

1 KINSELLA WEITZMAN ISER KUMP & ALDISERT LLP
2 SHAWN CHAPMAN HOLLEY (SBN 136811)
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Superior Court of California
County of Los Angeles

JAN 19 2011

John A. Clarke, Executive Officer/Clerk
By: T. Vo, Deputy

5 Attorneys for Defendant MONTANA FISHBURNE

6 SUPERIOR COURT OF THE STATE OF CALIFORNIA
7 COUNTY OF LOS ANGELES
8

9 THE PEOPLE OF THE STATE OF
0 CALIFORNIA,

CASE NO. OCA04823

1 Plaintiff,

2 **DEFENDANT'S MOTION FOR SPECIFIC
3 ENFORCEMENT OF THE PEOPLE'S
4 OFFER; MEMORANDUM OF POINTS
5 AND AUTHORITIES; DECLARATION
6 OF COUNSEL IN SUPPORT THEREOF;
7 EXHIBITS**

vs.

8 MONTANA FISHBURNE,

9 Defendant.

Date: January 24, 2011
Time: 9:00 a.m.
Court: 56

1 TO THE HONORABLE MARY LOU VILLAR, JUDGE OF THE SUPERIOR
2 COURT AND TO CARMEN A. TRUTANICH, CITY ATTORNEY OF LOS ANGELES,
3 AND TO HIS DULY-APPOINTED REPRESENTATIVE, DEPUTY CITY ATTORNEY
4 ALEX PEREZ; AND TO THE PLAINTIFF:

5 PLEASE TAKE NOTICE THAT on the 24th day of January, 2011 at 9:00 a.m. or as
6 soon thereafter as the matter may be heard, Montana Fishburne, by and through her counsel,
7 Shawn Chapman Holley of Kinsella Weitzman Iser Kump and Aldisert, LLP, will move and
8 hereby moves for specific enforcement of the plea bargain that was reached between the parties in
9 the herein case.

10 This motion is based on the attached memorandum of points and authorities, the attached
11 Declaration of Counsel and supporting exhibits, on all records and files in the herein case and on
12 such oral and/or documentary evidence as may be presented at the hearing on the motion.

13
14 DATED: January 13, 2011

Respectfully submitted,

15
16 KINSELLA WEITZMAN ISER KUMP & ALDISERT LLP

17
18 By: 

19 Shawn Chapman Holley
20 Attorneys for Defendant, MONTANA FISBURNE

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. Introduction**

3 Montana Fishburne was charged in Misdemeanor Complaint Case Number OCA04823 on
4 March 5, 2010 in Count I with Penal Code Section 242 and in Count II with Penal Code Section
5 236. Ms. FISHBURNE pled "not guilty" to the charges on March 11, 2010.

6 On or about June 3, 2010, the City Attorney's Office filed an Amended Complaint in
7 which FISHBURNE was charged in Count VI with Penal Code Section 245(a) and in Count VII
8 with Penal Code Section 602.5b. A separate criminal case arising out of the same set of facts and
9 filed against Jerome Greene was consolidated with Ms. FISHBURNE's case on that date.¹ On
10 June 3, 2010, Ms. FISHBURNE and Mr. GREENE entered 'not guilty' pleas to the Amended
11 Complaint.

12 The underlying allegations as set forth in the police reports concern Wendy Matias, a
13 married woman involved in a romantic relationship with GREENE, who was FISHBURNE's
14 fiancé. Though she provides inconsistent and conflicting versions of what occurred, Matias
15 alleges that on the date of the incident, both FISHBURNE and GREENE entered her apartment
16 without her permission and physically assaulted her, causing her injury (hereinafter "the
17 incident").

18
19 **II. History Of Negotiations**

20 Throughout the pendency of these proceedings, GREENE has been represented by Samuel
21 M. Weiss and FISHBURNE has been represented by Shawn Chapman Holley. Ms. Holley made
22 her first appearance on the record on behalf of FISHBURNE on April 1, 2010 in Department 40,
23 Judge Karla Kerlin presiding.

