

1 MELINDA HAAG (CABN 132612)
United States Attorney

2 DAVID R. CALLAWAY (CABN 121782)
3 Chief, Criminal Division

4 JOHN H. HEMANN (CABN 165823)
Assistant United States Attorney

5 450 Golden Gate Avenue, Box 36055
6 San Francisco, California 94102-3495
7 Telephone: (415) 436-7200
8 FAX: (415) 436-7234
John.Hemann@usdoj.gov

9 Attorneys for United States of America

10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

13 UNITED STATES OF AMERICA,) Case No. CR 14-0102 CRB
14 Plaintiff,)
15 v.) GOVERNMENT’S OPPOSITION TO
16 IAN FURMINGER,) DEFENDANT FURMINGER’S MOTION FOR
17 Defendant.) BAIL PENDING APPEAL
18)

19 Defendant Furminger’s motion for bail pending appeal should be denied.

20 On December 5, 2014, Furminger was found guilty by a jury of two counts of honest services
21 fraud, one count of civil rights conspiracy, and one count of conspiracy to commit theft from a federally
22 funded program. On February 23, 2015, this Court sentencing him to a 41 month term of imprisonment
23 and ordered him to surrender to the United States Bureau of Prisons to begin serving his sentence on
24 April 3, 2015.

25
26 **A. Legal Standards**

27 Once a defendant has been convicted and sentenced, the Bail Reform Act of 1984 (“the Act”)
28

1 presumes that the defendant should be detained pending appeal. Accordingly, courts “shall order that a
2 person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has
3 filed an appeal or a petition for a writ of certiorari, be detained,” unless the defendant can demonstrate
4 by clear and convincing evidence that he is entitled to relief. 18 U.S.C. § 3143(b)(1).

5 First, defendant must prove by clear and convincing evidence that, if released, he is “not likely to
6 flee or pose a danger to the safety of any other person or the community.” 18 U.S.C. §3143(b)(1)(A).

7 Second, even if defendant meets this first requirement, he must also demonstrate by clear and
8 convincing evidence that “the appeal is not for the purpose of delay and raises a substantial question of
9 law or fact likely to result in: (i) reversal, (ii) an order for a new trial, (iii) a sentence that does not
10 include a term of imprisonment, or (iv) a reduced sentence to a term of imprisonment less than the total
11 of the time already served plus the expected duration of the appeal process.” 18 U.S.C. § 3143(b)(1)(B).

12 With respect to the latter requirement, the Court must resolve two distinct questions: (1) whether
13 the appellate issues raised by the defendant are “substantial” and (2) whether those issues are “likely to
14 result in reversal.” *United States v. Handy*, 761 F.2d 1279, 1280-81 (9th Cir. 1985). “[T]he word
15 ‘substantial’ defines the level of merit required in the question raised on appeal, while the phrase ‘likely
16 to result in reversal’ defines the type of question that must be presented.” *Id.* A “substantial question”
17 is one that is “fairly debatable,” and “[l]ikely to result” in reversal means that “if the substantial question
18 is determined favorably to the defendant on appeal, that decision is likely to result in reversal or an order
19 for a new trial.” *Id.* The burden is on the defendant to overcome the presumption that he should be
20 detained while his appeal is pending. *See United States v. Montoya*, 908 F.2d 450, 451 (9th Cir. 1990).

21 22 **B. Risk of Flight and Danger to the Community**

23 Furminger cannot establish by clear and convincing evidence that he is not a flight risk or danger
24 to the community. Furminger (1) faces a substantial sentence if unsuccessful on his appeal; (2) has
25 consistently failed to acknowledge or take responsibility for his crimes; (3) he has a serious alcohol
26 addiction and engages in anti-social behavior; and (4) has not offered and does not possess sufficient
27 funds of his own to secure a release bond.

28 In “determining whether there are conditions of release that will reasonably assure the

1 appearance of the person as required and the safety of any other person and the community,” the court is
2 directed to consider the “history and characteristics of the person.” 18 U.S.C. § 3142(g)(3). The Bail
3 Reform Act specifically requires consideration of the defendant’s “character,” “employment,” “financial
4 resources,” and “history relating to drug or alcohol abuse.” Furminger, in his motion, directs the Court
5 to aspects of his history and character that, he contends, carry his burden by clear and convincing
6 evidence. But he does not tell the whole story.

