

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOHN EAKIN

Plaintiff,

v.

AMERICAN BATTLE MONUMENTS
COMMISSION, *et al*

Defendants

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CIV. A. NO. SA-12-CA-1002-FB(HJB)

**PLAINTIFF'S OBJECTION TO REPORT AND RECOMMENDATION OF
UNITED STATES MAGISTRATE JUDGE AND MOTION IN LIMINE**

Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), Plaintiff respectfully files his objection to the Magistrate Judge's Report and Recommendation, entered February 2, 2015, addressing (1) Plaintiff's Motion to Lift Stay and for Partial Summary Judgment on Issue of Due Process (Docket Entry 94); (2) Defendants' Motion to Strike Plaintiff's Motion to Lift Stay and for Partial Summary Judgment on Issue of Due Process, or in the Alternative, for an Extension of Time to File Opposition to Plaintiff's Motion for Partial Summary Judgment (Docket Entry 99); (3) Sally Hill Jones's Opposed Motion to Intervene Pursuant to Federal Rule of Civil Procedure 24 (Docket Entry 90); (4) Sally Hill Jones' Motion for Leave to File Electronically (Docket Entry 91); and John Patterson's Opposed Motion to Intervene Pursuant to Federal Rule of Civil Procedure 24 (Docket Entry 102).

Plaintiff strongly disputes Defendants contention that they have identified the remains of Private Kelder and that he therefore has no standing to bring any of his broader contentions before the Court.

Therefore, Plaintiff respectfully objects to the recommendations concerning Plaintiff's Motion to Lift Stay and for Partial Summary Judgment on Issue of Due Process (Docket Entry 94); dismissal of Plaintiff's case; and, denial of the motions to intervene by Sally Hill Jones (Docket Entry 90) and John Patterson (Docket Entry 102).

Plaintiff believes the Report and Recommendation to be clearly erroneous in that it is based on incomplete, misleading and legally insufficient information provided by Defendants and is counter to the intent of the Court's order recognizing that "*all ten sets of remains*" must all be identified to conclude this litigation. [emphasis added] Nor does the Report and Recommendation allow for further relief within thirty (30) days of the conclusion of the disinterment and testing process as provided for in the Court's Order (Docket Entry 84) and which would allow for consideration of Interveners' general and specific claims.

Defendants' identification of remains, without concurrence of the family, is defective under their own regulations and is without statutory basis.

To allow identification (or non-identification) of less than all associated remains, as Defendants propose, is a violation of Defendants' published regulations and customary scientific procedures. Further, Defendants have identified only a small portion of the remains of Private Kelder and suggest they will deliver additional portions at some unspecified time in the future. To allow the delivery of suspect remains in installments simply for the purpose of litigation posturing by Defendants is grossly unjust, disrespectful and shocks the conscience.

Additionally, dismissal of the claims of multiple interveners, without notice and without consideration of their right to intervene, is unfair and counter to the principal of judicial economy. In addition to Interveners' general due process claims for injunctive relief addressed by the Report and Recommendation, Interveners bring specific claims similar to those presented

by Plaintiff pertaining to the identification of their family members which are not addressed by the Report and Recommendations, but which are also recommended for dismissal with the general due process claims of Plaintiff. These associated claims are nearly identical to Plaintiff's claim to the identification of the remains of Arthur H. "Bud" Kelder. In one case, Intervener's family member was originally buried in Cabanatuan Grave 822, only a few feet from the grave of Arthur H. "Bud" Kelder.

Pursuant to Federal Rule of Evidence 702, Plaintiff also moves for an order excluding in its entirety the report of Dr. Thomas Holland. (Exh. 3)

Federal Rule of Evidence 702, as explicated by the familiar *Daubert* line of cases, requires that, to be admissible, expert testimony must be the product of reliable principles and methods (It must also be based upon sufficient facts or data and apply the principles and methods reliably to those facts). Here, as shown by Exhibit 1, there simply is no such method; the analysis is merely the "ipse dixit of the expert." *Kunzho Tire Co., Ltd., v. CarMichael, etc.*, 526 U.S. 137, 141 (1999).