24 On April 1, 2010, the date upon which Ms. Holley first appeared on the case on the record,
25

26
27 ¹ There were no additional facts alleged or information provided between the filing of the original
28 and the amended Complaints, and Mr. Perez offered no explanation as to why the additional
charges against Ms. FISHBURNE were not initially filed.

1 the assigned prosecutor, Alex Perez, was not in court to discuss or handle the case. Accordingly,
2 the case was continued to April 26, 2010.

3 On April 26, 2010, Ms. Holley appeared on the matter and, again, Mr. Perez was not in
4 court to discuss or handle the case. Accordingly, the case was continued to June 3, 2010.

5 On June 3, 2010, when Mr. Perez and Ms. Holley were finally able to discuss the case, Mr.
6 Perez extended the offer which, he indicated, had been conveyed to him by his supervisor, Lara
7 Bloomquist. Specifically, the offer was stated to be: **UPON FISHBURNE'S 'GUILTY' OR**
8 **'NO CONTEST PLEA', SHE WOULD BE SENTENCED TO ONE OF TWO OPTIONS OF**
9 **HER CHOOSING: 120 DAYS IN JAIL OR 90 DAYS IN AN INPATIENT TREATMENT**
10 **PROGRAM** (hereinafter "the offer").

11 At that time, Ms. Holley advised Mr. Perez (1) that the facts would not be disputed and the
12 case would not proceed to trial; (2) that Ms. FISHBURNE would accept the 'treatment option' as
13 set forth in the offer; (3) that the case would need to be continued so that the details could be
14 arranged. Thereafter, and in accordance with this plan, Ms. Holley identified two out-of-state
15 inpatient treatment programs for Mr. Perez's consideration, even going so far as to obtain written
16 pre-approval from both facilities accepting Ms. FISHBURNE into their programs. Mr. Perez
17 expressed no opposition to either program.

18 Though Ms. Holley and Mr. Perez had reached a deal in principle, executing the deal was
19 proving to be difficult. This was not due to resistance or recalcitrance on Ms. FISHBURNE's or
20 Ms. Holley's part, but, rather, to outside influences which were making it difficult, it not
21 impossible, for Ms. FISHBURNE to effectively execute the deal. The specifics of these
22 difficulties, as well as Ms. Holley's concerns about them, were shared openly with Mr. Perez who,
23 again, expressed no objection to continuing the case in an effort to overcome these obstacles and
24 proceed with the deal.²

25 Thereafter, Mr. GREENE pled *no contest* and was placed on summary probation and
26

27 ² Because of the media interest in the case, the specific details at issue are being omitted herein.
28 Counsel has no objection to discussing them fully *in camera*.

REDACTED

1 ordered to perform Cal Trans.³

2 At the time of Mr. GREENE's plea, Ms. Holley expressed to Mr. Perez her hope and
3 expectation that the procession of the case without the co-defendant would help to facilitate the
4 execution of the deal with Ms. FISHBURNE. Again, Ms. Holley reiterated her and her client's
5 position: (1) that the facts would not be disputed and the case would not proceed to trial; (2) that
6 Ms. FISHBURNE would accept the 'treatment option' as set forth in the offer; (3) that the case
7 would need to be continued so that the details could be arranged. Mr. Perez expressed no
8 objection to the case being continued for that purpose.

9 On September 13, 2010, Ms. FISHBURNE entered an inpatient
10 treatment program, in accordance with the 'treatment option' set forth in the offer.

11 Shortly thereafter, Ms. FISHBURNE signed a document acknowledging her agreement to
12 remain in the inpatient treatment program for 180 days – **that is, 90 days longer than what was**
13 **set forth in the People's offer.**

14 On October 21, 2010, the date of a pre-trial hearing on the matter, Ms. Holley and Mr.
15 Perez discussed the case outside the courtroom. At that time, Mr. Perez expressed his desire to
16 speak with , the director of the program. Mr. Perez explained that he
17 wanted to be satisfied that the program was "legitimate" and that it was adequately addressing Ms.
18 FISHBURNE's issues. Ms. Holley provided contact information to Mr. Perez.