7 First, Furminger omits his very serious alcohol addiction. PSR ¶ 75. Furminger drinks
8 constantly throughout the day. He was “buzzed” during his interview with the Probation Officer. He
9 acknowledges that he needs treatment, but any such treatment he may be getting apparently is not
10 working, as he continues to drink to excess.

11 Second, Furminger actively promotes the fantasy that he is a person of character, pointing to
12 awards that he has received as a police officer. Def. Mem. at 4:17-20. In doing so, he simply disregards
13 the conduct for which he was convicted, as well as his behavior as a police officer that included
14 throwing small explosives out of moving cars for fun and stealing antique call boxes. He also fails to
15 advise the Court that he is a virulent racist and homophobe who, *even while a police officer*, felt free to
16 share his views with other individuals, including other San Francisco police officers. See Declaration of
17 Special Agent Tyler Nave, Ex. A. A selection of Furminger’s views, expressed in text messages sent
18 while he was with the SFPD, include:

- 19 • “We got two blacks at my boys [sic] school and they are brother and sister! There cause dad
20 works for the school district and I am watching them like hawks.”
- 21 • In response to a text asking “Do you celebrate quanza [sic] at your school?” Furminger wrote:
22 “Yeah we burn the cross on the field! Then we celebrate Whitemas.”
- 23 • “Its [sic] worth every penny to live here [Walnut Creek] away from the savages.”
- 24 • “Those guys are pretty stupid! Ask some dumb ass questions you would expect from a black
25 rookie! Sorry if they are your buddies!”
- 26 • “The buffalo soldier was why the Indians Wouldnt [sic] shoot the niggers that found for the
27 confederate They [sic] thought they were sacred buffalo and not human.”
- 28 • “Gunther Furminger was a famous slave auctioneer.”

- 1 • “My wife has 2 friends over that don’t know each other the cool one says to me get me a drink
- 2 nigger not knowing the other is married to one just happened right now LMFAO.”
- 3 • “White power.”
- 4 • In response to a text saying “Niggers should be spayed,” Furminger wrote “I saw one an hour
- 5 ago with 4 kids.”
- 6 • “I am leaving it like it is, painting KKK on the sides and calling it a day!”
- 7 • “Cross burning lowers blood pressure! I did the test myself!”
- 8 • In response to a text saying “All niggers must fucking hang,” Furminger wrote “Ask my 6 year
- 9 old what he thinks about Obama.”
- 10 • In response to a text saying “Just boarded train at Mission/16th,” Furminger wrote “Ok, just
- 11 watch out for BM’s” [black males].
- 12 • “I hate to tell you this but my wife friend [sic] is over with their kids and her husband is black!
- 13 If [sic] is an Attorney but should I be worried?” Furminger’s friend, an SFPD officer,
- 14 responded: “Get ur pocket gun. Keep it available in case the monkey returns to his roots. Its
- 15 [sic] not against the law to put an animal down.” Furminger responded, “Well said!”
- 16 • In response to a text from another SFPD officer regarding the promotion of a black officer to
- 17 sergeant, Furminger wrote: “Fuckin nigger.”

18 If the medals and awards Furminger received as a police officer are somehow relevant to the analysis of
 19 his character, Def. Mem. at 4:17-20, his views regarding black citizens, who were part of the population
 20 he was sworn to protect, also are relevant. He not only possessed but felt free to articulate these views
 21 to others while he was a San Francisco Police Officer. Although these sort of overtly racist views sadly
 22 still are expressed in some communities, it is shocking and appalling to find a police officer in San
 23 Francisco who would give voice to them. Furminger’s willingness to do so – which exemplifies his
 24 erratic and anti-social behavior – should be taken into account.

25 Finally, Furminger does not currently pay child support, has minimal financial resources, and is
 26 not employed. The text messages show that he has a history of withholding child support payments,
 27 predating his resignation from the SFPD. Nave Decl., Ex. A. He also has persistent mental health
 28 issues. PSR ¶¶ 72-73.