I. INTRODUCTION

The Magistrate Judge's conclusion and recommendation was based on the best information available to him, but is erroneous in that it is based on a deliberately incomplete, misleading and statutorily deficient identification submitted by Defendants. Additionally, Plaintiff has had no opportunity for in-depth inquiry in to the accuracy and veracity of the "Identification Package" upon which rests Defendants' assertion to have identified the remains of Arthur H. "Bud" Kelder. For all of the above reasons, Plaintiff seeks the exclusion of the report of Dr. Thomas Holland and an opportunity to inquire in to the methods and facts of such identification.

That the central basis for the Magistrate Judge's Report and Recommendation is the Defendants' claim to have identified the remains of Arthur H. "Bud" Kelder is shown by:

"With positive identification of Private Kelder's remains, Plaintiff's claims concerning the identification and release of those remains are now moot."

Rpt & Rec, Docket Entry 103 at 6

While the Report and Recommendation correctly states that the identification was undisputed, that was due to Defendants' intentionally late delivery of the Identification Package to Plaintiff. Consequently, Plaintiff was unable to timely object to Defendants' Motion to Strike Plaintiff's Motion to Lift Stay and for Partial Summary Judgment on Issue of Due Process when his response became due. There was no pending dispositive motion based on the identification of the remains for Plaintiff to respond to.

"It is undisputed that Defendants have identified one set of remains in Cabanatuan Common Grave 717 as Private Kelder. (See Docket Entry 98, Docket Entry 101)"

Id. at 7

The late delivery of the identification package, on a weekend, and the necessity to consult with experts, made it impossible for Plaintiff to timely file an informed response and dispute the validity of Defendants' identification of the remains of Arthur H. "Bud" Kelder.

The timeline for delivery of the Identification Package is described in Enclosure 10, Declaration of John Eakin.

Plaintiff and this Court were misled by Defendants' spurious assertion that they had properly identified the remains of Arthur H. "Bud" Kelder. Plaintiff, like the Magistrate Judge, relied on Defendants' Sixth Status report (Docket Entry 98) and reasonably expected it to be complete and truthful.

In addition to the Sixth Status Report (*Id.*), Plaintiff and his family members received telephonic notification from Defendants' Counsel and personnel of the Army Casualty Office, and accepted Defendants' assurance that the remains of Arthur H. "Bud" Kelder had been accurately identified and were ready to be released to his family.

The deficiencies in the identification package presented to Plaintiff were well camouflaged in 138 pages of highly technical material and not readily apparent to Plaintiff until reviewed by experts. The deficiencies in Defendants' Identification Package are centered on the following issues:

- The inadequacies in Defendants' DNA testing;
- The absence of any data concerning the identification of the associated remains;
- Defendants' failure to exhume the four additional sets of remains; and,
- That it is highly irregular to release only partial remains prior to completion of identification of all related remains.

In addition to the above scientific and technical discrepancies in Defendants' identification process, the identification presented to the Court in Defendants' Sixth Status Report (*Id.*) was premature under Defendants' published regulations requiring simultaneous identification of multiple remains.

Defendants have not identified other of the exhumed remains, admit that their testing is ongoing and have yet to even exhume four sets of associated remains they know were misidentified and buried by the wrong families. They can't reliably identify any remains as those of Arthur H. "Bud" Kelder and admit that it is likely that a considerable portion of his remains are commingled with those of the other thirteen sets of remains.

Further, Defendants have no statutory authority to assert the identification of Arthur H. "Bud" Kelder without the concurrence of the family or certification of identity by the Armed Forces Medical Examiner. It appears that Defendants' identification of the remains of Arthur H.

"Bud" Kelder was premature, incomplete and unsupported by statute or Defendants' published regulations.

II. THE VALIDITY OF DEFENDANTS' IDENTIFICATION OF X-816 IS SUSPECT

Attached as Exhibit 1 is the declaration of Dr. Mark Leney, Ph.D. Dr. Leney has a Ph.D in Biological Anthropology from the University of Cambridge and is currently an Assistant Professor of Medicine at University of Massachusetts Medical School. He is a former employee of Defendant JPAC's Central Identification Laboratory where, among other positions, he served as DNA coordinator. In this position, Dr. Leney coordinated DNA testing between Defendant JPAC and the Armed Forces DNA Identification Laboratory (AFDIL). Dr. Leney has opined that Defendants' identification of Arthur H. "Bud" Kelder is premature, incomplete and based on poor science.