19 Also during this conversation, further details of the offer were discussed. Ms. Holley made
20 the following proposal: that Ms. FISHBURNE would plead to the Assault with a Deadly Weapon
21 charge, as well as to the Battery charge; that she would NOT be sentenced on the Assault with a
22 Deadly Weapon charge; that she WOULD be sentenced on the Battery charge to probation with
23 180 days in the , that some period of jail time would be suspended
24 during her probationary term; and that, upon successful completion of probation, the Assault with
25 a Deadly Weapon plea could be withdrawn. Mr. Perez sought clarification of Ms. Holley's

26 _____
27 ³ According to Ms. Matias, GREENE punched her three times in the face, causing her to fall onto
28 the ground.

1 proposal⁴ and, upon receiving it, carefully wrote down in his file the details of Ms. Holley's
2 proposal.

3 The case was then continued to November 16, 2010 to provide Mr. Perez an opportunity to
4 speak with and, presumably, to consider Ms. Holley's proposal.

5 On November 16, 2010, Ms. Holley and Mr. Perez again met outside Department 40 to
6 discuss how the case would proceed. Mr. Perez explained that he had spoken with and
7 that he believed that the treatment program was legitimate. He further expressed his belief --
8 again, based on his conversation with -- that Ms. FISHBURNE was progressing in the
9 program and complying with its directives.

10 It was then that Mr. Perez advised Ms. Holley that he had decided to withdraw the offer
11 and that the only option available to Ms. FISHBURNE was 120 days in jail. When Ms. Holley
12 asked what had occurred to justify this unexpected action, Mr. Perez responded as follows: (1) that
13 the facts warrant jail; (2) that the offer was withdrawn each time it wasn't accepted; (3) that
14 lenient offers are replaced with harsher options as time passes; (4) that as a prosecutor he is
15 entitled to change his mind.

16
17 **III. Detrimental Reliance**

18 Ms. FISHBURNE has been successfully participating in the inpatient treatment program
19 since September 13, 2010 and remains there today. Her treatment has been and continues to be
20 exorbitantly costly. Though it is uncontroverted that her stay at the treatment program has been a
21 positive influence on her life, her decision to admit herself to the program and to remain there for
22 **twice the amount of time offered by the People** was based solely on her interest in and desire to
23 fulfill her end of the bargain as set forth in the People's offer.

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27 ⁴ Specifically, Mr. Perez asked Ms. Holley if she was proposing a type of "informal diversion" on
28 the Assault with a Deadly Weapon charge, to which she responded affirmatively.

1 **IV. ARGUMENT**

2 **A. PLEA BARGAINING IS AN ESSENTIAL COMPONENT**
3 **OF THE ADMINISTRATION OF JUSTICE**

4 “The disposition of criminal charges by agreement between the prosecution and the
5 accused, sometimes loosely called ‘plea bargaining’ is an essential component of the
6 administration of justice. Properly administrated, it is to be encouraged.” *Santobello vs. New*
7 *York (1971) 404 U.S. 257*. “However, all of these considerations [promoting plea bargaining]
8 presuppose fairness in securing agreement between an accused and a prosecutor (*Id. at p. 261*).

9 Discussions between prosecutors and counsel for Ms. FISHBURNE began in earnest
10 shortly after the case against Ms. FISHBURNE was filed. Ms. Holley immediately expressed her
11 client’s interest in accepting the ‘treatment option’ of the People’s offer.

12 Despite the fact that the case was continued on numerous occasions, Ms. Holley never
13 wavered in her position that Ms. FISHBURNE would accept the People’s offer. The numerous
14 defense requests to continue the case were based only on external factors (all of which were
15 openly discussed with Mr. Perez) and the logistics of finalizing “the deal”. Mr. Perez never
16 objected to these requests to continue the case, nor did he express his opposition to the reasons
17 therefore.

18 Accordingly, Mr. Perez’s arbitrary decision to “change [his] mind” flies in the face of the
19 United States Supreme Court’s directives regarding fairness in negotiations and plea bargaining.

