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October 14, 2008

REF: 93676-23

Gail P. Clayton, Clerk
 Surry Circuit Court
 203 Church Street
 P.O. Box 203
 Surry, VA 23883


RE: Commonwealth v. Michael D. Vick

Dear Mrs. Clayton:

Please find enclosed a Motion to Allow Defendant to Enter Plea Via Two-Way Electronic Video which I would thank you to file in the referenced matter.

Thank you for your continuing cooperation in this matter. Should you have any questions or need additional information, please do not hesitate to give me a call.

Sincerely,



Lawrence H. Woodward, Jr.

LHWjr:th

Enclosure

cc: William R. Martin, Esq.
 Gerald Poindexter, Esq.

FILED

OCT 15 2008

SURRY COUNTY CIRCUIT COURT
 GAIL P. CLAYTON, CLERK

Virginia:

IN THE CIRCUIT COURT FOR THE COUNTY OF SURRY

COMMONWEALTH OF VIRGINIA,
Plaintiff

v.

MICHAEL VICK

Defendant

Docket Nos: CR07-0000056 and
CR07-0000057**Motion to Allow Defendant Michael Vick to
Enter Plea Via Two-Way Electronic Video**

Defendant, Michael Vick, through undersigned counsel, hereby moves this honorable Court for an Order allowing him to enter his plea in the above-captioned matter through use of two-way electronic video.

Factual Background

On September 26, 2007, Mr. Vick personally appeared before Magistrate Judge John J. Ellis, Jr., and was informed of the charges against him, had his travel restricted to the Commonwealth of Virginia, and had bond set at \$50,000. Since that appearance, Mr. Vick, through counsel, has been negotiating with the Commonwealth in an attempt to reach a plea agreement with the Commonwealth. At this time, the parties have entered into a plea agreement that has been signed by all parties, and Mr. Vick is prepared to enter a guilty plea before this Court. Mr. Vick is currently incarcerated in Leavenworth USP, located in Leavenworth, Kansas. In the interest of accepting full responsibility for the conduct charged in this case, Mr. Vick is attempting to admit his guilt and bring this prosecution to an end. Furthermore, this motion will save the government the needless expense of transporting him from Kansas to Virginia, Mr. Vick has executed a waiver of his right to personally appear before this Court to enter his plea and requests that the Court grant his motion to allow the plea to be entered through use of two-way electronic video. (See Waiver, attached hereto as Ex. 1.

Legal Argument

Mr. Vick should be allowed to enter his guilty plea via video based on the Virginia Code and applicable case law in the Commonwealth. Use of two-way electronic video to allow a defendant to participate in proceedings is not a novel concept. In fact, the Virginia Code, while not specifically addressing plea hearings, does provide for appearances to occur through use of two-way electronic video: "Where an appearance is required or permitted before a magistrate, intake officer or, prior to trial, before a judge, the appearance may be by (i) personal appearance before the magistrate, intake officer or judge or (ii) use of two-way electronic video and audio communication." Va. Code Ann. § 19.2-3.1(A). This procedure is allowed provided that the following conditions are met: 1) the persons communicating can simultaneously see and speak to one another; 2) the signal transmission is live and in real time; 3) the signal transmission is secure from interception by lawful means; and 4) any other specifications promulgated by the Chief Justice of the Supreme Court. *See id.* § 19.2-3.1(B). Other states have made it more clear and promulgated statutes that specifically allow guilty pleas to occur via closed circuit television. *See, e.g.,* Mich. Stat. Ann. § 767.37a(5) (2008) (the act "does not prohibit the use of 2-way close circuit television for...criminal pleas"); Nev. Rev. Stat. Ann. § 178.388(4) (2008) (presence of defendant not required at any preceding stage if court has provided for the use of a closed-circuit television to facilitate communication between the court and the defendant during the proceeding); Miss. Code Ann. § 99-1-12(1)(d) (2008) (allowing arraignment where guilty plea is entered to be conducted via closed circuit television upon waiver of any right to be present).

While there is no case law in the Commonwealth which addresses the Virginia Code and its applicability to a proposal for use of a two-way video in the instance of entering a guilty plea, Virginia courts have held that after an initial appearance the defendant can waive his right to be present at trial or other stages of the proceeding. *See Head v. Commonwealth*, 3 Va. App. 163, 169 (Ct. App. 1986) ("A defendant may waive his right to be present at the beginning of his trial after presence at arraignment just as he may waive his right to be present at any later stage."). Thus, it is consistent with both the Virginia Code and case law in this jurisdiction, that a two-way video can be utilized for entering a guilty plea, provided the defendant executes a waiver prior to the proceeding. Such an approach is consistent with the case law in other states as well.

