

2003

## Utah v. Silia Olive : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca2](https://digitalcommons.law.byu.edu/byu_ca2)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Mark Shurtleff, Utah Attorney General; Karen A. Klucznik, Assistant Attorney General; Sirena M. Wissler; William K. Kendall; Deputy Salt Lake County District Attorneys; attorneys for appellee. Julie George; attorney for appellant.

---

### Recommended Citation

Brief of Appellee, *Utah v. Olive*, No. 20030359 (Utah Court of Appeals, 2003).  
[https://digitalcommons.law.byu.edu/byu\\_ca2/4320](https://digitalcommons.law.byu.edu/byu_ca2/4320)

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

IN THE UTAH COURT OF APPEALS

---

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	Case No. 20030359-CA
SILIA OLIVE,	:	
Defendant/Appellant.	:	

---

*BRIEF OF APPELLEE*

---

APPEAL FROM CONVICTIONS FOR FELONY MURDER, A FIRST DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-5-203 (Supp. 2001); AGGRAVATED KIDNAPPING, A FIRST DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-5-302 (Supp. 2001); AND CONSPIRACY TO COMMIT ASSAULT, A CLASS C MISDEMEANOR, IN VIOLATION OF UTAH CODE ANN. § 76-4-201 (Supp. 2001), IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE ANTHONY B. QUINN, PRESIDING

KAREN A. KLUCZNIK (7912)  
Assistant Attorney General  
MARK L. SHURTLEFF (4666)  
Utah Attorney General  
160 East 300 South, 6<sup>th</sup> Floor  
PO BOX 140854  
Salt Lake City, Utah 84114-0854  
Telephone: (801) 366-0180

JULIE GEORGE  
32 Exchange Place, Suite 101  
Salt Lake City, Utah 84111

SIRENA M. WISSLER  
WILLIAM K. KENDALL  
Deputy Salt Lake County  
District Attorneys

ATTORNEY FOR APPELLANT

ATTORNEYS FOR APPELLEE

**IN THE UTAH COURT OF APPEALS**

---

<b>STATE OF UTAH,</b>	:	
	:	
<b>Plaintiff/Appellee,</b>	:	<b>Case No. 20030359-CA</b>
	:	
<b>v.</b>	:	
	:	
<b>SILIA OLIVE,</b>	:	
	:	
<b>Defendant/Appellant.</b>	:	

---

***BRIEF OF APPELLEE***

---

**APPEAL FROM CONVICTIONS FOR FELONY MURDER, A FIRST DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-5-203 (Supp. 2001); AGGRAVATED KIDNAPPING, A FIRST DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-5-302 (Supp. 2001); AND CONSPIRACY TO COMMIT ASSAULT, A CLASS C MISDEMEANOR, IN VIOLATION OF UTAH CODE ANN. § 76-4-201 (Supp. 2001), IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE ANTHONY B. QUINN, PRESIDING**

**KAREN A. KLUCZNIK (7912)**  
**Assistant Attorney General**  
**MARK L. SHURTLEFF (4666)**  
**Utah Attorney General**  
**160 East 300 South, 6<sup>th</sup> Floor**  
**PO BOX 140854**  
**Salt Lake City, Utah 84114-0854**  
**Telephone: (801) 366-0180**

**JULIE GEORGE**  
**32 Exchange Place, Suite 101**  
**Salt Lake City, Utah 84111**

**SIRENA M. WISSLER**  
**WILLIAM K. KENDALL**  
**Deputy Salt Lake County**  
**District Attorneys**

**ATTORNEY FOR APPELLANT**

**ATTORNEYS FOR APPELLEE**

## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	iii
JURISDICTION AND NATURE OF PROCEEDINGS .....	1
ISSUES ON APPEAL AND STANDARD OF REVIEW .....	1
CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES .....	2
STATEMENT OF THE CASE .....	2
STATEMENT OF FACTS .....	3
SUMMARY OF THE ARGUMENT .....	10
ARGUMENT	
I. DEFENDANT’S CLAIM THAT THE TRIAL COURT COMMITTED PLAIN ERROR IN NOT ABOLISHING FELONY MURDER OR ADDING SUBSTANTIVE ELEMENTS TO IT FAILS WHERE NO SETTLED APPELLATE LAW SUPPORTS SUCH ACTION .....	12
A. Settled appellate law holds that the only mens rea necessary for felony murder is the mens rea required for the predicate offense. ....	14
B. Settled appellate law holds that a trial court lacks authority to abolish the felony murder statute merely on policy grounds. ....	15
C. The plain language of the felony murder statute defeats defendant’s claim that the State must prove the murder was “planned,” “foreseeable,” or “in furtherance of” the underlying felony. ....	16
D. Evidence that Amy was murdered during the course of several overlapping felonies demonstrates a continuous chain of events from the commencement of the first felony through the murder. ....	19
II. DEFENDANT’S CLAIM THAT THE TRIAL COURT COMMITTED PLAIN ERROR UNDER EITHER THE STATE OR FEDERAL DOUBLE JEOPARDY CLAUSE IN NOT DISMISSING DEFENDANT’S FELONY MURDER CONVICTION FAILS WHERE THE SUPREME COURT HAS HELD THAT FELONY MURDER AND THE PREDICATE CRIME DO NOT MERGE .....	21

A.	Defendant’s assertion that statutory changes since <i>McCovey</i> undermine that decision is incorrect. ....	23
B.	Distinctions between defendant’s case and <i>McCovey</i> do not, without more, establish plain error. ....	24
III.	DEFENDANT’S CLAIM THAT THE TRIAL COURT COMMITTED PLAIN ERROR IN NOT DISMISSING HER AGGRAVATED KIDNAPPING AND FELONY MURDER CHARGES ONCE SHE WAS ACQUITTED OF AGGRAVATED ROBBERY FAILS BECAUSE INCONSISTENT VERDICTS DO NOT ESTABLISH INSUFFICIENCY OF THE EVIDENCE .....	27
A.	Proceedings below. ....	28
B.	Controlling law defeats defendant’s premise that inconsistent verdicts render evidence insufficient as a matter of law. ....	28
IV.	DEFENDANT HAS NOT SHOWN THAT HER TRIAL COUNSEL WAS INEFFECTIVE IN NOT CHALLENGING HER AGGRAVATED KIDNAPPING AND FELONY MURDER CHARGES ON THE BASES RAISED ABOVE WHERE DEFENDANT HAS NOT SHOWN THAT SUCH CHALLENGES WOULD HAVE BEEN SUCCESSFUL .....	34
	CONCLUSION .....	36
ADDENDA A -	Utah Code Ann. § 76-5-203 (Supp. 2001)	
	Utah Code Ann. § 76-5-302 (Supp. 2001)	
	Utah Code Ann. § 76-3-203.1 (Supp. 2001)	

## TABLE OF AUTHORITIES

### FEDERAL CASES

<i>Albernaz v. United States</i> , 450 U.S. 333 (1981) .....	26
<i>Brown v. Ohio</i> , 432 U.S. 161 (1977) .....	23, 26
<i>Dunn v. United States</i> , 284 U.S. 390 (1932) .....	29, 32, 33
<i>Missouri v. Hunter</i> , 459 U.S. 359 (1983) .....	22, 26
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052 (1984) .....	34
<i>United States v. Powell</i> , 469 U.S. 57 (1984) .....	30, 33

### STATE CASES

<i>Belt v. Turner</i> , 25 Utah 2d 380, 483 P.2d 425 (1971) .....	16
<i>Gottling v. P.R. Inc.</i> , 2002 UT 95, 61 P.3d 989 .....	15
<i>Kawamoto v. Fratto</i> , 2000 UT 6, 994 P.2d 187 .....	15
<i>West Valley City v. Majestic Inv. Co.</i> , 818 P.2d 1311 (Utah App. 1991) .....	20, 28, 34
<i>State v. Bishop</i> , 717 P.2d 261 (Utah 1986) .....	15
<i>State v. Bisner</i> , 2001 UT 99, 37 P.3d 1073 .....	24, 25
<i>State v. Bluff</i> , 2002 UT 66, 52 P.3d 1210 .....	14, 24, 25
<i>State v. Brooks</i> , 908 P.2d 856 (Utah 1995) .....	12, 21
<i>State v. Burns</i> , 2000 UT 56, 4 P.3d 795 .....	16, 17
<i>State v. Chacon</i> , 962 P.2d 48 (Utah 1998) .....	34
<i>State v. Coonce</i> , 2001 UT App 355, 36 P.3d 533 .....	17, 20, 28, 33
<i>State v. Diaz</i> , 2002 UT App 288, 55 P.3d 1131 .....	2
<i>State v. Dunn</i> , 850 P.2d 1201 (Utah 1993) .....	1, 13, 22, 27, 35