20
21 **B. A PROSECUTOR MAY WITHDRAW FROM A PLEA**
22 **BARGAIN SO LONG AS THE DEFENDANT HAS**
NOT DETRIMENTALLY RELIED ON IT

23 “A prosecutor may withdraw from a plea bargain before a defendant pleads guilty or
24 otherwise detrimentally relies on that bargain.” *People vs. Rhoden (1999) 75 Cal.App 4th 1346 at*
25 *1354*.

26 “Detrimental reliance may be demonstrated where the defendant performed some part of
27 the bargain.” *Reed vs. Becka (1999), 33 S.C. 676*.

28 The People’s offer was initially made in March 2010, shortly after charges were filed

1 Thus, Mr. Perez's argument to Ms. Holley on November 16 when he withdrew the offer
2 that "this is a jail case" lacks merit. If this is a "jail case", it was a "jail case" when the offer was
3 first made, and it was a "jail case" for the subsequent several months when the offer was extended
4 by Mr. Perez.

5 Had the People consistently, from the start, expressed its view that the underlying facts
6 demanded jail, then counsel for Mr. FISHBURNE would have proceeded differently in her
7 approach to the case. Specifically, Ms. Holley would not have encouraged her client to expend
8 considerable funds to enroll in the _____, nor would she have persuaded her client to
9 remain there for 180 days.

10 Simply, Mr. Perez's statement that the facts of the case demand a jail sentence, and nothing
11 less, is non-sensical given that his office offered a no-jail sentence for seven months.

12
13 **B. Ms. Fishburne's Subsequent Conduct Does Not Justify A Harsher Sentence**

14
15 If Mr. Perez had withdrawn the offer because Ms. FISHBURNE had been arrested in a
16 new matter or if she had engaged in unlawful conduct, then the People would be justified in
17 withdrawing its offer. But that is not the case.

18 On the contrary, Ms. FISHBURNE has engaged in extremely positive subsequent conduct.
19 She voluntarily admitted herself into an inpatient treatment program and voluntarily extended her
20 stay there for double the amount of time requested by the People. She has not reoffended and she
21 has not engaged in any unlawful conduct.

22 Thus, Mr. Perez's decision to withdraw the offer was not based on any negative conduct on
23 the part of Ms. FISHBURNE.

24
25 **C. The Offer Was Withdrawn Each Time It Was Not Accepted**

26 First, the offer was directly accepted by Ms. Holley when she and Mr. Perez discussed the
27 matter upon their first meeting in Department 40 on June 3, 2010.

28 Ms. Holley made it clear to Mr. Perez that Ms. FISHBURNE would not dispute the

1 charges, would not proceed to trial and would accept the 'treatment option' of the offer. Plainly,
2 the offer was accepted from the start.

3 Even if Mr. Perez were to argue that the offer was not accepted because a plea was not
4 formally executed on the record, it is customary for an offer to remain open unless and until it is
5 specifically withdrawn. It is also customary for the prosecutor to provide advance notice of the
6 anticipated withdrawal – for example, a prosecutor will keep an offer “open” to a particular date or
7 deem an offer open for “today only.”

8 Customarily, in the absence of such notice of the offer’s impending withdrawal, the offer
9 remains open to the defendant and defense counsel has no reason to expect otherwise.

10 Thus, Mr. Perez’s argument that the offer was never accepted is also meritless.

11
12 **D. Harsh Offers Replace Lenient Offers If Not Accepted Early**

13 Mr. Perez’s argument that the City Attorney’s “policy” is to withdraw lenient offers with
14 harsh offers whenever the lenient offer isn’t promptly accepted is also a non-starter.

15 Again, Ms. FISHBURNE accepted the offer from the start. Through her counsel she
16 consistently acknowledged that she would not dispute the facts and would not proceed to trial.

17 Moreover, to the extent that such a “policy” exists, it is neither arbitrary, capricious nor
18 based on the sudden “changing mind” of the assigned prosecutor.

19
20 **IV. CONCLUSION**

21 The facts of Ms. FISHBURNE’s case remained fixed from the time the matter was filed.

22 The People were aware of the facts when they first tendered the “no jail offer”.

23 Further, Mr. Perez was aware of the facts when he extended the offer for several months to
24 Ms. Holley after the case was filed. Thus, it would be non-sensical and illogical to use “the facts”
25 as justification for the ‘jail offer’ when the facts justified the “no jail offer” for more than six
26 months.

