

2000

# Utah v. Manuel Ernesto Samora : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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THE STATE OF UTAH, :  
 :  
 Plaintiff/Appellee, :  
 :  
 v. :  
 :  
 MANUEL ERNESTO SAMORA, : Case No. 20000884-CA  
 : Priority No. 2  
 Defendant/Appellant. :

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**BRIEF OF APPELLANT**

Appeal from a judgment of conviction for attempted joyriding with intent to temporarily deprive owner, a class A misdemeanor, in violation of Utah Code Ann. § 41-1a-1314 (1998) and Utah Code Ann. § 76-4-101 (1999), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable J. Dennis Frederick, Judge, presiding.

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**FILED**  
Utah Court of Appeals

JAN 21 2001

Paulette Stagg  
Clerk of the Court

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**JURISDICTIONAL STATEMENT**

This Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(e) (1996). The Honorable J. Dennis Frederick, Judge, Third District Court, Salt Lake County, State of Utah sentenced Defendant/Appellant Manuel Ernesto Samora ("Appellant" or "Samora") and entered judgment of conviction for attempted joyriding with intent to temporarily deprive the owner, a class A misdemeanor (R. 42). A copy of the Judgment is in Addendum A.

**STATEMENT OF THE ISSUES, STANDARD OF REVIEWS, PRESERVATION**

Issue 1. Whether the trial judge violated due process, Appellant's right to appear and defend, and Utah R. Crim. P. 22 when he sentenced Appellant in absentia to the maximum sentence without affording defense counsel or the state an opportunity to speak at sentencing.

Standard of Review. This issue involves a question of law which is reviewed for correctness. See State v. Anderson, 929 P.2d 1107, 1110 (Utah 1996) (issue of whether defendant was properly sentenced in absentia involves a question of law). In addition, the ultimate issue as to whether Appellant voluntarily absented himself from sentencing is reviewed for correctness. See generally State v. Ham, 910 P.2d 433, 438 (Utah App. 1996) (reviewing ultimate issue of whether consent to search was voluntary for correctness). While a trial judge ordinarily has discretion in sentencing, such discretion is not unlimited. See State v. Johnson, 856 P.2d 1064, 1071 (Utah 1993) (recognizing trial court exceeds its discretion when it fails to sentence based on reliable and relevant information, and reviewing question of whether trial judge sentenced defendant based on reliable and relevant information as a question of law). Any underlying factual findings are reviewed for clear error. See generally State v. Pena, 869 P.2d 932, 935 (Utah 1994) (factual findings are reviewed for clear error).

Preservation. Although defense counsel was not given an opportunity to speak, the trial court nevertheless considered the issue of whether it was appropriate to proceed, and concluded that Appellant had voluntarily absented himself (R. 64:2). A copy of the sentencing transcript is in Addendum B. The trial court also entered findings of fact and conclusions of law, a copy of which is in Addendum C (R. 44-45). In fact, although the parties were never given the opportunity to address the issue of whether proceeding in absentia was appropriate under the circumstances of the case, the prosecutor was able to

prepare findings and conclusions on that issue (R. 64:2). Because the trial court considered this issue below, it is properly preserved for appellate review. See State v. Eldredge, 773 P.2d 29, 36 (Utah 1989) (purpose of requiring that an issue be raised in the trial court is to allow the trial judge to review the issue and correct an error).<sup>1</sup>

Alternatively, the trial judge committed plain error in proceeding in absentia and in failing to base the sentencing decision on relevant and reliable information without affording defense counsel the opportunity to speak. See Johnson, 856 P.2d at 1071; Utah R. Crim. P. 22; State v. Dunn, 850 P.2d 1201, 1208-09 (Utah 1993) (plain error occurs when an error is obvious and prejudices the defendant). Under Johnson and Utah R. Crim. P. 22(a), the error in failing to conduct a full sentencing hearing was obvious as was the denial of Samora's right to presence at sentencing pursuant to Article I, section 12, Utah Constitution. The obvious error prejudiced Samora since he received the maximum sentence when he otherwise was a candidate for probation; see discussion infra at 11.

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<sup>1</sup> The purposes of the preservation rules are to: (1) allow trial counsel the opportunity to review and correct any errors, and (2) preclude defense counsel from foregoing objections as a matter of strategy and when the strategy does not work and defendant is convicted, claiming error. Eldredge, 773 P.2d at 36; State v. Labrum, 925 P.2d 937, 939 (Utah 1996); State v. Bullock, 791 P.2d 155, 159 (Utah 1989), *cert. denied*, 497 U.S. 1024 (1990). In this case where the trial judge reviewed the issue of whether to proceed in absentia at sentencing and entered findings and conclusions on that issue, both of those purposes were met. The trial court had the opportunity to review the issue and correct the error, and no possible trial strategy existed for foregoing the objection. Accordingly, the issue was properly preserved for appeal.

Finally, the issue should also be reviewed because exceptional circumstances justifying review exist in this case. See State v. Irwin, 924 P.2d 5, 11 (Utah App. 1996). Utah R. Evid. 22(a) requires a trial judge to afford defendant the opportunity to provide relevant information at sentencing; due process requires the judge to conduct a full and fair sentencing hearing. Where the judge does not afford counsel the opportunity to speak and does not conduct a full and fair sentencing hearing, a procedural anomaly requiring review exists. See id. (exceptional circumstances doctrine generally applies to rare procedural anomalies). In addition, the question of whether the trial judge imposed legal sentence is of widespread interest as evidenced by the number of cases before this Court raising a similar issue. Id. (doctrine of exceptional circumstances may be applied where "matters of extraordinary importance or widespread interest" exist). Without appellate review, the egregious violation of due process, Utah R. Crim. P. 22 and the right to presence which occurred in this case would go unchecked. In this case where the trial judge had the obligation to conduct a full and fair sentencing hearing and failed to do so, exceptional circumstances require that this Court review the issue on appeal.

Issue 2. Whether Appellant waived his right to appeal by failing to appear at sentencing.

Preservation. The state raised this issue in its response to this Court's *sua sponte* motion for summary disposition. This Court ordered that this issue be considered as part of the plenary review of this case. See Addendum D.

Standard of Review. This issue involves a question of law. See generally Pena, 869 P.2d at 936 (questions of law are reviewed for correctness).

### **TEXT OF RELEVANT RULES AND CONSTITUTIONAL PROVISIONS**

The text of the following rules and constitutional provision is in Addendum E:

Utah R. Crim. 17(a)(2);

Utah R. Crim. P. 22;

Utah Const. art. I, § 7;

Utah Const. art. I, § 12;

U.S. Const. amend. XIV.

### **STATEMENT OF THE CASE**

On April 18, 2000, the state charged Samora with unlawful control of a motor vehicle, a third degree felony (R. 07). On August 8, 2000, Samora pled guilty to attempted unlawful control of a motor vehicle with intent to temporarily deprive, a class A misdemeanor, before the Honorable Robin Reese (R. 63). Judge Reese scheduled sentencing for September 22, 2000 before the Honorable J. Frederick Dennis (R. 63:8). When Samora failed to appear at sentencing on September 22, 2000, Judge Frederick sentenced him to the maximum one year sentence (R. 64). This appeal follows.

