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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

C. DWAYNE GILMORE,
Plaintiff,
v.
C. LOCKARD, et al.,
Defendants.

Case No. 1:12-cv-00925-SAB (PC)

ORDER VACATING DECEMBER 3, 2015
ORDER, GRANTING PLAINTIFF’S
MOTION TO WITHDRAW CONSENT TO
MAGISTRATE JUDGE JURISDICTION,
AND REASSIGNING ACTION TO
DISTRICT JUDGE LAWRENCE J. O’NEILL
AND MAGISTRATE STANLEY A. BOONE

(ECF Nos. 151, 153)

ORDER DIRECTING CLERK OF COURT TO
REASSIGN CASE TO DISTRICT JUDGE
LAWRENCE J. O’NEILL AND
MAGISTRATE STANLEY A. BOONE

ORDER DIRECTING DEFENDANTS TO
FILE AND SERVE A SUGGESTION OF
DEFENDANT TORRES’ DEATH ON
PLAINTIFF AND DEFENDANT TORRES’
SUCCESSOR OR PERSONAL
REPRESENTATIVE

THIRTY (30) DAY DEADLINE

Plaintiff C. Dwayne Gilmore is a state prisoner proceeding *pro se* and *in forma pauperis* in this civil rights action pursuant to 42 U.S.C. § 1983. This action proceeds against Defendants Lockard, Lopez, Hightower, and Torres for excessive force, and against Defendant Torres for deliberate indifference to serious medical needs, in violation of the Eighth Amendment.

I. Procedural Background

On June 7, 2012, Plaintiff initiated this action. (ECF No. 1.)
On June 29, 2012, Plaintiff consented to the jurisdiction of a magistrate judge pursuant to

1 28 U.S.C. § 636(c). (ECF No. 8.)

2 On November 18, 2013, the Court ordered that this action proceed only against
3 Defendants Lockard, Lopez, Hightower, and Torres for excessive force, and against Defendant
4 Torres for denial of adequate medical care and directed that service of summons and Plaintiff's
5 first amended complaint was appropriate for Defendants Lockard, Lopez, Hightower, and Torres.
6 (ECF No. 17.)

7 On February 24, 2014, the Deputy Attorney General representing Defendants Lopez and
8 Hightower filed a notice stating that Defendant Torres had died. (ECF No. 23.) The notice stated
9 that it was being made under Federal Rule of Civil Procedure 25(a). (Id.)

10 On March 5, 2014, March 17, 2014, April 4, 2014, May 16, 2014, and July 17, 2014,
11 Plaintiff filed five motions to substitute Defendant Torres. (ECF Nos. 25, 28, 31, 43, 61.)

12 On March 6, 2014, March 21, 2014, April 17, 2014, May 20, 2014, and July 25, 2014, the
13 Court denied each of Plaintiff's motions to substitute Defendant Torres without prejudice. (ECF
14 Nos. 26, 29, 32, 48, 63.)

15 On April 4, 2014, Defendants Hightower and Lopez filed an answer to Plaintiff's first
16 amended complaint. (ECF No. 30.)

17 On May 15, 2014, Defendant Lockard filed an answer to Plaintiff's first amended
18 complaint. (ECF No. 40.)

19 On May 19, 2014, Defendants Hightower, Lockard, and Lopez declined magistrate judge
20 jurisdiction pursuant to 28 U.S.C. § 636(c). (ECF No. 45.) On May 20, 2014, this case was
21 assigned to U.S. District Judge Lawrence J. O'Neill and U.S. Magistrate Judge Gary S. Austin.
22 (ECF No. 46.)

23 On November 20, 2014, Plaintiff filed his sixth motion to substitute Defendant Torres.
24 (ECF No. 89.)

25 On May 27, 2015, the assigned Magistrate Judge issued findings and recommendations
26 recommending that Plaintiff's sixth motion to substitute Defendant Torres be denied, that
27 Defendant Torres be dismissed from this action, with prejudice, and that Plaintiff's medical
28 deliberate indifference claim be dismissed from the action. (ECF No. 123.)

1 On July 8, 2015, the undersigned issued an order adopting the May 27, 2015 findings and
2 recommendations in full, denying Plaintiff's sixth motion to substitute Defendant Torres,
3 dismissing Defendant Torres from this action, with prejudice, and dismissing Plaintiff's medical
4 deliberate indifference claim from this action. (ECF No. 131.)

5 On August 17, 2015, due to the retirement of Magistrate Judge Austin, this action was
6 reassigned to Magistrate Judge Stanley A. Boone. (ECF No. 144.)

7 On October 19, 2015, Plaintiff filed a motion to withdraw his consent to magistrate judge
8 jurisdiction. (ECF No. 151.)

9 On December 3, 2015, the assigned Magistrate Judge denied Plaintiff's motion to revoke
10 his consent to magistrate judge jurisdiction. (ECF No. 155.)

11 On September 1, 2016, Defendants Hightower, Lockard, and Lopez consented to
12 magistrate judge jurisdiction pursuant to 28 U.S.C. § 636(c). (ECF No. 199.)

13 On September 22, 2016, the undersigned issued an order assigning this case to Magistrate
14 Judge Boone to conduct any and all further proceedings in this case, including trial and entry of
15 final judgment, pursuant to 28 U.S.C. § 636(c). (ECF No. 201.)

