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Clerk
District Court

MAY 10 2019

for the Northern Mariana Islands
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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN MARIANA ISLANDS**

REYNALDO ATRERO MANILA,

Plaintiff,

v.

ROBERT GUERRERO, JOSE K.
PANGELINAN, and GEORGIA M.
CABRERA, in their personal capacities,

Defendants.

Case No.: 18-cv-00003

**DECISION AND ORDER ON DEFENDANT
GUERRERO AND DEFENDANT
CABRERA'S MOTION TO DISMISS THE
SECOND AMENDED COMPLAINT**

I. INTRODUCTION

In this civil rights case concerning alleged violations of a prisoner's Eighth Amendment right to adequate medical care, Personal Capacity Defendants Robert Guerrero and Georgia M. Cabrera¹ move to dismiss Pro Se Plaintiff Reynaldo Manila's Second Amended Complaint for failure to state a claim upon which relief can be granted. The Motion to Dismiss (ECF No. 36), brought under Rule 12(b)(6) of the Federal Rules of Civil Procedure, is supported by a Memorandum of Law ("Memo.," ECF No. 37-1). Plaintiff filed an Opposition ("Opp'n," ECF No. 40), and Defendants filed a Reply (ECF No. 43). The matter was heard on May 9, 2019. After affording the parties an opportunity to be heard, the Court granted the Motion to Dismiss in favor of Defendant Guerrero, with leave for Plaintiff

¹ Personal Capacity Defendant Jose K. Pangelinan did not join in the motion. References to "Defendants" are to Guerrero and Cabrera only.

1 to amend, and granted it in part and denied it in part with respect to Defendant Cabrera. This Decision
2 and Order sets forth the Court’s ruling in writing and memorializes the Court’s reasoning.

3 **II. BACKGROUND**

4 According to the Second Amended Complaint (“SAC,” ECF No. 35) and attached documents,²
5 the facts that Plaintiff alleges are as follows:

6 Robert Guerrero was commissioner of the CNMI Department of Corrections (“DOC”) when
7 Plaintiff, a DOC inmate serving a CNMI criminal sentence, was diagnosed with retinal detachment in
8 the left eye. (SAC at 1.) In November and December 2015, eye doctors in Saipan repeatedly advised
9 DOC of Plaintiff’s urgent need for off-island treatment. (*Id.*) On November 17, Mark Robertson, O.D.
10 (Marianas Eye Institute) recommended, “Emergency referral to Phillipines [*sic*] retinal specialist
11 ASAP!” (Consultation Report, ECF No. 35-3, at 1.) On November 18, Don Hardt, O.D. (Hardt Eye
12 Clinic) wrote a letter “To whom it may concern” stating, “Emergency surgery from a fellowship
13 trained retinal specialist is indicated. [Manila’s] prognosis for visual recovery is decreased with each
14 day surgery is delayed.” (ECF No. 35-3 at 2.) Hardt also noted that a specialist would be visiting Guam
15 on December 12, but warned that if treatment were delayed until then “the outcome will likely be
16 poor.” (*Id.*) On November 19, Dr. Robertson wrote a letter to “Captain Cabrera, Department of
17 Corrections, reiterating his November 17 findings and stating, “While this is not a life-threatening
18 condition, it is very much a vision-threatening one, with each day of delay significantly increasing the
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23 ² In deciding this Rule 12(b)(6) motion, the Court may consider documents such as these, on which Plaintiff
24 relies, because the complaint refers to them, they are central to Plaintiff’s claim, and their authenticity is not
questioned. *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006).

1 chances that he may totally and permanently loose [sic] all vision from his left eye.” (ECF No. 35-3
2 at 3.) On December 17, after examining Plaintiff, Dr. Robertson reported to DOC that the retinal
3 detachment “has progressed to the point where much more vision loss will be permanent. Further delay
4 will eventually lead to TOTAL IRREVERSIBLE BLINDNESS.” (Consultation Report, ECF No. 35-3, at 4.)

