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7 UNITED STATES DISTRICT COURT
8 EASTERN DISTRICT OF CALIFORNIA
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10 C. DWAYNE GILMORE,

11 Plaintiff,

12 vs.

13 D. AUGUSTUS, et al.,

14 Defendants.

1:12-cv-00925-GSA-PC

ORDER DENYING PLAINTIFF'S MOTION
FOR SUBSTITUTION, WITHOUT PREJUDICE
TO RENEWAL OF THE MOTION
WITHIN THIRTY DAYS
(Doc. 25.)

THIRTY DAY DEADLINE

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16 **I. BACKGROUND**

17 C. Dwayne Gilmore ("Plaintiff") is a state prisoner proceeding pro se and in forma
18 pauperis with this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff filed the Complaint
19 commencing this action on June 7, 2012. (Doc. 1.) This action now proceeds on the First
20 Amended Complaint filed on March 8, 2013, against defendants Correctional Officer (C/O) C.
21 Lockard, C/O C. Lopez, C/O J. Hightower, and C/O J. J. Torres for excessive force, and against
22 defendant C/O J. J. Torres for denial of adequate medical care, in violation of the Eighth
23 Amendment.¹ On December 12, 2013, the court issued an order directing the United States
24 Marshal ("Marshal") to serve defendants in this action. (Doc. 19.)

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26 ¹ On November 18, 2013, the court issued an order dismissing all other claims and defendants from this
27 action for failure to state a claim. (Doc. 17.) Defendants Lieutenant D. Augustus, Sergeant J. S. Diaz, Licensed
28 Vocational Nurse (LVN) A. Serna, LVN B. Ismat, LVN I. Bari, LVN J. Canada, LVN Z. Nartume, and John Doe
were dismissed from this action based on Plaintiff's failure to state any claims against them upon which relief may
be granted under §1983, and Plaintiff's claims based on supervisory liability and claims for conspiracy and
violation of due process were dismissed from this action for Plaintiff's failure to state a claim under § 1983. (Id.)

1 On February 24, 2014, Defendants filed a Notice of defendant Torres' death pursuant to
2 Rule 25(a) of the Federal Rules of Civil Procedure, requesting the court to issue an order
3 relieving the Marshal from serving defendant Torres as ordered in the court's December 12,
4 2013 order. (Doc. 23.) On March 5, 2014, Plaintiff filed a response to Defendants' Notice,
5 opposing Defendants' request to relieve the Marshal from service, and requesting a court order
6 directing the Marshal to serve the estate of defendant Torres and to "command all necessary
7 assistance from the California Department of Corrections and Rehabilitation to execute the
8 order." (Doc. 25 at 2:4-11.)

9 **II. RULE 25(a)(1) - MOTION FOR SUBSTITUTION**

10 Rule 25(a)(1) of the Federal Rules of Civil Procedure provides that:

11 "If a party dies and the claim is not thereby extinguished, the
12 court may order substitution of the proper parties. The motion for
13 substitution may be made by any party or by the successors or
14 representatives of the deceased party and, together with the notice
15 of hearing, shall be served on the parties as provided in Rule 5
16 and upon persons not parties in the manner provided in Rule 4 for
17 the service of a summons, and may be served in any judicial
18 district. Unless the motion for substitution is made not later than
19 90 days after the death is suggested upon the record by service of
20 a statement of the fact of the death as provided herein for the
21 service of the motion, the action shall be dismissed as to the
22 deceased party."

23 Under Rule 25(a)(1), any party may file a motion for substitution, which must be served
24 on all parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule
25 4 for the service of a summons. Thus, parties may be served by service on their attorney, Fed.
26 R. Civ. P. 5(b), but non-party successors or representatives of the deceased party must be
27 served in the manner provided by Rule 4 for the service of a summons. See Barlow v. Ground,
28 39 F.3d 231, 232-234 (9th Cir. 1994).

To proceed with a motion for substitution, Plaintiff must provide proof of service of the
motion for substitution upon the other parties to this action and the successors or
representatives of J. J. Torres, as required by Rule 25(a)(1). Plaintiff is advised that he is
responsible for identifying and finding J. J. Torres' heirs or representatives. Such assistance is
not a function of the Marshal or the court. Plaintiff is also responsible to arrange for service of

1 the motion for substitution. Plaintiff's in forma pauperis status does not entitle him to
2 assistance free of charge by the Marshal or the court for service of the motion for substitution.

3 Therefore, Plaintiff's motion for substitution shall be denied, without prejudice to
4 renewal of the motion in compliance with Rule 25(a)(1) within thirty days.

5 **III. CONCLUSION**

6 Based on the foregoing, IT IS HEREBY ORDERED that:

- 7 1. Plaintiff's motion for substitution, filed on March 5, 2014, is DENIED, without
8 prejudice to renewal of the motion within thirty days from the date of service of
9 this order; and
- 10 2. Plaintiff's failure to file a motion for substitution in compliance with Rule
11 25(a)(1) pursuant to this order shall result in the dismissal of defendant J. J.
12 Torres from this action.

13
14 IT IS SO ORDERED.

15 Dated: March 6, 2014

/s/ Gary S. Austin
16 UNITED STATES MAGISTRATE JUDGE