### **STATEMENT OF THE FACTS**

Samora was charged with taking his girlfriend's car on March 31, 2000 (R. 07, 21). According to the plea affidavit, Samora had been living with his girlfriend for over three years when he took the car, and did not intend to permanently deprive her of the vehicle (R. 21).

At the plea colloquy, Samora indicated that his former girlfriend, Kelly Johnson, was still using Samora's cell phone and had other property belonging to Samora (R. 63:6-7). The record also shows that Samora had worked full time at the same job for a year (R. 10).

After Samora pled guilty, the state requested a presentence report (R. 63:5). On September 18, 2000, Judge Frederick revoked Samora's release because he had not appeared at Adult Probation and Parole for preparation of a presentence report (R. 35).

On September 22, 2000, Samora did not appear at sentencing (R. 64:2). Without affording either party the opportunity to speak, Judge Frederick summarily concluded that Samora had voluntarily absented himself and sentenced Samora to the maximum one year sentence (R. 64:2); see Addendum B.

### **SUMMARY OF THE ARGUMENT**

The trial judge violated Utah R. Crim. P. 22(a) and due process by failing to afford the parties an opportunity to present information relevant to sentencing and by otherwise failing to base the sentence on relevant information or to conduct a full and fair sentencing hearing. Imposing a maximum sentence based solely on the failure to appear without considering the nature and circumstances of the crime, defendant's background or society's interests and without affording the parties the opportunity to present information relevant to sentencing violates the rule and due process and requires a new sentencing hearing.

The trial judge further violated due process and the Rules of Criminal Procedure by sentencing Appellant in absentia. Appellant did not knowingly waive his right to presence at sentencing in this case where he was not informed that he would be sentenced even if he were not present. The critical role of presence at sentencing requires that the right to presence not be lightly forfeited. In this case where Appellant did not waive his right to be present at sentencing, the trial court erred in sentencing him in absentia and the sentence must be vacated.

Just as he did not knowingly waive the right to presence, Samora did not knowingly waive his right to appeal. The right to appeal is essential to a fair hearing and cannot be easily waived. In this case, nothing in the record demonstrates that Samora was informed that if he did not appear at sentencing, he would waive his right to appeal any unlawful sentence which was rendered against him. In addition, Samora did not escape after an appeal was in place; instead, he did not appear at sentencing. Moreover, it would be fundamentally unfair to proceed with sentencing despite the fact that Samora was not present, then disallow an appeal of that sentence because Samora was not in custody. Finally, the rationale for dismissing appeals when an inmate escapes, while of questionable continuing validity, does not apply to this situation because the state is able to enforce any ruling on appeal in this case and has proceeded with this case and obtained a final judgment despite Samora's absence. In such circumstances, the state has reaped a

benefit from Samora's absence, so allowing review of his unlawful sentence is appropriate and necessary for the integrity of the system.

### ARGUMENT

#### POINT I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT SENTENCED APPELLANT IN ABSENTIA TO THE MAXIMUM ALLOWABLE SENTENCE WITHOUT ANY INPUT FROM EITHER PARTY.

Judge Frederick began the sentencing proceeding by pointing out, "[t]his is another case where the defendant apparently is not present . . . ." (R. 64:2). Without affording either party an opportunity to speak, Judge Frederick then stated:

Mr. Samora entered a plea of guilty to a class A misdemeanor crime of joyriding with attempt to deprive. He has failed to appear at Adult Probation and Parole and/or in this Court, I will determine thereby that he has voluntarily absented himself from these proceedings, and will order that he be committed under the plea he entered to the Adult Detention Center for a period of one year, and order that he be fined an amount of \$2500 (inaudible) [Mr. Defense Counsel].

I will order the commitment to issue forthwith, and [Mr. Prosecutor], as to findings and conclusions of law, I'll ask you to prepare.

(R. 64:2).

A. THE TRIAL JUDGE VIOLATED DUE PROCESS AND UTAH R. CRIM. P. 22 WHEN HE SENTENCED SAMORA WITHOUT CONSIDERING RELEVANT AND RELIABLE INFORMATION AND WITHOUT AFFORDING THE PARTIES THE OPPORTUNITY TO SPEAK AT SENTENCING.

The state and federal due process clauses "require[] that a sentencing judge act on reasonably reliable and relevant information in exercising discretion in fixing sentence."



State v. Howell, 707 P.2d 115, 118 (Utah 1985); see also Johnson, 856 P.2d at 1071 (state and federal due process protections applicable to sentencing require that judge make sentencing decision based on reliable and relevant information). A sentence which is not based on reliable and relevant information must be vacated. See id. at 1071-75 (vacating sentence based on unreliable hearsay report).

Utah R. Crim. P. 22(a) further attempts to effectuate the due process requirement of a full and fair sentencing hearing based on relevant and reliable information by requiring sentencing judges to give both the defendant and the prosecutor an opportunity to present any information which might be material to the sentence. Utah R. Crim. P. 22(a) states in part:

Before imposing sentence the court *shall afford* the defendant an opportunity to make a statement and to present information in mitigation of punishment, or to show any legal cause why sentence should not be imposed. The prosecuting attorney shall also be given an opportunity to present any information material to the imposition of sentence.

Utah R. Crim. P. 22(a) (emphasis added); see Howell, 707 P.2d at 118 ("[t]o ensure fairness in the sentencing procedure, [Utah R. Crim. P. 22(a)] directs trial courts to hear evidence from both the defendant and the prosecution that is relevant to the sentence to be imposed").

The plain language of Rule 22(a) places on the trial court the responsibility to afford defense counsel the opportunity to speak at sentencing and to present information

relevant to sentencing.<sup>2</sup> While Rule 22(a) mandates that the trial court give the parties the opportunity to speak at sentencing, due process as outlined in Johnson, 856 P.2d at 1071 requires that any sentence imposed by trial judges be based on reliable and relevant information. Working together, Rule 22(a) and due process require a trial judge to make sure that a fair and full sentencing hearing which meets due process requirements occurs.

In this case, the trial court did not afford defense counsel or the prosecutor the opportunity to present information relevant to sentencing. Failure to hold a full sentencing hearing and the concomitant failure to base the sentencing decision on complete and accurate information requires a new sentencing hearing pursuant to Johnson, 856 P.2d at 1071-75. In a case such as the present one where the trial judge did not afford defense counsel or the prosecutor the opportunity to present information pertinent to the sentencing decision, conducting a harmless error review would undermine the due process requirement of a full and fair sentencing hearing. Since defense counsel was not given the opportunity to present relevant information, complete information favorable to the defendant is not in the record. Moreover, the prosecutor may have been aware of mitigating circumstances and requested a less severe sentence; that information would likewise not be in the record since the prosecutor was not afforded the opportunity to speak. Reviewing the record under these circumstances to determine whether the

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<sup>2</sup> Where a defendant is represented by counsel, defendant presents information through defense counsel.

missing information would have impacted on the sentence would be ludicrous where the parties were not afforded the opportunity to include that information in the record.

