

Plaintiff's Name James Millner

CDCR No. F-83475

Address P.O. Box 5103

Delano, CA 93216

Kern Valley State Prison, C3-128

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

JAMES MILLNER

1:17-cv-00507 SAB (PC)

(Name of Plaintiff)

(Case Number)

vs.

**CIVIL RIGHTS COMPLAINT UNDER:**

DR. DELEO,

42 U.S.C. 1983 (State Prisoner)

RN RELEVANTE

DR. ULIT

DR. SPAETH

CHIEF MEDICAL EXAMINER

(Names of all Defendants)

**I. Previous Lawsuits (list all other previous or pending lawsuits on additional page):**

A. Have you brought any other lawsuits while a prisoner? Yes x No     

B. If your answer to A is yes, how many? 2

Describe previous or pending lawsuits in the space below. (If more than one, attach additional page to continue outlining all lawsuits in same format.)

1. Parties to this previous lawsuit:

Plaintiff James Millner

Defendants C/O's Marroquin, Anderson, and Rodriguez. Dr. DeLeo.

2. Court (if Federal Court, give name of District; if State Court, give name of County)

Eastern District Court

3. Docket Number 1:13-c4-02029-SAB-(PC)

4. Assigned Judge Stanley Booth

1 2. Parties to this previous lawsuit:

2 Plaintiff: James Millner

3 Defendants: Dr. Woods, et al.

4 Court: Eastern District Court

5 Docket Number: 1:16-cv-01209-SAB      Assigned Judge: Stanley Booth

6 Disposition: Awaiting judge's response to court order

7 Filing Date: July 25, 2016      Disposition Date: Pending

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Dismissed Without Prejudice. (This suit is a refiling of this action.)

6. Filing Date (approx.) Nov. 2013 7. Disposition Date (approx.) \_\_\_\_\_

## II. Exhaustion of Administrative Remedies

**NOTICE:** Pursuant to the Prison Litigation Reform Act of 1995, “[n]o action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a). Prior to filing suit, inmates are required to exhaust the available administrative remedy process, Jones v. Bock, 549 U.S. 199, 211, 127 S.Ct. 910, 918-19 (2007); McKinney v. Carey, 311 F.3d 1198, 1999 (9th Cir. 2002), and neither futility nor the unavailability of money damages will excuse the failure to exhaust, Porter v. Nussle, 534 U.S. 516, 524, 122 S.Ct. 983, 988 (2002). If the court determines that an inmate failed to exhaust prior to filing suit, the unexhausted claims will be dismissed, without prejudice. Jones, 549 U.S. at 223-24, 127 S.Ct. at 925-26.

A. Is there an inmate appeal or administrative remedy process available at your institution?

Yes X No \_\_\_\_\_

B. Have you filed an appeal or grievance concerning ALL of the facts contained in this complaint?

Yes X No \_\_\_\_\_

C. Is the process completed?

Yes X If your answer is yes, briefly explain what happened at each level.

Plaintiff's claims were denied at all three stages.

No \_\_\_\_\_ If your answer is no, explain why not.

III. Defendants

List each defendant's full name, official position, and place of employment and address in the spaces below. If you need additional space please provide the same information for any additional defendants on separate sheet of paper.

A. Name Dr. Larry DiLeo is employed as doctor and surgeon.

Current Address/Place of Employment unknown/unknown

B. Name RN Relevante is employed as registered nurse

Current Address/Place of Employment 3000 W. Cecil Avenue in Delano, CA/KVSP

C. Name Dr. Ulit is employed as doctor and surgeon

Current Address/Place of Employment 3000. W. Cecil Ave. in Delano, CA/KVSP

D. Name Dr. Spaeth is employed as Chief Physician and Surgeon

Current Address/Place of Employment 3000 W. Cecil Ave. in Delano, CA/KVSP

E. Name Chief Medical Examiner is employed as Chief Medical Examiner

Current Address/Place of Employment 3000 W. Cecil Ave. in Delano, CA/KVSP

IV. Causes of Action (You may attach additional pages alleging other causes of action and the facts supporting them if necessary. Must be in same format outlined below.)