<i>State v. Frausto</i> , 2002 UT App 259, 53 P.3d 486, cert. denied, 63 P.3d 104 (Utah 2002) .....	13, 22
<i>State v. Gallion</i> , 572 P.2d 683 (Utah 1977) .....	16
<i>State v. Garcia</i> , 2001 UT App. 19, 18 P.3d 1123 .....	13, 22, 25, 27
<i>State v. Gardiner</i> , 814 P.2d 568 (Utah 1991) .....	15
<i>State v. Garner</i> , 2002 UT App. 234, 52 P.3d 467 .....	26
<i>State v. Gomez</i> , 2002 UT 120, 63 P.3d 72 .....	26
<i>State v. Hancock</i> , 874 P.2d 132 (Utah App. 1994) .....	33
<i>State v. Holgate</i> , 2000 UT 74, 10 P.3d 346 .....	3, 19, 28, 34
<i>State v. Honie</i> , 2002 UT 4, 57 P.3d 977 .....	15
<i>State v. Johnson</i> , 740 P.2d 1264 (Utah 1987) .....	20
<i>State v. Lemons</i> , 844 P.2d 378 (Utah App. 1992) .....	20, 28, 33
<i>State v. McCovey</i> , 803 P.2d 1234 (Utah 1990) .....	15, 17, 18, 22, 24, 26
<i>State v. Ross</i> , 951 P.2d 236 (Utah App. 1997) .....	13, 14, 15, 22, 27, 29
<i>State v. Rudolph</i> , 970 P.2d 1221 (Utah 1998) .....	17
<i>State v. Stewart</i> , 729 P.2d 610 (Utah 1986) .....	32, 33
<i>State v. Thomas</i> , 961 P.2d 299 (Utah 1998) .....	26
<i>State v. Webb</i> , 790 P.2d 65 (Utah App. 1990) .....	26
<i>State v. Whittle</i> , 1999 UT 96, 989 P.2d 52 .....	34
<i>Stephens v. Bonneville Travel, Inc.</i> , 935 P.2d 518 (Utah 1997) .....	16

## STATE STATUTES

1990 Utah Laws ch. 207, § 1 .....	24
-----------------------------------	----

Utah Code Ann. § 76-2-103 (1999) .....	18
Utah Code Ann. § 76-3-203.1 (Supp. 1991) .....	24
Utah Code Ann. § 76-3-203.1 (Supp. 2001) .....	2, 23, 24
Utah Code Ann. § 76-4-201 (Supp. 2001) .....	cover page
Utah Code Ann. § 76-5-203 (Supp. 1990) .....	24
Utah Code Ann. § 76-5-203 (Supp. 1991) .....	24
Utah Code Ann. § 76-5-203 (Supp. 2001) .....	2, 14, 17, 18, 20, 23, 25
Utah Code Ann. § 76-5-302 (Supp. 2001) .....	2, 13, 24
Utah Code Ann. § 78-2a-3 (Supp. 2002) .....	1

## STATE CONSTITUTIONAL PROVISIONS AND RULES

Utah Const. Art. VI .....	16
Utah R. App. P. 24 .....	26
Utah R. Crim. P. 22 .....	12, 21, 27



IN THE UTAH COURT OF APPEALS

---

STATE OF UTAH,	:	
	:	
Plaintiff/Appellee,	:	Case No. 20030359-CA
	:	
v.	:	
	:	
SILIA OLIVE,	:	
	:	
Defendant/Appellant.	:	

---

*BRIEF OF APPELLEE*

---

**JURISDICTION AND NATURE OF PROCEEDINGS**

This is an appeal from convictions for felony murder and aggravated kidnapping, both first degree felonies, and for conspiracy to commit assault, a class C misdemeanor. This Court has jurisdiction pursuant to the “pour-over” provisions of Utah Code Ann. § 78-2a-3(2)(j) (Supp. 2002).

**ISSUES ON APPEAL AND STANDARD OF REVIEW**

- I. Did the trial court commit plain error in not sua sponte abolishing the crime of felony murder or adding substantive elements to it where no settled appellate law supports such action?**

Because defendant did not preserve this claim below, it succeeds on appeal only if she can establish plain error. To establish plain error, defendant must show that (1) an error exists; (2) the error should have been obvious to the trial court; and (3) the error was prejudicial. *State v. Dunn*, 850 P.2d 1201, 1208-09 (Utah 1993).

**II. Did the trial court commit plain error under either the state or federal double jeopardy clause in not dismissing defendant's felony murder conviction where the supreme court has held that felony murder and the predicate crime do not merge?**

The same standard of review applies to this point as to Point I.

**III. Does defendant's claim that the trial court committed plain error in not dismissing her aggravated kidnapping and felony murder charges for insufficient evidence once she was acquitted of aggravated robbery fail since inconsistent verdicts do not establish insufficiency of the evidence?**

The same standard of review applies to this point as to Point I.

**IV. Has defendant shown that her trial counsel was ineffective in not challenging her aggravated kidnapping and felony murder convictions on the bases raised above where defendant has not shown that such challenges would have been successful?**

An ineffective assistance of counsel claim raised for the first time on appeal raises a question of law. *State v. Diaz*, 2002 UT App 288, ¶ 13, 55 P.3d 1131.

**CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES**

The following statutes, relevant to this appeal, are attached at Addendum A:

Utah Code Ann. § 76-5-203 (Supp. 2001);  
Utah Code Ann. § 76-5-302 (Supp. 2001);  
Utah Code Ann. § 76-3-203.1 (Supp. 2001).

**STATEMENT OF THE CASE**

Defendant was charged by amended information with one count each of aggravated robbery and conspiracy to commit murder involving Keith Williams as the victim; and with one count each of felony murder and gang-enhanced aggravated kidnapping involving Amy Tavey as the victim (R. 62-65). At her preliminary hearing,

defendant was bound over on all charges (R. 54-55, 68-69). After a six day jury trial in which she was tried with co-defendant Darius Malaga, defendant was convicted of aggravated kidnapping, felony murder, and conspiracy to commit assault. (R. 90-93, 305-06). She was found not guilty of aggravated robbery (R. 305). Defendant was sentenced to consecutive terms of fifteen-years-to-life for aggravated kidnapping and five-years-to-life for murder (R. 307-08). She was sentenced to a concurrent term of 90 days in jail for conspiracy, and was ordered to pay \$7,979.18 in restitution (R. 308). Defendant received no additional sentence for the gang enhancement (R. 307-08). Defendant timely appealed (R. 312). The supreme court transferred the matter to this Court for disposition (R. 332).

### **STATEMENT OF FACTS<sup>1</sup>**

On May 3, 2002, defendant convinced her girlfriend to lure Keith Williams, a drug associate, to defendant's apartment so that defendant's friends could assault and kidnap him (R. 346:145-46, 213-14; R. 347:280). By the end of the night, Williams had been beaten up, robbed, tied up with duct tape, and forced into the trunk of his own car (R. 346:158; R. 347:371, 376-78, 381, 387). Williams's girlfriend, Amy Tavey, who unexpectedly accompanied Williams to the apartment, had been kidnapped and murdered, her body dumped into the Jordan River (R. 346:150, 158-59, 166-67, 199, 210, 212, 236-37; R. 347:329, 334-35, 362, 485).

---

<sup>1</sup> The facts are set forth in the light most favorable to the jury's verdict. *See State v. Holgate*, 2000 UT 74, ¶ 2, 10 P.3d 346.

In August 2001, defendant was working as a staff member at the Copper Hills Drug Rehabilitation Center when she met Amanda Miller, a patient there (R. 346:134; 349: 803). Defendant and Amanda maintained a friendship after Amanda was discharged (R. 346:135). Most of the time, they did drugs together (R. 346:186).

On May 3, 2002, defendant called Amanda for a favor (R. 346:141). Amanda agreed and asked defendant what it was that she needed (R. 346:142). Defendant told Amanda that she would rather tell her in person and arranged to pick up Amanda later that evening. (R. 346:142). At the time, Amanda was staying at the home of defendant's cousins, the Laos (R. 346:140).

Sometime after dark, defendant arrived at the Lao house with Darius Malaga and Tony Pita in defendant's boyfriend's car, a white Buick (R. 346:137, 142-43; R. 349: 824). Amanda got into the car and, after a brief stop, the four drove to defendant's apartment, where they met up with defendant's boyfriend, Anthony Lavulo, and with William Raymond Wallace ("Raymond") and Marguerite Lao ("Liti") (R. 346:144-145; R. 349: 826, 828).

Once in the apartment, defendant took Amanda into a bedroom and asked her to call Keith Williams ("Boss"), a drug dealer from whom defendant and Amanda had previously purchased crystal methamphetamine ("meth") (R. 346:145-46, 214). Defendant told Amanda to convince him to come over because they were planning to beat up and kidnap him (R. 346:146, 213; R. 347:280). After four or five attempts, Amanda

was finally able to talk with Boss (R. 346:193). Several conversations later, Boss told Amanda that he would come over as soon as he could (R. 346:148, 193).

Shortly before Boss arrived, he called and talked with defendant (R. 346:150). Boss informed defendant that his girlfriend, Amy Tavey, was with him and asked if it was okay if Amy came up to the apartment with him (R. 346:150; R. 347: 362). Defendant told Boss to “go ahead and bring her” (R. 346:151; R. 347: 363-64).

Before Boss arrived, defendant told everybody what to do, and “everyone got into their places” (R. 346:149, 151). Amanda went into one of the two bedrooms (R. 346:151); Darius was standing just inside the kitchen doorway next to the door of the apartment (R. 346:156); Tony and Anthony were in the living room (R. 346:156); Raymond was in one of the bedrooms (R. 349:843). Defendant then went out onto the patio for a smoke (R. 349:839-40).

When Boss and Amy arrived at defendant’s apartment, Boss parked his car in the back of the building because he was not on good terms with “Liz,” a drug dealer who sometimes stayed with defendant (R. 347:360, 366). According to Boss, Liz had started a false rumor that he had shot at her, and that rumor was the source of tension between the two (R. 347:367).