5 On December 29, 2015, Attorney Steven P. Pixley wrote a letter to Jose K. Pangelinan, who
6 took over as acting DOC commissioner after Guerrero transferred to the Department of Public Safety.
7 (SAC at 2.) Pixley wrote, “As you are aware, the Board of Parole recently recommended that Mr.
8 Manila’s sentence be commuted. I understand that Acting Governor Ralph Torres is reviewing this
9 recommendation now.” (ECF No. 35-3, at 5.) Pixley noted that he met with Plaintiff on December 24
10 and that Dr. Robertson had provided DOC with a report “stressing the extreme urgency of Mr.
11 Manila’s medical situation.” (*Id.*) He said he was attaching a copy of the report. (*Id.*)

12 On January 14, 2016, Dr. Robertson examined Plaintiff again and submitted the following
13 findings and recommendations: “Patient is becoming blind in left eye from untreated retinal
14 detachment. As has already been communicated repeatedly, Mr. Manila has a retinal detachment, and
15 any postponement of treatment increases risk of loosing [sic] more vision. I see no value in continuing
16 to have him evaluated where treatment is not available. He will need to follow up here after treatment,
17 but full resources NOW should be put toward getting him TREATMENT, not get repeated evaluations
18 where such treatment can not be given.” (Consultation Report, ECF No. 35-3, at 6.)

19 The next day, January 15, Pixley wrote to CNMI Assistant Attorney General John Cook. (ECF
20 35-3, at 7–8.) In the letter, he noted that it was his understanding that the Office of the Governor was
21 now handling the matter. (*Id.* at 7.) He wrote that DOC “has known that my client will go blind unless
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1 he receives off-island surgery for almost two months and no action has been taken to obtain this
2 medical treatment.” (*Id.*) He noted DOC’s obligation under the Eighth Amendment to provide for
3 serious medical needs and stated: “Unless arrangements are made to obtain off-island treatment for
4 my client on or before January 20, 2016, I will file an action in the United States District Court seeking
5 appropriate relief without further notice.” (*Id.* at 8.)

6 On January 29, 2016, Plaintiff was brought off island for treatment. (SAC at 2.) He returned
7 to Saipan on March 14. (*Id.*) By that time, Defendant Cabrera was DOC commissioner. (*Id.*) On June
8 21, silicone oil from Plaintiff’s left eye was removed by Dr. Eugene Ng on Guam. (*Id.*)

9 On July 25, Dr. Dennis Williams (Marianas Eye Institute) examined Plaintiff. (SAC at 2.) The
10 reason for the consultation was Plaintiff’s complaint of blurry vision in the right eye and a follow-up
11 on the retinal detachment. (Consultation Report, ECF No. No. 35-3, at 9.) Dr. Williams found a
12 cataract in the left eye and recommended cataract surgery. (*Id.*)

13 On September 19, Dr. Williams wrote a letter to Commissioner Cabrera, noting that “Mr.
14 Manila has a severe and progressing cataract in his left eye due to recent retinal detachment repair and
15 silicone oil removal that was performed in his left eye in February 2016.” (ECF No. 35-3, at 10.) He
16 observed that although a cataract is not an eye disease or a life-threatening condition, “vision will
17 continue to worsen as the cataract continues to mature.” (*Id.*) He recommended cataract surgery “to
18 help restore clear vision in that eye.” (*Id.*) He repeated the recommendation after a consultation on
19 May 17, 2017: “Suggest cataract surgery OS [left eye].” (Consultation Report, ECF No. 35-3, at 11.)

20 Commissioner Cabrera refused to authorize the surgery. (SAC at 2.) She told Plaintiff that
21 cataract surgery was not necessary because his condition was not life-threatening. (*Id.*) When the next
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1 DOC commissioner, Vince Attao, approved cataract surgery in August 2017, Cabrera (who apparently
2 remained at DOC as a captain) disagreed with his decision. (SAC at 3.) She also refused to give
3 Plaintiff extra toilet paper to wipe his eye. (*Id.*) On November 2, 2017, Plaintiff grieved Cabrera to
4 Commissioner Attao. (SAC at 3; Inmate Grievance, ECF No. 35-3, at 13.)