**Claim 1:** The following civil right has been violated (e.g. right to medical care, access to courts, due process, free speech, freedom of religion, freedom from cruel and unusual punishment, etc.):

Denial of Medical Care resulting in cruel and unusual punishment

Supporting Facts (Include all facts you consider important to Claim 1. State what happened clearly and in your own words. You need not cite legal authority or argument. Be certain to describe exactly what each defendant, *by name*, did to violate the right alleged in Claim 1.):

Defendant DiLeo Denied medical care for plaintiff's broken foot and wrist on 8-2-13.

Defendant Relevante denied medical care (appliances) to plaintiff in 2016.

Defendant Ulit denied medical care (surgery to wrist) to plaintiff on 9-8-2016.

Defendant Spaeth denied medical care (surgery to wrist) to plaintiff on 10-28-2016.

Defendant CME denied medical care (surgery to wrist) to plaintiff on 8-3-2016.

SEE ATTACHED COMPLAINT WITH JURY DEMAND







in violation of the Eighth Amendment's Cruel and Unusual Punishment Clause of the United States Constitution.

#### Jurisdiction and Venue

1. This court has jurisdiction over plaintiff's claims in violation of Federal Constitutional rights under 42 USC §§ 1331(1) and 1334.

2. Plaintiff's claims for both injunctive and preliminary injunctive relief are authorized by 28 USC §§ 2283 and 2284 and Federal Rules of Civil Procedure, Rule 65.

#### Parties

3. The plaintiff, James Millner, was incarcerated at KVSP during the events described in this complaint. (Note: while plaintiff broke his wrist at High Desert State Prison ["HDSP"], his claims herein occurred while housed at KVSP.)

4. Defendant Dr. DiLeo is a physician and surgeon who was employed by the California Department of Corrections and Rehabilitations ("CDCR") at KVSP during the events described in this complaint. He is being sued in his individual and official capacities.

5. Dr. W. Ulit is a physician and surgeon employed by CDCR at KVSP, and has had care over the plaintiff. He is being sued in his individual and official capacities.

6. Dr. Spaeth, Chief Physician and Surgeon is employed by CDCR at KVSP, and has had care over the plaintiff. He is being sued in his individual and official capacities.

7. The Chief Medical Examiner ("CME"), whose name is unknown to the plaintiff, is the chair to the Medical Review board, and is employed by CDCR at KVSP. S/he has had care over the plaintiff and denied his surgery. The CME is being sued in his/her individual and official capacities.

8. RN Relevante is a registered nurse employed by CDCR at KVSP, and has had



care over plaintiff. He is being sued in his individual and official capacities.

#### Facts

9. On July 13, 2013, plaintiff was assaulted by three correctional officers resulting in four broken bones in his foot. (Note: this assault is not at issue in this civil rights action.) As a result of the entire incident, plaintiff ended up attempting suicide and going to what is known as the Mental Health Crisis Bed ("MHCB") at HDSP, where on July 28, 2013, he had a syncopal episode, and due to his broken foot and lack of ambulatory device, could not stop himself from falling. As a result, he broke his wrist, and was taken to Banner Lassen Medical center. There, doctors verified his wrist had a severely displaced fracture and explained that it would heal in 4-6 weeks.

10. Plaintiff was then, on July 31, 2013, transferred back to KVSP with no crutches for his ankle or medical appliances for his wrist. On the same day, plaintiff was seen by medical, and referred to see the doctor.

#### Denial of Medical Care (DiLeo)

11. On August 2, 2013, plaintiff saw Defendant DiLeo for medical treatment of his foot and wrist fractures. However, DiLeo did not administer any form of medical treatment for either his broken foot or broken wrist, which was severely displaced. Rather, DiLeo referred plaintiff to see a specialist.

12. Two weeks later, on August 16, 2013, plaintiff finally saw Dr. Smith, who diagnosed plaintiff as having a broken foot consisting of three broken metatarsals, and a severely displaced distal radius fracture to his wrist, noting the fracture was displaced and angulated. Dr. Smith recommended surgery ASAP. On the same day, Defendant DiLeo, rather than send plaintiff out for surgery immediately, instead referred plaintiff to a new ortho consult with a different specialist. Further, it was not until August 16, 2013--two weeks after plaintiff initially saw DiLeo--that he finally prescribed some form of medical treatment for his foot--an

after-surgery boot.