Even if this Court were to attempt a review for prejudice, the record in this case demonstrates harm caused by the court's failure to afford counsel the opportunity to consider information relevant to sentencing. The record demonstrates that the crime in this case was part of a domestic dispute which occurred at the end of a three-year live-in relationship (R. 63; 21). Although Samora admitted that he took his girlfriend's car without her permission, he did not have the intent to permanently deprive her of that vehicle and the car was returned to her (R. 21, 03). No violence was involved and Kelly Johnson continued to use Samora's cell phone and had some of his property in her possession (R. 63:7). Since Judge Frederick was not present at the plea hearing and a transcript had not been prepared, he did not know that this crime involved a domestic dispute or that the victim had some of Samora's property. Had the judge been fully aware of the circumstances, probation, not the maximum sentence, would have been likely.

Samora's nonappearance at sentencing does not alter the likelihood that he would not have received the maximum sentence. First, failing to appear at sentencing is punishable by other means and should not enter into the sentencing matrix. For example, a defendant who fails to appear at sentencing can be charged with a separate crime or held on a bench warrant after not appearing. In addition, if the judge sentences a defendant in absentia, the defendant loses the right to allocution which can play an important role in

mitigating sentence; see discussion infra at 14-25 regarding impropriety of sentencing in absentia.

Common sense dictates that imposing a maximum sentence based solely on a failure to appear at sentencing can result in sentences which are not appropriate in light of society's interests, the nature of the crime or the defendant's background, and which impact profoundly on criminal justice resources. Filling the jail with misdemeanants serving maximum sentences who are irresponsible regarding their court dates but who otherwise do not present a threat to society nor deserve severe punishment makes little sense. Instead, the sentencing decision is more appropriately based on a complete review of the nature of the crime and the background of the defendant.

Additionally, even if nonappearance at sentencing were considered in determining the appropriate sentence, it would be only one of several factors to be considered.

"A sentence in a criminal case should be appropriate for the defendant in light of his background and the crime committed and also serve the interests of society which underlie the criminal justice system." State v. McClendon, 611 P.2d 728, 729 (Utah 1980). In other words, pursuant to McClendon, Johnson and due process, a sentence must be based not only on the circumstances of the crime, but also on other factors such as the defendant's background and the interests of society. The crime in this case where Samora took his live-in girlfriend's car and had no intent to permanently deprive her of that car was relatively benign. Nothing in the record suggests Samora had an extensive criminal

history or was involved in violence, and Samora had been employed full-time at the same place for a year. Under these circumstances, probation was likely and Samora was prejudiced by the judge's failure to conduct a full sentencing hearing.

As a final matter, even if this issue was not adequately preserved for review by the trial judge's ruling, it nevertheless was plain error requiring that the sentence be vacated. The error in failing to afford defense counsel the opportunity to speak on behalf of his client and in otherwise failing to base the sentencing decision on reliable and relevant information was obvious in light of Rule 22(a) and Johnson. See generally Dunn, 850 P.2d at 1208-09 (plain error occurs where error is obvious and prejudices defendant). The obviousness of the error in failing to afford counsel the opportunity to present information relevant to sentencing is bolstered by Utah Code Ann. § 77-18-1 (7) (1999) which mandates that the trial judge receive any information regarding the appropriate sentence which the parties desire to present, and that such information "be presented in open court on the record and in the presence of the defendant." Utah Code Ann. § 77-18-1 (7) (1999).

While this due process error requires vacation of the sentence regardless of whether prejudice is apparent in the record (see discussion supra at 10), even if prejudice were required, the record demonstrates that Samora was harmed by the judge's failure to conduct a full and fair sentencing hearing. As outlined supra at 11, the error in failing to afford defense counsel the opportunity to present information relevant to sentencing

prejudiced Samora since the trial judge was not fully informed of the nature and circumstances of the crime or Samora's background. Had the trial judge been fully informed and considered all relevant and reliable information, probation would have been the appropriate sentence.

In addition, exceptional circumstances require review of this issue. See Irwin, 924 P.2d at 11. The irregular procedure which occurred in this case whereby the judge sentenced Samora in absentia without affording either party the opportunity to speak is an exceptional circumstance which requires review. See discussion supra at 4. Without review, the flagrant violation of Samora's right to due process which occurred in this case would not be scrutinized nor corrected.

**B. THE TRIAL COURT VIOLATED DUE PROCESS AND UTAH R. CRIM. P. 22 BY SENTENCING SAMORA IN ABSENTIA.**

In addition to failing to comply with Utah R. Crim. P. 22(a) and due process in conducting the sentencing hearing without affording counsel the opportunity to present relevant information, Judge Frederick violated Rule 22, due process and Article I, section 12, Utah Constitution by sentencing Samora in absentia. Article I, section 12, Utah Constitution and the Sixth Amendment to the United States Constitution guarantee the right to be present at sentencing. See Anderson, 929 P.2d at 1109-10; United States v. McPherson, 421 F.2d 1127, 1129 (D.C. Cir. 1969). Because the right to presence at

sentencing is constitutionally guaranteed, the trial judge may not proceed in absentia unless the defendant waives the right to presence.

1. The Record Does Not Demonstrate a Knowing Waiver of the Right to Presence at Sentencing; Samora Was Not Informed That the Sentencing Would Occur If He Was Not Present and It Cannot Be Assumed That Samora Would Have Known That He Would Be Sentenced in Absentia If He Did Not Appear.

Any waiver of the right to be present at sentencing "must be voluntary and involve an intentional relinquishment of a known right." Anderson, 929 P.2d at 1110 (further citation omitted). The burden is on the state to establish waiver, and a knowing and voluntary waiver may not be presumed by the trial court. State v. Houtz, 714 P.2d 677, 678-79 (Utah 1986).

In order to knowingly and voluntarily waive the right to presence at sentencing, the defendant must, at the very least, be given notice of the proceedings. Anderson, 929 P.2d at 1110. In addition, the directive given the defendant must provide sufficient warning that the hearing will proceed even if the defendant is not present for a knowing waiver of the right to presence to occur. McPherson, 421 F.2d at 1129-30.

In Anderson, 929 P.2d at 1111, the Supreme Court held that sentencing the defendant in absentia did not violate the defendant's right to allocution where the defendant was informed of the trial date and signed a written waiver of his right to be present. Id. at 1110-11. The Court recognized that the right to allocution at sentencing "is an inseparable part of the right to be present" found in Article I, section 12, Utah

Constitution. Id. at 1111. Anderson waived his right to allocution by his voluntary absence after being informed of the trial date, his execution of a written waiver of his right to be present, his failure to appear at trial, and his failure to keep in touch with counsel or appear at sentencing. Id. at 1110-11.

The Utah Supreme Court's decision in Anderson is consistent with the McPherson approach of requiring that the defendant be informed that the proceeding will be held without him in order to have a knowing waiver<sup>3</sup>, and must be read in light of the facts and policy considerations relevant to the circumstances under which Anderson failed to appear. Because Anderson was warned of the consequences of failing to appear and had signed a written waiver of his right to presence in which he agreed to be tried in absentia, requiring that the defendant be warned of the consequences of nonappearance in order to find a knowing waiver of the right to presence fits squarely within the Anderson holding. See Anderson, 929 P.2d at 1110. Relying on McPherson, the Anderson court stated, "[t]o intentionally relinquish the right to be present, the defendant must have notice of the proceedings." Id. (citing McPherson, 421 F.2d at 1130). Since the notice required in

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<sup>3</sup> McPherson focused on the nature of the communication with the defendant, i.e. on whether the defendant was informed the hearing would proceed in his absence, in determining whether the defendant knowingly waived his right to presence. McPherson, 421 F.2d at 1129-30. In fact, although the trial judge in McPherson made it clear that the defendant was to be present at sentencing and that serious consequences would occur if he was not, the appellate court concluded that a knowing waiver of the right to presence did not occur where the record did not show that the defendant was informed that the trial would proceed without him. Id.