After parking, Boss and Amy got out of the car and started walking towards defendant’s apartment (R. 347:368). Boss gave Amy his leather USA jacket to wear because she did not have a jacket at the time (R. 347:368).

As Boss and Amy came around the corner of the apartment building, they saw defendant sitting on her third-floor patio smoking a cigarette (R. 347:371). Boss joked with defendant briefly, and then walked with Amy up the stairs to defendant's apartment (R. 347:372). Defendant took one more drag of her cigarette, threw it out, and went inside (R. 347:372).

When Boss tried to open the door of defendant's apartment, he was surprised to find the door locked (R. 347:372; R. 349:840). When he had been to the apartment before, the door was always unlocked (R. 347:372). Boss knocked and waited (R. 347:372-73). About sixty seconds later, defendant answered the door, smiled and backed up (R. 347:372-73).

When Boss and then Amy stepped into the apartment, "the smile just dropped from [defendant's] face" as she looked over Boss's right shoulder (R. 347:156, 374). When Boss turned to see what defendant was looking at, Darius hit him over the head with a "silver-looking gun" (R. 347: 375). Boss's head started to bleed, and he fell to the floor (R. 346:157; R. 347: 376). Immediately, the other males joined Darius in beating Boss (R. 346: 158; R. 347:377-78). Darius told Boss that all of this was happening because he had heard that Boss had shot at Liz (R. 347:379-80).

Boss tried unsuccessfully to push Amy out the door (R. 347:378). When Amy's mouth dropped open, defendant came over and placed her hand over Amy's mouth (R. 346:158, 199).

After robbing Boss of jewelry, his wallet, and his car keys, Darius pulled Boss's black beanie over his eyes, duct taped his hands behind his back, and placed a strip of tape over his mouth (R. 347:381). Darius then pulled out his gun, placed it against the back of Boss's head, and took him to the bathroom (R. 347:383). Boss did not see Amy again, but he heard someone say that "they were going to rape her" (R. 347:383).

During the commotion, one of the males forced Amy into the kitchen and hit her (R. 349:847-48). He then stood over her, ordering her to keep her eyes on the floor (R. 349:848). Defendant told Amy to get up and led Amy down the narrow hallway back to defendant's bedroom (R. 346:159; R. 347:470; R. 349: 848). As defendant took Amy into the bedroom, Amy was crying (R. 347:470-71; R. 349:858). When Amy asked defendant not to hurt her, defendant "just told her to be quiet" (R. 347:470-71; R. 349: 858).

Soon, Darius called on defendant to help find Boss's car (R. 349:853). When defendant returned to the apartment, Boss's car was parked at the bottom of the stairs leading to the apartment (R. 346:219).

When defendant re-entered her bedroom, she found Amy in the hallway between defendant's bedroom and her private bathroom (R. 349:856). Amy was lying on the floor, cowering, as another one of the males stood over her, yelling at her to keep her eyes on the floor (R. 349:856-57). Amy was no longer wearing her leather jacket (R. 349:856,

857). As the male left the bedroom, defendant got a red “hoodie” out of her closet and told Amy to put it on (R. 346:161; R. 349:860).<sup>2</sup>

A few minutes later, Darius and the male picked Boss up and led him out of the apartment and down the stairs (R. 347:386-87). They then ordered Boss to get into the trunk of his car (R. 347:387)

About the same time, defendant told Amy to cover her head and face with the hood of the hoodie and then led Amy out of the apartment to her boyfriend’s white Buick (R. 346:166-67, 210, 212). Anthony, Amanda, and Liti followed (R. 347:473). Defendant, Amanda, and Anthony got into the front seat of the car; Amy was placed in the back seat with Liti on her right side and a pile of defendant’s clothes on her left (R. 346:167; R. 347: 474). Amy was still crying (R. 347:475).

Before leaving, defendant asked Darius, who was driving Boss’s car, to follow her because her license plates were expired, and she did not want to get pulled over by the police (R. 349:867). Defendant left the apartment complex and headed toward the Lao residence near the Jordan River (R. 346:168; R. 349:871). Darius pulled up closely behind defendant’s car and followed (R. 346:168).

Soon after leaving defendant’s apartment, Boss was able to free his hands from the duct tape, pop the trunk, and escape undetected (R. 347:390-91). About fifteen minutes later, defendant’s and Boss’s cars arrived at the Lao house (R. 346:168).

---

<sup>2</sup>A “hoodie” is a sweatshirt with a hood (R. 346:161-62).



During the ride, defendant told Amy that “if she kept her mouth shut then nothing was going to happen” (R. 346:236-37). However, defendant never told Amy she was free to leave, asked Amy where she wanted to go, or told her what was going to happen to her (R. 346:236-37; R. 347:485). Amy remained silent (R. 346:238; R. 347: 475-76).

As the two cars approached the Lao house, Darius pulled up next to defendant, told her to park, and drove off (R. 346:169; R. 349:872). Defendant parked the car and got out briefly to let Amanda out (R. 346:169; R. 347: 477). Amanda said good-bye and then walked into the Lao house (R. 346:170; R. 348:510). Everyone else stayed in the car (R. 347:476, 478). About 30 minutes later, they saw Boss’s car pull up again (R. 347:478; R. 349:882).

Darius got out of Boss’s car and approached defendant’s car (R. 347:481; R. 349: 885). Liti got out to meet Darius and asked if he was okay (R. 347:482). Ignoring the question, Darius continued to walk toward defendant’s car and asked, “Where’s the girl?” (R. 347:482). Liti told him that Amy was in the car (R. 347: 482).

Darius opened defendant’s rear door, pulled Amy out of the car, and led her away (R. 347:483; R. 349:887-88). Liti got back into defendant’s car with defendant and Anthony (R. 347:483; 349: 888). A few minutes later, all three heard multiple gunshots (R. 347:484; 349: 889).

Inside the house, Amanda also heard several gunshots (R. 346:172, 235-36). She looked out the window and saw the white Buick driving away (R. 346:232-34; R. 348:533-34).

Amy's body was found floating on her left side next to the north shore of the Jordan River (R. 347:329). An autopsy revealed that she had been murdered by gunshots fired into her back that penetrated her heart and lungs. (R. 347:334-45).

Defendant and Anthony were arrested in Bountiful, Utah on May 5 (R. 349:715). Darius, Tony and Raymond were arrested in Las Vegas, Nevada on May 13 (R. 348:595, 637-41). A gun found in the Las Vegas apartment in which they were staying matched the bullets that caused Amy Tavey's death (R. 349:686-67, 690-92, 759-62). The leather jacket Amy was wearing, as well as Amy's purse, were found in defendant's apartment (R. 347:450, 452-53).

### **SUMMARY OF THE ARGUMENT**

**Issue I.** Defendant claims that the trial court committed plain error in not abolishing the felony murder statute or adding elements that would exclude her crime. Defendant provides no controlling law to support her claims. In fact, her claims are directly contrary to settled appellate law as well as the plain language of the felony murder statute. Thus, these claims fail.

Alternatively, defendant claims that the trial court plainly erred in not dismissing her felony murder conviction because the evidence was insufficient to establish that Amy was killed in the course of the predicate offense. This claim fails because defendant has marshaled none of the evidence supporting the jury's verdict.

**Issue II.** Defendant claims that the trial court committed plain error in not merging her felony murder and aggravated kidnapping convictions under the state and

federal double jeopardy clauses. Because defendant's claim is directly contrary to controlling case law, defendant's claim fails.

**Issue III.** Defendant claims that the trial court committed plain error in not dismissing her felony murder and aggravated kidnapping convictions because the evidence was insufficient to convict her of aggravated kidnapping. Defendant argues that because she was acquitted of the charged felonies against Keith Williams, her aggravated kidnapping conviction could only be based on an intent to harm Amy Tavey, and nothing in the evidence demonstrated that she intended to harm Amy.

The variant of aggravated kidnapping with which defendant was charged required the State to prove that defendant detained Amy Tavey against her will "with intent . . . to facilitate the commission, attempted commission, or flight after commission or attempted commission of a felony." At trial, the State argued that defendant's aggravated kidnapping of Amy served as the underlying felony for a felony murder conviction. It argued that her aggravated robbery of Keith Williams served as the necessary felony supporting defendant's aggravated kidnapping conviction. The jury convicted defendant of aggravated kidnapping and felony murder, but acquitted her of aggravated robbery.

Defendant's claim rests on the assumption that, because the jury acquitted her of the felony of aggravated robbery, the evidence on that felony was insufficient to support her aggravated kidnapping conviction. Under both United States and Utah Supreme Court precedent, that assumption is erroneous. Because a jury may acquit a person for multiple reasons other than insufficiency of the evidence, acquittal on a predicate crime

does not establish insufficient evidence on the compound crime. Rather, defendant must show, under the normal sufficiency of the evidence test, that the actual evidence at trial did not support conviction of the compound crime based on that predicate felony.

Because defendant has not made that showing here, her claim fails.

**Issue IV.** Defendant claims that her trial counsel was ineffective in failing to preserve her plain error claims. To establish ineffective assistance of counsel, defendant must show both that counsel performed deficiently and that counsel's performance prejudiced him. Counsel is not ineffective for failing to raise futile objections. Where defendant's plain error arguments have not shown that the trial court erred on any of her claims, defendant has not carried that burden here.

