

**MILITARY COMMISSIONS TRIAL JUDICIARY
NAVAL STATION GUANTANAMO BAY**

UNITED STATES OF AMERICA

v.

**KHALID SHAIKH MOHAMMAD,
WALID MUHAMMAD SALIH
MUBARAK BIN ‘ATTASH,
RAMZI BIN AL SHIBH,
ALI ABDUL AZIZ ALI,
MUSTAFA AHMED ADAM
AL HAWSAWI**

AE 901 (WBA)

**Defense Motion to Cancel
Pretrial Hearings Scheduled for
16 January – 3 February 2023**

5 December 2022

1. Timeliness:

This motion is timely.

2. Relief Sought:

Defense Counsel for Mr. bin ‘Atash move this Military Judge to cancel the public hearings scheduled for 16 January – 3 February 2023.

3. Overview:

There are two matters that, inter alia, have contributed to the cancellation of pretrial hearings in 2022: the on-going plea negotiations between Trial Counsel and the Defense that include the review of the “Policy Principles” by various levels of the government and the appointment and on-board processing of Mr. Matthew Engle as Learned Counsel for Mr. bin ‘Atash. On 18 October 2022, this Military Judge found that “[i]t is impracticable for this Commission to convene in an open session while a decision on the ‘policy principles’ remains pending and while Mr. bin ‘Attash’s new Learned Counsel continues to build a relationship with his client and become familiar with the case.”¹

¹ AE 899 (DO) at ¶ 2.b (cancelling the November 2022 pretrial hearings).

With respect to building a relationship with Mr. bin ‘Atash and general in-processing, Mr. Matthew Engle has made substantial progress on three fronts. First, Mr. Engle completed his read-on to the Special Access Programs level on 1 November 2022. On 18 November 2022, Mr. Engle was granted access to the classified discovery in this case. His clearance to serve as Learned Counsel in this matter is now fully resolved. Second, since 22 August 2022, Mr. Engle has made four trips to Naval Station-Guantanamo Bay, Cuba (“NSGB”) to meet with Mr. bin ‘Atash and work on forming the necessary attorney-client relationship. That work is ongoing but productive. Third, Mr. Engle and other members of Mr. bin ‘Atash’s defense team have continued to work with trial counsel toward a negotiated resolution of this case, with a particular focus on the “prosecution principles” and other matters that the parties can address while they await decision on the Policy Principles under consideration by the government. For example, prior to filing this motion, Defense Counsel for Mr. bin ‘Atash returned a draft stipulation of fact to Trial Counsel for use in a potential plea agreement. This stipulation, which required significant work throughout the fall of 2022, will put the parties in a position to proceed expeditiously if they can reach agreement on the Policy Principles.

Trial Counsel have suggested that a response to the Policy Principles from other government actors and agencies can be expected around the end of calendar year 2022 or beginning of calendar year 2023. Given the limited travel options to and from NSGB during December 2022 and the intervening holidays, even if a response on the Policy Principles comes before the new year, Defense Counsel will not have adequate time to review the Government’s response, meet with their clients to discuss it, make informed and considered decisions regarding the potential plea agreements, and complete negotiations before 16 January 2023. For this reason, the time currently scheduled for hearings in January and February 2023 would be better used for Defense

Counsel to review the Government's position on the Policy Principles with their clients. Resuming contested hearings in January 2023 is likely to hinder, rather than advance, the parties' shared interest in achieving an agreed resolution of this case.

Finally, Defense Counsel for Mr. bin 'Atash give notice to this Military Judge of two scheduling conflicts for Mr. Engle that were set prior to his appointment as Learned Counsel. Since Mr. Engle's appointment as Learned Counsel, he has accepted no other appointments or commitments to represent any other person, in any other court, except Mr. bin 'Atash. Mr. Engle has no intent to accept any other cases until such time as Mr. bin 'Atash's case is resolved—one way or the other—before this Commission. However, prior to being appointed and funded by the Commission in this matter on 1 June 2022, Mr. Engle was already serving as Learned Counsel in two pending non-authorized capital cases that have multi-week trials scheduled for January 2023 and March 2023 respectively.² These trials currently conflict with pretrial hearings scheduled for 16 January – 3 February 2023 and 6 – 24 March 2023. Of course, if either of those trials are rescheduled (which Mr. Engle does not anticipate), Mr. Engle will ensure that the judges in those cases are aware of this Commission's 2023 hearing schedule in order to avoid any future conflict.

