

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOHN A. PATTERSON, JOHN BOYT, §
JANIS FORT, RUBY ALSBURY, §
RAYMOND BRUNTMYER, §
JUDY HENSLEY, and DOUGLAS KELDER, §

Plaintiffs, §

v. §

Civil Action No. SA-17-CV-467-XR

DEFENSE POW/MIA ACCOUNTING §
AGENCY; KELLY MCKEAGUE, §
in his official capacity as Director of the §
DPAA; U.S. DEPARTMENT OF DEFENSE; §
JAMES MATTIS, in his official capacity as §
Secretary of Defense; AMERICAN §
BATTLE MONUMENTS COMMISSION; §
and WILLIAM MATZ, in his §
official capacity as Secretary of the §
American Battle Monuments Commission, §

Defendants. §

**PLAINTIFFS’ MOTION TO COMPEL PRODUCTION OF REMAINS,
OR, IN THE ALTERNATIVE, FOR PHYSICAL EXAMINATION
(Pursuant to Federal Rules of Civil Procedure 34, 35, and 37)**

The Families¹ file this Motion to Compel Production of Remains, or, in the Alternative, for Physical Examination against the Government² and would show the Court as follows:

¹ John A. Patterson (“Patterson”), John Boyt (“Boyt”), Janis Fort (“Fort”), Ruby Alsbury (“Alsbury”), Raymond Bruntmyer (“Bruntmyer”), Judy Hensley (“Hensley”), and Douglas Kelder (“Kelder”) are referred herein collectively as the “Families.”

² Defense POW/MIA Accounting Agency (“DPAA”), Director of the DPAA Kelly McKeague, United States Department of Defense, Secretary of Defense James Mattis, American Battle Monuments Commission (“ABMC”), and Secretary of the ABMC William Matz are referred herein collectively as the “Government.”

I. Introduction

1. The Families served the Government with a Request for Production on February 15, 2018. Request No. 22 seeks production of the remains from multiple graves for inspection and DNA testing. A copy of the Request for Production is attached as Exhibit A.

2. The Government's response was due on March 19, 2018, but the Government requested additional time to respond. On March 21, 2018, the Government submitted their response to the Families' production request and refused to produce the remains requested for examination and/or DNA testing. Doc. 25 at 12. A copy of the Government's response to the production request is attached as Exhibit B.

3. The DPAA has recommended disinterment of the remains from Cabanatuan Common Graves 822 and 704. Doc. 26 at 13-14. Thus, the DPAA is in agreement with the Families that the remains from Cabanatuan Common Graves 822 and 704 should be disinterred.

II. Relief Sought

4. For the promotion of truth and justice, the Families move the court for an order allowing the disinterment, examination, and DNA testing of the following remains:

a. The remains designated as Manila #2 X-1130, Manila Maus X4685, Manila American Cemetery Grave J-7-20.

b. The remains designated as Manila #2 X-3629, Manila Maus X1298, Manila American Cemetery Grave N-15-19.

c. The remains designated as Leyte #1 X618, Manila Maus X2322, Manila American Cemetery Grave L-8-113.

d. Any remains recovered from Cabanatuan Grave 822 that are designated by the Government as “unknowns.”

e. Any remains recovered from Cabanatuan Grave 704 that are designated by the Government as “unknowns.”

f. Any remains recovered from Cabanatuan Grave 407 that are designated by the Government as “unknowns.”

g. Any remains recovered from Cabanatuan Grave 717 that are designated by the Government as “unknowns.”

h. Any remains recovered from Cabanatuan Grave 717 that are being held in storage at an identification laboratory by the Government or that have not been returned to their respective next-of-kin.³

5. Further, pursuant to Rule 37(a) of the Federal Rules of Civil Procedure, the Families move the Court for an order (1) overruling the objections filed by the Government to Request No. 22 in Plaintiffs’ First Request for Production and (2) compelling the Government to produce and permit inspection and testing of the Remains.

6. Alternatively, in addition to the motion to compel pursuant to Rule 37(a), the Families move the Court for an order compelling the Government to produce the Remains identified in the above paragraph for physical examination and DNA testing pursuant to Federal Rule of Civil Procedure 35.

7. In addition to the production request and physical examination requested above, the Families move the Court for an order compelling the Government to produce the Remains identified in the above paragraph pursuant to common law discovery principles.

³ The remains described in Paragraph 5, a-h, are referred herein collectively as the “Remains.”