## ARGUMENT

### **I. DEFENDANT'S CLAIM THAT THE TRIAL COURT COMMITTED PLAIN ERROR IN NOT ABOLISHING FELONY MURDER OR ADDING SUBSTANTIVE ELEMENTS TO IT FAILS WHERE NO SETTLED APPELLATE LAW SUPPORTS SUCH ACTION<sup>3</sup>**

Defendant claims that the trial court committed plain error in not merging her aggravated kidnapping conviction with her felony murder conviction because "the felony murder rule and its [e]ffect to . . . two other enhancements for Aggravated Kidnaping are

---

<sup>3</sup>Defendant asserts that this Court can reach this claim under either the plain error doctrine or rule 22(e), of the Utah Rules of Criminal Procedure. *See* Appt. Br. at 47. However, the supreme court has held that rule 22(e), which allows a court to correct an illegal sentence at any time, does not provide for review of sentences where the claim is actually a challenge to the underlying convictions. *See State v. Brooks*, 908 P.2d 856, 860 (Utah 1995). Because defendant's challenge is actually to her convictions, rule 22(e) is not applicable.

so severed [sic] and constitute such multiple penalties that the trial court should have foreseen that this issue needed to be dealt with.” Apl’t. Br. at 45. Defendant asserts that the court should have “abolish[ed] the felony murder rule,” at least “for crimes in which other enhancements will apply, i.e., Kidnaping-gang-enhanced crimes etc.” or “restricted it either in scope-strict construction or in causal connection or in time; or even require[d] a separate finding of mens rea.” Apl’t. Br. at 31, 34.<sup>4</sup> Defendant’s claims lack merit.<sup>5</sup>

To establish plain error, defendant must show that (1) an error exists; (2) the error should have been obvious to the trial court; and (3) the error was prejudicial. *State v. Dunn*, 850 P.2d 1201, 1208-09 (Utah 1993). An error is plain only if defendant can show that “the law was clear at the time of trial,” *State v. Garcia*, 2001 UT App 19, ¶ 6, 18 P.3d 1123, which in most cases means there was “settled appellate law” to guide the trial court, *State v. Ross*, 951 P.2d 236, 239 (Utah App. 1997); *see also State v. Frausto*, 2002 UT

---

<sup>4</sup>Defendant actually asserts that “Utah should either abolish the felony murder” or “at the very least,” follow other jurisdictions that “have restricted it either in scope-strict construction or in causal connection through consequence or in time; or even require a separate finding of mens rea.” Apl’t. Br. at 31. However, because defendant raises her claim under the plain error doctrine, this Court is limited to reviewing only whether the trial court obviously erred in not sua sponte taking such action.

<sup>5</sup>Throughout her brief, defendant claims that the trial court erred in not dismissing her felony murder conviction because her kidnapping conviction had already been enhanced to aggravated kidnapping and then enhanced again because of the gang enhancement. *See* Apl’t. Br. at 35-39, 44-45. However, although the jury found that she committed the aggravated kidnapping in concert with two or more people, nothing in the trial court’s sentencing ruling indicates that defendant received an enhanced sentence because of that finding. *See* R. 307-08 (sentencing defendant to maximum minimum term of fifteen-years-to-life for aggravated kidnapping conviction); Utah Code Ann. § 76-5-302 (Supp. 2001) (providing that punishment for aggravated kidnapping is “imprisonment for an indeterminate term of not less than 6, 10, or 15 years and which may be for life”).

App 259, ¶ 22, 53 P.3d 486, *cert. denied*, 63 P.3d 104 (Utah 2002). Thus, it cannot be plain error not to adopt a new rule not previously addressed by the appellate courts.

**A. Settled appellate law holds that the only mens rea necessary for felony murder is the mens rea required for the predicate offense.**

Defendant claims that the trial court committed plain error in not “requir[ing] a separate finding of mens rea” in connection with the “causes the death” element of felony murder. Aplt. Br. at 31.

The plain language of the felony murder statute contains no such mens rea requirement:

- (2) Criminal homicide constitutes murder if:
  - (d)(i) [she] is engaged in the commission, attempted commission, or immediate flight from the commission or attempted commission of any predicate offense, or is a party to the predicate offense; and
  - (ii) a person other than a party as defined in Section 76-2-202 is killed in the course of the commission, attempted commission, or immediate flight from the commission or attempted commission of any predicate offense.

Utah Code Ann. § 76-5-203(2)(d) (Supp. 2001).

Nor is a separate mens rea finding required by “settled appellate law.” *Ross*, 951 P.2d at 239. In fact, Utah’s courts have repeatedly rejected defendant’s claim. *See State v. Bluff*, 2002 UT 66, ¶ 23, 52 P.3d 1210 (noting court has already twice rejected claims that “felony murder requires the mens rea to commit murder”; re-iterating that only mens rea necessary for felony murder is “the mens rea to commit the underlying felony”); *see*

also *State v. Honie*, 2002 UT 4, ¶ 25, 57 P.3d 977; *State v. McCovey*, 803 P.2d 1234, 1238 (Utah 1990).

Against this “settled appellate law,” *Ross*, 951 P.2d at 239, defendant’s claim fails

**B. Settled appellate law holds that a trial court lacks authority to abolish the felony murder statute merely on policy grounds.**

Defendant claims that the trial court committed plain error in failing to “abolish the felony murder rule,” at least “for crimes in which other enhancements will apply, i.e., Kidnaping-gang-enhanced crimes etc.” *Aplt. Br.* at 31, 34.<sup>6</sup>

Again, defendant cites to no settled Utah law supporting her claim. *See Aplt. Br.* at 31-34. In fact, the law is uniformly to the contrary. *See Gottling v. P.R. Inc.*, 2002 UT 95, ¶ 23, 61 P.3d 989 (“This court cannot ignore or strike down an act because it is either wise or unwise. . . . Until the law is changed, this court must enforce it as it is now written, whether we agree with it or not.”) (citations and internal quotation marks omitted); *Kawamoto v. Fratto*, 2000 UT 6, ¶ 17, 994 P.2d 187 (holding courts “are bound by the language of the statute”); *State v. Gardiner*, 814 P.2d 568, 573 (Utah 1991)(holding courts are “not free to fashion . . . a rule [where] the legislature has already acted in the area”); *State v. Bishop*, 717 P.2d 261, 264 (Utah 1986) (““That the Legislature of this state has the sole power to fix the punishment to be inflicted for a particular crime, with the limitation only that it be not cruel or excessive, will not be

---

<sup>6</sup>*See note 5 supra.*

questioned.’”) (citation omitted); *State v. Gallion*, 572 P.2d 683, 688-89 (Utah 1977); *Belt v. Turner*, 25 Utah 2d 380, 381, 483 P.2d 425, 426 (1971); Utah const. Art. VI, § 1.

Consequently, defendant’s claim fails.

**C. The plain language of the felony murder statute defeats defendant’s claim that the State must prove the murder was “planned,” “foreseeable,” or “in furtherance of” the underlying felony.**

Defendant claims that the trial court committed plain error in not dismissing her felony murder conviction because “Darius Malaga’s cold blooded, unexpected execution style murder of Amy Tavey was not planned by the participants in Keith William’s [sic] assault, nor was it even foreseeable, and it was not in furtherance of the crime against Keith Williams.” Aplt. Br. at 32.

Defendant cites to no Utah authority supporting her claim that felony murder requires proof that the murderer’s conduct was “planned,” “foreseeable,” or “in furtherance of the [predicate] crime.” *See* Aplt. Br. at 32-34. Nor can she, given the plain language of the felony murder statute.

This Court’s “primary goal in interpreting statutes is to give effect to the legislative intent, as evidenced by the plain language, in light of the purpose the statute was meant to achieve.” *State v. Burns*, 2000 UT 56, ¶ 25, 4 P.3d 795. This Court “assume[s] that each term in the statute was used advisedly.” *Stephens v. Bonneville Travel, Inc.*, 935 P.2d 518, 520 (Utah 1997) (citations omitted). In addition, “statutory term[s] should be interpreted and applied according to [their] usually accepted meaning,



where the ordinary meaning of the term[s] results in an application that is neither unreasonably confused, inoperable, nor in blatant contradiction of the express purpose of the statute.” *State v. Coonce*, 2001 UT App 355, ¶ 9, 36 P.3d 533 (citations omitted). Finally, “courts are not to infer substantive terms into the text that are not already there.” *State v. Rudolph*, 970 P.2d 1221, 1229 (Utah 1998) (citation and internal quotation marks omitted).

Nothing in the plain language of the felony murder statute requires proof that the felony murder was “planned,” “foreseeable,” or “in furtherance of the [underlying felony].” Aplt. Br. at 32. *See* Utah Code Ann. § 76-5-203(2)(d). In fact, such a requirement conflicts with the “plain language [of the statute] in light of the purpose the statute was meant to achieve.” *Burns*, 2000 UT 56, ¶ 25.

The main purpose of the felony murder statute is to “deter the use of force or weapons in the commission of a felony” by “allow[ing] the State to obtain a . . . murder conviction without proving any form of *mens rea*, or mental state.” *State v. McCovey*, 803 P.2d 1234, 1238 (Utah 1990).

Consistent with that purpose, the broad language of the statute—requiring only that “a person . . . is killed in the course of the . . . predicate offense”—encompasses not only those killings perpetrated by the actor or her cohorts, but also those killings committed by the victim or third parties in response to the actor or her cohorts. *See* Utah Code Ann. § 76-5-203(2)(d). Such killings, obviously, would neither be planned nor in furtherance of the underlying felony.