27 Additionally, Ms. FISHBURNE has engaged in no unlawful conduct since the time the
28 offer was made which would explain or justify the withdrawal.

1 Finally, City Attorney "policies" designed to promote judicial economy cannot be used in
2 an arbitrary and capricious manner, especially when they are inapplicable to the unique
3 circumstances of a particular case.

4 Most importantly, Ms. FISHBURNE, through her counsel, expressed her desire to accept
5 the 'treatment option' of the offer from the start and substantially performed her part of the
6 bargain contemplated in the offer and resultant plea agreement. Mr. Perez's unanticipated
7 withdrawal of the offer has created a scenario in which Ms. FISHBURNE detrimentally relied on
8 the People's offer – an offer unjustifiably withdrawn. This withdrawal is tantamount to a breach
9 of the agreement, and the case law is clear that the appropriate remedy in such a situation is
10 specific enforcement of the agreement. Principles of fundamental fairness demand nothing less,
11 particularly when contemplating the conduct of a prosecutor – a position which should and must
12 be held to a standard of heightened principles and ethics.

13
14 DATED: January 13, 2010

Respectfully submitted,

KINSELLA WEITZMAN ISER KUMP &
ALDISERT LLP

By: 

Shawn Chapman Holley

Attorneys for Defendant MONTANA FISHBURNE

1 explained that it did not effect Ms. FISHBURNE's desire to accept the 'treatment option' of the
2 deal.

3 8. After Mr. Greene pled 'no contest' and the case proceeded without him, it was my
4 hope that the interference with my efforts would cease and that I would be able to execute the
5 deal. I openly expressed these thoughts and hopes to Mr. Perez.

6 9. I advised Ms. FISHBURNE to enter _____, explaining to her
7 that doing so would satisfy the 'treatment option' of the offer. Ms. FISHBURNE did so solely on
8 this basis.

9 10. On September 13, 2010, Ms. FISHBURNE was admitted to _____. Shortly
10 thereafter, she signed an agreement acknowledging her willingness to remain there for 180 days,
11 90 days more than the offer contemplated.

12 11. On October 21, 2010, I shared with Mr. Perez the documentation from
13 describing the substance and length of the program. [See Exhibit A]

14 12. On that date, Mr. Perez told me that he wanted to speak with _____, the
15 Program Director, to assess the "legitimacy" of the program and its purview. I provided
16 contact information to Mr. Perez. [See Exhibit B].

17 13. On that date, I also made a proposal to Mr. Perez concerning the details of the
18 anticipated plea. I proposed that Ms. FISHBURNE be permitted to plead to both the Battery and
19 Assault with a Deadly Weapon charges, but that she be not sentenced on the Assault with a
20 Deadly Weapon charge. I further proposed that she be placed on probation on the Battery charge,
21 be ordered to remain at _____ for 180 days with a period of jail time suspended during the term
22 of probation. I finally proposed that the Assault with a Deadly Weapon plea be withdrawn upon
23 successful completion of probation. To this proposal, Mr. Perez asked if I was suggesting
24 "informal diversion" on the Assault with a Deadly Weapon charge. I said I was. He then wrote
25 my proposal down in his file.

26 14. On November 16, 2010, I met with Mr. Perez in the hallway outside Court. He
27 said that he had spoken with _____ and that he believed that _____ was legitimate and that
28 Ms. FISHBURNE had been progressing there.

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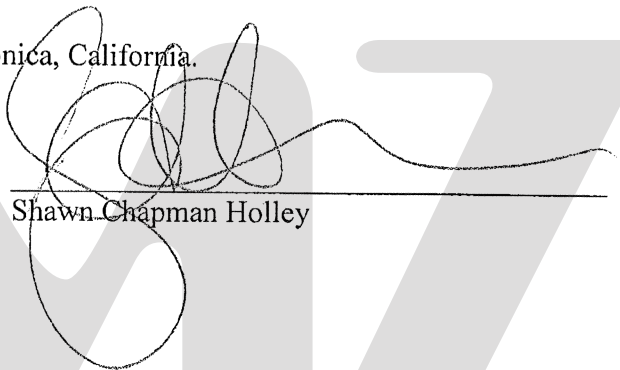
15. Mr. Perez then told me that he was withdrawing the 'treatment option' and that Ms. FISHBURNE would only be permitted to accept the 'jail option'.