It should be noted that Defendants' identification package is signed by Dr. Thomas D. Holland, Scientific Director, JPAC-CIL. (Exh. 3) Almost exactly two years earlier, Dr. Holland on January 28, 2013 asserted that, "the existing and available data do not meet the level of scientific certainty required by current DoD disinterment guidance." (Supp AR, at 4). His assertion then was counter to the recommendations of JPAC investigators Chief Rick Stone, Dr. Paul Emanovsky and Dr. Debra Prince Zinni, all of whom had recommended disinterment. (Docket Entry 23 *inter alia*) Now, Dr. Holland has rushed to judgment and, with selective use of the available evidence, claims that he has identified the remains he previously asserted could not be identified.

Plaintiff believes that Dr. Holland's recommendation against disinterment then, and now, his recommendation for identification, were both made for the purpose of litigation posturing and neither represent a sound or truthful analysis of the facts.

III. DEFENDANTS PROPOSE TO RETURN ONLY PARTIAL REMAINS

During nearly six months of testing, Defendants repeatedly presented to the Court the bogus excuse that DNA extraction was difficult because the remains had been treated with an embalming compound.¹ Faced with the prospect of the intervention of additional parties, Defendants suddenly present a premature and incompletely documented proposal intended simply to dispose of this lawsuit as quickly as possible.

Defendants' Forensic Anthropology Report (Exh. 2 at 2) illustrates the partial remains Defendants propose to return to Plaintiff as three long bones, a skull and a handful of small bones and teeth.

Plaintiff's Exhibits 15A thru 15J to his First Amended Complaint contain skeletal charts of each of the ten sets of remains which were exhumed in August 2014. Each of these "X-files" describe remains which are essentially anatomically complete.

The August 2014 exhumations of the ten graves recovered ten sets of remains best described as anatomically complete with the exception of a few small/soft bones. Defendants' examination determined that the remains were moderately commingled and had been recovered from three different caskets. (Sci Dir Memo, Exh. 3 at 3). Defendants' consulting anthropologist described the remains as heavily commingled. (Consultant Memo, Exh. 4)

Defendants have failed to identify the remains of the thirteen other men buried in Cabanatuan Grave 717, four of whom have not yet been exhumed, and it is probable that a substantial quantity of the remains of Arthur H. Kelder remain commingled with these thirteen other sets of remains.

¹ In Plaintiff's Response to Defendants' Opposition to Motion to Intervene Filed by Sally Hill Jones, (ECF Doc. No. 97 at 2) Plaintiff provided evidence that Defendants had intentionally delayed identification of X816 and X345 with a bogus claim that the remains had been treated with an embalming compound which made DNA extraction difficult.

IV. DEFENDANTS' PROPOSED IDENTIFICATION IS IN CONFLICT WITH THEIR OWN REGULATIONS AND IS WITHOUT STATUTORY BASIS.

The Identification Package put forth by Defendants and purported to be the basis for Defendants' Sixth Status Report (Docket Entry 98) is signed by Thomas D. Holland, Scientific Director, JPAC-CIL. (Exh. 3) Department of Defense Instruction 3001.03, "Accounting for Personnel Lost in Past Conflicts - The Armed Forces Identification Review Board" (AFIRB), (DODI 3001.03) provides for only two means of official determination of the identity of unidentified remains.

Title 10 U.S. Code § 1471 provides for forensic pathology investigations conducted by the Armed Forces Medical Examiner (AFME) which may determine the identity of remains. Or, in the absence of action by the AFME to identify remains, DODI 3001.03 requires that the family of the deceased must accept the proposed identification. Should the family of the deceased wish to dispute the identification or take no action to accept the identification, the case is reviewed by the AFIRB which may remand the case to the laboratory proposing the identification or accept the proposed identification. Findings of the AFIRB are then reviewed by The Adjutant General (TAG) of the U.S. Army. Upon the concurrence of the TAG, the Secretary of the Army is then allowed to make appropriate disposition of the remains.

