UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOHN EAKIN,	§	
	§	
Plaintiff,	§	
	§	
v.	§	SA-12-CV-1002-FB (HJB)
	§	
AMERICAN BATTLE MONUMENTS COMMISSION, et al.	§	
	§	
	§	
Defendants.	§	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

To the Honorable Chief United States District Judge Fred Biery:

This Report and Recommendation concerns Plaintiff's Motion to Vacate Judgment and Resume Discovery. (Docket Entry 127.) The District Court referred this motion to the undersigned for consideration pursuant to 28 U.S.C. § 636(b). (*See* Docket Entry 133.) For the reasons set out below, I recommend that Plaintiff's motion (Docket Entry 127) be **DENIED**.

I. Background.[1]

Plaintiff's suit concerns the remains of Army Private Arthur H. "Bud" Kelder, Plaintiff's cousin (once removed). (Docket Entry 27, at 6.)[2] Kelder died in 1942 as a prisoner of the Japanese military while serving in the Pacific Theater during World War II. Private Kelder's

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[1] A more detailed statement of the case may be found in the undersigned's prior two Reports and Recommendations in this case. (*See* Docket Entries 30 and 103.)

[2] Plaintiff is first cousins with Douglas Kelder, Private Kelder's nephew and next-of-kin. Douglas Kelder and Plaintiff both served in Vietnam. (*Id.*)

remains were among those of 14 servicemen originally interred in Grave 717 in a prisoner-of-war camp cemetery at Cabanatuan, Nueva Ecija Province, Philippine Islands. (Docket Entry 39, at 1–2.) Beginning in 2009, Plaintiff sought to have Defendants identify and determine the recoverability of Private Kelder's remains. His efforts have included various administrative proceedings and participation in at least three lawsuits: a Freedom of Information Act ("FOIA") action styled *Eakin v. U.S. Dep't of Def.*, SA-10-CV-748-FB; the present case, SA-12-CV-1002-FB; and *Patterson, et al. v. Defense POW/MIA Acct. Agency, et al.*, SA-17-CV-467-XR.

The present case. After obtaining documents in his FOIA action, Plaintiff filed this lawsuit on October 18, 2012, alleging causes of action under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701–706, and the Missing Service Personnel Act, 10 U.S.C. §§1501–1509, and seeking declaratory relief under 28 U.S.C. § 2201 and mandamus relief under 28 U.S.C. § 1361. (Docket Entry 1.) The District Court dismissed Plaintiff's suit without prejudice for lack of jurisdiction, but gave Plaintiff an opportunity to amend his complaint. (*See* Docket Entry 30; Docket Entry 34.) Plaintiff then filed an amended complaint, alleging four causes of action: (1) a request for a declaratory judgment that "[f]amilies have [an] absolute right to possession of remains;" (2) a request for mandamus relief that Defendants identify and return remains of missing military service personnel; (3) a request for declaratory judgment identifying particular remains as those of Private Kelder; and (4) a request for injunctive relief, declaring that "Plaintiff[']s and others['] . . . rights to due process in seeking the return of family members who died in defense of the United States." (Docket Entry 39, at 22–33.) After Plaintiff amended his complaint, the Court ordered the parties to engage in limited documentary discovery. (Docket Entry 62.)

Defendants subsequently filed a Suggestion of Mootness and Motion to Stay Discovery Pending Decision on Mootness or Other Resolution. (Docket Entry 64.) Defendants suggested that Plaintiff's claims were likely moot because the Secretary of the Army had already "approved the disinterment for identification of the ten sets of remains associated with Cabanatuan common grave 717." (*Id.* at 1.) Private Kelder was believed to be among the remains. (*Id.*) Defendants also requested that the case be stayed pending the resolution of the process for identifying the remains. (*Id.*) Over Plaintiff's opposition (*see* Docket Entry 73), the District Court stayed the case and ordered that Defendants file an advisory every thirty days informing the Court of the status of the disinterment and DNA testing. (*See* Docket Entry 84, at 2.)

On January 22, 2015, Defendants filed a status report that Private Kelder's remains were identified "from the remains associated with Cabanatuan Common Grave 717 that were disinterred from the Manila American Cemetery and Memorial in the Philippines." (Docket Entry 98, at 1.) In light of the identification of Private Kelder's remains, the undersigned recommended to the District Court that Plaintiff's suit be dismissed as moot in part and for lack of standing in part. (Docket Entry 103, at 6–9.)

Plaintiff objected to the undersigned's recommendation, "strongly disput[ing] Defendants['] contention that they have identified the remains of Private Kelder" and further disputing that the undersigned's finding that he had "no standing to bring any of his broader contentions before the Court." (Docket Entry 110, at 1.) Plaintiff specifically argued that Defendants had "identified only a small portion of the remains of Private Kelder," and he objected to Defendants' proposal to "allow the delivery of suspect remains in installments." (*Id.* at 2.)