1 Furminger is not a person who can be trusted to be awarded bail pending appeal. His behavior is
2 sufficiently erratic and the coming prison sentence is too long to find that he has carried his burden by
3 clear and convincing evidence.

4 5 **C. Questions on Appeal**

6 Furminger does not identify any substantial question of law or fact that is likely to result in a
7 reversal or order for a new trial; he does not raise sentencing as an issue at all.

8 Furminger's motion is remarkable for its lack of specificity; it is almost entirely unclear what
9 specific rulings he is challenging. He does not cite any legal authority in support of his contention that
10 this Court committed error during the trial. He does not cite to a single page of the record to identify a
11 particular error. He did not raise *any* of these arguments in his motion for an acquittal or new trial. The
12 government submits that these failures, alone, require denial of Furminger's motion. A question on
13 appeal cannot be substantial if the appellant cites neither law nor fact to establish error. Leaving the
14 government and the Court to discern and analyze the law and facts related to possible questions on
15 appeal is not sufficient to satisfy the appellant's burden.

16 Furminger cursorily identifies four issues, each of which the government address. First, he
17 contends that the Court erred by prohibiting the defense from "introducing evidence that would have
18 impeached the credibility of prosecution witness Reynaldo Vargas." Def. Mem. at 5:9-10. He does not
19 state what this evidence was or the basis for the Court's ruling. The government believes that Furminger
20 is referring to the Court's ruling that he could not introduce time cards and related evidence to impeach
21 Vargas after Vargas testified that he did not falsify time cards while an SFPD officer because that
22 evidence is extrinsic and thus prohibited under Rule 608. (RT 1304:8-11) This is not a substantial
23 question. The standard of review on appeal would be for an abuse of discretion. *United States v. Benny*,
24 786 F.2d 1410, 1419-20 (9th Cir. 1986). Both the plain language of Rule 608(b) and the caselaw
25 interpreting it are clear that extrinsic evidence may not be offered to attack credibility. *Id.* That is
26 precisely the improper purpose for which Furminger says is should have been admitted. Def. Mem. at
27 5:14-15 ("Had the jury been allowed to hear such evidence it is likely that Mr. Vargas's testimony
28 incriminating Mr. Furminger would not have been believed."). This is not a substantial question.

1 Second, the defense claims that this Court erred by admitting over objection certain text
2 messages “that constituted irrelevant character evidence and were highly prejudicial.” Def. Mem. at
3 5:16-18. This issue has neither a beginning nor an ending: Furminger does not say what text messages
4 he is referring to or how they were either character evidence or highly prejudicial.

5 Third, Furminger again raises the severance issue. The trial proved this issue to be an absolute
6 non-starter. Vargas testified that he conspired with *both* Furminger and Robles to commit a number of
7 thefts and that Furminger knew about others in which he did not directly participate. Hernandez
8 testified that Furminger was present during conversations with Robles about thefts. The standard of
9 review for denial of a Rule 14(a) motion to sever is abuse of discretion. *United States v. Mayfield*, 189
10 F.3d 895, 899 (9th Cir. 1999). Severance is appropriate under Rule 14 “only if there is a serious risk that
11 a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from
12 making a reliable judgment about guilt or innocence.” *Zafiro v. United States*, 506 U.S. 534, 539 (1993).
13 When the appellant fails, as Furminger does here, to identify a specific trial right that was compromised,
14 the court of appeals will not disturb the district court’s ruling. *United States v. Stinson*, 647 F.3d 1196,
15 1205 (9th Cir. 2011). Furminger also fails, fatally, to explain how this Court’s instructions to the jury
16 that it consider the evidence against each defendant individually were not adequate to protect his trial
17 rights. Where “the district court uses great diligence in instructing the jury to separate the evidence,
18 severance is unnecessary because the prejudicial effects of the evidence of codefendants are
19 neutralized.” *United States v. Patterson*, 819 F.2d 1495, 1503 (9th Cir. 1987).

20 Fourth, Furminger again challenges the sufficiency of the evidence, claiming that there was
21 “little evidence relating to any wrongdoing by Mr. Furminger.” Def. Mem. at 5:25-26. He makes no
22 effort to specify what element of what offense of conviction was wanting for evidence. The Court of
23 Appeals will not reverse a conviction for insufficient evidence “if any rational trier of fact could have
24 found the evidence sufficient.” *United States v. Alvarez-Valenzuela*, 231 F.3d 1198, 1201–02 (9th Cir.
25 2000). There is no question that a rational juror could have found the evidence sufficient to convict
26 Furminger, as this Court found in denying his motion for acquittal.