Plaintiff, as the designated primary next-of-kin (PNOK) of Arthur H. "Bud" Kelder, has not accepted Defendants' proposed identification of the remains.

Since neither the AFME nor AFIRB have yet considered the proposed identification of the remains of Arthur H. "Bud" Kelder, the Magistrate Judge's action in acting on the identification was premature and without basis in law or Defendants' published procedures. Defendants have no statutory basis upon which to declare the identification of the remains of Arthur H. "Bud" Kelder.

V. **DEFENDANTS' IDENTIFICATION IS INCOMPLETE UNTIL ALL REMAINS HAVE BEEN IDENTIFIED.**

A basic tenet of identification of skeletal remains is that all associated remains be examined and identified concurrently. Defendants' own regulations and manuals, as well as good scientific practice, require simultaneous examination and identification of all remains involved in a multiple fatality event. Plaintiff recognizes that this is not always possible, but in this case Defendants' identification package indicates that they have not even processed all the DNA samples they have obtained so far.

As examples of Defendants' internal guidance regarding simultaneous and/or semi-complete identifications:

"b. Multiple remains from a single incident will be processed for identification simultaneously.

....

f. Information concerning identification or shipment of remains will not be released to news media before -

(1) Establishment of a final identification determination for all remains."

Army Regulation 638-2 ¶ 8-9 (Exh. 7)

"The Commander, United States Army Human Resources Command ... has established the following policies for identifying remains.

- Deceased personnel must be identified as quickly as possible by employing all well-known means and scientific resources.
- Multiple remains from a single incident will be processed for identification simultaneously.
- Commingled remains will not be arbitrarily separated.

....

- Information concerning the identification or shipment of remains will not be released to news media before establishing a final identification for all remains and notifying next of kin."

U.S. Army Field Manual FM 4-20.65 ¶ 1-8 (Exh. 8)

"When multiple remains are involved, simultaneous identification processing of all remains is desired. all other remains, including identified but semi-complete remains, should be held for additional study by identification specialists."

NAVMEDCOMINST 5360.1 ¶ 4-10a. (Exh. 9)

Instead of concurrently identifying the remains of all fourteen men originally buried in Cabanatuan Grave 717, Defendants, through inappropriate use of DNA testing and proceeding apparently without preparation or plan, have created an impossible situation by arbitrary reassociation, without documentation, of the hundreds of individual bones comprising the ten remains exhumed. They now propose to deliver to Plaintiff partial remains consisting of approximately fifteen percent of the skeletal remains which should be returned. (Exh. 2 at 2)

Defendants acknowledge that additional remains may be identified in the future and will dispose of them as directed by Plaintiff. (Exh. 3 at 3) This is unacceptable to Plaintiff, Plaintiff's family and certainly to the families of the thirteen other men involved who deserve these remains to be competently identified rather than presented piecemeal simply for Defendant's convenience in disposing of this litigation.

In addition to the ten remains exhumed, Defendants are aware that four of the fourteen men originally buried in Cabanatuan Grave 717 had been misidentified and that the wrong remains were buried in four graves in the U.S. Despite this knowledge, Defendants have failed to exhume these graves or notify the four families who had received the wrong remains. (DPMO Research Memo, dated 7 Sep 2010, Exhibit 6)

Defendants' Historical Narrative notes that, "there are DNA sequences present in this group of remains that do not correspond to reference samples on file for individuals associated with this common grave." (Exh. 5 at 7) This is consistent with the four Servicemembers previously incorrectly identified.

VI. DEFENDANTS FAILED TO USE EVERY AVAILABLE RESOURCE TO COMPLETE THE DISINTERMENT AND DNA TESTING AS QUICKLY AND EFFICIENTLY AS POSSIBLE.

The identification package prepared by Defendants discloses that they failed to employ nuclear DNA testing as proposed by Plaintiff in Plaintiff's Motion to Compel. (Docket Entry 65-2) Nuclear DNA is unique to an individual rather than exclusionary as is the mitochondrial and Y-STR DNA testing performed by Defendants. Further, nuclear DNA tests can often be completed in less than one week, are less expensive and considered the gold standard for use in identification of skeletal remains. Defendants have proven only that they lack the technology and will to conclusively identify the remains of Arthur H. "Bud" Kelder.

