

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

JOHN EAKIN

Plaintiff,

AMERICAN BATTLE MONUMENTS
COMMISSION, et al

Defendants

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CASE NUMBER: SA-12-CA-1002-FB-HJB

**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR DECLARATORY
JUDGMENT ,OR, IN THE ALTERNATIVE, TO COMPEL PRODUCTION**

Plaintiff has shown compelling evidence that the unidentified remains known as Manila Cemetery #2 X816 (X816) are those of Private Arthur H. Kelder, and in the absence of any effort by Defendants to act on such evidence in the sixty-six years since the recovery of the X816 remains, Plaintiff is entitled to a declaration that the unidentified remains X816 are those of Private Kelder. Fed. R. Civ. P. 57

Under the Declaratory Judgment Act, the Court “may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.” 28 U.S.C. § 2201(a)

Alternative to declaratory relief asserting the identity of unidentified remains X816, Plaintiff requests the Court compel Defendants to produce remains X816 for inspection and DNA analysis.

Since the very first efforts to recover the remains of Private Kelder, it has been undisputed that his were among those recovered from Cabanatuan Grave 717. The only reason

his remains were not immediately identified was due to the absence of information which individually identified his remains from among the ten unknowns. Kelder IDPF Plf. Ex. 16F at 26-27

Plaintiff has obtained additional individually identifying information either overlooked by military personnel or which military personnel negligently failed to obtain. This evidence has been provided to three experts in the science of identification of skeletal remains and their reports are presented for consideration by this Court. Expert reports Plf. Ex. 1,22,23 (Attachment 1-3 to this Motion).

FACTUAL HISTORY

Plaintiff's Cousin, Private Arthur H. Kelder, died while a prisoner of the Imperial Japanese Army at Cabanatuan POW Camp #1 in the Philippine Islands on November 19, 1942. At the conclusion of WWII, U.S. Army Graves Registration units disinterred the remains of over 2,700 deceased military personnel from the camp cemetery. The remains of fourteen men were recovered from Grave 717 which was consistent with the burial roster maintained by the prisoners. The identities of all fourteen were known, but not individually identifiable. One set of remains found in Grave 717 were identified on the basis of an identification tag as those of BAIN. This association further correlates the burial roster to the actual grave. Bain IDPF Plf. Ex. 16A

The remaining thirteen sets of remains were then interred in a temporary military cemetery designated as Manila Cemetery #2. Three additional sets of remains were identified on the basis of military dental records as those of HANSCOM, NICHOLS and GUTIERREZ. These additional identifications further authenticated the accuracy of the burial records. Hanscom, Nichols & Gutierrez IDPFs Plf. Ex. 16D, 16I, 16C

The now ten unidentified remains were again disinterred and moved to an airport hangar designated as Manila Mausoleum where they were again processed for identification. During this time a U.S. Army Identification Board recommended the individual identification and burial of OVERBY and the group burial of the remaining nine unknowns including KELDER. This recommendation was disapproved by higher authority and the ten unidentified remains were buried as unknowns in individual graves at the Fort McKinley Post Cemetery (now known as the Manila American Cemetery and operated by Defendant American Battle Monuments Commission). This recommendation by a U.S. Army Identification Board officially recognized the identities of those buried in Grave 717. Kelder IDPF Plf. Ex. 16F at 26-27 (Attachment 4 to this Motion).

Two of these unidentified remains, X815 and X816, were subsequently disinterred and simply for the convenience of the government moved to other locations in the Ft McKinley Cemetery to fill graves vacated when other unknowns were identified. Unidentified remains files X815 & X816 Plf. Ex. 15C at 19, 15D at 15

The records of the recovery of these remains and burials were classified and restricted from public access. The families of these unidentified men were told only that their remains were “non-recoverable.” Kelder IDPF Plf. Ex. 16F at 26

By 2009 the records had been automatically declassified and Plaintiff, quite by chance, obtained them. It was obvious that KELDER and the others had not been identified because the government had not attempted to obtain civilian dental records.

Plaintiff compiled dental records from government documents which were overlooked or neglected by graves registration personnel. These records narrowed the possible matches to Private Kelder to only those of unidentified remains X816 and X819. X819 had been previously

identified as NICHOLS. X816 dental chart Plf. Ex 15D at 21 (Attachment 6 to this Motion), Plf. Ex. 15A-15J and 16A-N

Plaintiff obtained additional burial records at the National Archives and Records Administration (NARA) which further confirmed the accuracy of the burial records. Various Cabanatuan Cemetery Records (Attachment 8 to this Motion).