See, e.g., *Illinois v. Stroud*, 804 N.E.2d 510, 517 (Ill. 2004) (“[A] defendant’s appearance at a guilty plea proceeding via closed circuit television is constitutionally permissible only if the defendant waives the right to physical presence on the record after being advised of his right to be present.”); *Mansfield v. Florida*, 618 So. 1385, 1386 (Fl. Ct. App., 2d Dist. 1993) (affirming use of video hookup at guilty plea proceeding due to defendant’s execution of a waiver, fact that attorneys were present during the hearing and that defendant was placed under oath).

In the case at hand, Mr. Vick personally appeared before the Magistrate Judge for his initial appearance. His attorneys have informed him that he has a right to personally appear to enter his guilty plea. (Waiver at 1.) Nonetheless, he has executed a knowing waiver of that right. (*Id.* at 2-4.) To further protect Mr. Vick’s rights through this proceeding, he will have one lawyer present with him at Leavenworth USP at the time of the plea proceeding, and a second attorney present in the courtroom in Surry County. (*Id.* at 5.) In addition, undersigned counsel has been informed that Leavenworth has the capability to provide the two-way video conferencing necessary to meet the requirements of the Virginia Code section. Undersigned counsel has consulted with an electronic specialist who is employed full time in the position of Manager of Network Operations at the law firm of Sutherland Asbill & Brennan LLP, and has been advised that appropriate secure equipment and technical expertise can be provided to the Court without any further costs to the Commonwealth.

Thus, Mr. Vick’s request meets the requirements of the Virginia Code section, and his execution of a waiver of his right to personally appear comports with case law regarding the appearance of a defendant at trial and other proceedings. Therefore, Mr. Vick respectfully requests that his Motion to Enter Plea Via Two-Way Electronic Video be granted.

Respectfully Submitted,
MICHAEL VICK

By: 

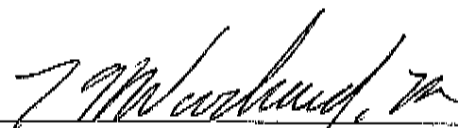
Counsel for the Defendant

Lawrence H. Woodward, Jr., Esq.
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Virginia Beach, VA 23452
(757) 671-6000

William R. Martin, Esq.
Sutherland Asbil & Brennan, LLP
1275 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 383-0271

CERTIFICATE OF SERVICE

I hereby certify that a copy of the forgoing Motion to Allow Defendant to Enter Plea Via Two-Way Electronic Video was mailed first class mail to Gerald G. Poindexter, Esq., Office of the Commonwealth's Attorney, P.O. Box 358, Surry, Virginia 23883 on this 14th day of October.



Lawrence H. Woodward, Jr.

FILED

OCT 15 2008

**SURRY COUNTY CIRCUIT COURT
GAIL P. CLAYTON, CLERK**

EXHIBIT 1

FILED

OCT 15 2008

**SURRY COUNTY CIRCUIT COURT
GAIL P. CLAYTON, CLERK**

Virginia:

IN THE CIRCUIT COURT FOR THE COUNTY OF SURRY

COMMONWEALTH OF VIRGINIA,

Plaintiff

v.

MICHAEL VICK

Defendant

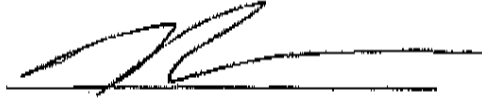
Docket Nos: CR07-0000056 and
CR07-0000057

Defendant Michael Vick's Waiver of Right to Appear at Plea Hearing

I, MICHAEL DWAYNE VICK, hereby waive my right to personally appear at my plea hearing and any related motions hearings. In support of this waiver, I state the following:

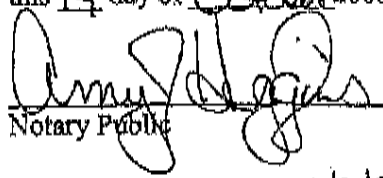
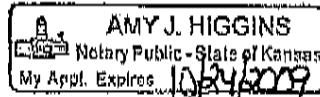
1. My attorneys have informed me that pursuant to Virginia Code Section 19.2-259, I have an absolute right to be present at the plea hearing and any motions hearings related to my plea that the Court may conduct in this matter;
2. I understand that by waiving my right to be personally present at the plea and any related motions hearings, I am still bound by and subject to the courts rulings, orders and judgments;
3. I further understand that I am subject to the Court's jurisdiction in all respects as if I had personally appeared;
4. I am also waiving my right to argue on any potential appeal that I was not personally present at the time my plea was entered;
5. I understand that my appearance will be through two-way video conference with the Court, and that one of my attorneys will be present in the courtroom in Surry County, while my other attorney will be present with me at Leavenworth USP.

Based on the foregoing, I am knowingly waiving my right to personally appear at the plea hearing and submit this waiver in support of my motion to appear via two-way video conference.



Michael Dwayne Vick

Subscribed and sworn before me
this 14 day of October 2008.


