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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 THIRD
MOTION FOR SUBSTITUTION, WITHOUT
PREJUDICE TO RENEWAL OF THE MOTION,
AS INSTRUCTED BY THIS ORDER
(Doc. 31.)

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. (Doc. 23.)

3 On March 5, 2014, Plaintiff filed a motion for substitution pursuant to Rule 25(a).
4 (Doc. 25.) On March 6, 2014, the court denied Plaintiff's motion, without prejudice to renewal
5 of the motion, providing additional information. (Doc. 26.)

6 On March 17, 2014, Plaintiff filed a second motion for substitution pursuant to Rule
7 25(a). (Doc. 28.) On March 21, 2014, the court denied Plaintiff's second motion for
8 substitution, without prejudice to renewal of the motion providing (1) the name of J. J. Torres'
9 heir, or the name of the representative of J. J. Torres' estate, and (2) the address of the heir or
10 representative. (Doc. 29.)

11 On April 4, 2014, Plaintiff filed a third motion for substitution under Rule 25(a), which
12 is now before the court. (Doc. 31.)

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

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

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

27 A “proper party” under Rule 25(a)(1) is the legal representative of the deceased party;
28 e.g., an executor of the deceased's will or an administrator of his or her estate. Mallonee v.
Fahey, 200 F.2d 918, 919-920, & n.3 (9th Cir. 1952).

29 **Discussion**

30 In his third motion for substitution, Plaintiff provides the name and address of Elizabeth
31 B. Torres, heir of defendant J. J. Torres, as requested by the court. With this information, the
32 court is prepared to request service of the motion for substitution by the Marshal. However, the

1 court requires Plaintiff's assurance that Elizabeth B. Torres is defendant J. J. Torres' legal
2 representative. As noted above, a "proper party" under Rule 25(a)(1) is the legal representative
3 of the deceased party; e.g., an *executor* of the deceased's will or an *administrator* of his or her
4 estate. Mallonee, 200 F.2d at 919-920, & n.3 (emphasis added).

5 Plaintiff shall be granted leave to file a fourth motion for substitution providing either
6 (1) evidence that Elizabeth B. Torres is J. J. Torres' legal representative, or (2) the name and
7 address² of another person, with evidence that the person is J. J. Torres' legal representative.
8 Should Plaintiff require discovery to identify the legal representative or obtain evidence, he
9 should file a motion for limited discovery within thirty days.

10 **III. CONCLUSION**

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

- 12 1. Plaintiff's third motion for substitution, filed on April 4, 2014, is DENIED,
13 without prejudice to renewal of the motion within thirty days of the date of
14 service of this order, providing information as instructed by this order;
- 15 2. Should Plaintiff require discovery to identify defendant Torres' legal
16 representative or obtain evidence, Plaintiff should file a motion for limited
17 discovery within thirty days; and
- 18 3. Plaintiff's failure to comply with this order shall result in the dismissal of
19 defendant J. J. Torres from this action.

20 IT IS SO ORDERED.

21 Dated: April 17, 2014

22 /s/ Gary S. Austin
23 UNITED STATES MAGISTRATE JUDGE

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² Plaintiff must provide a street address to enable the Marshal to effect personal service.