McPherson was that sentencing would proceed without the defendant if he did not appear, this reliance on McPherson in Anderson requires that the defendant be given notice that the sentencing will occur even if he does not appear in order to sentence in absentia.

Requiring that a defendant be informed that sentencing will proceed without him for there to be a knowing and voluntary waiver of the right to presence is also consistent with United States Supreme Court case law interpreting Fed. R. Crim. P. 43. See Crosby v. United States, 506 U.S. 255, 256, 113 S.Ct. 748, 749, 122 L.Ed.2d 25 (1993). In Crosby, the Court recognized that it cannot be assumed that a defendant who fails to appear knows that a trial will go on without him. In fact, "[s]ince the notion that trial may be commenced in absentia still seems to shock most lawyers, it would hardly seem appropriate to impute knowledge that this will occur to their clients.'" Crosby, 506 U.S. at 261 (citation omitted). Moreover, while under the federal rules, a trial may continue to conclusion when a defendant disappears after the trial has begun, a trial in absentia is not permitted if the defendant fails to appear at the beginning of trial. Id. at 262 (citing Taylor v. United States, 414 U.S. 17 (1973)). In making a distinction between absenting oneself mid-trial and not appearing at the beginning of trial for purposes of determining whether a defendant waived his right to presence, the Supreme Court recognized that a defendant who flees mid-trial knows that the trial has begun and will proceed without him whereas a defendant who does not appear at the beginning of trial has no such knowledge. Hence, while a knowing waiver of the right to presence occurs when a defendant flees

mid-trial, a knowing waiver is not demonstrated when the defendant fails to appear at all because the nonappearing defendant has not knowingly waived his right to presence.

Although Anderson supports the McPherson approach, it also fails to control the issue before this Court because it involved circumstances which are different from those in the present case. The trial court properly tried Anderson in absentia based on a written waiver of the right to presence. In determining whether the subsequent sentencing could also be conducted in absentia, the Court looked to cases involving similar circumstances where a defendant was properly tried in absentia and had not shown up by the time of sentencing. Anderson, 929 P.2d at 1110. Because it would create an anomaly to be able to try in absentia a defendant who affirmatively waived his right to presence but then be unable to sentence him, the Supreme Court held that sentencing Anderson in absentia after he had expressly waived his right to presence at trial was appropriate. Id. The Anderson court did not consider the current circumstances, however, where a defendant who had not been informed at the plea hearing that sentencing would occur without him later failed to appear at sentencing.

Moreover, because presence of the defendant at sentencing is even more critical than it is at trial, the right to presence at sentencing cannot be lightly forfeited. See United States v. Turner, 532 F. Supp. 913, 915 (1982); State v. Fettis, 664 P.2d 208, 209 (Ariz. 1983). "[T]he common law has traditionally required that the defendant be present at his sentencing." Turner, 532 F. Supp. at 915; United States v. Lastra, 973 F.2d 952,

955 (D.C. Cir. 1992) (citation omitted) ("The requirement that the defendant be present when sentence is passed has deep common law origins."). Presence is of critical importance to sentencing not only because it allows the judge to be presented with all of the information needed for a full and fair sentencing, but also because it allows the judge to question and admonish the defendant. Indeed, "[i]t is only when the defendant is before the court that a reasonable and rational sentencing can take place." Fettis, 664 P.2d at 209.

Presence is of instrumental value to the defendant for the exercise of other rights, such as to present mitigating evidence and challenge aggravating evidence, and it may also be advantageous to him that the decision maker be required to face him. The state may have an interest in the presence of the defendant in order that the example of personal admonition might deter others from similar crimes. Moreover, it may sometimes be important that the convicted man be called to account publicly for what he has done, not to be made an instrument of the general deterrent, but to acknowledge symbolically his personal responsibility for his acts and to receive personally the official expression of society's condemnation for his conduct. The ceremonial rendering of judgment may also contribute to the individual deterrent force of the sentence if the latter is accompanied by appropriate judicial comment on the defendant's crime.

Turner, 532 F. Supp. at 915.

Presence of the defendant at sentencing also preserves the dignity of the individuals being sentenced as well as the court and the system itself.

Respect for the dignity of the individual is at the base of the right of a man to be present when society authoritatively proceeds to decide and announce whether it will deprive him of liberty. *It shows a fundamental lack of respect for the dignity of a man to sentence him in absentia.* The presence of the defendant indicates that society has sufficient confidence in the

justness of its judgment to announce it in public to the convicted man himself. Presence thus enhances the legitimacy and acceptability of both sentence and conviction.

Turner, 532 F. Supp. at 915-16 (citations omitted) (emphasis added). The important policy considerations relating to presence at sentencing require that the right to presence at sentencing not be easily waived. See id. at 915 (important policy considerations supporting right to presence at sentencing "militate against a rule allowing presence at sentencing to be lightly waived").

Because of the critical importance of presence to sentencing, many jurisdictions refuse to allow sentencing in absentia except in extraordinary circumstances. Fettis, 664 P.2d at 209. Such extraordinary circumstances, while "rare indeed" (id.), may include circumstances where a defendant has expressly waived his right to be present at sentencing. See Turner, 532 F. Supp. at 916 (citation omitted). Extraordinary circumstances allowing sentencing in absentia may also include circumstances where the defendant has been fully informed that sentencing will proceed in his absence if he does not appear at the sentencing hearing. See Lowery v. State, 759 S.W.2d 545, 546 (Ark. 1988) (court unwilling to find defendant waived the right to presence at sentencing "in the absence of language specifically advising an accused that he is subject to being sentenced prospectively without his being present"); People v. Link, 685 N.E.2d 624, 626 (Ill. App. 1997) (court requires that defendant must be "warned his failure to appear may result in the proceedings continuing in absentia" in order to sentence a defendant in absentia);

People v. Bennett, 557 N.Y.S.2d 731, 732 (N.Y. Sup. Ct. 1990) (court reasons that sentencing in absentia was permissible where defendant was fully advised that sentencing would occur in his absence if he failed to appear); People v. Harris, 564 N.Y.S.2d 481 (N.Y. Sup. Ct. 1991) (same); People v. Christopher R., 522 N.Y.S.2d 28 (N.Y. Sup. Ct. 1987) (same). These cases support the notion that at the very least, a defendant must be informed that the sentencing will occur even if he is not present in order to knowingly waive his right to presence.

While Utah R. Crim. P. 22(a) facilitates due process and the Article I, section 12, Utah Constitution right to appear and defend by allowing defendant to speak and present information relevant to sentencing, Rule 22(b) allows sentencing to proceed even though the defendant is not present "[o]n the same grounds that a defendant may be tried in defendant's absence." Utah R. Crim. P. 22(b). The grounds on which a defendant may be tried in his absence are circumstances where the defendant has knowingly and voluntarily waived his right to presence; in the context of sentencing, a knowing waiver does not occur unless the defendant has been informed that the sentencing will proceed even if he is not present.

