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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

IAN FURMINGER,  
Plaintiff and Appellant,

v.

CITY AND COUNTY OF SAN  
FRANCISCO RETIREMENT  
SYSTEM et al.,

Defendants and Respondents.

A162040

(San Francisco County  
Super. Ct. No. CPF-20-517076)

Section A8.597-16 of the City and County of San Francisco Charter mandates that any member of the San Francisco Employees' Retirement System (SFERS) convicted of a crime involving moral turpitude committed in connection with his or her official duties forfeits all rights to his or her SFERS retirement benefits. This appeal presents a single issue: whether wire fraud as defined by 18 U.S.C. section 1343 is a crime "involving moral turpitude" for purposes of the charter's forfeiture provision. We follow settled precedent to hold that it is. The trial court correctly found former San Francisco Police Department Sergeant Ian Furminger was convicted of such crimes, so we affirm its denial of his petition for writ of

administrative mandamus challenging the forfeiture of his pension.

## **BACKGROUND**

The relevant facts, which are undisputed, are taken from the trial court's order. "On December 5, 2014, Petitioner, who was formerly employed as a sergeant for the San Francisco Police Department (SFPD), was found guilty of four federal crimes: two violations of 18 U.S.C. §1343 (wire fraud); one violation of 18 U.S.C. §241 (conspiracy against civil rights); and one violation of 18 U.S.C. §371 (conspiracy to commit theft concerning federally funded program)<sup>[1]</sup> . . . . The convictions arose out of Petitioner's participation in a scheme with other SFPD officers, while executing search warrants, making arrests, and seizing evidence, to steal money, drugs, gift cards, and other valuable items for their personal benefit. He was sentenced to serve a term of 41 months in federal prison and three years on supervised release, to pay a \$25,000 fine, and to complete 120 hours of community service. . . . After he was indicted, Petitioner was initially suspended without pay and then, following his conviction, resigned from the Police Department. . . .

"On April 10, 2015, [SFERS] notified Petitioner that pursuant to his convictions of crimes committed in connection with his service as a police officer, he had forfeited the right to his pension except for refund of his accumulated

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<sup>1</sup> The Ninth Circuit affirmed Furminger's convictions in *United States v. Furminger* (9th Cir. June 3, 2016) 652 Fed.Appx.494).

contributions. . . . SFERS’s decision was made pursuant to San Francisco Charter Section A8.597-16, which provides that ‘[a]ny member convicted of a crime involving moral turpitude committed in connection with his or her duties as an officer or employee of the City and County shall forfeit all rights to any benefits under the Retirement System. . . .’ . . . On June 26, 2019, Petitioner notified SFERS that he wished to appeal the decision, denying that his convictions involved moral turpitude, asserting that he had been ‘wrongly convicted,’ and blaming his co-defendants. . . . Following the submission of pre-hearing briefs, a hearing was held before an administrative law judge [ALJ], at which Petitioner testified, counsel presented opening statements, and documentary exhibits were admitted. . . . Following the submission of post hearing briefs, the ALJ issued a ruling denying Petitioner’s appeal. . . . The ALJ found that two of Petitioner’s convictions, of conspiracy against civil rights in violation of 18 U.S.C. §241 and conspiracy to commit theft concerning a federally funded program in violation of 18 U.S.C. §371, potentially involve conduct that does not necessarily involve moral turpitude, and therefore do not provide cause for forfeiture.”

However, the ALJ reached the contrary conclusion as to Furminger’s two convictions under 18 U.S.C. section 1343 (hereafter section 1343, or wire fraud), finding they involved moral turpitude because section 1343 “has as a necessary element an intent to defraud or obtain money or property by false

or fraudulent pretenses.” Accordingly, it found Furminger’s retirement benefits were forfeited.

Furminger filed a petition for writ of administrative mandamus in the trial court pursuant to Code of Civil Procedure section 1094.5, asserting the ALJ erred in determining section 1343 involves moral turpitude “because the least adjudicated elements of the statute . . . do not necessarily involve moral turpitude and Petitioner was not convicted of crimes involving moral turpitude.” After considering briefing and argument, the trial court denied the petition. Furminger filed this timely appeal.