8. The purpose of this request is for there to be postmortem examination and DNA testing, which will elicit the truth and promote justice. This Court has the authority to issue such an order pursuant to common law discovery principles and Federal Rules of Civil Procedure 34, 35, and 37.⁴

III. Authority Supporting Relief Requested

A. Courts Have Consistently Authorized Disinterment for Discovery Purposes

9. Notwithstanding the judicial reverence that must be shown to those who have departed from this world, courts have consistently recognized that the rights of litigants must also be protected. Long ago, Dean Wigmore stated:

The exhumation or the autopsy of a corpse, when useful to ascertain facts in litigation, should of course be performed. Reverence for the memory of those who have departed does not require us to abdicate the high duty of doing justice to the living; and the orders of a court of justice, exercising the power of the state in the communal interest, are not to be placed on the same level with the acts of an unlicensed and self-seeking intruder upon hallowed ground.

8 J. Wigmore, *Evidence in Trials at Common Law* § 2221, at 197-99 (McNaughton rev. ed. 1961) (Wigmore) (footnotes omitted). Courts all over have echoed these sentiments. In the words of an early Maryland decision: “[C]ourts have never hesitated to have a body exhumed where the application under the particular circumstances appeared reasonable and was for the purpose of eliciting the truth in the promotion of justice.” [*Painter v. U.S. Fid. & Guar. Co.*, 123 Md. 301, 91 A. 158, 160 \(1914\)](#).

10. For example, in [*Stephens v. National Gypsum Co.*](#), a federal district court in Georgia

⁴ In an abundance of caution, the Families explicitly reserve their right to seek further relief from the court in regards to the Governments’ response to the Families First Request for Production. By filing this motion, the Families are not waiving their right to seek any other type of relief from the Court and may seek production of other responsive documents.

concluded that courts may order disinterment in civil cases for discovery purposes. 685 F. Supp. 847, 847-48 (M.D. Ga. 1988). It explained that disinterment should be permitted when there is (1) good cause, (2) necessity, and (3) a strong showing that the examination will establish the facts sought. *Id.* at 848. There, the court granted a motion for disinterment because each factor was met. In reaching its conclusion, the court relied upon a Fifth Circuit opinion, *Travelers Ins. Co. v. Welch*, 82 F.2d 799 (5th Cir. 1936), where the Fifth Circuit found that a court is permitted to order disinterment “for the promotion of truth in private litigation” While the *Travelers* case considered the question under Louisiana Law, the court found that the concept was “an accurate statement of the law.” *Stephens*, 685 F. Supp. at 847. Accordingly, the court concluded that it had the authority to order disinterment and an examination, which included the procurement of body tissue from the remains. *Id.* at 848.

11. There are numerous other examples where federal courts have ordered disinterment for discovery purposes. In *Brewer v. Am. Med. Alert Corp.*, a federal court in Tennessee granted a motion to disinter based on a showing that the disinterment and examination would likely reveal facts that were in dispute. 1:08-0069, 2010 WL 280986 (M.D. Tenn. Jan. 20, 2010). Likewise, in *Labiche v. Certain Ins. Companies or Underwriters at Lloyd’s London, England*, a case within the Fifth Circuit, Judge Skelly Wright found that “[w]here the interests of justice appear to require it, exhumation should be ordered.” 196 F. Supp. 102, 104-05 (E.D. La. 1961).

12. Moreover, countless state courts have reached the same conclusion.⁵ For example,

⁵ See *Landrum v. Armstrong World Indus., Inc.*, 535 So. 2d 656, 657 (Fla. Dist. Ct. App. 1988); *In re Bernardi*, 132 Ill. App. 2d 186, 189, 267 N.E.2d 717, 720 (1971) (“The courts have often exerted their authority to order disinterment of a body for evidential purposes in civil cases”); *Stastny v. Tachovsky*, 178 Neb. 109, 121, 132 N.W.2d 317, 325 (1964) (“An order for an autopsy upon motion of a party in a civil action is not necessarily precluded by the fact that other sources of evidence exist on the subject.”); *Drake v. Bowles*, 97 N.H. 471, 473, 92 A.2d 161, 163 (1952) (“Discovery may even call for an autopsy if good and substantial reasons exist which make the

one state supreme court held that a trial court properly ordered the disinterment of a set of remains so that a party could establish their claims by means of identification. [*In re Percival's Estate*, 101 S.C. 198, 85 S.E. 247 \(1915\)](#).

i. Justice Requires that the Remains be Produced

13. Here, the interests of justice require that the remains be produced for examination and postmortem DNA testing. The disinterment and testing will reveal essential facts that are in dispute. Specifically, it will definitively show whether the remains at issue are who the Families allege they are. There is no doubt that the testing will elicit the truth and promote justice.