Utah R. Crim. P. 17(a)(2), which recognizes that in order to proceed in absentia at trial, the defendant must knowingly and voluntarily waive his right to presence, does not affect the determination of whether the constitutional right to presence at sentencing was waived. Utah R. Crim. P. 17(a)(2) states in part, "[i]n prosecutions for offenses not

punishable by death, the defendant's voluntary absence from the trial after notice to defendant of the time for trial shall not prevent the case from being tried and a verdict or judgment entered therein shall have the same effect as if defendant had been present."

While this rule suggests that voluntary absence from trial after notice of the time for trial constitutes a knowing waiver of the right to presence at trial, it does not outline what constitutes a knowing waiver of the right to presence at sentencing. More importantly, even if Rule 17(a)(2) applied to sentencing hearings rather than trial, the Article I, section 12 right to presence at sentencing would override the rule. Because of the greater importance of presence at sentencing, the fundamental, common law roots in requiring presence at sentencing and the lack of awareness by most people that a sentencing will be held if the defendant is not present, the right to presence at sentencing cannot be waived except in extraordinary circumstances which may include circumstances where the defendant was informed that the sentencing would be held even if he did not appear.

In the present case where Samora was not informed that he would be sentenced even if he did not appear at sentencing, Samora did not knowingly waive his right to presence at sentencing. The trial judge therefore erred in sentencing Samora in absentia and the sentence must be vacated.

## 2. The Public Interest Did Not Require That Samora Be Sentenced in Absentia.

In determining whether the right to presence has been waived thereby allowing for

sentencing in absentia, a trial court must also weigh whether the public interest in proceeding without the defendant outweighs the defendant's interest in being present. See Anderson, 929 P.2d at 1111 (court relies on practical considerations which supported proceeding with the sentencing in absentia); United States v. Fontanez, 878 F.2d 33, 36 (2d Cir. 1989) (court considers whether public interest in proceeding with sentencing in absentia outweighed defendant's interest in being present in deciding whether to uphold sentencing in absentia).

In Anderson, the Supreme Court upheld the sentencing in absentia after concluding that "[p]ractical considerations . . . mitigate[d] in favor of in absentia sentencing." Anderson, 929 P.2d at 1111. Anderson had executed a written waiver of his right to be present, then left the state. The Court was concerned that Anderson could absent himself for years "and the eventual sentencing would have to be performed by a judge who was unfamiliar with the case and had no access to relevant information." Id.

Concerns about dilatory defendants who attempt to delay the administration of justice by failing to appear at sentencing are remedied by requiring trial judges to exercise their discretion to proceed in absentia by balancing "the public interest in proceeding [without the defendant]" against the defendant's interest in being present. Smith v. Mann, 173 F.3d 73, 76 (2d Cir. 1999), *cert. denied*, 120 S.Ct. 200; see also Fontanez, 878 F.2d at 36-37; People v. Parker, 440 N.E.2d 131, 137 (N.Y. 1982). Requiring that trial courts balance the public interest in proceeding against the defendant's interest in being present

ensures that trial courts "vigorously safeguard" the right to presence. Fontanez, 878 F.2d at 36.

The factors to be considered when balancing the public interest in proceeding in absentia against the defendant's interest in being present include whether there is a possibility that the defendant could be contacted and brought to court within a reasonable amount of time, the difficulty in rescheduling the sentencing hearing, the burden on the state in not proceeding, and whether there is a possibility that information relevant to sentencing will be lost. See Parker, 440 N.E.2d at 1317; Fontanez, 878 F.2d at 36; Anderson, 929 P.2d at 1111.

In this case, Judge Frederick erred in sentencing Samora in absentia where the judge did not balance the public interest in proceeding against Samora's interest in being present, and the record fails to demonstrate that the public interest required that Samora be sentenced in absentia. Continuing the sentencing hearing to another date would not have been difficult; sentencing hearings take a relatively short amount of time and are often rescheduled. The state would not have been burdened by a continuance since it presented no information pertinent to sentencing; the state could have easily done the same thing if the sentencing had been rescheduled, and there was no threat that information relevant to sentencing would be lost if sentencing were rescheduled. Since Judge Frederick had taken the case from another judge, was not present when the plea was taken and had no specific knowledge that would be lost, the public had no interest in



maintaining him as the judge; even if a delay in sentencing caused reassignment of the case, information pertinent to sentencing would not be lost and the effective administration of justice would not be undermined since Judge Frederick did not sit through the trial as the Anderson judge had, and did not take the plea.

Samora's fundamental, critical interest in being present for sentencing was not outweighed by the public interest in proceeding. The trial judge therefore erred in sentencing Samora in absentia and the sentence must be vacated.

POINT II. SAMORA'S ABSENCE FROM SENTENCING DOES NOT REQUIRE DISMISSAL OF HIS APPEAL.<sup>4</sup>

Article I, section 12, Utah Constitution guarantees a fundamental right to appeal a criminal conviction. That right is "essential to a fair criminal proceeding" and cannot be lightly forfeited. State v. Tuttle, 713 P.2d 703, 704 (Utah 1985). Just as Samora did not

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<sup>4</sup> The state argued in its response to this Court's *sua sponte* motion for summary disposition that Samora was not entitled to pursue this appeal because he is a fugitive. After both parties filed responses to the motion for summary disposition, this Court withdrew the motion but ordered the parties to address all issues raised in the responses. Samora therefore addresses this issue in his opening brief.

The record in this case demonstrates only that Samora failed to appear at sentencing and a bench warrant was issued. The state's claim that Samora remains a fugitive therefore does not have record support.

While Samora maintains that this Court should not review the state's claim that Samora is a fugitive, as a matter of candor to the Court, however, counsel acknowledges that as of the day this brief is filed, Manuel Samora does not appear on the jail roster for Salt Lake County. Counsel has not checked the jail rosters for other counties throughout the state nor other states to determine whether Samora is being held elsewhere. Nor has counsel checked the Salt Lake County jail roster throughout this appeal to determine whether Samora has served time during the course of appeal and released on an ankle monitor or by other means.

knowingly waive his right to presence by not appearing at sentencing, he did not knowingly or intentionally waive his right to appeal. In fact, the record does not demonstrate that Samora was informed of his right to appeal his sentence or that if he did not appear at sentencing, he would be sentenced in absentia and forfeit his right to appeal.

In Tuttle, the Court held that "[i]n light of the fundamental nature of the right to appellate review of a criminal conviction and the lack of any sound practical or policy justification for refusing to hear the appeals of escapees after they are returned to custody, we conclude that a criminal appeal dismissed after escape may be reinstated unless the State can show that it has been prejudiced by the defendant's absence and consequent lapse of time." Id. at 705. The rationale for allowing reinstatement of the appeal was that "an escape cannot [] be said to be a knowing waiver of appeal rights . . . ." Id. at 704. In fact, the Tuttle Court overruled State v. Brady, 655 P.2d 1132 (Utah 1982), which had held that an appeal could not be reinstated after escape, because Brady was based on the incorrect determination that one who escapes intentionally and knowingly abandons his appeal rights. Id. Hence, Tuttle directs that the focus is on whether the defendant knowingly and intelligently waived his appeal rights when he absconded, and clearly indicates that escape does not constitute a knowing and intentional waiver of the right to appeal.