1 **D. Conclusion**

2 Furminger's motion for bail pending appeal should be denied.

3
4 DATED: March 13, 2015

Respectfully submitted,

5 MELINDA HAAG
6 United States Attorney

7 *John H. Hemann*

8 _____
9 JOHN H. HEMANN
10 Assistant United States Attorney

1 MELINDA HAAG (CABN 132612)
United States Attorney

2 DAVID R. CALLAWAY (CABN 121782)
3 Chief, Criminal Division

4 JOHN H. HEMANN (CABN 165823)
Assistant United States Attorney

5 450 Golden Gate Avenue, Box 36055
6 San Francisco, California 94102-3495
7 Telephone: (415) 436-7200
8 FAX: (415) 436-7234
John.Hemann@usdoj.gov

9 Attorneys for United States of America

10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

13 UNITED STATES OF AMERICA,

14 Plaintiff,

15 v.

16 IAN FURMINGER,

17 Defendant.
18

) Case No. CR 14-0102 CRB

) DECLARATION OF SPECIAL AGENT TYLER
) NAVE IN SUPPORT OF GOVERNMENT'S
) OPPOSITION TO DEFENDANT FURMINGER'S
) MOTION FOR BAIL PENDING APPEAL

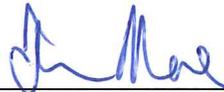
19 I, Tyler Nave, declare as follows:

- 20 1. I am a Special Agent with the Federal Bureau of Investigations (FBI). I have been a special
- 21 agent since March 2009. I am one of the agents assigned to this case.
- 22 2. During the investigation that led to this case, the FBI obtained text messages for Ian Furminger's
- 23 personal mobile telephone number, including for the time from October 2011 to June 2012.
- 24 Furminger was still a San Francisco Police Officer during this time frame. Text messages for
- 25 earlier times were not available when the FBI obtained these messages.
- 26 3. I have reviewed the text messages seized by the FBI. The messages include overtly racists and
- 27 homophobic statements made by Furminger and people with whom he was communicating.
- 28

- 1 4. I prepared the attached spreadsheet, Attachment A, containing some of those messages.
- 2 a. The text of the messages highlighted in yellow were messages sent from Furminger's cell
- 3 phone.
- 4 b. I redacted the telephone numbers from the spreadsheet.
- 5 i. The redactions in red, which appear as red blocks, are from Furminger's cell
- 6 phone.
- 7 ii. The redactions in blue are from telephone numbers I know from my investigation
- 8 to be associated with other San Francisco Police Officers.
- 9 iii. The redactions in black are from telephone numbers associated with civilians
- 10 known to the FBI or with individuals not known to the FBI.

11 I swear under penalty of perjury that the foregoing statements are true and correct to the best of

12 my knowledge. Executed this 13th day of March 2015 at San Francisco, California.

13 

14 _____
15 TYLER NAVE
16 Special Agent, FBI

MESSAGE DATE/TIME	FROM	TO	MESSAGE TEXT
10/25/2011 16:13:36			[Dont worry about my height, worry that Im white!]
10/25/2011 16:14:08			[White Power!]
10/26/2011 18:57:21			[I was trying to be nice to you as everyone knows your gay]
10/27/2011 17:20:30			[I love calling you a fag! Good enough?]
10/31/2011 9:38:20			[Looks like the minutes ran out on your mexican phone again bitch!]
11/09/2011 10:07:13			[I'm working on us]
11/09/2011 10:13:24			[Fuckin border bandits]
11/09/2011 10:15:54			[We got two blacks at my boys school and they are brother and sister! There cause dad works for school district and I am watching them like hawks]
11/09/2011 10:17:46			[Do you celebrate qaunza at your school?]
11/09/2011 10:19:18			[Yeah we burn the cross on the field! Then we celebrate Whitemas]
11/09/2011 10:20:33			[Its worth every penny to live here away from the savages]
11/21/2011 17:00:35			[Those guys are pretty stupid! Ask some dumb ass questions you would expect from a black rookie! Sorry if they are your buddies!]
11/24/2011 7:58:49			[The buffalo soldier was why the indians Wouldnt shoot the niggers that fought for the confederate They thought they were sacred buffalo and not human]
11/24/2011 7:58:50			[They were not far off Marley was a nigger]