Despite Plaintiff's objections, the District Court adopted the undersigned's recommendation. (Docket Entry 120.) On *de novo* review, the Court agreed with the undersigned that "plaintiff's claim of delay in the identification process is now moot because the remains of Private Kelder have been identified and there is no live controversy regarding his requested relief." (*Id.* at 2.) The Court further agreed "that, while plaintiff's efforts to return the remains of all deceased servicemen and servicewomen buried in unknown graves to their families are commendable, plaintiff has suffered no injury which this Court can address in regards to these other remains." (*Id.*) The Court accordingly entered judgment dismissing Plaintiff's suit. (Docket Entry 121.) Plaintiff did not appeal.

The* Patterson *case. In *Patterson*, Judge Rodriguez considered a lawsuit by next of kin regarding the remains of seven servicemembers buried in Cabanatuan, including Private Kelder. *See Patterson v. Defense POW/MIA Accounting Agency*, 398 F. Supp. 3d 102, 111–15 (W. D. Tex. 2019) (discussing issues presented). With regard to Private Kelder, Judge Rodriguez noted that some of his remains had been identified in 2015, and that Private Kelder's next-of-kin took issue with the delay in recovering the rest of his remains. *Id.* at 112. Plaintiff was not a party to the *Patterson* suit; however, he was designated as an expert witness in that case. *See id.* at 115.[3]

Judge Rodriguez granted summary judgment for the defendants as to all the *Patterson* plaintiffs' claims, including their claims of Due Process violations and violations of the APA. 398 F. Supp. 3d at 115–26. On the Due Process claims, Judge Rodriguez concluded that the plaintiffs had neither a protected property interest nor a protected liberty interest in the as-yet-unidentified

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[3] In *Patterson*, Doug Kelder was the party seeking Private Kelder's remains. *See* note 2, *supra.*

remains, *see id*. at 117–21; on the APA claims, he found, *inter alia*, that the plaintiffs had failed to show any arbitrary or capricious action or other violation of law in the processing of remains from common grave 717, where Private Kelder's remains were located, *id.* at 126. No appeal was taken from Judge Rodriguez's decision.

The instant motion to vacate. Plaintiff filed the instant motion to vacate on August 28, 2024, nine years and five months after this case was dismissed. (Docket Entry 127.) In his motion, Plaintiff argues that "Defendants have returned only token portions" of Private Kelder's remains, and that they have "wrongfully concealed portions of the subject remains." (*Id.* at 1.) He acknowledges that some further remains have since been provided to Private Kelder's next-of-kin, but insists that additional remains are either located at the identification laboratory or have been wrongly commingled and buried as unknowns in Central ID Lab ("CIL") caskets. (*Id.* at 6–7.) Plaintiff seeks relief under Federal Rule of Civil Procedure 60(b)(6), asking that the Court order the immediate return of private Kelder's complete remains, or alternatively that the parties be ordered to engage in additional discovery regarding his claims. (*Id.* at 10–11.) Defendants oppose Plaintiff's motion. (Docket Entry 137.)

II. Analysis.

Under Rule 60(b)(6), a court may relieve a party from a final judgment for "any other reason that justifies relief." FED. R. CIV. P. 60(b)(6).[4] The Rule provides the court with "a grand reservoir of equitable power to do justice in a particular case." *Batts v. Tow–Motor Forklift Co.*,

[4] As its language indicates, 60(b)(6) is a catch-all provision, authorizing the court to act on grounds other than those listed in Rule 60(b)(1) through 60(b)(5). In this case, Plaintiff specifically foregoes any reliance on subsections (1) through (5). (Docket Entry 127, at 8.)

66 F.3d 743, 747 (5th Cir. 1995) (citation omitted). Despite the breadth of the Rule, courts "have narrowly circumscribed its availability," holding that such relief is to be granted only when "extraordinary circumstances are present." *Id*. (internal quotation marks and citation omitted); *cf. Macias v. DeWitt Cnty., Tex.*, No. 2:23-CV-43, 2024 WL 5078261, at * 5 (S.D. Tex. Oct. 17, 2024) (holding that relief under Rule 60(b)(6) "is more stringent" than other avenues for post-judgment relief). Stated differently, Rule 60(b)(6) requires a showing of "manifest injustice," and it cannot "be used to relieve a party from the free, calculated, and deliberate choices he has made." *Yesh Music v. Lakewood Church,* 727 F.3d 356, 363 (5th Cir. 2013) (citation and internal quotation marks omitted); *cf. Gonzalez v. Crosby*, 545 U.S. 524, 537–38 (2005) ("[P]etitioner's Rule 60(b)(6) motion fail[ed] to set forth an 'extraordinary circumstance' justifying relief. . . . [where his] decision not to appeal had been free and voluntary."). Additionally, a Rule 60(b)(6) motion must be made "'within a reasonable time,' unless good cause can be shown for delay." *In re Osborne*, 379 F.3d 277, 283 (5th Cir. 2004) (quoting FED. R. CIV. P. 60(c)(1)).