While Tuttle did not directly overrule Hardy v. Morris, 636 P.2d 473, 474 (Utah 1981), which held that an appeal could be dismissed when a defendant escapes, it does

call the holding of Hardy into question. The recognition in Tuttle of the importance of the right to appeal, and the further recognition that escape does not constitute a knowing and voluntary waiver of that right, suggest that an appeal should not be dismissed simply because the defendant is not in custody. In light of Tuttle, the Court in Hardy focused on an incorrect rationale when it determined that a defendant's escape "disentitles" him to appeal his conviction. Hardy, 636 P.2d at 474.<sup>5</sup> Instead, the focus should be on whether a defendant knowingly and voluntarily waived his right to appeal when he absconded; Tuttle tells us that he did not.

In addition, even if Hardy still allowed for dismissal of an appeal when a defendant escapes, it would not require dismissal in this case. The holding in Hardy was based on a determination that because the defendant had escaped and placed himself

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<sup>5</sup> The Hardy rationale that the state would not be able to enforce a judgment on appeal so it would not be fair to allow the defendant to proceed and possibly reap the benefit of a favorable ruling on appeal is of questionable validity. If the state were to win on appeal, it could enforce a favorable ruling just as it could and did without the appeal. Hardy, who had escaped, was eventually picked up and returned to custody. If the appeal had gone forward and the conviction affirmed, the judgment holding Hardy would have been final. Instead, the state enforced the conviction and judgment from the trial court. In other words, when a defendant is convicted and appeals, and the state prevails on appeal, nothing is left to do with the case except enforce the decision by continuing to hold the defendant. Hence, there is no unfairness to the state by proceeding with the appeal. By contrast, however, there is unfairness to the defendant who loses this fundamental right to appeal even though he has not knowingly and intentionally waived it. The efficient administration of the justice system is better served by allowing appeals to go forward regardless of whether the defendant has absconded. In addition, fairness and due process require that convictions or sentences which are in violation of the law or are fundamentally unfair be reviewed unless the defendant knowingly and voluntarily waived the right to appellate review.

outside the control of the judicial system, it would not be fair to allow him to ask the court to consider his case because "the escaped prisoner should not be able to reap the benefit of a decision in his favor when the state could not enforce a decision in its favor." Hardy, 636 P.2d at 474 (citation omitted).

In this case, Samora has not escaped. While Hardy had an appeal in place, then chose to leave, Samora simply did not appear at sentencing. The state then reaped the benefit of sentencing Samora in absentia. It can enforce that sentence; a bench warrant is in place and Samora will be required to serve a year in jail when he is arrested. Hence, the unfairness of allowing the defendant to proceed when the state cannot enforce a favorable appeal does not exist in this case. Indeed, it would be fundamentally unfair to not allow review of the procedure utilized in this case where the decision has already been made to proceed in Samora's absence, the state has reaped the benefit of obtaining a maximum sentence, and Samora has lost the benefit of his right to presence, his right to present information relevant to sentencing, and his right to a full and fair sentencing hearing. In other words, the state has proceeded in this case despite the defendant's absence and benefitted from that absence; to not allow Samora to challenge the propriety of the process used against him would be fundamentally unfair.

This Court's decision in State v. Moya, 815 P.2d 1312 (Utah App. 1991) likewise supports a review of Samora's claims on appeal. In Moya, this Court decided the merits of Appellant's claims despite the fact that he was "a fugitive from the criminal justice

system." Id. at 1318 (Bench, J., dissenting). Although one of the judges dissented because of Moya's fugitive status, indicating that the appeal should be dismissed, the majority nevertheless kept the appeal in place and reached Moya's claims. Because the issue of whether to dismiss the appeal was obviously considered in light of the dissent, the fact that the majority did not dismiss the appeal suggests that the Court proceeded because (1) review was required to protect the fundamental right to appeal, (2) Moya's fugitive status did not establish that he knowingly waived his right to appeal, and (3) the issues raised in the appeal went to the heart of whether the sentence was legal, making the appeal essential to a fair proceeding regardless of whether the defendant was in custody.

The circumstances in Moya which precluded dismissal of the appeal also exist in this case. The right to appeal is essential to a fair proceeding in this case where the trial judge proceeded with sentencing in Samora's absence without input from the parties. Samora was not informed that sentencing would proceed without him if he did not appear, and had no way of knowing that by not appearing, he would also waive his right to appeal any sentence imposed when he did not appear. The legality of the procedure utilized in sentencing Samora in absentia is at the heart of this appeal. It would be fundamentally unfair to not review that procedure because Samora continues to not be in contact with the court.

If this Court were to dismiss this appeal, it would create the ultimate unfair paradox: a trial court could go ahead and sentence a defendant even though the defendant

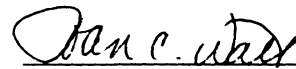
was not present, but the defendant could do nothing to pursue any subsequent proceedings to ensure that the sentencing was lawful because he did not appear. In other words, the absence from proceedings would affect the ability to go forward only when proceeding might benefit the defendant. A judge could impose an illegal sentence on an absent defendant without any ramifications. Such an approach would severely undermine the integrity of the system.

Moreover, because appeals often take more than a year, if Samora's appeal is put on hold, he will receive little or no practical benefit from a positive result because the sentence would not be vacated until he had served all or most of this term. This, too, would undermine the integrity of the system by allowing courts to impose and carry out illegal sentences without review until after the defendant has been required to serve the sentence. The fundamental nature of the right to appeal and fairness require that this Court review at this point the legality of the procedure utilized by the trial court in sentencing Samora.

**CONCLUSION**

Defendant/Appellant Manuel Samora respectfully requests that this Court vacate his sentence and remand his case for a full and fair sentencing hearing.

RESPECTFULLY SUBMITTED this 29<sup>th</sup> day of January, 2001.

A handwritten signature in cursive script, appearing to read "Joan C. Watt", is written over a horizontal line.

JOAN C. WATT

Attorney for Defendant/Appellant


A horizontal line is drawn above the name "JOHN K. WEST".

JOHN K. WEST

Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, JOAN C. WATT, hereby certify that I have caused to be delivered eight copies of the foregoing to the Utah Court of Appeals, 450 South State, 5<sup>th</sup> Floor, P. O. Box 140230, Salt Lake City, Utah 84114-0230, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6<sup>th</sup> Floor, P. O. Box 140854, Salt Lake City, Utah 84114-0854, this 29~~th~~ day of January, 2001.

  
\_\_\_\_\_  
JOAN C. WATT

DELIVERED to the Utah Court of Appeals and the Utah Attorney General's Office as indicated above this \_\_\_\_\_ day of January, 2001.

