

1
2
3
4
5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF CALIFORNIA
7

8 C. DWAYNE GILMORE,

9 Plaintiff,

10 vs.

11 D. AUGUSTUS, et al.,

12 Defendants.
13
14
15

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

ORDER DENYING PLAINTIFF'S FIFTH
MOTION FOR SUBSTITUTION, WITHOUT
PREJUDICE

ORDER GRANTING PLAINTIFF FURTHER
LEAVE TO CONDUCT DISCOVERY FOR
LIMITED PURPOSE, AND TO SERVE
ADDITIONAL INTERROGATORIES FOR
LIMITED PURPOSE, AS DISCUSSED BY THIS
ORDER

(Doc. 61.)

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.)
25

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
2 to Rule 25(a) of the Federal Rules of Civil Procedure. (Doc. 23.)

3 On July 17, 2014, Plaintiff filed a motion for substitution pursuant to Rule 25(a), or in
4 the alternative, a motion to continue conducting limited discovery. (Doc. 61.)

5 **II. MOTION FOR SUBSTITUTION UNDER RULE 25(a)(1), OR IN THE**
6 **ALTERNATIVE, FOR LEAVE TO CONTINUE CONDUCTING LIMITED**
7 **DISCOVERY**

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

9 "If a party dies and the claim is not thereby extinguished, the
10 court may order substitution of the proper parties. The motion for
11 substitution may be made by any party or by the successors or
12 representatives of the deceased party and, together with the notice
13 of hearing, shall be served on the parties as provided in Rule 5
14 and upon persons not parties in the manner provided in Rule 4 for
the service of a summons, and may be served in any judicial
district. Unless the motion for substitution is made not later than
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."

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

18 **Discussion**

19 This is Plaintiff's fifth motion for substitution under Rule 25(a). Plaintiff seeks to
20 substitute defendant Torres' legal representative in place and stead of defendant Torres, who is
21 deceased. On May 21, 2014, the court issued an order granting Plaintiff leave to conduct
22 limited discovery to identify defendant Torres' legal representative. (Doc. 48.) Plaintiff was
23 advised that "a 'proper party' under Rule 25(a)(1) is the legal representative of the deceased
24 party; e.g., an *executor* of the deceased's will or an *administrator* of his or her estate." (Id. at
25 2:12-14.)

26 Plaintiff provides evidence that on May 29, 2014, he served an interrogatory on
27 defendant J. Hightower requesting the identity of defendant Torres' legal representative, and on
28 July 8, 2014, Plaintiff received a response objecting to the request on the grounds that it lacks

1 foundation, is compound, and exceeds the permissible number of interrogatories under Rule
2 33(a)(1). (Exhs. A and B to Motion, Doc. 61 at 7-13.)

3 Plaintiff now files this fifth motion for substitution, requesting substitution of defendant
4 Torres with defendant Torres' widow and legal representative, Elizabeth Torres, who resides at
5 950 West Loyala Ave., Visalia, CA 93277-6556. As evidence that Elizabeth Torres is the
6 legal representative, Plaintiff provides copies of two obituaries for Johnny James Torres
7 indicating that the decedent left behind a wife named Elizabeth Torres. (Exh. D to Motion,
8 Doc. 61 at 22-24.) As further evidence, Plaintiff submits copies of two pages from an internet
9 site, identifying John J. Torres, Sr. and Elizabeth B. Torres as persons who "may know" each
10 other and who share the same "previous locations." (Exh. E. to Motion, Doc. 61 at 25-27.)

11 Plaintiff's evidence is not sufficient to prove that defendant J. J. Torres' widow is
12 Elizabeth B. Torres who currently resides at the address provided by Plaintiff, or that she is his
13 legal representative. Therefore, Plaintiff's motion for substitution shall be denied, without
14 prejudice.

15 In the alternative, Plaintiff has requested leave to continue conducting limited discovery
16 to identify defendant Torres' legal representative, pursuant to the court's order of May 21,
17 2014. Good cause appearing, this request shall be granted.² Plaintiff is reminded that his
18 interrogatories or requests for production for this purpose must be relevant and narrowly
19 tailored to identifying the unknown legal representative. Further, this limited discovery must
20 be conducted in compliance with the discovery deadline established by the court's scheduling
21 order of April 25, 2014. (Doc. 36.)

22 Plaintiff is also granted leave to serve interrogatories for this limited purpose in addition
23 to the twenty-five written interrogatories that Plaintiff is presently allowed to serve on any
24

25
26 ² The Ninth Circuit held in Gillespie v. Civiletti that "where the identity of alleged defendants will not be
27 known prior to the filing of a complaint ... the plaintiff should be given an opportunity through discovery to
28 identify the unknown defendants, unless it is clear that discovery would not uncover the identities, or that the
complaint would be dismissed on other grounds." Gillespie v. Civiletti, 629 F.2d 637, 642 (9th Cir.1980); also see
Wakefield v. Thompson, 177 F.3d 1160, 1163 (9th Cir.1999). The Gillespie and Wakefield holdings govern the
present case.

1 other party under Rule 33(a)(1).³ Thus, Defendants are precluded from objecting to Plaintiff's
2 interrogatories, if made for the limited purpose of identifying defendant Torres' legal
3 representative, on the ground that they cause Plaintiff to exceed the limit of twenty-five
4 interrogatories for each party allowed under Rule 33(a)(1).

5 **III. CONCLUSION**

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

- 7 1. Plaintiff's fifth motion for substitution, filed on July 17, 2014, is DENIED,
8 without prejudice to renewal of the motion at a later stage of the proceedings;
- 9 2. Plaintiff is granted continued leave to conduct discovery for the limited purpose
10 of discovering the identity, name, and address of defendant Torres' legal
11 representative, for purposes of substitution, pursuant to the court's order of May
12 21, 2014 and as instructed by this order; and
- 13 3. Plaintiff is granted leave to serve interrogatories for this limited purpose in
14 addition to the twenty-five written interrogatories that Plaintiff is presently
15 allowed to serve on any other party under Rule 33(a)(1), as discussed by this
16 order.

17
18 IT IS SO ORDERED.

19 Dated: July 25, 2014

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE

20
21
22
23
24
25
26
27

³ Pursuant to Rule 33(a)(1) of the Federal Rules of Civil Procedure, "[u]nless otherwise stipulated or
28 ordered by the court, a party may serve on any other party no more than 25 written interrogatories, including all
discrete subparts. Leave to serve additional interrogatories may be granted to the extent consistent with Rule
26(b)(2)." Fed. R. Civ. P. 33(a)(1).