## DISCUSSION

### I. Standard of Review

“Code of Civil Procedure section 1094.5 is the administrative mandamus provision providing the procedure for judicial review of adjudicatory decisions rendered by administrative agencies.’ (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 514–515.) . . . In cases reviewing decisions which affect a vested, fundamental right,” such as retirement benefits, the trial court exercises independent judgment on the evidence and we review its factual findings for substantial evidence. (*Molina v. Board of Administration, etc.* (2011) 200 Cal.App.4th 53, 60–61; *Hall-Villareal v. City of Fresno* (2011) 196 Cal.App.4th 24, 29.) But where, as here, the case presents a question of law, our review is de novo. (*Molina v. Board of Administration, etc.*, at p. 61; *Hall-Villareal v. City of Fresno*, at p. 29 [de novo review of

interpretation of city charters]; *In re Lesansky* (2001) 25 Cal.4th 11, 16 [whether offense involves moral turpitude is a question of law].)

## **II. The Trial Court Correctly Found Wire Fraud Involves Moral Turpitude.**

As noted, section A8.597-16 of the charter (section A8.597-16) provides that “[a]ny member convicted of a crime involving moral turpitude committed in connection with his or her duties as an officer or employee of the City and County shall forfeit all rights to any benefits under the Retirement System except refund of his or her accumulated contributions.” As best we understand his position, Furminger argues wire fraud is not a “crime involving moral turpitude” because it requires neither that the perpetrator made any specific false statement nor that a victim was actually deceived or harmed. Therefore, he maintains, the offense does “not necessarily involve moral turpitude.” He is mistaken.

Furminger’s wire fraud conviction is conclusive proof that he committed all acts necessary to constitute the offense. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 110 (*Chadwick*)). To determine whether it involves moral turpitude, we look to its elements to see if “the least adjudicated elements of the conviction necessarily involve moral turpitude.” (*People v. Castro* (1985) 38 Cal.3d 301, 316–317 (*Castro*)). “The ‘least adjudicated elements’ test means that ‘from the elements of the offense alone—without regard to the facts of the particular violation—

*one can reasonably infer the presence of moral turpitude.’” (People v. Campbell (1994) 23 Cal.App.4th 1488, 1492.)*

Analyzed under this test, there is no doubt that federal wire fraud is such an offense. Section 1343 criminalizes conduct by any person who, “having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice.” Its elements are: “(1) the existence of a scheme to defraud; (2) the use of wire, radio, or television to further the scheme; and (3) a specific intent to defraud. [Citation.] “The specific intent requirement is an aspect of the “scheme to defraud” requirement; i.e., there is no fraudulent scheme without specific intent.’” (*United States v. Jinian* (9th Cir. 2013) 725 F.3d 954, 960.)

State and federal courts have consistently recognized that “a crime in which an intent to defraud is an essential element is a crime involving moral turpitude.” (*In re Hallinan* (1954) 43 Cal.2d 243, 247 (*Hallinan*); see, e.g., *Chadwick, supra*, 49 Cal.3d at p.110; *Kirby v. Alcoholic Beverage Control Appeals Bd.* (1969) 270 Cal.App.2d 535, 540; *Jordan v. De George* (1951) 341 U.S. 223, 227, 232 [“[w]ithout exception, federal and state courts have held that a crime in which fraud is an ingredient involves moral turpitude”]; *Ku v. Attorney General* (3d Cir. 2019) 912 F.3d 133, 143 (*Ku*); *Singh v. Attorney General* (3d Cir. 2015)

807 F.3d 547, 550; see also *In re Gossage* (2000) 23 Cal.4th 1080, 1098 [criminal acts of dishonesty committed for financial gain necessarily involve moral turpitude].) Indeed, citing a string of cases going back to 1951—including a United States Supreme Court case—*Ku* specifically applies this principle to section 1343 to hold its violation involves moral turpitude. (912 F.3d at p. 143; see also *United States v. Andrews*, 681 F.3d 509, 518 (3d Cir. 2012).) California law compels the identical conclusion here. (*Castro, supra*, 38 Cal.3d at pp. 316–317; *Hallinan, supra*, 43 Cal.2d at p. 247.)