\_\_\_\_\_



ADDENDA

## ADDENDUM A

**IMAGED**

THIRD DISTRICT COURT-SALT LAKE COURT  
SALT LAKE COUNTY, STATE OF UTAH

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STATE OF UTAH, : MINUTES  
Plaintiff, : SENTENCE, JUDGMENT, COMMITMENT  
 :  
 :  
 :  
vs. : Case No: 001906887 FS  
 :  
 :  
MANUEL ERNESTO SAMORA, : Judge: J. DENNIS FREDERICK  
Defendant. : Date: September 22, 2000  
Custody: Salt Lake County Jail

S.O. # 103075

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PRESENT  
Clerk: cindyb  
Prosecutor: MURPHY, J KEVIN  
Defendant not present  
Defendant's Attorney(s): WEST, JOHN K

ENTERED IN REGISTRY  
OF JUDGMENTS  
DATE 9-28-00

DEFENDANT INFORMATION

Date of birth: August 21, 1958

Video

Tape Number: 1 Tape Count: 9:25-9:27

CHARGES

1. ATTEMPTED JOYRIDING W/ INTENT TO TEMP DEPRIVE OWNR (amended)  
Class A Misdemeanor  
Plea: Guilty - Disposition: 08/08/2000 Guilty Plea

SENTENCE JAIL

Based on the defendant's conviction of ATTEMPTED JOYRIDING W/  
INTENT TO TEMP DEPRIVE OWNR a Class A Misdemeanor, the defendant is  
sentenced to a term of 1 year(s)

Commitment is to begin immediately.



Case No: 001906887  
Date: Sep 22, 2000

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SENTENCE FINE

Charge # 1            Fine: \$2500.00  
                      Suspended: \$0.00  
                      Surcharge: \$2119.05  
                      Due: \$4619.05  
  
                      Total Fine: \$2500.00  
                      Total Suspended: \$0  
                      Total Surcharge: \$2119.05  
                      Total Principal Due: \$4619.05  
                                  Plus Interest

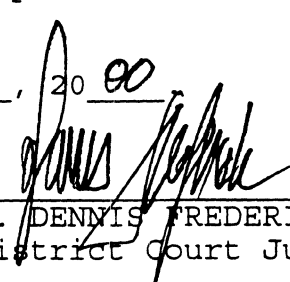
SENTENCE TRUST

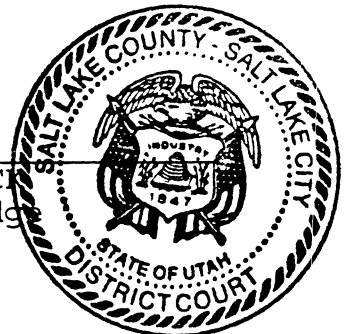
The defendant is to pay the following:  
Attorney Fees:            Amount: \$250.00 Plus Interest  
Pay in behalf of: LDA

Pay fine to The Court.

The Court finds defendant voluntarily absented himself from sentencing proceedings and the Court sentences the defendant in absentia. Counsel for the State to prepare the findings and order. Defendant to be committed forthwith upon his arrest on this Court's bench warrant.

Dated this 22<sup>nd</sup> day of Sept, 2000

  
J. DENNIS FREDERICK  
District Court Judge



## ADDENDUM B

281-887

**FILED DISTRICT COURT**

Third Judicial District

OCT 26 2000 -1-

SALT LAKE COUNTY

By

*Sharon Blackburn*

Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT  
OF SALT LAKE COUNTY, STATE OF UTAH

**ORIGINAL**

STATE OF UTAH,

Plaintiff,

vs.

MANUEL ERNESTO SAMORA,

Defendant.

Case No. 001906887

Sentencing Hearing  
Electronically Recorded on  
September 22, 2000

BEFORE: THE HONORABLE J. DENNIS FREDERICK  
Third District Court Judge

For the Plaintiff:

Kevin J. Murphy  
Asst. Attorney General  
160 E. 300 S. #600  
Salt Lake City, UT 84114  
Telephone: (801)366-0180

For the Defendant:

John West  
LEGAL DEFENDERS  
424 E. 500 S. #300  
Salt Lake City, UT 84111  
Telephone: (801)532-5444

Transcribed by: Beverly Lowe RPR/CSR/CCT

1771 SOUTH CALIFORNIA AVENUE  
PROVO, UTAH 84606  
TELEPHONE: (801)377-0027

**FILED**

NOV 06 2000

COURT OF APPEALS

20000884-4

P R O C E E D I N G S

(Electronically recorded on September 22, 2000)

THE COURT: We'll go now to Manuel Ernesto Samora.

This is case No. CR 006887. Mr. West, you're appearing on behalf of Mr. Samora. This is another case where the defendant is apparently not present (inaudible) in custody. A warrant has previously been issued for his arrest.

Mr. Samora entered a plea of guilty to a class A misdemeanor crime of joy riding with attempt to deprive. He has failed to appear at Adult Probation and Parole and/or in this Court, I will determine thereby that he has voluntarily absented himself from these proceedings, and will order that he be committed under the plea he entered to the Adult Detention Center for a period of one year, and order that he be fined an amount of \$2500 (inaudible) Mr. West.

I will order the commitment to issue forthwith, and Mr. Murphy, as to the findings of fact and conclusions of law, I'll ask you to prepare.

MR. MURPHY: Very well, your Honor.

(Hearing concluded)

REPORTER'S CERTIFICATE

STATE OF UTAH )

)

COUNTY OF UTAH )

I, Beverly Lowe, a Notary Public in and for the State of Utah, do hereby certify:

That the foregoing proceedings were transcribed under my direction from the electronic tape recording made of these proceedings.

That this transcript is full, true, and correct and contains all of the evidence, all of the objections of Counsel and rulings of the Court and all matters to which the same relate which were audible through said tape recording.

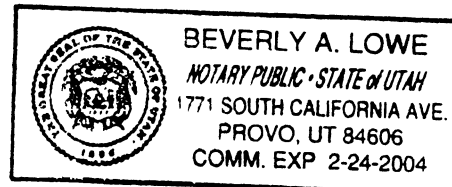
I further certify that I am not interested in the outcome thereof.

That certain parties were not identified in the record, and therefore the name associated with the statement may not be the correct name as to the speaker.

WITNESS MY HAND AND SEAL this 27th day of October 2000.

My commission expires:  
February 24, 2004

*B. Lowe*  
\_\_\_\_\_  
NOTARY PUBLIC  
residing in Utah County





## ADDENDUM C

DAVID E. YOCOM  
District Attorney for Salt Lake County  
Kevin Murphy, 5768  
Deputy District Attorney  
231 East 400 South, Suite 300  
Salt Lake City, Utah 84111  
Telephone: (801) 363-7900

**FILED DISTRICT COURT**  
Third Judicial District  
OCT 10 2000  
By C. Murphy  
SALT LAKE COUNTY  
Deputy Clerk

IN THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT  
IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

THE STATE OF UTAH,  Plaintiff,  -vs-  MANUEL ERNESTO SAMORA,  Defendant.	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER SENTENCING DEFENDANT IN ABSENTIA  Case No. 001906887  Judge J. Dennis Frederick
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This case was called for sentencing on September 22, 2000. The State was represented by Kevin Murphy of the Salt Lake District Attorney's Office; defense counsel John West was present. However, defendant did not appear. The court enters the following—

FINDINGS OF FACT

1. The Court record reflects, and the Court finds, that defendant had written and oral notice of the September 22, 2000, 8:30 AM sentencing hearing.
2. The Court finds that defendant has voluntarily absented himself from the sentencing hearing.