14. There is good cause for the examinations and DNA testing. The examinations will lead to the discovery of specific facts relevant to the Families' causes of action and are necessary to the Families' case. The examination is necessary, as there is no other way to obtain the information sought. A past medical report, deposition, or other discovery request will not reveal this information. Further, the matter needs to be addressed urgently so that the remains can be tested in the best condition possible and do not continue to deteriorate. Additionally, the Families will be able to use experts that have previously conducted postmortem DNA testing on allegedly unidentified remains of service members from World War II. The declarations of John Smithee and Jon Davoren further establish that there is good cause and urgent necessity for this motion. Further, the declarations show that the examination and testing will establish the facts sought. Whatever the results of the examinations are, certain facts in this case will be established conclusively.

evidence of the autopsy vital.”); [*Kusky v. Laderbush*, 96 N.H. 286, 287, 74 A.2d 546, 547 \(1950\)](#); [*State v. Wood*, 127 Me. 197, 199, 142 A. 728, 729 \(1928\)](#); [*Gray v. State*, 55 Tex. Crim. 90, 101, 114 S.W. 635, 642-43 \(1908\)](#).

15. Moreover, while reverence must be shown to all remains, the disinterment requested will not unfairly prejudice anyone. The DPAA has already recommended disinterment of numerous remains that are requested herein. Doc. 26 at 13-14. No individual outside the DPAA has objected to the disinterment. Additionally, the Government has stated that it is the DPAA's intention to disinter all Cabanatuan graves. *Id.* at 13. Accordingly, whether or not disinterment should take place is not in dispute between the Families and the DPAA.

16. Also, the information obtained from the examination and DNA testing will be provided to the Government and will benefit the Government and other families. This examination and testing will be the quickest and most efficient way to resolve the dispute regarding the identity of the remains. Instead of spending even more countless hours and resources reviewing case files, the essential facts in dispute can be resolved in a matter of weeks with a reliable DNA test.

17. Finally, the Families will be able to conduct the examination and DNA testing during the discovery period in this case. Based on history and testing capabilities, the DPAA will be unable to conduct the DNA testing of the remains at issue by the time this lawsuit is resolved.

18. In sum, (1) there is good cause for this motion, (2) the motion is necessary, and (3) the motion will establish facts at issue in this litigation. Accordingly, under common law discovery principles, the Families are entitled to the production of the Remains requested for examination and testing, which will elicit the truth in the promotion of justice. The Families move the court for an order allowing the disinterment, examination, and DNA testing of the Remains.

B. Federal Rule of Civil Procedure 34(a) Authorizes Disinterment

19. Furthermore, Rule 34(a)'s provisions encompass exhumation, autopsy, and postmortem DNA testing orders. *See [Zalatuka v. Metropolitan Life Ins. Co.](#), 108 F.2d 405 (7th Cir. 1939)* (while the Seventh Circuit never explicitly endorsed the trial court's discovery order,

later courts and other authorities have cited the case for the proposition that Rule 34(a)'s provisions encompass exhumation and autopsy orders.).⁶ "Given the use of the broad term 'tangible thing,' in Rule 34, it is difficult to imagine anything that could not be required to be produced under appropriate circumstances. For example, a dead body has been held to be subject to an order for production." *See 7 Moore's Federal Practice*, § 34.12[2] (Matthew Bender 3d Ed.) (2017). Thus, under Rule 34(a), the production of the remains for postmortem examination and DNA testing is proper. *See id.* ("DNA testing is not beyond the scope of the discovery rules . . .").