11/24/2011 8:01:11			[Ha! We stole california from the mexicans too! Would have had Baha too but felt it wasnt worth it]
11/24/2011 8:03:41			[n The indians never had shit Columbus thought he landed where he was headed India So HE named them indians They never had a name of their own And the]
11/24/2011 8:03:42			[n re is evidence that the moors niggers were here first]
11/24/2011 8:06:41			[Gunther Furminger was a famous slave auctioneer]
12/08/2011 7:21:41			[I cant imagine working At costco and hanging out with filthy flips. hate to sound racist but that group is disgusting]
12/10/2011 7:50:55			[5 He would be so much better off had he married a white chick with a brain he would have a nice house with white kids that were not ghetto as his are An]
12/10/2011 8:06:09			[Just saw on news there was a peace march in oakland. everyone marching was white]
12/10/2011 15:34:36			[My wife has 2 friends over that dont know each other the cool one says to me get me a drink nigger not knowing the other is married to one just happ]
12/10/2011 15:34:36			[ened right now LMFAO]
12/10/2011 16:15:04			[Can you work tomorrow?]
12/10/2011 16:32:54			[I hardly remember being at your crib! straight swervin nitro! bout to do it again foo]

12/10/2011 16:34:23			[Cool...hopefully I'll be 97]
12/10/2011 16:35:04			[Da naaaa]
12/10/2011 16:48:54			[Gotta get my drunk on....!]
12/10/2011 16:49:42			[Word! let me know blood]
12/10/2011 17:21:16			Have fun tonight! but dont stand under the miselto]
12/10/2011 17:24:25			[Hoda and i are getting married!]
			[[name redacted] walked up to [name redacted] and said Break yo-self nigga! Then [name redacted] said, dont
12/10/2011 18:01:32			make me go old school on yo bitch ass nigga!]
1/23/2012 18:00:29			Ok is fine in the morning im going. In the morning for orden my medical report to hospital
1/23/2012 18:10:51			Ok
1/23/2012 18:11:59			Yeah man something else man! Fuckin sorry ass people
1/23/2012 18:13:19			Ok see you in susie house 3:00pm tank you
1/23/2012 18:13:59			And only when they think there caught red handed...there us a reason why people for not likefriend....lol
1/23/2012 18:34:00			Oh my fucking god, r u kidding me? i am so sorry
1/23/2012 18:40:06			No not at all, are You kidding me? Its all good, I expected a lot of work and thats not much
1/23/2012 18:41:15			They are called black
1/25/2012 11:15:08			White power
1/28/2012 12:39:45			White Power Family, [Furminger home address redacted]

2/5/2012 13:45:39			All good, I still hate black people!
2/10/2012 9:43:26			Niggers should be spayed
2/10/2012 9:44:35			I saw one an hour ago with 4 kids
2/10/2012 9:44:59			See
2/10/2012 9:45:18			That would be four less
2/21/2012 19:19:36			I am just leaving it like it is, painting KKK on the sides and calling it a day!
2/22/2012 13:04:25			Cross burning lowers blood pressure! I did the test myself!
2/22/2012 13:05:39			So do I. Every camping trip I burn an image of the prez
2/24/2012 15:36:29			At his school! Multi purpose room! Their shouldnt be any blacks!
2/28/2012 9:22:05			All niggers must fucking hang
2/28/2012 9:22:09			Oh and Peachey is fuckin retarded
2/28/2012 9:23:22			Ask my 6 year old what he thinks about Obama
4/16/2012 12:05			[Just boarded train at Mission/16th]
4/16/2012 12:06			[Ok, watch out for BM's]
4/16/2012 12:07			[Too late. I'm surrounded. And the only gun I have is broken!]
4/16/2012 12:08			[Your fucked]
4/16/2012 12:08			[Dumb nig nug.]
4/18/2012 19:20			[20,000 bees are in Vacaville near School but they are not dangerous like black people]
4/20/2012 15:28			[You are a total homo! And your gay!]