It would be inconsistent with the statute’s purpose to require that the State prove that the murder was “planned”—i.e., intentional or knowing—or “foreseeable”—i.e., done with depraved indifference, recklessness, or criminal negligence. *See* Utah Code Ann. § 76-2-103 (1999) (providing that person engages in conduct “[i]ntentionally . . . when it is his conscious objective or desire to engage in the conduct or cause the result”; person “acts knowingly . . . when he is aware that his conduct is reasonably certain to cause the result”; person acts “[r]ecklessly” or “[w]ith criminal negligence” if he is or ought to be “aware of a substantial and unjustifiable risk that . . . the result will occur”); § 76-5-203(2)(a), (c) (defining homicide to include when “actor intentionally or knowingly causes the death of another” and when, “acting under circumstances evidencing a depraved indifference to human life, the actor engages in conduct which creates a grave risk of death to another and thereby causes the death of another”); § 76-5-205(1)(a) (Supp. 2001) (defining manslaughter as when actor “recklessly causes the death of another”); § 76-5-206 (1999) (defining negligent homicide as when “actor, acting with criminal negligence, causes the death of another”).

Moreover, even if foreseeability were an issue, implicit in the statute’s purpose to “deter the use of force or weapons in the commission of a felony,” *see McCovey*, 803 P.2d 1238, is a legislative finding—and thus not one which must be proved by the State—that any killing occurring during the commission of a predicate felony in which force or weapons are used is inherently foreseeable because of the nature of the underlying felony.

Finally, where Amy Tavey was a witness to the crimes of defendant and her cohorts against Keith Williams, and where Amy Tavey was kidnapped and then murdered before she could report those crimes to anyone else, defendant is hard-pressed to claim that Amy's murder was not "foreseeable" or "in furtherance of" the underlying crimes.

Thus, defendant's claim fails.

**D. Evidence that Amy was murdered during the course of several overlapping felonies demonstrates a continuous chain of events from the commencement of the first felony through the murder.**

Defendant claims that the trial court committed plain error in not dismissing her felony murder conviction because "there must be continuous action between the commission of the felony and the killing for the felony murder rule to apply." Aplt. Br. at 32. Defendant's claim, apparently, is that the evidence does not establish this "continuous action." Aplt. Br. at 32.

To establish plain error on a sufficiency of the evidence claim, "defendant must demonstrate first that the evidence was insufficient to support a conviction of the crime charged and second that the insufficiency was so obvious and fundamental that the trial court erred in submitting the case to the jury." *State v. Holgate*, 2000 UT 74, ¶ 17, 10 P.3d 346.

To demonstrate the first part of this test, "defendant must marshal all evidence supporting the jury's verdict and must then show how this marshaled evidence is insufficient to support the verdict even when viewed in the light most favorable to the

verdict.” *State v. Lemons*, 844 P.2d 378, 381 (Utah App. 1992) (internal quotation marks and citation omitted); *see also State v. Coonce*, 2001 UT App 355, ¶ 6, 36 P.3d 533 (holding defendant “must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the [defendant] resists”) (citing *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1315 (Utah App. 1991)); *Majestic Inv. Co.*, 818 P.2d at 1315 (“After constructing this magnificent array of supporting evidence, the challenger must ferret out a fatal flaw in the evidence.”). Defendant has not carried her burden here; therefore, this claim fails. It also fails on the merits.

To convict defendant of felony murder, the State had to prove that she

- (i) [was] engaged in the commission, attempted commission, or immediate flight from the commission or attempted commission of any predicate offense, or [was] a party to the predicate offense; and
- (ii) a person other than a party as defined in Section 76-2-202 [was] killed in the course of the commission, attempted commission, or immediate flight from the commission or attempted commission of any predicate offense.

Utah Code Ann. § 76-5-203 (Supp. 2001). The supreme court has suggested that the phrase, “in the course of,” “denotes a continuing chain of events,” requiring “a close proximity in terms of time and distance” and “no break in the chain of events from the inception of the felony to the time of the homicide.” *State v. Johnson*, 740 P.2d 1264, 1267-68 (Utah 1987) (citation omitted).

Here, the evidence presented to the jury shows a continuous chain of events from the luring of Keith Williams over to defendant's apartment so that he could be attacked and kidnapped, to defendant's putting her hand over Amy Tavey's mouth and restraining her, first in defendant's bedroom and then in defendant's car, to the taking of Amy's property, to Darius's retrieving Amy from defendant's car in order to murder her. (R. 346:141, 145-46, 158-59, 161, 166-69, 210, 212-13, 219, 236-37; R. 347:280, 374-78, 381-84, 470-71, 473, 478, 481-84; R. 349:848, 853, 856-57, 860, 867, 882, 885, 887-88).

Consequently, the trial court did not err, let alone obviously err, in not dismissing defendant's felony murder conviction.

**II. DEFENDANT'S CLAIM THAT THE TRIAL COURT COMMITTED PLAIN ERROR UNDER EITHER THE STATE OR FEDERAL DOUBLE JEOPARDY CLAUSE IN NOT DISMISSING DEFENDANT'S FELONY MURDER CONVICTION FAILS WHERE THE SUPREME COURT HAS HELD THAT FELONY MURDER AND THE PREDICATE CRIME DO NOT MERGE<sup>7</sup>**

Defendant claims that the trial court committed plain error in convicting her of both aggravated kidnapping and felony murder because "her conviction of Kidnaping . . . was enhanced to Aggravated Kidnaping and then enhanced again for the 'Gang Enhancement' . . . and then essentially enhanced again with the use of the Felony Murder Statute . . . and . . . such double or triple enhancements are really lesser included offenses and should be treated as such." *Aplt. Br.* at 35. Defendant claims that, otherwise, "these

---

<sup>7</sup>This claim is also not reachable under rule 22(e), Utah Rules of Criminal Procedure. *See* note 3 *supra*; *see also State v. Brooks*, 908 P.2d 856, 860 (Utah 1995) (holding that merger claim "is not to the legality of the sentence but to the conviction of the lesser included offense").

double and triple enhancements violate the state and federal guarantees against double jeopardy.” Aplt. Br. at 35. In effect, defendant argues that double jeopardy guarantees prevent her conviction for both felony murder and aggravated kidnapping. This claim lacks merit.

As previously discussed, to establish plain error, defendant must show that (1) an error exists; (2) the error should have been obvious to the trial court; and (3) the error was prejudicial. *State v. Dunn*, 850 P.2d 1201, 1208-09 (Utah 1993). An error is plain only if defendant can show that “the law was clear at the time of trial,” *State v. Garcia*, 2001 UT App 19, ¶ 6, 18 P.3d 1123, which in most cases means there was “settled appellate law” to guide the trial court, *State v. Ross*, 951 P.2d 236, 239 (Utah App. 1997); *see also State v. Frausto*, 2002 UT App 259, ¶ 22, 53 P.3d 486, *cert. denied*, 63 P.3d 104 (Utah 2002).

In presenting her argument, defendant acknowledges that the case law is directly contrary to her claim. *See* Aplt. Br. at 35 (“The claim that the felony murder statute and the underlying predicate act were really less[e]r included offenses did not go far in 1990 when it was raised before the Utah Supreme Court.”). In *State v. McCovey*, 803 P.2d 1234, 1239 (Utah 1990), the supreme court held that the legislature intended felony murder and predicate offense to be punished as separate crimes; therefore, “[a]llowing punishment for both felony murder and the underlying felony violates neither the double jeopardy principles of the fifth amendment to the United States Constitution, nor Utah Code Ann., § 76-1-402(3).” *See also Missouri v. Hunter*, 459 U.S. 359, 366, 368 (1983) (“With respect to cumulative sentences imposed in a single trial, the Double Jeopardy

Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.” ); *Brown v. Ohio*, 432 U.S. 161, 165 (1977) (“The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments.”).

Defendant contends, however, that “statutory changes since *McCovey* make the issue ripe for review.” Aplt. Br. at 35-36. Alternatively, she claims that *McCovey* is distinguishable. Neither of defendant’s contentions establish plain error.

**A. Defendant’s assertion that statutory changes since *McCovey* undermine that decision is incorrect.**

Defendant claims that recent statutory amendments render reconsideration of *McCovey*’s holding “ripe for review.” Aplt. Br. at 36. First, defendant asserts that, “[s]ince the decision in *McCovey*, Utah has modified the Felony Murder State to make the penalty a first degree felony with a punishment of Five to Life.” Aplt. Br. at 36. In addition, defendant asserts, “since the time of *McCovey* Utah has enacted the ‘Gang Enhancement’ statute in 76-3-203.1 making any defendant subject to an enhanced penalty if the underlying crime was committed in concert with two or more persons.” Aplt. Br. at 36. Because neither of defendant’s assertions are correct, this claim fails.

First, contrary to defendant’s claim, “Utah has [*not*] modified the Felony Murder Statute [since *McCovey*] to make the penalty a first degree felony with a punishment of Five to Life.” Aplt. Br. at 36. The crime was merely renamed; it has always been a first degree felony. When *McCovey* was decided, section 76-5-203 (which includes felony

murder) was labeled “murder in the second degree,” with “[m]urder in the second degree [being] a felony of the first degree.” Utah Code Ann. § 76-5-203 (1990). In 1991, the statute was relabeled “murder,” with “[m]urder [being] a first degree felony.” *See* Utah Code Ann. § 76-5-203 (Supp. 1991). At all times, felony murder was a first degree felony. *Id.* § 76-5-203 (1990); § 76-5-203 (Supp. 1991).