20. Accordingly, pursuant to Rules 34 and 37 of the Federal Rules of Civil Procedure, the Families respectfully request that the Court compel the Government to comply with the Families' request for production of the Remains for examination and testing.

i. Response to the Governments' Objections to the Rule 34 Request

21. As shown in Exhibit B, the Government listed multiple objections to Request No.

22. Many of the objections are misplaced. Others lack merit.

a) Government's First Objection – No Authority

22. As shown above, there is significant case law showing that this Court has jurisdiction and authority to order disinterment of the remains that are in the possession and control of the Government. On the other hand, the Government has cited no case law to support their position.

b) Government's Second Objection - Vagueness

23. This Request is not vague. A responding party should use common sense when

⁶ *See, e.g., Grimsley v. Seaboard Sys. R.R.*, No. 83-880-Civ-J-12, slip op. at 3 (M.D. Fla. Sept. 26, 1984); *Alford v. Northeast Ins. Co.*, 102 F.R.D. 99, 101 (N.D. Fla. 1984); 10A Federal Procedure, LAWYERS EDITION, Discovery and Depositions § 26.369, at 41 n.69 (1988); R. HAYDOCK & D. HERR, DISCOVERY PRACTICE § 6.2, at 416 & n.2 (2d ed. 1988); 4A J. MOORE, J. LUCAS & D. EPSTEIN, MOORE'S FEDERAL PRACTICE § 34.09, at 34-53 (2d ed. 1988).

interpreting words and phrases used in discovery requests. A plain reading of the Request shows what is being sought and provides the Government with the opportunity to respond. Further, for purposes of this motion, the part of the discovery requests objected to is not at issue.

c) Government's Third Objection – Vagueness

24. The Request is not vague. Again, a responding party should use common sense when interpreting words and phrases used in discovery requests. A plain reading of the Request shows what is being sought and provides the Government with the opportunity to respond.

d) Government's Fourth Objection – Outside Scope

25. The Government erroneously assumes that the Families' discovery request constitutes ultimate relief. The ultimate relief sought by the Families is to properly bury the remains of their family members. This discovery will elicit the truth and conclusively show that the Government is violating the Families' constitutionally protected rights. It is unquestionable that the identity of the remains at issue in this case is relevant and material.

e) Government's Fifth Objection – Unreasonable, Burdensome, Disproportionate

26. The DPAA has already recommended disinterment of the remains from Graves 822 and 704. Additionally, the DPAA intends to disinter all Cabanatuan graves. Consequently, it is doubtful that this would add an undue burden to the Government. Further, the Government has failed to present any evidence establishing any undue burden. Any burden is the result of the Government's own conscious, discretionary decisions. Finally, the ultimate issue at stake in this litigation is the proper burial of fallen U.S. Army service members from World War II. The right to provide a proper burial to family members is a fundamental right. Thus, this discovery is not disproportionate to the needs of this case.

f) Government's Sixth Objection – Privacy/Ability

27. The Government fails to identify who has an equal or greater legal claim than the Families in this case. Such a general claim is improper. Further, the Government wrongfully suggests that the Families are not interested in the appropriate identification of other service members. Additionally, the Government has not identified any case or statute prohibiting the discovery of information that is sought. Finally, experts that have been hired by the Government in the past will be the ones performing the examinations and testing. Control of the remains is not what is requested for discovery. Access is what is being requested.

C. Federal Rule of Civil Procedure 35(a) Authorizes Production

28. An evidentiary postmortem examination and DNA test can be properly ordered pursuant to Federal Rule of Civil Procedure 35(a). See [*In re Certain Asbestos Cases*, 112 F.R.D. 427 \(N.D. Tex. 1986\)](#) (the court exhaustively analyzed Rule 35(a) and found that an evidentiary autopsy can be properly ordered pursuant to the terms of Rule 35(a)); [*Plaisted v. Geisinger Med. Ctr.*, 210 F.R.D. 539, 541 \(M.D. Pa. 2002\)](#); [*Belkow v. Celotex Corp.*, 1989 WL 56976 \(N.D. Ill. May 19, 1989\)](#) (upon a “proper showing Rule 35(a) permits the court to order an autopsy”).

29. There are multiple reasons why Rule 35(a) properly authorizes the production requested in the present case. First, as a pretrial discovery rule, “Rule 35(a) should be interpreted liberally in favor of granting discovery.” [*In re Certain Asbestos Cases*, 112 F.R.D. at 432](#). Second, while postmortem DNA testing is a significant procedure, “invasive procedures that are medically approved have been allowed upon living persons by authority of Rule 35.” [*Id.* at 433](#). Third, a decedent is a “person” as required by the rule. [*Id.*](#) Fourth, Rule 35(a) permits an examination on anyone in the custody or under the control of a party, including a decedent. [*Id.*](#) Finally, the decedent’s next of kin are the ones asking for the postmortem DNA testing.