5/5/2012 17:41:59			[Busted up but thats what happens to fags!]
5/6/2012 10:54:36			[We decided to chill but ended up going to BC house for first half of fight! Home around 9 ish]
5/6/2012 10:55:29			[Cool...who won that....cotto...not]
5/6/2012 10:56:23			[No, the nigger!]
5/6/2012 10:56:48			[Nigger...]
5/10/2012 14:39:25			[I resent you an email because I haven't heard from you. When do you plan to pay me child support for this month?]
5/10/2012 14:40:22			[When do You plan on letting me see [name redacted]?]
5/10/2012 14:51:26			[As soon as she wants to but it would be a mistake to force her at this point.]
5/10/2012 14:51:50			[Does that mean that you don't plan on paying me?]
5/10/2012 17:02:17			[Please answer me. \nDo you plan on paying child support?\n]
5/10/2012 17:03:55			[Please answer me! Court wants joint custody, you want full custody! You have a plan to keep me out of [name redacted]life for good]
5/10/2012 17:05:40			[Court wants joint custody? What are you talking about? Will you be paying child support?]
5/10/2012 17:06:46			[Read last text]
5/10/2012 17:08:31			[I'm tired of your nonsense. I need to know if you are planning to pay child support so I can make the necessary decisions.]
5/10/2012 17:09:32			[Are You planning on letting me see [name redacted]! I am tired of You hurting her future!]

5/10/2012 17:11:57			[I'm tired of your nonsense. I need to know if you are planning to pay child support so I can make the necessary decisions.]
5/10/2012 17:12:27			[Are You planning on letting me see [name redacted]! I am tired of You hurting her future!]
5/10/2012 17:26:11			[[name redacted] doesn't want to see you. You have hurt her, repeatedly.]
5/10/2012 17:28:02			[No, You have hurt her permanently! This was never about her and I, and now she lost her Dad and brother over your inability to budget money!]
5/10/2012 17:28:54			[You should see this text war I am having with Lucie! Awesome! Fuck her!]
5/10/2012 17:31:17			[I an you are once again...confused, making things worse and causing stress. Please reply about child support.]
5/10/2012 17:33:18			[And You broke my parents hearts too They are 81 and not in great health Her dog is not doing great either Hope your happy cause the gravy train runs]
5/10/2012 17:33:19			[to a complete stop in 5 years My parents and Kojack will be gone by then and [name redacted] will be in high school]
5/10/2012 17:36:14			[I am far from confused! You have an agenda and is going to seriously damage [name redacted] and her future!]
5/10/2012 17:42:38			[Does that mean that you will pay child support?]
5/10/2012 18:11:53			[Since this all started you have done nothing to reunite [name redacted] and I only asked for money You all talk about me hurting [name redacted] but never the reason so we]
5/10/2012 18:11:54			[can come to a resolution]

5/10/2012 18:14:06			[You keep creating more reasons. It's been hard to keep up. We 'all' have told you repeatedly. I only ask for [name redacted] child support when you fail to pay me.]
5/19/2012 19:45:04			[I hate to tell you this but my wife friend is over with their kids and her husband is black! If is an Attorney but should I be worried?]
5/19/2012 20:27:04			[Get ur pocket gun. Keep it available in case the monkey returns to his roots. Its not against the law to put an animal down]
5/19/2012 20:27:41			[Well said!]
5/19/2012 20:29:32			[U may have to kill the half breed kids too. Don't worry. Their an abomination of nature anyway.]
6/2/2012 20:38:33			[Dude. Your boy made Q50 . Sgt. Aj Holder]
6/2/2012 20:39:00			[Fuckin nigger]
6/2/2012 20:39:46			[LoL and Yolanda Williams]
6/2/2012 20:40:07			[Or my]
6/2/2012 20:40:02			[Nigger bitch]
6/10/2012 22:50:24			[Your sister lies more than any nigger I have ever met in my life! You awake?]

Key	
	Ian Furminger's redacted telephone number
	Police Officer's redacted telephone numbers
	Non-Police Officer's redacted telephone numbers
	Ian Furimnger's sent text messages