Furminger’s arguments to the contrary are meritless. He asserts that “[n]umerous cases describe the elements and purpose of [section 1343] which substantiate [his] contention that he was not convicted of a crime involving moral turpitude,” but identifies not a single authority in support of this claim. He further contends section 1343 can be violated by “having a scheme and sending the scheme in interstate commerce” without involving moral turpitude, but the contention ignores the mens rea required for the offense. “The specific intent requirement is contained in the latter part of the statute—‘for the purpose of executing [a] scheme or artifice [to defraud]’—and must be proved regardless of whether the person made the transmission after ‘having devised’ or while ‘intending to devise’ the scheme to defraud. . . . Either way, the person must have made the transmission *for the purpose of executing* the fraud scheme in order to be convicted.” (*Ku, supra*, 912 F.3d at p. 143.) We address below our view that Furminger’s insistence that “fraud is

not an essential element of 18 U.S.C. § 1343” veers uncomfortably close to the line between zealous advocacy and misrepresentation of the law. (See Bus. & Prof. Code, § 6068, subd. (d) [attorney’s duty “never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law”].)

Referring to an abbreviated discussion of the underlying facts and evidence in the trial court’s order, Furminger next contends that, rather than restricting its inquiry to the elements of section 1343, the court relied on statements in the superseding indictment to find his offense involved moral turpitude. The contention is meritless. The order unambiguously shows the court applied the least adjudicated elements test to determine whether wire fraud necessarily involves moral turpitude. That is exactly what the law requires. (*Castro, supra*, 38 Cal.3d at pp. 316–317.)

Furminger goes further astray with his contention that section 1343 does not involve moral turpitude because it does not require that a victim actually be defrauded. “Without such a victim,” he argues, “a conviction of § 1343 does not involve moral turpitude even though it criminalizes having a scheme and sending the scheme in interstate commerce.” But that is not the law. The determinative question, as we have observed, is whether the specific intent to defraud is an essential element of the offense at issue; whether an individual was actually victimized by the crime is irrelevant to that inquiry. (*Lindsey v. United States* (9th Cir. 1964) 332 F.2d 688, 690 [no requirement that a victim actually be defrauded]; *Hallinan, supra*, 43 Cal.2d at 247.)

Equally immaterial is Furminger's protest that he was not convicted of an *aggravated* offense. Nothing in the law suggests that only aggravated felonies may involve moral turpitude.

We conclude the trial court correctly applied the least adjudicated elements test to conclude Furminger was convicted of an offense involving moral turpitude and thereby forfeited his pension under section A8.597-16.

### **III. Furminger's Remaining Arguments Are Waived.**

The final pages of Furminger's opening brief in this court consist of a laundry list of what he describes as jurisdictional issues, including nine bullet-pointed ways in which he claims SFERS deprived him of a fair trial and "proceeded without/in excess of its jurisdiction and in violation of due process" and six overlapping points he casts as abuses of the agency's discretion. None of the issues so identified are supported by intelligible legal argument, citation to the relevant portions of the record, or, in large part, to pertinent legal authority. And where Furminger does append case citations to his claims, he makes no attempt to argue their applicability to the facts of this case.

"[A]n appealed judgment is presumed correct, and appellant bears the burden of overcoming the presumption of correctness.'" (*Hearn v. Howard* (2009) 177 Cal.App.4th 1193, 1207.) "[T]o demonstrate error, an appellant must supply the reviewing court with some cogent argument supported by legal analysis and citation to the record.' [Citation.] 'We are not obliged to make other arguments for [appellant] [citation], nor are we obliged to speculate about which issues counsel intend to raise.'

