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5 UNITED STATES DISTRICT COURT  
6 EASTERN DISTRICT OF CALIFORNIA  
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8 C. DWAYNE GILMORE,

9 Plaintiff,

10 vs.

11 D. AUGUSTUS, et al.,

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

ORDER DENYING PLAINTIFF'S FOURTH  
MOTION FOR SUBSTITUTION, WITHOUT  
PREJUDICE  
(Doc. 43.)

ORDER GRANTING DISCOVERY FOR  
LIMITED PURPOSE

14 **I. BACKGROUND**

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

23 On February 24, 2014, Defendants filed a Notice of defendant Torres' death pursuant to  
24 Rule 25(a) of the Federal Rules of Civil Procedure. (Doc. 23.)  
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26 <sup>1</sup> 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 May 16, 2014, Plaintiff filed a motion for substitution pursuant to Rule 25(a), or in  
2 the alternative, a motion for limited discovery, which is now before the court. (Doc. 43.)

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

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

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

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

20 **Discussion**

21 Plaintiff provides the name and address of Elizabeth B. Torres, whom he identifies as  
22 the wife and heir of deceased defendant J. J. Torres, and submits copies of two obituaries for  
23 Johnny James Torres indicating that the decedent left behind a wife named Elizabeth Torres.  
24 (Motion at 5-6.) Plaintiff’s evidence is not sufficient to prove that deceased defendant J. J.  
25 Torres’ wife is Elizabeth B. Torres who currently resides at the address provided by Plaintiff,  
26 or that she is his legal representative. As noted above, a “proper party” under Rule 25(a)(1) is  
27 the legal representative of the deceased party; e.g., an *executor* of the deceased’s will or an  
28 *administrator* of his or her estate. Mallonee, 200 F.2d at 919-920, & n.3 (emphasis added).  
Therefore, Plaintiff’s motion for substitution shall be denied, without prejudice.

Plaintiff has requested leave to conduct limited discovery. The Ninth Circuit held in  
Gillespie v. Civiletti that “where the identity of alleged defendants will not be known prior to  
the filing of a complaint ... the plaintiff should be given an opportunity through discovery to  
identify the unknown defendants, unless it is clear that discovery would not uncover the

1 identities, or that the complaint would be dismissed on other grounds.” Gillespie v. Civiletti,  
2 629 F.2d 637, 642 (9th Cir.1980); also see Wakefield v. Thompson, 177 F.3d 1160, 1163 (9th  
3 Cir.1999). The Gillespie and Wakefield holdings govern the present case. Plaintiff has  
4 attempted and has been unable to obtain the name and address of a deceased defendant’s legal  
5 representative for purposes of substitution. The Court is unaware of any reason why discovery  
6 would not yield the identity of the legal representative, and Defendants have raised no other  
7 basis for dismissal of the cause of action against defendant Torres. Therefore, Plaintiff will be  
8 permitted to attempt to discover the identity of the unknown legal representative. Plaintiff’s  
9 interrogatories or requests for production for this purpose must be relevant and narrowly  
10 tailored to identifying the unknown legal representative. Further, this limited discovery must  
11 be conducted in compliance with the discovery deadline established by the court’s scheduling  
12 order of April 25, 2014. (Doc. 36.)

13 **III. CONCLUSION**

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

- 15 1. Plaintiff’s fourth motion for substitution, filed on May 16, 2014, is DENIED,  
16 without prejudice to renewal of the motion at a later stage of the proceedings;  
17 and
- 18 2. Plaintiff is granted leave to conduct limited discovery for the purpose of  
19 discovering the name and address of defendant Torres’ legal representative, for  
20 purposes of substitution, as instructed by this order.

21 IT IS SO ORDERED.  
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23 Dated: May 20, 2014

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