Notary Public

My Commission expires: 10/24/2009

EXHIBIT 2

FILED

OCT 15 2008

**SURRY COUNTY CIRCUIT COURT
GAIL P. CLAYTON, CLERK**

AFFIDAVIT OF HERBERT J. HOELTER

STATE OF MARYLAND)
) ss.:
COUNTY OF BALTIMORE)

HERBERT J. HOELTER, being duly sworn, deposes and says:

1. I am the Chief Executive Officer and co-founder of the National Center on Institutions and Alternatives ("NCIA"). I submit this Affidavit in support of Michael Vick's resolution of pending state charges so that he may qualify for programs within the Federal Bureau of Prisons (FBOP).

2. By way of background, I co-founded NCIA in June 1977. NCIA is a private, nonprofit organization which provides services in the areas of criminal justice counseling, as well as mental health, special education, and youth services. In addition to its work in the criminal justice system, NCIA also operates two schools which specialize in the education of autistic and other disabled students. In addition, NCIA operates community residential units for adults with developmental disabilities.

3. For the past 31 years, I have worked with defendants in the federal court and federal prison systems. One of my areas of expertise is assisting attorneys and defendants with issues regarding federal prisons and policies of the FBOP. In this capacity, I am knowledgeable about the process by which a federal inmate becomes eligible for community-based facilities within the FBOP.

4. I have been asked by attorneys for Mr. Vick to provide my professional opinion regarding Mr. Vick's eligibility for participation in community-based programs offered by the FBOP.

5. Mr. Vick is currently not eligible for numerous FBOP release programs because his state charges have not been resolved. Inmates who are nearing the end of their sentence are normally permitted to transfer for a period of up to six months to a Residential Reentry Center (formerly known as CCC or halfway house). This transfer enables the inmate to make a more seamless transition back into the community. The majority of inmates released from Federal prison Camps are released through Residential Reentry Centers.

6. While an inmate is at a Residential Reentry Center he receives, among other things, counseling and is required to procure employment. Thus, service of a portion of an inmate's sentence in a Residential Reentry Center is essential to provide the inmate a reasonable opportunity to adjust to and prepare for his impending reentry into the community.

7. Bureau of Prisons policy prohibits Mr. Vick from serving any portion of his sentence in a Residential Reentry Center until the resolution of his pending state charges. Specifically, BOP Program Statement 7310.04 *Community Corrections Center (CCC) Utilization and Transfer Procedures* states:

Inmates in the following categories shall not ordinarily participate in CCC programs:...Inmates with unresolved pending charges, or detainers, which will likely lead to arrest, conviction, or confinement.

BOP Program Statement 7310.04, page 11.

8. Should Mr. Vick resolve his state charges, either by being returned to Court via writ by the Commonwealth of Virginia, or via videoconference at his current prison location, he would become eligible to participate in FBOP re-entry programs and begin to rebuild his life.


Herbert J. Hoelter

Sworn to before me this
13th day of October 2008


Notary Public

EXHIBIT 3

FILED

OCT 15 2008

**SURRY COUNTY CIRCUIT COURT
GAIL P. CLAYTON, CLERK**

SUTHERLAND

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Washington, DC 20004-2415
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ATLANTA
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BILLY MARTIN
DIRECT LINE: 202.383.0271
E-mail: billy.martin@sutherland.com

October 9, 2008

VIA FEDERAL EXPRESS

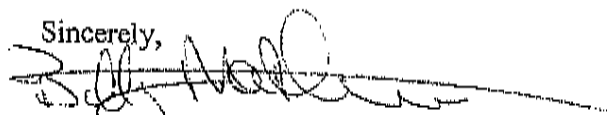
USP Leavenworth
P.O. Box 1000
Leavenworth, KS 66048

Re: Michael Vick, Register No. 33765-183

I am writing to confirm our conversation from October 3, 2008. At that time, you advised me that Mr. Vick will not be considered eligible for release to a halfway house until all "pending state charges" are resolved. The Bureau of Prisons ("BOP") takes the position that the plea agreement entered into between Mr. Vick and the Commonwealth of Virginia does not constitute resolution of his state court case. Rather the Court must accept his plea before the BOP will consider the matter to be resolved.

As you may know, due to the cost of prisoner transfers, the Virginia State Court prosecutors are not willing to seek a writ for the transfer of Mr. Vick to the Commonwealth of Virginia for purposes of entering his plea. Thus, we are planning to file a motion to allow Mr. Vick to enter his plea via videoconference from Leavenworth. We have been advised that Leavenworth has the capability to support the necessary two-way videoconference. Thus, if the Court allows the entry of his plea in this manner, by videoconference, the state court charges will be resolved and it is our understanding that, at that time, Mr. Vick will be considered eligible for transfer to a halfway house.

Sincerely,



William R. Martin

BM/kv