Plaintiff worked with the U.S. Army Past Conflicts Repatriation Branch to obtain Family Reference Samples (DNA) from the families of each Grave 717 unknown. These DNA samples have been sequenced and entered in to the U.S. Army DNA database. Admin. Rec. 220-221

Kelder family members informed Plaintiff that KELDER's older Brother, Herman Kelder, DDS, was a dentist and had made an audio recording containing an oral history of the family. On this tape he described replacing some of his Brother's silver dental restorations with gold inlays. A transcript of this audio tape was authenticated by doctor Kelder's Son and the family member who had caused the tape to be recorded. This record is equivalent to patient notes he would have maintained in his dental practice and are authenticated by two sworn statements of persons who knew him. Statements of Doug Kelder & Ron Kelder Plf. Ex. 4A & 4B (Attachment 5 to this Motion), X816 dental chart Plf. Ex 15D at 21 (Attachment 6 to this Motion)

The presence of gold dental inlays are relatively rare and have been observed only twenty-two (22) times in 721 Cabanatuan "X" files. Review of the dental charts of all fourteen remains recovered from Grave 717 show that only X816 contained gold dental inlays. *This, in combination with other evidence, provides conclusive evidence that remains X816 are those of Private Kelder.*

The accumulated evidence was then submitted for independent review by two board certified forensic odontologists and the former Deputy Director of Intelligence (J2) at the Joint POW/MIA Accounting Command (JPAC). Each expert has concluded that unidentified remains X816 are those of Private Arthur H. Kelder. Expert reports Plf. Ex. 1,22,23 (Attachments 1-3 to this Motion).

ALTERNATE MOTION

In the event this court is unable to provide declaratory relief indicating unidentified remains X816 are those of Private Arthur H. Kelder, Plaintiff requests the Court to issue an order compelling the production of the X816 remains for inspection and to obtain samples for DNA testing.

“Beginning with Operation Desert Storm in 1991, the United States military has used DNA analysis to help with identification of soldiers’ remains. Such analysis provides a means of identifying remains too badly damaged for identification through dental records or fingerprints. Identification is made by comparing DNA taken from the remains with a DNA sample previously taken from the decedent or his or her biological relatives.” *Mayfield v. Dalton*, 901 F.Supp.300, 302 (DCHI, 1995)

“Mitochondrial deoxyribonucleic acid (mtDNA) comparison is a scientifically recognized technique, that, when used in conjunction with other evidence, strengthens a case for post-mortem identification.” Army Regulation 638-2 ¶ 8-10

The evidence presented herein constitutes clear and convincing evidence that unidentified remains X816 are those of Private Arthur H. Kelder. However, as an alternate course of action, Plaintiff submits that family reference samples (DNA) are available for each of the ten still

unidentified remains recovered from Grave 717, and that these family reference samples are adequate to identify each set of remains beyond any possible doubt if presented for testing.

Production of these remains for DNA testing would be within DoD policy since Plaintiff has provided clear and convincing evidence of a substantial probability of identification (Supp. Rec. at 3-4) and would also contribute to judicial economy since it would be dispositive of this litigation.

CONCLUSION

For the above reasons, Plaintiff respectfully requests the Court grant his Motion for Declaratory Judgment, or, Alternatively, to Compel Production of unidentified remains Manila Cemetery #2 X816 for DNA analysis.

Respectfully submitted,

/s/ John Eakin

John Eakin, Plaintiff pro se
9865 Tower View, Helotes, TX 78023
Telephone: 210-695-2204
Email: jeakin@airsafety.com

TABLE OF ATTACHMENTS

ATTACHMENT 1, Plf. Ex. 1

Report of Dr. David Senn, DDS, DABFO, University of Texas, San Antonio Health Science Center – Bexar County Medical Examiner

ATTACHMENT 2, Plf. Ex. 23

Report of Dr. Richard R. Souviron, DDS, DABFO, Miami-Dade County Medical Examiner's Office

ATTACHMENT 3, Plf. Ex. 22

Declaration of Rick Stone, previously Deputy Chief, WWII Section, Intelligence Section (J2), Joint POW/MIA Accounting Command