4. Burden of Proof:

The movant bears the burden of persuasion; the standard of proof is a preponderance of the evidence.³

² These cases began as death-eligible capital murder cases. Following mitigation investigations, however, the Department of Justice decided not to seek death sentences. Therefore, the current posture of these cases is that they are set for trial as non-death penalty murder cases.

³ R.M.C. 905(c)(1).

5. Facts:

a. The Accused face conviction and execution for their alleged roles in the attacks against the United States on September 11, 2001.

b. On 5 February 2019, Mr. Engle was appointed to represent Mr. Torey White in a capital prosecution in the Middle District of Pennsylvania.⁴ A three-week trial is scheduled to commence on 9 January 2023 in Harrisburg, Pennsylvania.⁵

c. On 4 November 2021, Mr. Engle was appointed to represent Mr. Kalub Shipman in a capital murder prosecution in the Eastern District of Virginia.⁶ A three-week trial in that multi-defendant case is scheduled to commence on 1 March 2023 in Norfolk, Virginia.⁷

d. On 1 June 2022, the Convening Authority (“CA”) appointed and funded Mr. Matthew Engle as Learned Counsel for Mr. bin ‘Atash.⁸ Approximately 3 months earlier, in March 2022, Trial Counsel and the Defense began discussing a non-trial resolution of the case.

e. On 7 June 2022, this Military Judge cancelled the June/July 2022 hearings, in part, because “certain aspects of the plea negotiations involve [Policy Principles] which are beyond the CA to approve” and remain pending before U.S. policy makers.⁹

f. On 21 July 2022, this Military Judge issued a Scheduling Order for 2023. In that Order, 6 pretrial hearings are currently set to occur during the calendar year, including one from 16 January – 3 February 2023 and another from 6 – 24 March 2023.¹⁰

⁴ United States v. Torey White, 1:16-CR-212 (M.D.P.A. Feb. 5, 2019).

⁵ Trial Scheduling Order for Mr. Torey White (copy provided as Attach. B).

⁶ United States v. Kalub Shipman, 2:20-CR-90 (E.D.V.A. Nov. 4, 2021).

⁷ Trial Scheduling Order for Mr. Kalub Shipman (copy provided as Attach. C).

⁸ AE 894A (WBA, GOV) at ¶ 3.a.

⁹ AE 899(DO) at ¶ 2.a. (explaining decision in AE 893G(ORD) to cancel the June/July 2022 hearings).

¹⁰ AE 895(SO) at ¶¶ 1.a., 1.b.

g. On August 15 2022, Trial Counsel informed the Defense that it did not expect to receive a formal response on the Policy Principles—which had been under active consideration by various levels of the Government since March 2022—until the end of calendar year 2022. More recently, the Chief Defense Counsel has reported receiving information that this response will not come before the end of 2022.

h. On 13 October 2022, this Military Judge cancelled the November 2022 hearings and ordered Trial Counsel to provide the Commission with an update as to the status of the decision on the Policy Principles every two weeks starting on 16 December 2022 until it has been notified of a “final decision.”¹¹

6. Argument:

- a. A pretrial resolution of this case is best facilitated by cancelling the pending public hearings.

Over the last eight months, the parties have made progress toward a potential pretrial agreement in this case and are still engaged with the prosecution regarding critical matters related to the plea agreement. This is in no small part attributable to the Commission cancelling the intervening contested hearings. While public hearings were canceled in the second half of 2022, the defense teams were able to meet with their respective clients on a near-daily basis to discuss the many issues that arise in a pretrial resolution of a case of this magnitude. Being onboard NSGB in January and February 2023 without public hearings promises the same productive work. Mr. bin ‘Atash submits that the most productive use of this time would be to cancel the public hearings and allow the defense teams to travel to NSGB and continue working toward a pretrial resolution of this case. This is particularly true given that the Government’s responses regarding the Policy

¹¹ AE 899(DO) at ¶ 3.b.