30. The physical condition and DNA of the persons to be examined is in controversy. Specifically, there is a dispute between the parties regarding the Remains' identity. The Families have sufficient information about each particular decedent and their present location. Thus, this is not a general request to disinter random remains and is proper. See [*Beach v. Beach*, 114 F.2d 479, 481 \(D.C. Cir. 1940\)](#) (“Clearly the characteristics of one's blood which are expressed in terms of red and white corpuscles, or of haemoglobin, are part of one's ‘physical condition.’”).

31. Again, there is good cause for the examinations and they are necessary. The examinations will lead to the discovery of specific facts relevant to the Families' causes of action and are necessary to the Families' case. The examination is necessary, as there is no other way to obtain the information sought. A past medical report, deposition, or other discovery request will not reveal this information. Further, the matter needs to be addressed urgently so that the remains can be tested in the best condition possible and do not continue to deteriorate. Additionally, the Families will be able to use experts that have previously conducted postmortem DNA testing on allegedly unidentified remains of service members from World War II. The declaration of John Smithee further establishes that there is good cause and urgent necessity for this motion.

32. Finally, results from previous litigation have shown that the records relied upon by the Families in this case are trustworthy. See *Eakin v. American Battle Monuments Commission, et al*, No. SA-12-CA-1002-FB (factually identical case, where the same type of data relied upon here proved to be accurate). The disinterment will elicit the truth and promote justice.

D. Time, Place, and Manner for Disinterment and Postmortem DNA Testing

33. The Families request that the Court give the Government no more than sixty (60) days to disinter the Remains and produce them to the Families for postmortem DNA testing. Once the Remains are produced, the postmortem examination and DNA testing will be completed within

forty-five (45) days. Alternatively, should the Court find it proper, the Families respectfully request that the Court issue an appropriate schedule providing deadlines for when certain remains must be produced and examinations performed.

34. The Families request that the remains be produced for examination and testing at a U.S. military base or facility located within 30 miles of San Antonio, Texas. This location is sought so that the Government can keep custody of the remains while the Families are granted access to conduct discovery and obtain DNA samples. Alternatively, should the Court find it proper, the Families respectfully request that the Court designate a reasonable location where the Remains must be produced for examination and testing.

35. The postmortem examination and DNA testing will be provided by Jon Davoren, and other support staff, affiliated with Bode Cellmark Forensics. Professionals affiliated with Bode Cellmark Forensics have partnered with government agencies before to conduct similar testing.

36. The Remains will be treated with care and tested only for identification purposes. The Families, as the primary next of kin, have every intention of preserving the Remains as much as possible.

37. The Families have no objection to the Government being present at the testing.

E. Exams Sought are Reasonable

38. The Court has the discretion to deny an examination when the tests or procedures to be performed are potentially dangerous or experimental and of unproven scientific value. *See, e.g., Usher v. Lakewood Eng'g & Mfg. Co., 158 F.R.D. 411, 413 (N.D. Ill. 1994)*. However, none of those issues are present in this request. The declaration of Jon Davoren establishes that only well-accepted procedures and testing will be performed that do not pose any unusual risk or danger to the service members' remains. Even if some unusual procedure were contemplated, it would be

the burden of the party resisting the examination to raise and prove that the examination posed unusual dangers.

F. Conclusion

39. Here, the interests of justice require that the Remains be produced for postmortem DNA testing, inspection, and/or physical examination. The examination and testing will reveal essential facts that are in dispute. Specifically, it will definitively show whether the Remains are who the Families allege they are. Further, while reverence must be shown to all remains, the disinterment requested will not unfairly prejudice anyone. The DPAA has already recommended disinterment for numerous remains and intends to disinter the others.

40. For the reasons stated in this motion, the Families respectfully request that the relief sought in this motion be granted, that the Government be compelled to produce the Remains, and that the Families be provided the opportunity to conduct (1) an inspection, (2) examination, and/or (3) DNA testing of the Remains as described in this motion and the attached supporting documents.

Respectfully submitted,

/s/ John T. Smithee, Jr.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 13th day of April 2018, a true and correct copy was delivered as follows:

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/s/ John T. Smithee, Jr.

John T. Smithee, Jr.

CERTIFICATE OF CONFERENCE

Counsel for the Plaintiffs certifies that, prior to filing this motion, he conferred in good faith with counsel for the Government by phone call on March 28, 2018. There have also been previous discussions regarding the issues presented in this motion. Despite meeting and conferring, the parties have been unable to resolve their differences.

/s/ John T. Smithee, Jr.

John T. Smithee, Jr.