup> *See supra* notes 25–27, 31 and accompanying text.

<sup>175</sup> *State v. Dix*, 193 S.E.2d 897, 903 (N.C. 1973) (quoting *People v. Adams*, 192 N.W.2d 19, 30 (Mich. Ct. App. 1971)); *see also Gov’t of the Virgin Is. v. Ventura*, 775 F.2d 92, 98 (3d Cir. 1985) (holding that it was significant that the victim was taken from one environment to another).

If, however, the victim was taken from an open area to a dark, secluded warehouse in another state before being raped, one could more easily find that a separate crime of kidnapping occurred due to this significant change of environment. Furthermore, when examining if the victim was exposed to a change of environment, the term “‘environment’ [should not] be defined restrictively”<sup>176</sup> because “an asportation of 500 feet may alter the victim’s situation not at all.”<sup>177</sup> In other words, what is important in defining an environmental change is not the distance a victim is transported, but rather the extent to which, if at all, her situation has changed. Viewed in the context of *Gabaldon*, Gabaldon’s kidnapping conviction cannot be sustained under this additional prong. At no time during the events in question did Dale’s environment ever change. Dale entered Gabaldon’s vehicle of her own free will,<sup>178</sup> and never left the environment alive.<sup>179</sup> Dale’s beating and transportation all took place within the confines of Gabaldon’s car.<sup>180</sup> Therefore, she never experienced an altering of her situation significant enough to constitute a change of environment.<sup>181</sup> Each proposed prong, therefore, fails to justify Gabaldon’s separate conviction for kidnapping,<sup>182</sup> and provides two more reasons why the court erred in its decision to uphold it.

#### CONCLUSION

*United States v. Gabaldon* began as just another case dealing with a divisibility of crimes issue, but it became nothing short of a comedy of errors. The initial error was the court’s refusal to adopt the four prong test laid down in *Government of the Virgin Islands v. Berry*—a test designed to evaluate the propriety of a separate conviction for kidnapping. The Third Circuit’s rationale in promulgating this test was to avoid situations in which persons committing minor offenses involving minimal restraint were then sentenced to life imprisonment under the various kidnapping statutes. It is difficult to see any reason why this

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<sup>176</sup> *Dix*, 193 S.E.2d at 903 (citing *Adams*, 192 N.W.2d at 30).

<sup>177</sup> *Id.* (citing *Adams*, 192 N.W.2d at 30).

<sup>178</sup> *See supra* note 19 and accompanying text.

<sup>179</sup> *See supra* notes 19–31 and accompanying text.

<sup>180</sup> *See supra* notes 22–31 and accompanying text.

<sup>181</sup> *See supra* notes 175–77 and accompanying text.

<sup>182</sup> *See supra* note 32 and accompanying text.

policy is any less applicable in the Tenth Circuit. The fact that Gabaldon is a cold-blooded murderer does not render pursuit of this sound public policy any less advisable. The Tenth Circuit failed to look past this one defendant, and as a result, created a dangerous precedent whereby the *Berry* court's greatest fears will inevitably be realized.

The Tenth Circuit's next error came in its rather brazen declaration that even had it adopted the *Berry* test, Gabaldon's kidnapping conviction would still have easily been upheld. Quite to the contrary, Gabaldon's kidnapping conviction would not have passed muster under the *Berry* test. Dale's confinement during the initial beating clearly fails all four prongs of the test because it was short in duration, occurred during the commission of a separate offense, was of a type inherent in a separate offense, and did not create a significantly independent danger to Dale. Similarly, Dale's transportation prior to her death undoubtedly fails the first and fourth prongs of the test, and there are strong arguments that it also fails the remaining two. Taken in totality, the court's error is painstakingly clear: Gabaldon's kidnapping conviction does not survive the *Berry* analysis.

The *Berry* test, however, is not perfect. Despite the fact that it is a revolutionary tool in divisibility of crimes analysis, it can be improved. With this in mind, this Comment has proposed two additional factors. First, courts should examine the mental state of the defendant to determine whether or not he had a separate motive to kidnap. This first factor protects defendants who commit minor offenses from being charged and convicted of a more serious offense, kidnapping. Second, by analyzing whether the victim was subjected to a significant change of environment—the presence of which is generally indicative of a separate crime of kidnapping—one can reduce overzealous prosecution of kidnapping statutes. These additional prongs, therefore, will advance the policy concerns of the *Berry* court and will lead to the test's increased acceptance.