[Citations.] We may and do ‘disregard conclusory arguments that are not supported by pertinent legal authority or fail to disclose the reasoning by which the appellant reached the conclusions he wants us to adopt.’” (*Hernandez v. First Student, Inc.* (2019) 37 Cal.App.5th 270, 277; *Hearn v. Howard, supra*, 177 Cal.App.4th at p. 1207; *Sprague v. Equifax, Inc.* (1985) 166 Cal.App.3d 1012, 1050; see Cal. Rules of Court, rule 8.204(a)(1)(B) & (C).) Our review is therefore limited to issues that have been adequately raised and supported in the appellant’s opening brief; we will not reach issues briefed for the first time in a reply brief. (*Golden Door Properties, LLC v. County of San Diego* (2020) 50 Cal.App.5th 467, 554–555; *State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 836.)

Furminger’s treatment of his various “jurisdictional” issues falls woefully short of these standards. Accordingly, we deem them abandoned. (*Golden Door Properties, LLC v. County of San Diego, supra*, 50 Cal.App.5th at pp. 554–555.)

#### **IV. Furminger’s Arguments Are Meritless, But We Do Not Impose Sanctions.**

Prior to oral argument, this court notified Furminger’s attorney, David P. Clisham, that it was considering sanctioning him for pursuing a frivolous appeal. (See Cal. Rules of Court, rule 8.276, subd. (a)(1); *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 654.) In deciding whether to award sanctions we consider the issue both objectively (“whether any reasonable person would agree that the point is totally and completely devoid of merit, and, therefore frivolous”) and subjectively (“the

motives of the appellant and his or her counsel.”) ( *Id.* at pp. 649–650.) In exercising our discretion we are mindful that the line between a frivolous appeal and one that is merely meritless is often vague, and that we must proceed carefully to avoid chilling the right to appeal. ( *Id.* at p. 650.) Accordingly, sanctions for frivolous appeals should not be used “ ‘in all but the clearest cases.’ ” ( *Ibid.*)

The objective standard is satisfied here. Through his counsel, Furminger asserts a totally baseless legal position that no reasonable attorney would advance in the face of a wall of precedent consistently rejecting it over many decades. This is not a situation in which anyone could reasonably say—certainly Furminger makes no attempt to say—that the cases arrayed against him are poorly reasoned, outmoded or have been overtaken by changing circumstances. Against all reason, he simply refuses to accept the established adverse authority.

At oral argument, counsel insisted that we fail to appreciate that *Ku* is distinguishable because it merely held wire fraud is an “aggravated felony.” (*Ku, supra*, 912 F.3d at pp. 138–143 [applying 8 U.S.C. § 1101(a)(43)(M)(i) in a removal proceeding under the Immigration and Nationality Act].) But counsel ignores that *Ku* also specifically addressed—and rejected, as contrary to settled precedent—the argument he makes here: that wire fraud is not a crime of “moral turpitude.” (*Ku, supra*, 912 F.3d at p. 143, applying U.S.C. § 1182(a)(2)(A)(i)(I).) That we might construe 18 U.S.C. § 1343 differently for purposes of

pension benefits forfeiture under the San Francisco City Charter was never sustainable.

Much as we are troubled by Furminger's unsupportable arguments, we assume that counsel's motive was his misguided view that he was providing vigorous advocacy. Therefore, we do not find the subjective element and discharge the order to show cause without imposition of sanctions. Its issuance should warn Furminger's counsel that another court may interpret adherence to a baseless position as deliberate misrepresentation of the law constituting bad faith under *Flaherty*.

#### **DISPOSITION**

The order denying Furminger's petition for writ of administrative mandamus is affirmed. Respondents are awarded their costs on appeal.

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Ross, J.\*

WE CONCUR:

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Streeter, Acting P.J.

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Brown, J.

*A162040 Furminger v. City and County of San Francisco Retirement System*

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\* Judge of the Superior Court of California, County of San Francisco, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.