Second, again contrary to defendant’s claim, *see* Aplt. Br. at 36, section 76-3-203.1, the gang enhancement statute, *was* in effect when *McCovey* was decided. Section 76-3-203.1 became effective on April 23, 1990. *See* 1990 Utah Laws ch. 207, § 1; Utah Code Ann. § 76-3-203.1 (Supp. 1991). *McCovey* wasn’t decided until eight months later, on December 18, 1990. *See McCovey*, 803 P.2d at 1234. Moreover, *McCovey*’s holding has since been reaffirmed by the supreme court at least twice. *See State v. Bluff*, 2002 UT 66, ¶ 38, 52 P.3d 1210; *State v. Bisner*, 2001 UT 99, ¶ 65, 37 P.3d 1073.<sup>8</sup>

Thus, defendant’s claim on this basis fails.

**B. Distinctions between defendant’s case and *McCovey* do not, without more, establish plain error.**

Defendant asserts that distinctions between her case and *McCovey* also “make this issue one which needs to be reviewed by this Court.” Aplt. Br. at 36. Defendant notes

---

<sup>8</sup>In any case, as previously discussed, defendant has not shown that her aggravated kidnapping sentence was in fact enhanced under section 76-3-203.1. *See* note 5 *supra*. Defendant’s sentence on that conviction was fifteen-years-to-life (R. 306-07); *see also* Utah Code Ann. § 76-5-302(Supp. 2001) (providing that punishment for aggravated kidnapping is “imprisonment for an indeterminate term of not less than 6, 10, or 15 years and which may be for life”). Nothing in the trial court’s sentencing ruling supports defendant’s claim that that sentence included a gang enhancement. *See* R. 352:12-15.



first that, unlike in *McCovey*, the victim of the predicate crime here “is the same as the murder.” Aplt. Br. at 36. In addition, unlike in *McCovey*, defendant here did not “fire[] the gun killing the murder victim.” Aplt. Br. at 36. Finally, defendant claims, “[h]ere, unlike in *McCovey*, there are other more serious enhancements already at work other than the Felony Murder statute,” i.e., “the twice enhanced Kidnaping conviction”; this Court should determine, defendant asserts, whether a third enhancement, i.e., the penalty for the felony murder, “is a violation of . . . the Doctrine of Double Jeopardy.” Aplt. Br. at 37.

As previously stated, to establish obvious error, defendant must show that “the law was clear at the time of trial.” *Garcia*, 2001 UT App 19, ¶ 6. Defendant does not carry that burden by merely distinguishing settled appellate law from the case at bar.

In any case, none of defendant’s distinctions undermine *McCovey*’s holding. For example, nothing in *McCovey* requires that the victim of the predicate felony be different from the victim of the murder. *See* Aplt. Br. at 36. In fact, *Bisner*—which is not cited by defendant—expressly rejected such a claim. *See Bisner*, 2001 UT 99, ¶ 63; *see also Bluff*, 2002 UT 66, ¶¶ 3-12, 38.

Similarly, nothing in *McCovey* requires that the person convicted of felony murder actually “fire[] the gun killing the murder victim.” Aplt. Br. at 36. The statute only requires that “a person other than a party . . . [be] killed in the course of the commission . . . or immediate flight from the commission . . . of any predicate offense.” Utah Code Ann. § 76-5-203.

Finally, defendant's claim that *McCovey* does not apply because "there are other more serious enhancements already at work" because of "the twice enhanced Kidnaping conviction," Aplt. Br. at 37, is also unavailing. As previously noted, the trial court's sentencing ruling does not indicate that defendant's aggravated kidnapping sentence was increased because of a gang enhancement. *See* note 5 *supra*. In any case, contrary to defendant's assertion, it is for the legislature, not the courts, to "determine how many enhancements can legally apply to the underlying crime before there is a violation of . . . the Doctrine of Double Jeopardy." Aplt. Br. at 37. *See McCovey*, 803 P.2d at 1239; *Hunter*, 459 U.S. at 366, 368; *Albernaz v. United States*, 450 U.S. 333, 344 (1981); *Brown*, 432 U.S. at 165.

Consequently, defendant's claim fails.<sup>9</sup>

---

<sup>9</sup>In the midst of her double jeopardy argument, defendant spends two paragraphs challenging as "unfair" the trial court's sentencing her to a minimum mandatory term of fifteen years for aggravated kidnapping. Aplt. Br. at 40. Where defendant provides no citation to the record to support her claim, let alone "reasoned analysis" of the record based on the scant legal authority she cites, *State v. Thomas*, 961 P.2d 299, 305 (Utah 1998), this Court should reject defendant's claim as inadequately briefed. *See also* Utah R. App. P. 24(a)(9); *State v. Gomez*, 2002 UT 120, ¶ 20, 63 P.3d 72; *State v. Garner*, 2002 UT App 234, ¶ 12, 52 P.3d 467; *State v. Webb*, 790 P.2d 65, 72 n.2 (Utah App. 1990). This is especially so where neither defendant nor the cases she cites address the trial court's express statements in support of his sentencing decision—that defendant "was the primary reason that Miss Tavey remained exposed to [grave] danger until it ultimately resulted in her death" and that "you just cannot ignore the results of the events that you helped to set in motion and could have stopped" (R. 352:13).

**III. DEFENDANT’S CLAIM THAT THE TRIAL COURT COMMITTED  
PLAIN ERROR IN NOT DISMISSING HER AGGRAVATED  
KIDNAPPING AND FELONY MURDER CHARGES ONCE SHE  
WAS ACQUITTED OF AGGRAVATED ROBBERY FAILS  
BECAUSE INCONSISTENT VERDICTS DO NOT ESTABLISH  
INSUFFICIENCY OF THE EVIDENCE<sup>10</sup>**

Defendant claims that the trial court committed plain error in not dismissing both the aggravated kidnapping charge and the felony murder charge on the ground that the evidence was insufficient to convict her of aggravated kidnapping. *See* Aplt. Br. at 40-41. Specifically, defendant claims that, “because the jury acquitted her of any felony crime involving Keith Williams, the only way to properly convict her of Aggravated Kidnaping was to find the intent to commit a felony crime against Amy Tavey,” and “[n]o where in the record is there evidence that [defendant] intended to hurt [Amy] Tavey that night.” Aplt. Br. at 40-41. Defendant’s claim lacks merit.

As previously stated, to establish plain error, defendant must show that (1) an error exists; (2) the error should have been obvious to the trial court based on “settled appellate law,” *Ross*, 951 P.2d at 239 (Utah App. 1997) or “law [that] was clear at the time of trial,” *Garcia*, 2001 UT App 19, ¶ 6; and (3) the error was prejudicial. *See Dunn*, 850 P.2d at 1208-09.

To establish plain error on a sufficiency of the evidence claim, “defendant must demonstrate first that the evidence was insufficient to support a conviction of the crime

---

<sup>10</sup>For the same reasons previously stated, this claim is also not reachable under rule 22(e), Utah Rules of Criminal Procedure. *See* notes 3 & 8 *supra*.

charged and second that the insufficiency was so obvious and fundamental that the trial court erred in submitting the case to the jury.” *Holgate*, 2000 UT 74, ¶ 17.

To demonstrate the first part of this test, “defendant must marshal all evidence supporting the jury’s verdict and must then show how this marshaled evidence is insufficient to support the verdict even when viewed in the light most favorable to the verdict.” *Lemons*, 844 P.2d at 381 (internal quotation marks and citation omitted); *see also Coonce*, 2001 UT App 355, ¶ 6; *Majestic Inv. Co.*, 818 P.2d at 1315.

**A. Proceedings below.**

Defendant was initially charged with one count each of aggravated robbery and conspiracy to commit murder involving Keith Williams as the victim; and with one count each of felony murder and gang-enhanced aggravated kidnapping involving Amy Tavey as the victim (R. 62-65). In closing argument, the State argued that defendant’s aggravated kidnapping of Amy Tavey served as the predicate offense for felony murder (R. 351:1009-10). It argued further that defendant’s aggravated robbery of Keith Williams served as the underlying felony supporting her aggravated kidnapping conviction (R. 351:1010). The jury convicted defendant of felony murder and aggravated kidnapping, but acquitted her of aggravated robbery (R. 305-06).

**B. Controlling law defeats defendant’s premise that inconsistent verdicts render evidence insufficient as a matter of law.**

Defendant claims that her convictions for aggravated kidnapping and felony murder should have been dismissed because, “as the jury acquitted her of any felony

crime involving Keith Williams . . . , the only way to properly convict her of Aggravated Kidnaping was to find the intent to commit a felony crime against Amy Tavey herself,” and “[n]o where in the record is there evidence that [defendant] intended to hurt [Amy] Tavey that night.” Aplt. Br. at 40-41.

Implicit in defendant’s claim is an assumption that the evidence was insufficient as a matter of law to convict her of aggravated kidnapping based on the predicate offense of aggravated robbery, because the jury acquitted her on the aggravated robbery charge. Thus, her argument rests on the premise that a jury’s verdicts must be consistent.

Defendant cites no “settled appellate law,” *Ross*, 951 P.2d at 239, supporting that premise. *See* Aplt. Br. 40-45. In fact, the law is to the contrary.