VII. DEFENDANTS HAVE DEMONSTRATED A PATTERN OF NON-COMPLIANCE WITH THE COURT'S INSTRUCTION TO PROCEED QUICKLY AND EFFICIENTLY

Plaintiff has previously advised this Court of other deficiencies in Defendants' identification process. Taken as a whole, these examples show a pattern of disregard for the Court's instruction to proceed as quickly and efficiently as possible. (Docket Entry 84 at 2)

- Defendants' response to the Motion to Intervene filed by Dr. Sally Hill Jones (ECF Doc. No. 96) argued that Dr. Jones' motion was moot because Defendants had determined that the unidentified remains in question, X-345, were not those of her family member. Defendants conceded that their non-identification was scientifically invalid and not reproducible. Both Dr. Jones and Plaintiff Eakin filed replies (ECF Doc. No. 97 & 100) pointing out the suspicious timing of Defendants' averment and suggesting that admittedly scientifically unvalidated evidence was inadmissible under Fed.R.Evid. 702.
- In Plaintiff's Response to Defendants' Opposition to Motion to Intervene Filed by Sally Hill Jones, (ECF Doc. No. 97 at 1) Plaintiff describes in detail Defendants' less than diligent efforts to identify the unidentified remains in question.
- In that same response, (*Id.* at 2) Plaintiff provided evidence that Defendants had intentionally delayed identification of X816 and X345 with a bogus claim that the remains had been treated with an embalming compound.
- On August 8, 2014, Defendants estimated that their DNA testing would be completed in 90 to 120 days. (Fletcher Decl, ECF Doc. No. 64-1 ¶ 11) After more than six months, their efforts have shown essentially no progress in identifying the remains.

IX. CONCLUSION

Plaintiff contends that Defendants have presented a premature, incomplete and misleading identification of the remains of Arthur H. "Bud" Kelder in an effort to mislead this Court and quickly dispose of this litigation without consideration of the merits. Defendants' identification without family concurrence does not comply with their published regulations and is legally insufficient upon which to assert that this litigation is moot. Plaintiff suggests that Defendants' identification package is legally and factually flawed and should be excluded.

Considering that the singular basis for the Magistrate Judge's Report and Recommendations was Defendants' incomplete and suspect identification package, Plaintiff respectfully requests that the Court reject those recommendations pertaining to Plaintiff and Interveners in their entirety.

Defendants have not identified the remains of Private Kelder and have shown no expectation that they will do so within any reasonable amount of time. A controversy remains before this Court and Plaintiff's case should not be dismissed. Further, Plaintiff's Motion to Lift Stay and for Partial Summary Judgment on Issue of Due Process (Docket Entry 94) is ripe for consideration by this Court.

Plaintiff suggests that equity and judicial economy would be served by granting the pending Motions to Intervene.

This Court instructed Defendants to "use every available resource to complete the disinterment and DNA testing as quickly and efficiently as possible." Plaintiff submits that Defendants' actions have been neither quick nor efficient and have not complied with this Court's order. (Docket Entry 84)

Plaintiff seeks the exclusion of the report of Dr. Thomas Holland and an opportunity to inquire in to the methods and facts of such identification.

In the absence of an identification plan by Defendants which is acceptable to the Court, Plaintiff is prepared, upon request, to put forth an identification plan for the Court's consideration.

Respectfully submitted,

/s/ _____
John Eakin, *pro se*
9865 Tower View Road
Helotes, Texas 78023
Tel: 210-695-2204
jeakin@airsafety.com

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of February, 2015, I caused the foregoing to be electronically filed with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

Susan Strawn, Assistant United States Attorney
601 N.W. Loop 410, Suite 600
San Antonio, Texas 78216

I further caused a copy to be sent by First Class Mail to:

Sally Hill Jones, Ph.D`
2661 Red Bud Way
New Braunfels, TX 78132

Debbie Gerlich Christian
986 View Ridge
Pipe Creek, Texas 78063

Hon. John Alexander Patterson
721 North Quidnessett Road
North Kingston, RI 02852

/s/ _____
John Eakin, *pro se*
9865 Tower View Road
Helotes, Texas 78023
Tel: 210-695-2204
jeakin@airsafety.com