Principles involved in this negotiation are expected soon. These Principles are at the heart of the plea negotiations and will undoubtedly require substantial research, consultation, and consideration with the defendants in order for productive plea conversations to continue.

- b. Mr. Engle is scheduled to serve as Learned Counsel in a capital trial in the Middle District of Pennsylvania During the January 2023 Hearings.

Mr. Engle had an active capital defense practice prior to being appointed as Learned Counsel in this Commission. Since his appointment, Mr. Engle has not accepted (and will not accept) any new cases that would interfere with his availability in this Commission. However, he is scheduled to be in trial in a case in which he has served as Learned Counsel in the Middle District of Pennsylvania for almost four years. Canceling the January-February 2023 hearings will enable Mr. Engle to complete trial in that case while other members of Mr. bin 'Atash's defense team travel to NSGB and continue work on the negotiations in this case.

- c. Cancelling the hearings benefits all participating and interested parties.

Cancelling the hearings in advance of arriving onboard NSGB allows the parties to bring only those personnel necessary for pretrial negotiations. Leaving the hearings scheduled, only to subsequently cancel them once the parties arrive on-island, entails travel to NSGB by a much larger group than necessary for pretrial negotiations. This would be an inefficient use of Prosecution, Defense, and Trial Judiciary resources and staff.

Additionally, victim family members travel great distances to NSGB or the Remote Viewing Locations to view the public hearings. Having victim family members travel such distances expecting to observe argument on pretrial motions or hear witness testimony, only to learn upon arrival that the hearings have been cancelled to allow the parties to continue negotiations, would be unfair. All interested parties—the Defense, the Prosecution, Trial

Judiciary, the public as represented by the media, and victim family members—deserve an early decision on whether this Military Judge will cancel the January-February 2023 hearings.

Because a pretrial resolution of this case is most likely to be accomplished by allowing the parties to use their time on NSGB to negotiate with each other, the Military Judge should cancel the January-February 2023 hearings. As this Military Judge acknowledged in AE 899(DO), it is impracticable for there to be pretrial proceedings while a decision on the Policy Principles remains pending. Defense Counsel are hopeful that the parties can receive clarity on the Government's decision on the Policy Principles in the coming weeks and then travel to NSGB on the already-scheduled OMC flights in January 2023 as planned, but with only those personnel necessary to work towards a pretrial agreement. Allowing the parties to meet on NSGB without the encumbrance of contested hearings promises continued focused and productive negotiations toward resolving this decade-long case.

7. Oral Argument:

Defense Counsel for Mr. bin 'Atash do not request oral argument.

8. Witnesses:

None at this time.

9. Conference with Opposing Counsel:

The Prosecution defers stating its position until reading the instant motion.

10. Attachments:

- A. Certificate of Service (1 page).
- B. Trial Scheduling Order for Mr. Torey White, dated 27 June 2022 (2 pages).
- C. Trial Scheduling Order for Kalub Shipman, dated 3 February 2022 (2 pages).

11. Signatures:

/s/

ANISHA P. GUPTA
Learned Counsel

/s/

WILLIAM R. MONTROSS, JR.
Detailed Defense Counsel

/s/

EDWIN A. PERRY
Detailed Defense Counsel

Attachment A

CERTIFICATE OF SERVICE

I certify that on 5 December 2022, I electronically filed, via email, the attached AE 901 (WBA), Defense Motion to Cancel Pretrial Hearings Scheduled for 16 January – 3 February 2023, with the Trial Judiciary and served a copy to all parties.