In 1932, the Supreme Court was asked to decide a case in which the defendant, charged with three interrelated crimes equally supported by the evidence, argued that his conviction by jury for one of those crimes had to be vacated where the same jury acquitted him of the other two. *Dunn v. United States*, 284 U.S. 390, 393 (1932). The Supreme Court rejected the claim, stating:

The most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant’s guilty. We interpret the acquittal as no more than their assumption of a power which they had no right to exercise, but to which they were disposed through lenity.

*Id.* (internal quotation marks and citations omitted). The Court concluded, “That the verdict may have been the result of compromise, or of a mistake on the part of the jury, is

possible. But verdicts cannot be upset by speculation or inquiry into such matters.” *Id.* at 394.

In 1984, the Supreme Court considered whether the same rule applied where the jury convicted the defendant of one crime that incorporated commission of another and the jury acquitted defendant of the incorporated crime. *See United States v. Powell*, 469 U.S. 57, 60-61 (1984).

In that case, the defendant was charged with multiple drug crimes, including (1) conspiring to possess cocaine with the intent to distribute; (2) possessing a specific quantity of cocaine with intent to distribute; and (3) using a telephone to commit the other two crimes. *Id.* at 60. The jury acquitted the defendant of the first two crimes but convicted her of the third. *Id.*

On appeal, Powell “argued that the verdicts were inconsistent, and that she therefore was entitled to reversal of the telephone facilitation convictions.” *Id.* The circuit court agreed with Powell, holding that “the jury’s acquittals on the predicate offenses required a finding of insufficient evidence on the compound offenses.” *Id.* at 62 n.6. The Supreme Court, applying *Dunn*, reversed. *Id.* at 64-69.

In support of its decision, the Court explained:

[I]nconsistent verdicts—even verdicts that acquit on a predicate offense while convicting on the compound offense—should not necessarily be interpreted as a windfall to the Government at the defendant’s expense. It is equally possible that the jury, convinced of guilt, properly reached its conclusion on the compound offense, and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the lesser offense. But in such situations

the Government has no recourse if it wishes to correct the jury's error; the Government is precluded from appealing or otherwise upsetting such an acquittal by the Constitution's Double Jeopardy Clause. . . .

. . . The fact that the inconsistency may be the result of lenity, coupled with the Government's inability to invoke review, suggests that inconsistent verdicts should not be reviewable.

*Id.* at 65-66.

The Court also rejected "a rule that would allow criminal defendants to challenge inconsistent verdicts on the ground that in their case the verdict was not the product of lenity, but of some error that worked against them." *Id.* at 66. "Such an individualized assessment would be based either on pure speculation, or would require inquiries into the jury's deliberations that courts generally will not undertake." *Id.*

Finally, the Supreme Court addressed defendant's claim "that an acquittal on a predicate offense necessitates a finding of insufficient evidence on a compound felony count." *Id.* at 68. The Court explained that such an argument "simply misunderstands the nature of the inconsistent verdict problem":

Whether presented as an insufficient evidence argument, or as an argument that the acquittal on the predicate offense should collaterally estop the Government on the compound offense, the argument necessarily assumes that the acquittal on the predicate offense was proper—the one the jury 'really meant.' This, of course, is not necessarily correct; all we know is that the verdicts are inconsistent. The Government could just as easily—and erroneously—argue that since the jury convicted on the compound offense the evidence on the predicate offense must have been sufficient.

Thus, the Court warned:

[R]eview of the sufficiency of the evidence undertaken by the trial and appellate courts . . . should not be confused with the problems caused by inconsistent verdicts. Sufficiency-of-the-evidence review involves assessment by the courts of whether the evidence adduced at trial could support *any rational determination* of guilty beyond a reasonable doubt. . . . This review should be independent of the jury's determination that evidence on another count was insufficient.

*Id.* at 67 (emphasis added).

In 1986, our state supreme court considered whether the principles of *Dunn* and *Powell* applied in Utah. *See State v. Stewart*, 729 P.2d 610 (Utah 1986) (per curiam). In *Stewart*, two co-defendants challenged the sufficiency of the evidence supporting their convictions based on the jury's acquittal of two other co-defendants of the crime where the evidence of the latters' guilt was strong. *Id.* at 611.

In rejecting the defendants' claim, the court concluded that their argument was "premised upon the *erroneous assumption* that the acquittals resulted from a determination by the jury that the evidence was necessarily insufficient to find guilty beyond a reasonable doubt." *Stewart*, 729 P.2d at 614 (emphasis added). "Such a view is purely speculative," the court held, because "[a] jury's acquittal of a defendant, whether tried separately or jointly with others, may also result from some compromise, mistake, or lenity on the jury's part." *Id.* "But verdicts cannot be upset by speculation or inquiry into such matters.'" *Id.* at 612 (quoting *Dunn v. United States*, 284 U.S. 390, 394 (1932)).



The court repeated *Powell*'s warning that review of a case for sufficiency of the evidence

‘should not be confused with the problems caused by inconsistent verdicts. Sufficiency-of-the-evidence review involves assessment by the courts of whether the evidence adduced at trial could support *any rational determination* of guilty beyond a reasonable doubt. . . . This review should be independent of the jury’s determination that evidence on another count was insufficient.’

*Id.* at 613 (on rehearing) (quoting *Powell*, 469 U.S. at 67); *see also State v. Hancock*, 874 P.2d 132, 134 (Utah App. 1994) (“In Utah, ‘it is generally accepted that the inconsistency of verdicts is not, by itself, sufficient ground to set the verdicts aside.’”) (quoting *Stewart*, 729 P.2d at 613).

In this case, defendant assumes that the jury could not simultaneously acquit her of the aggravated robbery of Keith Williams and find her guilty of the aggravated kidnapping of Amy Tavey based on that aggravated robbery. *See* Aplt. Br. at 40-41. Under *Stewart*, that is an “erroneous assumption.” *Stewart*, 729 P.2d at 614. In fact, the jury *could have* acquitted defendant of aggravated robbery by mistake or for reasons of lenity and still convicted her of aggravated kidnapping based on that same aggravated robbery. *See id.*; *Powell*, 469 U.S. at 64-69; *Dunn*, 284 U.S. at 393-94.

Defendant does not recognize this possibility. *See* Aplt. Br. at 40-45. Thus, she fails to marshal any of the evidence supporting the jury’s aggravated kidnapping verdict based on the aggravated robbery of Keith Williams. *See Coonce*, 2001 UT App 355, ¶ 6 (explaining marshaling required to support insufficient evidence claim); *Lemons*, 844

P.2d at 381 (same); *Majestic Inv. Co.*, 818 P.2d at 1315 (same). Defendant therefore neither shows that the evidence was insufficient to support the jury's verdict or that "the sufficiency was so obvious and fundamental that the trial court erred in submitting the case to the jury." *Holgate*, 2000 UT 74, ¶ 17.

Consequently, defendant's sufficiency of the evidence claim fails.

**IV. DEFENDANT HAS NOT SHOWN THAT HER TRIAL COUNSEL WAS INEFFECTIVE IN NOT CHALLENGING HER AGGRAVATED KIDNAPPING AND FELONY MURDER CHARGES ON THE BASES RAISED ABOVE WHERE DEFENDANT HAS NOT SHOWN THAT SUCH CHALLENGES WOULD HAVE BEEN SUCCESSFUL**

As an alternative to her plain error claims, defendant claims that her trial counsel "should have researched the application of the felony murder statute and filed any motion necessary to preserve the right to challenge the state statute when her conviction under the law had such a tenuous connection to the murder." She claims that counsel's failure to do so constituted ineffective assistance of counsel. *Aplt. Br.* at 46.

To succeed on an ineffective assistance of counsel claim, defendant must show both that his counsel "rendered deficient performance which fell below an objective standard of reasonable professional judgment" and that "counsel's deficient performance prejudiced him." *State v. Chacon*, 962 P.2d 48, 50 (Utah 1998) (citations omitted); *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984).

However, "the failure of counsel to make motions or objections which would be futile if raised does not constitute ineffective assistance." *State v. Whittle*, 1999 UT 96,

¶ 34, 989 P.2d 52 (citations and internal quotation marks omitted). Thus, to succeed on a claim involving failure to make motions or objections, defendant must show that counsel would have prevailed under the law at the time had counsel made those motions or objections. *See State v. Dunn*, 850 P.2d 1201, 1228 (Utah, 1993) (“To establish a claim of ineffectiveness based on an oversight or misreading of law, a defendant bears the burden of demonstrating why, on the basis of the law in effect at the time of trial, his or her trial counsel's performance was deficient) (citing *State v. Bullock*, 791 P.2d 155, 159 (Utah 1989); *State v. Carter*, 776 P.2d 886, 894 (Utah 1989); *State v. Lovell*, 758 P.2d 909, 913 (Utah 1988); *State v. Verde*, 770 P.2d 116, 118 (Utah 1989); *State v. Iacono*, 725 P.2d 1375, 1378 (Utah 1986) (per curiam); *State v. Malmrose*, 649 P.2d 56, 60 (Utah 1982)).

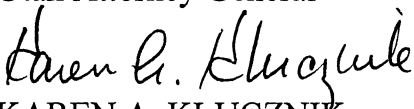
Defendant presents three claims on appeal. On none of them has defendant establish that the trial court committed plain error. Since defendant's ineffective assistance claim is based on those same arguments, *see pp. 13-32 supra*, defendant also has not shown “why, on the basis of the law in effect at the time of trial, his or her trial counsel's performance was deficient.” *Dunn*, 850 P.2d at 1228. Consequently, defendant's ineffective assistance claim fails.