13. Another week later, on August 23, 2013, plaintiff was seen by Dr. Alade. Dr. Alade noted the history of plaintiff's injury as: "Fell and injured the wrist on 7/28, remained untreated with malaligned distal radius fracture and ulnar styloid..." (Emphasis added.) At this time Dr. Alade recommended that plaintiff urgently get scheduled for a surgical procedure to include "attempt reduction and percutaneous pinning as well as open reduction and internal fixation of the fracture." Plaintiff was advised that treating the fracture late may result in "disability, re-stiffness and [being] unable to appropriately reduce the fracture and anatomical position." (Note: this advisement has turned out correct. After multiple surgeries, plaintiff's wrist is still crooked, and to date he still suffers from a lot of pain and loss of function, leaving him unable to use his hand for every day matters.)

14. On August 27, 2013, Defendant DiLeo finally cleared plaintiff for surgery, nearly one month after the injury. DiLeo, at this time, noted that there was no reason to hold up the surgery.

15. On September 5, 2013, plaintiff once again was seen by Dr. Alade, who again recommended surgery. On September 10, 2013, Defendant DiLeo finally set the date for plaintiff's surgery for September 26, 2013. Nearly 8 weeks after plaintiff fell and broke his wrist, plaintiff was finally taken into surgery for his wrist on September 26, 2013. There, the procedure consisted of a surgical procedure for a severely displaced left distal radius fracture where they performed open reduction and internal fixation of the left distal radius utilizing bone graft, tenosynovectohis of extensor tendons, and neurolysis of superficial radial nerve branched. This surgery took place two to four weeks after the estimated time it takes for a bone fracture to heal.

16. Later, plaintiff contracted an infection in his wrist after falling once

again, and on October 9, 2013, was diagnosed with a comminuted fracture of the distal radius with dorsal angulation. Degenerative changes were noted. On October 24, 2013, plaintiff once again had surgery. Unfortunately, this would not be the last surgery, and on December 10, 2013, DiLeo put plaintiff in for a third surgery.

17. Since Dr. DiLeo's initial failure to treat plaintiff's wrist on August 2, 2013, plaintiff has had to endure four surgeries all due to the fact it was allowed to heal displaced. On June 4, 2014, Dr. Smith recommended a shortening osteotomies, which plaintiff has yet to have, although he has had other surgeries since. Plaintiff is still waiting to receive shortening of his ulna. On June 6, 2014, plaintiff saw Dr. Manasrah concerning the fractures to his foot. On June 12, 2014, Dr. Manasrah noted plaintiff's foot was supposed to be addressed, but was not. He sent plaintiff to see Dr. Smith on June 18, 2014, who noted at least one of plaintiff's metatarsals was still healing. On July 29, 2014, Dr. Alade evaluated plaintiff for his wrist, noting his wrist was still severely displaced, and that plaintiff still had a broken metatarsal in his foot, more than a year after it was broken by the three correctional officers.

18. On December 2, 2015, plaintiff underwent a re-do radial osteotomies with iliac crest bone grafting and plating in his wrist by Dr. Amory. Subsequently, on December 10, 2015, plaintiff had an x-ray of his wrist, where it was determined that there was abnormal lucency surrounding the proximal most support screw as best appreciated lateral view. It was determined that this indicated hardware loosening. Further, it was determined there was a loose proximal support screw.

#### Denial of Medical Care (Relevante)

19. Further, after Dr. Amory removed plaintiff's cast, plaintiff was prescribed a wrist brace with a stabilizing bar and bone growth stimulator. However, when plaintiff was given the brace, the stabilizing bar had been removed. Further, he was never given his bone growth stimulator. Plaintiff contacted medical, and was

seen by RN Relevante, who refused to allow plaintiff the use of the stabilizing bar, stating that if Dr. Amory didn't want his wrist to move, he would have put it in a cast. Due to his wrist not receiving proper stabilization, combined with the loose screw and hardware and lack of bone growth stimulator, the bone graft did not take. After his last x-ray, Dr. Amory said during a subsequent Tel-Med appointment that the callus was disappearing from the graft and there was a void between the graft and bone.

#### **Denial of Medical Care (Chief Medical Examiner)**

20. On August 3, 2016, plaintiff was seen by Dr. Cogbuehi who informed him that the Medical Review Board, chaired by the Chief Medical Examiner, had denied the surgery in which Dr. Amory had ordered for him on June 25, 2016. As a result of this denial plaintiff is to be left permanently disabled and disfigured. Further, x-rays have shown plaintiff has a loose screw and hardware--which is now to remain as such permanently.