/s/

EDWIN A. PERRY

Detailed Defense Counsel

Attachment B

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA	:	CRIMINAL NO. 1:16-CR-212
	:	
v.	:	(Judge Conner)
	:	
TOREY WHITE,	:	
	:	
Defendant	:	

ORDER

AND NOW, this 27th date of June, 2022, upon consideration of the court's order (Doc. 1274) of March 29, 2022, severing defendant Torey White's trial from the trial of codefendant Kevin Coles, and granting White's request for a continuance of his trial to a date to be determined following conclusion of Coles' trial, which trial subsequently concluded on April 28, 2022, and the court having convened a telephonic scheduling conference with counsel for White and counsel for the government on May 26, 2022, and having thereafter conferred with counsel to confirm their availability for trial as well as the availability of all witnesses, and the court finding that the ends of justice served by granting a continuance to the date certain selected by the court and by counsel outweigh the best interests of the public and the defendant in a speedy trial, it is hereby ORDERED that:

1. Jury selection and trial shall commence at **9:30 a.m. on Monday, January 9, 2023**, in Courtroom #2, United States Courthouse and Federal Building, 228 Walnut Street, Harrisburg, Pennsylvania. Counsel remain ATTACHED for trial.
2. A pretrial conference shall commence at **10:00 a.m. on Wednesday, December 14, 2022**, in Courtroom #2, United States Courthouse and Federal Building, 228 Walnut Street, Harrisburg, Pennsylvania. Counsel who are not local to the Harrisburg area may participate in

the pretrial conference by video but shall provide notice to the undersigned's courtroom deputy of their intent to do so.

3. The pretrial submissions outlined in paragraphs 16(a) through 16(d) of the court's revised criminal practice order (Doc. 969) issued August 23, 2021, shall be filed no later than **Wednesday, December 7, 2022**. White shall be permitted to submit supplemental proposed jury instructions for matters arising during trial which could not reasonably have been anticipated before trial.
4. Counsel for White and for the government shall meet and confer to discuss appropriate substantive jury instructions in advance of the deadline established in paragraph 3 of this order. Counsel shall exercise their best efforts to file proposed substantive jury instructions jointly. Counsel may file separate proposed substantive jury instructions on any points for charge on which the parties disagree.
5. The court finds specifically finds, pursuant to 18 U.S.C. § 3161(h)(7)(A) and (h)(1)(D), that the ends of justice served by granting this continuance outweigh the best interests of the public and the defendant in a speedy trial. The Clerk of Court shall exclude the appropriate time in the above-captioned action pursuant to the Speedy Trial Act and this order.

/S/ CHRISTOPHER C. CONNER
Christopher C. Conner
United States District Judge
Middle District of Pennsylvania

Attachment C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

UNITED STATES OF AMERICA,

v.

Criminal Action No. 2:20-cr-90

JAQUATE SIMPSON, et al.,
Defendants.

ORDER

This matter comes before the Court on the government and the defendants' joint notice and proposed briefing schedule. (ECF No. 308.) The Court sets this case for trial on **March 1–March 21, 2023**. Trial will begin each day at 9:00 a.m.

Further, the Court sets the following pretrial deadlines:

1. The following motions are due on or before September 2, 2022: motions (1) challenging the sufficiency of the indictment, information, warrant, or violation notice; (2) raising any issues of venue or jurisdiction; (3) for discovery or production; (4) to suppress evidence; (5) for any mental examination; (6) objecting to use by the opposing party of any particular evidence known by a party that may be subject to pretrial ruling; and (7) raising any other pretrial matter. Response briefs are due on or before November 4, 2022, and rebuttal briefs are due on or before November 18, 2022.

2. All other motions are due forty-five (45) days before trial, unless a party shows good cause for filing later.

3. Subpoenas are due fourteen (14) days before trial.

4. Proposed voir dire questions and jury instructions are due seven (7) days before trial. The parties shall email their proposed voir dire questions and jury instructions to Chambers. The parties must submit jury instructions both with and without citations. The proposed voir dire


questions and jury instructions shall be typed in 12-point Times New Roman font using normal capitalization. The parties shall not capitalize all of the proposed voir dire questions and jury instructions.

5. If the parties wish to schedule a hearing on a motion, they should contact Chambers.

It is so ORDERED.

Let the Clerk send a copy of this Order to all counsel of record.

Date: 3 February 2022
Richmond, VA

<p>/s/  John A. Gibney, Jr. Senior United States District Judge</p>