## CONCLUSION

Based on the foregoing, the State asks this Court to affirm defendant's convictions and sentences.

RESPECTFULLY SUBMITTED 7 June 2004.

MARK L. SHURTLEFF  
Utah Attorney General

  
KAREN A. KLUCZNIK  
Assistant Attorney General

### CERTIFICATE OF MAILING

I certify that on 7 June 2004, I caused to be mailed, by U.S. Mail, postage prepaid, two accurate copies of this ***BRIEF OF APPELLEE*** to Julie George, 32 Exchange Place, Suite 101, Salt Lake City, Utah 84111, Attorney for Appellant.

Karen A. Kluge

# Addendum A

## **76-5-203. Murder.**

- (1) As used in this section, "predicate offense" means:
  - (a) violation of Section 58-37d-4 or 58-37d-5, Clandestine Drug Lab Act;
  - (b) child abuse, under Subsection 76-5-109(2)(a), when the victim is younger than 18 years of age;
  - (c) kidnapping under Section 76-5-301;
  - (d) child kidnapping under Section 76-5-301.1;
  - (e) aggravated kidnapping under Section 76-5-302;
  - (f) rape of a child under Section 76-5-402.1;
  - (g) object rape of a child under Section 76-5-402.3;
  - (h) sodomy upon a child under Section 76-5-403.1;
  - (i) forcible sexual abuse under Section 76-5-404;
  - (j) sexual abuse of a child or aggravated sexual abuse of a child under Section 76-5-404.1;
  - (k) rape under Section 76-5-402;
  - (l) object rape under Section 76-5-402.2;
  - (m) forcible sodomy under Section 76-5-403;
  - (n) aggravated sexual assault under Section 76-5-405;
  - (o) arson under Section 76-6-102;
  - (p) aggravated arson under Section 76-6-103;
  - (q) burglary under Section 76-6-202;
  - (r) aggravated burglary under Section 76-6-203;
  - (s) robbery under Section 76-6-301;
  - (t) aggravated robbery under Section 76-6-302; or
  - (u) escape or aggravated escape under Section 76-8-309.
- (2) Criminal homicide constitutes murder if:
  - (a) the actor intentionally or knowingly causes the death of another;
  - (b) intending to cause serious bodily injury to another, the actor commits an act clearly dangerous to human life that causes the death of another;
  - (c) acting under circumstances evidencing a depraved indifference to human life, the actor engages in conduct which creates a grave risk of death to another and thereby causes the death of another;
  - (d) (i) the actor is engaged in the commission, attempted commission, or immediate flight from the commission or attempted commission of any predicate offense, or is a party to the predicate offense; and  
(ii) a person other than a party as defined in Section 76-2-202 is killed in the course of the commission, attempted commission, or immediate flight from the commission or attempted commission of any predicate offense;
  - (e) the actor recklessly causes the death of a peace officer while in the commission or attempted commission of:
    - (i) an assault against a peace officer under Section 76-5-102.4; or
    - (ii) interference with a peace officer while making a lawful arrest under Section 76-8-305 if the actor uses force against a peace officer;
  - (f) commits a homicide which would be aggravated murder, but the offense is reduced pursuant to Subsection 76-5-202(3); or
  - (g) the actor commits aggravated murder, but special mitigation is established under Section 76-5-205.5.
- (3) Murder is a first degree felony.

- (4) (a) It is an affirmative defense to a charge of murder or attempted murder that the defendant caused the death of another or attempted to cause the death of another:
- (i) under the influence of extreme emotional distress for which there is a reasonable explanation or excuse; or
  - (ii) under a reasonable belief that the circumstances provided a legal justification or excuse for his conduct although the conduct was not legally justifiable or excusable under the existing circumstances.
- (b) Under Subsection (4)(a)(i) emotional distress does not include:
- (i) a condition resulting from mental illness as defined in Section 76-2-305; or
  - (ii) distress that is substantially caused by the defendant's own conduct.
- (c) The reasonableness of an explanation or excuse under Subsection (4)(a)(i) or the reasonable belief of the actor under Subsection (4)(a)(ii) shall be determined from the viewpoint of a reasonable person under the then existing circumstances.
- (d) This affirmative defense reduces charges only as follows:
- (i) murder to manslaughter; and
  - (ii) attempted murder to attempted manslaughter.



## **76-5-302. Aggravated kidnapping.**

(1) An actor commits aggravated kidnapping if the actor, in the course of committing unlawful detention or kidnapping:

(a) possesses, uses, or threatens to use a dangerous weapon as defined in Section 76-1-601; or

(b) acts with intent:

(i) to hold the victim for ransom or reward, or as a shield or hostage, or to compel a third person to engage in particular conduct or to forbear from engaging in particular conduct;

(ii) to facilitate the commission, attempted commission, or flight after commission or attempted commission of a felony;

(iii) to hinder or delay the discovery of or reporting of a felony;

(iv) to inflict bodily injury on or to terrorize the victim or another;

(v) to interfere with the performance of any governmental or political function; or

(vi) to commit a sexual offense as described in Title 76, Chapter 5, Part 4, Sexual Offenses.

(2) As used in this section, “in the course of committing unlawful detention or kidnapping” means in the course of committing, attempting to commit, or in the immediate flight after the attempt or commission of a violation of:

(a) Section 76-5-301, kidnapping; or

(b) Section 76-5-304, unlawful detention.

(3) Aggravated kidnapping is a first degree felony punishable by imprisonment for an indeterminate term of not less than 6, 10, or 15 years and which may be for life. Imprisonment is mandatory in accordance with Section 76-3-406.

**76-3-203.1. Offenses committed in concert with two or more persons — Notice — Enhanced penalties.**

(1) (a) A person who commits any offense listed in Subsection (4) is subject to an enhanced penalty for the offense as provided in Subsection (3) if the trier of fact finds beyond a reasonable doubt that the person acted in concert with two or more persons.

(b) "In concert with two or more persons" as used in this section means the defendant was aided or encouraged by at least two other persons in committing the offense and was aware that he was so aided or encouraged, and each of the other persons:

(i) was physically present; or

(ii) participated as a party to any offense listed in Subsection (4).

(c) For purposes of Subsection (1)(b)(ii):

(i) other persons participating as parties need not have the intent to engage in the same offense or degree of offense as the defendant; and

(ii) a minor is a party if the minor's actions would cause him to be a party if he were an adult.

(2) The prosecuting attorney, or grand jury if an indictment is returned, shall cause to be subscribed upon the information or indictment notice that the defendant is subject to the enhanced penalties provided under this section.

(3) The enhanced penalty for a:

(a) class B misdemeanor is a class A misdemeanor;

(b) class A misdemeanor is a third degree felony;

(c) third degree felony is a second degree felony;

(d) second degree felony is a first degree felony; and

(e) first degree felony is an indeterminate prison term of not less than nine years and which may be for life.

(4) Offenses referred to in Subsection (1) are:

(a) any criminal violation of Title 58, Chapter 37, 37a, 37b, or 37c, regarding drug-related offenses;

(b) assault and related offenses under Title 76, Chapter 5, Part 1;

(c) any criminal homicide offense under Title 76, Chapter 5, Part 2;

(d) kidnapping and related offenses under Title 76, Chapter 5, Part 3;

(e) any felony sexual offense under Title 76, Chapter 5, Part 4;

(f) sexual exploitation of a minor as defined in Section 76-5a-3;

(g) any property destruction offense under Title 76, Chapter 6, Part 1;

(h) burglary, criminal trespass, and related offenses under Title 76, Chapter 6, Part 2;

(i) robbery and aggravated robbery under Title 76, Chapter 6, Part 3;

(j) *theft and related offenses* under Title 76, Chapter 6, Part 4;

(k) any fraud offense under Title 76, Chapter 6, Part 5, except Sections 76-6-503, 76-6-504, 76-6-505, 76-6-507, 76-6-508, 76-6-509, 76-6-510, 76-6-511, 76-6-512, 76-6-513, 76-6-514, 76-6-516, 76-6-517, 76-6-518, and 76-6-520;

(l) any offense of obstructing government operations under Title 76, Chapter 8, Part 3, except Sections 76-8-302, 76-8-303, 76-8-304, 76-8-307, 76-8-308, and 76-8-312;

(m) tampering with a witness or other violation of Section 76-8-508;

(n) extortion or bribery to dismiss criminal proceeding as defined in Section 76-8-509;

(o) any explosives offense under Title 76, Chapter 10, Part 3;

- (p) any weapons offense under Title 76, Chapter 10, Part 5;
- (q) pornographic and harmful materials and performances offenses under Title 76, Chapter 10, Part 12;
- (r) prostitution and related offenses under Title 76, Chapter 10, Part 13;
- (s) any violation of Title 76, Chapter 10, Part 15, Bus Passenger Safety Act;
- (t) any violation of Title 76, Chapter 10, Part 16, Pattern of Unlawful Activity Act;
- (u) communications fraud as defined in Section 76-10-1801;
- (v) any violation of Title 76, Chapter 10, Part 19, Money Laundering and Currency Transaction Reporting Act; and
- (w) burglary of a research facility as defined in Section 76-10-2002.

(5) It is not a bar to imposing the enhanced penalties under this section that the persons with whom the actor is alleged to have acted in concert are not identified, apprehended, charged, or convicted, or that any of those persons are charged with or convicted of a different or lesser offense.