In this case, Plaintiff fails to show extraordinary circumstances or manifest injustice to justify relief under Rule 60(b)(6). Plaintiff's motion suggests two bases for relief: (1) that the Court erred in mooting his claim before all of Private Kelder's remains had been identified, and (2) that delays and improprieties in the processing and return of his remains necessitate the Court's intervention. However, the first of these issues was litigated before this Court in the original action, and the second was litigated in the *Patterson* case. In each case, the arguments were rejected by the District Court, and neither this Plaintiff nor Private Kelder's next-of-kin chose to appeal. Even assuming that the previous rulings in this case and *Patterson* were erroneous, Rule 60(b)(6) cannot relieve a party from the choice not to appeal a decision with which the party may

have disagreed. *See Gonzalez*, U.S. at 537–38. Rule 60(b)(6) "is not a substitute for a timely appeal." *Thymes v. Sans Chevaux Inv., L.L.C.*, 790 F. App'x 649, 650 (5th Cir. 2020) (quoting *Halicki v. La. Casino Cruises, Inc.*, 151 F.3d 465, 471 (5th Cir. 1998)).

In addition to failing to show "extraordinary circumstances" or "manifest injustice," Plaintiff also fails to show good cause for filing the instant motion more than nine years after the judgment in this case, and more than five years after the judgment in *Patterson*. Plaintiff's claim that the Court should not have mooted the case is based on actions taken in 2015; his claim of delays in returning Private Kelder's remains dates back at least to 2019—which, according to his motion, is the last year in which any remains were returned. (Docket Entry 127, at 5.) And with the exception of the new power of attorney that Private Kelder's nephew signed, authorizing Plaintiff to act on his behalf, none of the exhibits attached to Plaintiff's motion appear to be dated after 2014. (*See* Docket Entries 127 and 128.)[5]

III. Conclusion and Recommendation.

For the foregoing reasons, I recommend that Plaintiff's Motion to Vacate Judgment and Resume Discovery (Docket Entry 127) be **DENIED**. [6]

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[5] In his reply, Plaintiff suggests that one of the exhibits—an anthropologist's report originally dated from October 1948 (Docket Entry 128-3)—was obtained in 2022 through a FOIA lawsuit before Judge Lamberth (*See* Docket Entry 138, at 4 (citing *Eakin v U.S. Dep't of Def.*, No. 5:16-CV-972-RCL, 2022 WL 2657250 at (W.D. Tex., San Antonio, July 8, 2022)). Even assuming that the 1948 report provided additional grounds for relief and was not available until 2022, Plaintiff does not explain why it took him more than two years after receipt of the report to file his motion to vacate.

[6] Defendants raise additional grounds for denial of Plaintiff's motion, including *res judicata* and collateral estoppel. (Docket Entry 137, at 2–8.) As Plaintiff does meet the requirements for Rule 60(b)(6) relief, the Court need not address these additional arguments.

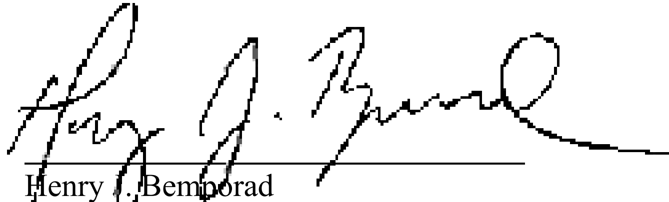
IV. Instructions For Service And Notice of Right to Object.

The United States District Clerk shall serve a copy of this Report and Recommendation on all parties by either (1) electronic transmittal to all parties represented by attorneys registered as a "filing user" with the Clerk of Court, or (2) by mailing a copy to those not registered by certified mail, return receipt requested. Written objections to this Report and Recommendation must be filed within **14 days** after being served with a copy of the same, unless this time period is modified by the District Court. 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b).

The parties shall file any objections with the Clerk of the Court and serve the objections on all other parties. An objecting party must specifically identify those findings, conclusions, or recommendations to which objections are being made and the basis for such objections; "objections that are frivolous, conclusory, or general in nature needn't be considered." *Williams v. Lakeview Loan Serv. LLC*, 694 F. Supp. 3d 874, 881 (S.D. Tex. 2023) (citing *Battle v. U.S. Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987)).

A party's failure to file written objections to the proposed findings, conclusions, and recommendations contained in this Report and Recommendation shall bar the party from a *de novo* review by the District Court. *Thomas v. Arn*, 474 U.S. 140, 149–52 (1985); *Acuña v. Brown & Root, Inc.*, 200 F.3d 335, 340 (5th Cir. 2000). Additionally, failure to file timely written objections to the proposed findings, conclusions, and recommendations contained in this Report and Recommendation shall bar the aggrieved party, except upon grounds of plain error, from attacking on appeal the unobjected-to, proposed findings and conclusions accepted by the District Court. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428–29 (5th Cir. 1996) (en banc).

SIGNED on January 8, 2025.



Henry J. Bemporad
United States Magistrate Judge