16. When asked why Mr. Perez had withdrawn the 'treatment option' he replied:

- a) that this is a "jail case";
- b) that it is the "policy" of the City Attorney's Office to replace lenient offers with harsh offers as the case ages;
- c) that the offer was withdrawn each time it wasn't directly accepted;
- d) that he was entitled to change his mind.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed January 13, 2011, at Santa Monica, California.



Shawn Chapman Holley

1 PROOF OF SERVICE

2 STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

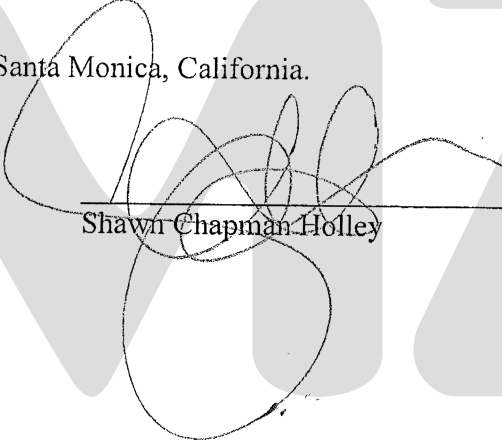
3 At the time of service, I was over 18 years of age and **not a party to this action**. I am
4 employed in the County of Los Angeles, State of California. My business address is [REDACTED]

5 On January 13, 2011, I served the following document(s) described as **DEFENDANT'S**
6 **MOTION FOR SPECIFIC ENFORCEMENT OF THE PEOPLE'S OFFER;**
7 **MEMORANDUM OF POINTS AUTHORITIES; DECLARATION OF COUNSEL IN**
8 **SUPPORT THEREOF; EXHIBITS** on the interested parties in this action as follows:
9 [REDACTED]

10 **BY PERSONAL SERVICE:** I personally delivered the document(s) directly to the
11 person(s) being served.

12 I declare under penalty of perjury under the laws of the State of California that the
13 foregoing is true and correct.

14 Executed on January 13, 2011, at Santa Monica, California.

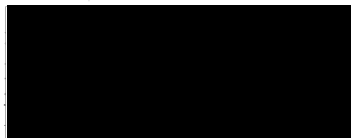
15 
16 _____
17 Shawn Chapman-Holley
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1 PROOF OF SERVICE

2 STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

3 At the time of service, I was over 18 years of age and **not a party to this action**. I am
4 employed in the County of Los Angeles, State of California. My business address is 808 Wilshire
Boulevard, 3rd Floor, Santa Monica, California 90401.

5 On January 19, 2011, I served the following document(s) described as **DEFENDANT'S**
6 **MOTION FOR SPECIFIC ENFORCEMENT OF THE PEOPLE'S OFFER;**
7 **MEMORANDUM OF POINTS AUTHORITIES; DECLARATION OF COUNSEL IN**
8 **SUPPORT THEREOF; EXHIBITS** on the interested parties in this action as follows:



10 **BY MAIL:** I enclosed the document(s) in a sealed envelope or package addressed to the
11 persons at the addresses listed in the Service List and placed the envelope for collection and
12 mailing, following our ordinary business practices. I am readily familiar with Kinsella Weitzman
13 Iser Kump & Aldisert's practice for collecting and processing correspondence for mailing. On the
14 same day the correspondence is placed for collection and mailing, it is deposited in the ordinary
15 course of business with the U.S. Postal Service, in a sealed envelope with postage fully prepaid.

16 I declare under penalty of perjury under the laws of the State of California that the
17 foregoing is true and correct.

18 Executed on January 19, 2011, at Santa Monica, California.

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20 Jentry Hyden Collins
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