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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.
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1:12-cv-00925-GSA-PC

ORDER DENYING PLAINTIFF'S SECOND
MOTION FOR SUBSTITUTION, WITHOUT
PREJUDICE TO RENEWAL OF THE MOTION
WITHIN THIRTY DAYS
(Doc. 28.)

THIRTY DAY DEADLINE

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.)

5 On March 5, 2014, Plaintiff filed a response to Defendants' Notice, opposing
6 Defendants' request to relieve the Marshal from service, and requesting a court order directing
7 the Marshal to serve the estate of defendant Torres and to "command all necessary assistance
8 from the California Department of Corrections and Rehabilitation to execute the order." (Doc.
9 25 at 2:4-11.) On March 6, 2014, the court issued an order denying Plaintiff's motion for
10 substitution, without prejudice to renewal of the motion within thirty days. (Doc. 26.) Plaintiff
11 was advised that pursuant to Rule 25(a)(1), he must provide proof of service of the motion for
12 substitution upon the other parties to this action and the successors or representatives of J. J.
13 Torres. (Id. at 2:24-26.) Plaintiff was also advised that he is responsible for identifying and
14 finding J. J. Torres' heirs or representatives, without assistance by the Marshal or the court.
15 (Id. at 2:26-27.)

16 On March 17, 2014, Plaintiff filed a second motion for substitution under Rule 25(a),
17 which is now before the court. (Doc. 28.)

18 **II. RULE 25(a)(1) – MOTION FOR SUBSTITUTION**

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

20 "If a party dies and the claim is not thereby extinguished, the
21 court may order substitution of the proper parties. The motion for
22 substitution may be made by any party or by the successors or
23 representatives of the deceased party and, together with the notice
24 of hearing, shall be served on the parties as provided in Rule 5
25 and upon persons not parties in the manner provided in Rule 4 for
26 the service of a summons, and may be served in any judicial
27 district. Unless the motion for substitution is made not later than
28 90 days after the death is suggested upon the record by service of
a statement of the fact of the death as provided herein for the
service of the motion, the action shall be dismissed as to the
deceased party."

Under Rule 25(a)(1), any party may file a motion for substitution, which must be served
on all parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule

1 4 for the service of a summons. Thus, parties may be served by service on their attorney, Fed.
2 R. Civ. P. 5(b), but non-party successors or representatives of the deceased party must be
3 served in the manner provided by Rule 4 for the service of a summons. See Barlow v. Ground,
4 39 F.3d 231, 232-234 (9th Cir. 1994).

5 **Discussion**

6 In his second motion for substitution, Plaintiff asserts that Deputy Attorney General
7 Michelle L. Angus, counsel for Defendant J. J. Torres, is the representative of J. J. Torres'
8 estate, and requests the court to direct the Marshal to serve his motion for substitution upon Ms.
9 Angus. However, there is no evidence that Ms. Angus is now the representative of the estate.
10 Plaintiff cannot assume that because Ms. Angus has appeared as counsel for Defendant, she is
11 now the representative of Defendant's estate.

12 Because Plaintiff is proceeding in forma pauperis in this action, he is entitled to service
13 by the Marshal.² Fed. R. Civ. P. 25(c)(3). However, before the court will issue a service order,
14 Plaintiff must identify by name one of the Defendant's heirs or the representative of
15 Defendant's estate, and provide sufficient information for the Marshal to locate the heir or
16 representative for service.

17 Plaintiff's second motion for substitution shall be denied, without prejudice to renewal
18 of the motion within thirty days. In the renewed motion, Plaintiff must provide to the court:

- 19 (1) The name of J. J. Torres' heir, or the name of the representative of J. J.
20 Torres' estate; and
21 (2) The address of the heir or representative.

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27 ² In its order issued on March 6, 2014, the court erroneously advised Plaintiff that his in forma pauperis
28 status does not entitle him to assistance free of charge by the Marshal for service of the motion for substitution.
(Doc. 26 at 3:1-2.) The court now corrects its error and advises Plaintiff that under Rule 25(c)(3), he is entitled to
such assistance.

1 **III. CONCLUSION**

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

- 3 1. Plaintiff's second motion for substitution, filed on March 17, 2014, is DENIED,
4 without prejudice to renewal of the motion within thirty days of the date of
5 service of this order, as instructed by this order; and
- 6 2. Plaintiff's failure to file a motion for substitution in compliance with Rule
7 25(a)(1) pursuant to this order shall result in the dismissal of defendant J. J.
8 Torres from this action.

9
10 IT IS SO ORDERED.

11 Dated: March 21, 2014

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