16 On March 2, 2017, a jury found against Plaintiff and in favor of Defendants, finding that
17 Defendants Hightower, Lockard, and Lopez did not use excessive force during the alleged
18 incident. (ECF No. 254.)

19 On April 3, 2017, Plaintiff filed a notice of appeal. (ECF No. 258.)

20 On August 28, 2019, the Ninth Circuit Court of Appeals "reverse[d] the jury verdict,
21 finding that the magistrate judge did not have jurisdiction over trial proceedings pursuant to §
22 636(c). [The Ninth Circuit] further reverse[d] dismissal of Torres as a Defendant, finding the 90-
23 day window under Rule 25(a) was never triggered, and we reverse the dismissal of Gilmore's
24 deliberate indifference claim. [The Ninth Circuit] remand[ed] for further proceedings consistent
25 with this opinion." Gilmore v. Lockard, 936 F.3d 857, 867-68 (9th Cir. 2019).

26 The Ninth Circuit Court of Appeals issued the mandate on September 19, 2019. (ECF No.
27 268.)

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1 **II. Plaintiff’s Motion to Withdraw His Consent to Magistrate Judge Jurisdiction**

2 On appeal, Plaintiff argued that the assigned Magistrate Judge erred by improperly
3 requiring that Plaintiff demonstrate “good cause” in order to withdraw his consent to magistrate
4 judge jurisdiction. Gilmore, 936 F.3d at 861. In its decision, the Ninth Circuit Court of Appeals
5 held that “a showing of good cause is not required” to withdraw consent to magistrate judge
6 jurisdiction “before all parties have consented.” Id. at 861-62. Further, the Ninth Circuit held
7 that, since Plaintiff’s motion to withdraw his consent was filed before Defendants had consented
8 to magistrate judge jurisdiction, “[t]here was no possible prejudice to Defendants at the time
9 [Plaintiff] sought withdrawal, [and it was not] inconvenient to the district court since the case had
10 already been assigned to District Judge O’Neill[,]” Plaintiff’s “motion to withdraw consent
11 should have been granted[.]” Id. at 863.

12 Therefore, since the Ninth Circuit has concluded that Plaintiff’s motion to withdraw
13 consent should have been granted, the undersigned vacates the December 3, 2015 order denying
14 Plaintiff’s motion to withdraw consent to magistrate judge jurisdiction. Instead, the Court grants
15 Plaintiff’s motion to withdraw consent to magistrate judge jurisdiction. Accordingly, this case is
16 reassigned to District Judge Lawrence J. O’Neill and Magistrate Judge Stanley A. Boone.

17 **III. Substitution of Defendant Torres**

18 On appeal, Plaintiff argued that Defendant Torres was improperly dismissed from the
19 action because, since the notification of death was not properly served on Defendant Torres’
20 estate, Federal Rule of Civil Procedure 25(a)(1)’s 90-day window was never triggered, and
21 because the assigned Magistrate Judge impermissibly placed the burden on him to provide precise
22 details of Torres’ estate. Gilmore, 936 F.3d at 864. The Ninth Circuit Court of Appeals agreed
23 with Plaintiff, holding that, “because ... the magistrate judge erred by placing the burden on
24 Gilmore to identify Torres’s successor or personal representative, we conclude that Rule 25(a)’s
25 90-day window was not triggered. We therefore reverse dismissal of Torres as a defendant, and
26 we reverse the dismissal of Gilmore’s deliberate indifference claim.” Id. at 867.

27 In this case, “given that [Defendants are] much better suited than [Plaintiff] to identify the
28 proper parties[,]” Defendants are required to identify Defendant Torres’ successor or personal

1 representative in order to trigger Rule 25(a)'s 90-day window for substitution. Id. Therefore,
2 within thirty (30) days from the date of service of this order, Defendants are required to file and
3 serve the suggestion of Defendant Torres' death on Plaintiff in the manner provided by Rule 5
4 and on Defendant Torres' successor or personal representative in the manner provided by Rule 4
5 for the service of a summons. Fed. R. Civ. P. 25(a)(3); Barlow v. Grounds, 39 F.3d 231, 233 (9th
6 Cir. 1994).

7 **IV. Order**

8 Accordingly, it is HEREBY ORDERED that:

- 9 1. The Magistrate Judge's December 3, 2015 order denying Plaintiff's motion to
10 withdraw his consent to magistrate judge jurisdiction, (ECF No. 155), is
11 VACATED;
- 12 2. Plaintiff's motion to withdraw his consent to magistrate judge jurisdiction, (ECF
13 No. 151), is GRANTED;
- 14 3. This action is reassigned to United States District Judge Lawrence J. O'Neill and
15 Magistrate Judge Stanley A. Boone;
- 16 4. The Clerk is directed to reassign this action in its entirety to United States District
17 Judge Lawrence J. O'Neill and Magistrate Judge Stanley A. Boone;
- 18 5. The new case number shall be 1:12-cv-00925-LJO-SAB (PC); and
- 19 6. Within **thirty (30) days** from the date of service of this order, Defendants are
20 required to file and serve the suggestion of Defendant Torres' death on Plaintiff in
21 the manner provided by Rule 5 and on Defendant Torres' successor or personal
22 representative in the manner provided by Rule 4 for the service of a summons.

23
24 IT IS SO ORDERED.

25 Dated: December 6, 2019

/s/ Lawrence J. O'Neill
26 UNITED STATES CHIEF DISTRICT JUDGE
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