#### **Denial of Medical Care (Ulit)**

21. Plaintiff subsequently filed an administrative appeal on the matter, and was subsequently seen by Dr. Ulit on August 26, 2016. After a review of plaintiff's medical history, Dr. Ulit denied plaintiff's surgery on September 8, 2016, despite the prior recommendation of another doctor and hardware loosening.

#### **Denial of Medical Care (Spaeth)**

22. Plaintiff appealed to the next level where the Chief Physician and Surgeon was assigned to review his case--Dr. Spaeth. Dr. Spaeth agreed with the decision of Dr. Ulit, and surgery was again denied to plaintiff on or around October 28, 2016, despite Dr. Amory's recommendation and hardware loosening.

#### **Exhaustion of Administrative Remedies**

23. Plaintiff filed a grievance on August 3, 2016, complaining about the continuous denial of medical care and the decision of the Medical Review Board to

deny him surgery. He completed all three steps outlining the original denial of medical care by Dr. DiLeo of his foot and wrist, and how this denial of medical care has led to a multitude of surgeries, disability and disfigurement. Plaintiff's medical appeal has been denied at all three levels. (Log no. KVSP-HC-160337573).

24. Plaintiff filed a previous appeal on April 24, 2016, against Defendant Relevante for denying him the stabilizing bar in his wrist brace and bone growth stimulator, leading to the failure of his surgery and hardware loosening. The appeal was heard and denied at all three levels. (Log no. KVSP-HC-16037174).

#### Claims for Relief

25. The actions of Defendant DiLeo on August 2, 2013, in which he denied plaintiff medical care for his severely displaced wrist fracture, and his fractured foot constituted cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution.

26. Dr. DiLeo's actions were deliberate and indifferent to plaintiff's serious medical need. Plaintiff's injuries were very plain, i.e. a fractured foot and angulated fractured wrist, and Dr. DiLeo let plaintiff's fractures heal displaced rather than give him prompt treatment.

27. Dr. DiLeo's denial of medical care on August 2, 2013, was the direct cause of plaintiff having to undergo multiple surgeries to attempt to repair the damage he caused, and has led permanent damage and deformity to plaintiff's wrist.

28. RN Relevante's actions in denying plaintiff the proper medical appliances and bone growth stimulator, as prescribed by Dr. Amory, was deliberate and indifferent to plaintiff's serious medical need causing plaintiff's bone graft to separate and hardware to loosen. This constituted cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution.

29. The Chief Medical Examiner's actions in denying plaintiff his surgery shortly prior to his being notified on August 3, 2016, as ordered by Dr. Amory, was

deliberate indifference to plaintiff's serious medical need in which plaintiff is now to suffer for the rest of his life disabled and disfigured along with a loose screw and hardware in his wrist. This constituted cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution.

30. Dr. Ulit's actions in denying plaintiff his surgery on September 8, 2016, was deliberate indifference to plaintiff's serious medical need in which plaintiff is now to suffer for the rest of his life disabled and disfigured along with a loose screw and hardware in his wrist. This constituted cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution.

31. Dr. Spaeth's actions in denying plaintiff his surgery on or around October 28, 2016, was deliberate indifference to plaintiff's serious medical need in which plaintiff is now to suffer for the rest of his life disabled and disfigured along with a loose screw and hardware in his wrist. This constituted cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution.

#### Relief Requested

WHEREFORE, plaintiff requests that the court grant the following relief:

A. Issue an injunction ordering Chief Medical Examiner, Spaeth and Ulit, or their agents to:

1. Immediately arrange for plaintiff to have the surgery ordered by Dr. Amory on June 25, 2016.

B. Award compensatory damages in the following amounts:

1. \$750,000.00 against Defendant DiLeo for the denial of medical care with regards to plaintiff's broken foot and wrist on August 2, 2013.

2. To be determined by jury trial against Defendants Ulit, Relevante, Spaeth, and the Chief Medical Examiner for their denial of medical care.

C. Award punitive damages in the following amounts:

1. \$250,000.00 against Defendant DiLeo for the initial denial of medical care on August 2, 2013, which resulted in plaintiff having to undergo multiple surgeries, suffer continuously in pain, lose function in his hand, and become permanently disfigured.

2. To be determined by jury trial against defendants Ulit, Relevante, Spaeth, and the Chief Medical Examiner.

D. Grant such other relief as it may appear that plaintiff is entitled.

Dated: 4-7-17

Respectfully submitted,

*James W. Millner*

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