CONCLUSIONS OF LAW

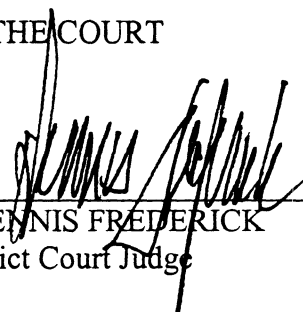
1. Pursuant to Utah Rules Criminal Procedure 22(b), it is appropriate that the defendant be sentenced in absentia.

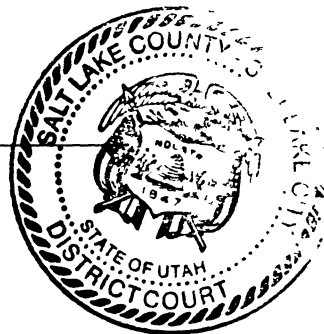
## ORDERS

1. Based upon his conviction for Attempted Forgery, a class A misdemeanor, the defendant is sentenced to a term of one year in the Salt Lake County Adult Detention Center.
2. The defendant is sentenced to pay a fine of \$2500.00.
3. A no-bail warrant is issued for the defendant's arrest.
4. Defendant's one year jail commitment shall commence upon his arrest and booking into the Salt Lake County Adult Detention Center on the warrant.

DATED this 10<sup>th</sup> day of Oct ~~September~~, 2000.

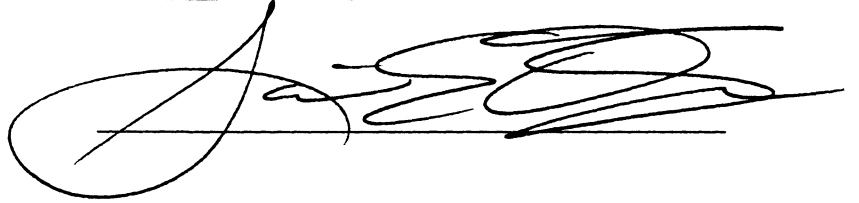
BY THE COURT

  
J. DENNIS FREDERICK  
District Court Judge



CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER SENTENCING DEFENDANT IN ABSENTIA was delivered to John K. West, Attorney for Defendant Manuel Ernesto Samora at 424 East 500 South, Suite 300, Salt Lake City, Utah 84111 on the \_\_\_\_ day of September, 2000.

A handwritten signature in black ink, consisting of a large, stylized 'J' followed by several loops and a horizontal line extending to the right.

## ADDENDUM D

Dec. 12/00

**FILED**  
Utah Court of Appeals  
DEC 05 2000

THE UTAH COURT OF APPEALS

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Paulette Stagg  
Clerk of the Court

State of Utah,	)	
	)	
Plaintiff and Appellee,	)	ORDER
	)	Case No. 20000884-CA
v.	)	
	)	
Manuel Ernesto Samora,	)	
	)	
Defendant and Appellant.	)	

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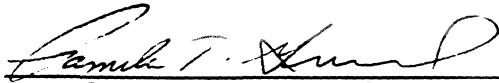
This matter is before the court on a sua sponte motion for summary affirmance pursuant to Rule 10 of the Utah Rules of Appellate Procedure.

IT IS HEREBY ORDERED that the sua sponte motion is withdrawn, and a ruling on the issues raised therein, as well as the additional issues raised in the parties' responses, is deferred pursuant to Rule 10(f), Utah Rules of Appellate Procedure, pending plenary presentation and consideration of the appeal.

IT IS FURTHER ORDERED that the State's request for a stay of briefing is denied, and appellant's opening brief shall be filed on or before January 15, 2001.

Dated this 5th day of December, 2000.

FOR THE COURT:

  
\_\_\_\_\_  
Pamela T. Greenwood,  
Presiding Judge

CERTIFICATE OF MAILING

I hereby certify that on December 5, 2000, a true and correct copy of the foregoing ORDER was deposited in the United States mail to the parties listed below:

JOHN K. WEST  
JOAN C. WATT  
SALT LAKE LEGAL DEFENDER ASSOCIATION  
424 E 500 S STE 300  
SALT LAKE CITY UT 84111

J. FREDERIC VOROS, JR.  
ASSISTANT ATTORNEY GENERAL  
160 E 300 S 6TH FL  
PO BOX 140854  
SALT LAKE CITY UT 84114-0854

Dated this December 5, 2000.

By   
Deputy Clerk

Case No. 20000884-CA

## ADDENDUM E



CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV

**Section 1. [Citizenship — Due process of law      Equal protection.]**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**Sec. 2. [Representatives — Power to reduce appointment.]**

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial Officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

**Sec. 3. [Disqualification to hold office.]**

No person shall be a Senator or Representative in Congress, or Elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

**Sec. 4. [Public debt not to be questioned — Debts of the Confederacy and claims not to be paid.]**

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

**Sec. 5 [Power to enforce amendment.]**

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article

UTAH RULES OF CRIMINAL PROCEDURE

**Rule 17. The trial.**

(a) In all cases the defendant shall have the right to appear and defend in person and by counsel. The defendant shall be personally present at the trial with the following exceptions:

(1) In prosecutions of misdemeanors and infractions, defendant may consent in writing to trial in his absence;

(2) In prosecutions for offenses not punishable by death, the defendant's voluntary absence from the trial after notice to defendant of the time for trial shall not prevent the case from being tried and a verdict or judgment entered therein shall have the same effect as if defendant had been present;

**Rule 22. Sentence, judgment and commitment.**

(a) Upon the entry of a plea or verdict of guilty or plea of no contest, the court shall set a time for imposing sentence which shall be not less than two nor more than 45 days after the verdict or plea, unless the court, with the concurrence of the defendant, otherwise orders. Pending sentence, the court may commit the defendant or may continue or alter bail or recognizance.

Before imposing sentence the court shall afford the defendant an opportunity to make a statement and to present any information in mitigation of punishment, or to show any legal cause why sentence should not be imposed. The prosecuting attorney shall also be given an opportunity to present any information material to the imposition of sentence.

(b) On the same grounds that a defendant may be tried in defendant's absence, defendant may likewise be sentenced in defendant's absence. If a defendant fails to appear for sentence, a warrant for defendant's arrest may be issued by the court.

(c) Upon a verdict or plea of guilty or plea of no contest, the court shall impose sentence and shall enter a judgment of conviction which shall include the plea or the verdict, if any, and the sentence. Following imposition of sentence, the court shall advise the defendant of defendant's right to appeal and the time within which any appeal shall be filed.

(d) When a jail or prison sentence is imposed, the court shall issue its commitment setting forth the sentence. The officer delivering the defendant to the jail or prison shall deliver a true copy of the commitment to the jail or prison and shall make the officer's return on the commitment and file it with the court.

(e) The court may correct an illegal sentence, or a sentence imposed in an illegal manner, at any time.

(f) Upon a verdict or plea of guilty and mentally ill, the court shall impose sentence in accordance with Title 77, Chapter 16a, Utah Code. If the court retains jurisdiction over a mentally ill offender committed to the Department of Human Services as provided by Utah Code Ann. § 77-16a-202(1)(b), the court shall so specify in the sentencing order.

(Amended effective January 1, 1995; January 1, 1996.)

## CONSTITUTION OF UTAH

### **Sec. 7. [Due process of law.]**

No person shall be deprived of life, liberty or property, without due process of law.

### **Sec. 12. [Rights of accused persons.]**

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.