ATTACHMENT 4, Plf. Ex. 16F

Kelder IDPF at 26, ID board proceeding

ATTACHMENT 5, Plf. Ex. 4A & 4B

Sworn statements of Douglas Kelder and Ronald Kelder

ATTACHMENT 6, Plf. Ex 15D

Tooth chart from X816 showing gold inlays

ATTACHMENT 7, Plf. Ex. 16F at 31

Kelder IDPF at 31 - Tooth chart from Kelder IDPF showing pattern of extractions

ATTACHMENT 8. – Plf. Ex. 24 - Grave 717 Information

- Cabanatuan Cemetery Burial roster extract
- Burial roster true copies – Kelder IDPF at 29
- Burial roster handwritten copy - NARA film 61
- Personal Effects Inventory - NARA film
- Cabanatuan Hospital Record - Kelder IDPF at 6
- Cabanatuan Cemetery Burial roster extract #2

All Plaintiff exhibits are available online at <http://bataanmissing.com/EakinVABMC/files.htm>

TABLE OF PLAINTIFF EXHIBITS

EXHIBITS TO COMPLAINT

Ex. 1	Report of Dr. David Senn, DDS, DABFO
Ex. 2	Declaration of John Eakin
Ex. 3	Extract from Cabanatuan POW Camp Cemetery burial roster grave 717
Ex. 4A	Identification Memorandum, dated 12 Dec 46
Ex. 4B	Identification Memorandum, dated 12 Dec 46 (transcript for legibility)
Ex. 5	Identification Board Proceedings – Cabanatuan Grave 717
Ex. 6AB	Statements of Ron Kelder & Doug Kelder
Ex. 7	Policy Memo on Prioritization of Remains Recovery and Identifications
Ex. 8	DPMO 1999 Annual Report – Policy on Disinterment for Identification
Ex. 9	Petition to US Army for Consideration of New Evidence of Identity, Unknown X-816
Ex. 10	US Army Response to Exhibit 9
Ex. 11	Extract from Army Regulation 638-2
Ex. 12	Petition to DPMO for Consideration of New Evidence of Identity, Unknown X-816
Ex. 13	Executive Order 10057
Ex. 14	Press releases and web pages concerning DNA collection for use in identification of the remains of deceased servicemembers
Ex. 15A	IDPF Unidentified Remains X-812 Manila2
Ex. 15B	IDPF Unidentified Remains X-814 Manila2
Ex. 15C	IDPF Unidentified Remains X-815 Manila2
Ex. 15D	IDPF Unidentified Remains X-816 Manila2
Ex. 15E	IDPF Unidentified Remains X-818 Manila2
Ex. 15F	IDPF Unidentified Remains X-820 Manila2
Ex. 15G	IDPF Unidentified Remains X-821 Manila2
Ex. 15H	IDPF Unidentified Remains X-822 Manila2
Ex. 15I	IDPF Unidentified Remains X-823 Manila2
Ex. 15J	IDPF Unidentified Remains X-824 Manila2
Ex. 16A	IDPF Bain 33035131
Ex. 16B	IDPF Collins 6578818
Ex. 16C	IDPF Gutierrez 20843125
Ex. 16D	IDPF Hanscom 6137280
Ex. 16E	IDPF Hirschi 19038407
Ex. 16F	IDPF Kelder 36016623
Ex. 16G	IDPF Kovach 20500764
Ex. 16H	IDPF Lobdell 20645267
Ex. 16I	IDPF Nichols 7009171
Ex. 16J	IDPF Overbey 13035026
Ex. 16K	IDPF Ruark 278681
Ex. 16L	IDPF Simmons 19019886
Ex. 16M	IDPF Waid 19049058
Ex. 16N	IDPF York Civilian

EXHIBITS TO PLF MO FOR DISCOVERY

Ex. 17	Whitehouse order to withhold information of atrocities
Ex. 18	Decl of Chambers
Ex. 19	DPMO website – Xfiles to be digitized
Ex. 20	DPMO 2013 budget

EXHIBITS TO PLF REPLY TO MOTION TO COMPLETE DISCOVERY

Ex. 21	Memorandum for record – JPAC Incident 425
Ex. 22	Declaration of Rick Stone

EXHIBITS TO PLF MO FOR DECLARATORY JUDGMENT

Ex. 23	Report of Dr. Richard R. Souviron, DDS, DABFO
Ex. 24	Multiple Burial Reports Cabanatuan Grave 717