5 Plaintiff underwent cataract surgery on September 5, 2017. (SAC at 3.) On October 11, 2017,
6 Dr. Williams told Plaintiff that his prior retinal surgery had been unsuccessful and that he (Williams)
7 would be recommending a consultation with a specialist based in California. (*Id.*)

8 On January 9, 2018, Dr. David Parks performed eye surgery on Plaintiff at Guam Medical
9 Plaza. (*Id.*) In the SAC, Plaintiff quotes from a report by Dr. Parks that is not in the record: “There
10 was an extensive pucker that associated with subretinal fibrosis. I removed as much of the surface
11 membranes without the subretinal membranes. He should improve but the overall prognosis is just for
12 slight improvement in his vision.” (*Id.*) Dr. Robertson examined Plaintiff on May 1, 2018 and told him
13 that he was permanently losing his left eye vision. (*Id.*; no consultation report in the record.) After a
14 consultation on August 7, 2018, Dr. Robertson found “Blindness LE from retinal detachment.”
15 (Consultation Report, ECF No. 35-3, at 12.)
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17 **III. LEGAL STANDARD**

18 To survive a motion to dismiss for failure to state a claim, a pleading “must contain sufficient
19 factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v.*
20 *Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).
21 The pleading must contain “more than labels and conclusions”; the “[f]actual allegations must be
22 enough to raise a right to relief above a speculative level.” *Eclectic Props. East, LLC v. Marcus &*
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1 *Millichap Co.*, 751 F.3d 990, 995 (9th Cir. 2014) (quoting *Twombly*, 550 U.S. at 555). “A claim has
2 facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable
3 inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678. A Rule
4 12(b)(6) dismissal “can be based on the lack of a cognizable legal theory or the absence of sufficient
5 facts alleged under a cognizable legal theory.” *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699
6 (9th Cir. 1988). Complaints by plaintiffs who are proceeding *pro se*, without a lawyer, must be
7 construed liberally, particularly in civil rights cases, and the court must afford such plaintiffs the
8 benefit of the doubt. *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010).

9 IV. DISCUSSION

10 The Court begins with an overview of the case law on the Eighth Amendment requirement for
11 adequate medical care of prisoners, and then proceeds to an analysis of the parties’ arguments.

12 1. Eighth Amendment

13 “[D]eliberate indifference to serious medical needs of prisoners constitutes the ‘unnecessary
14 and wanton infliction of pain’ proscribed by the Eighth Amendment.” *Estelle v. Gamble*, 429 U.S. 97,
15 104 (1976) (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)). Corrections officers may be liable
16 under 28 U.S.C. § 1983 for conduct “intentionally denying or delaying access to medical care or
17 intentionally interfering with the treatment once prescribed.” *Id.* at 104–5. However, “an inadvertent
18 failure to provide adequate medical care cannot be said to constitute ‘an unnecessary and wanton
19 infliction of pain’ or to be ‘repugnant to the conscience of mankind.’” *Id.* at 105–6 (quoting *Gregg*,
20 428 U.S. at 173, and *Palko v. Connecticut*, 302 U.S. 319 (1937)).
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22 The Ninth Circuit has adopted a two-part test for deliberate indifference to a prisoner’s serious
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1 medical needs. “First, the plaintiff must show a serious medical need by demonstrating that failure to
2 treat a prisoner’s condition could result in further significant injury or the unnecessary and wanton
3 infliction of pain. Second, the plaintiff must show that the defendant’s response to the need was
4 deliberately indifferent. This second prong—the defendant’s response to the need was deliberately
5 indifferent—is satisfied by showing (a) a purposeful act or failure to respond to a prisoner’s pain or
6 possible medical need and (b) harm caused by the indifference. Indifference may appear when prison
7 officials deny, delay or intentionally interfere with medical treatment . . .” *Jett v. Penner*, 439 F.3d
8 1091, 1096 (9th Cir. 2006) (cleaned up). Prison administrators “are liable for deliberate indifference
9 when they knowingly fail to respond to an inmate’s requests for help.” *Id.* at 1098. Plaintiff prisoner
10 is entitled to an inference that prison administrators received letters sent via institutional mail. *Id.* at
11 1093.

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13 For Eighth Amendment purposes, a prison official is deliberately indifferent only if he or she
14 is subjectively aware of a substantial risk of serious harm to the inmate. “[T]he official must both be
15 aware of facts from which the inference could be drawn that a substantial risk of serious harm exists,
16 and he must also draw the inference.” *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). “An official’s
17 failure to alleviate a significant risk that he should have perceived but did not, while no cause for
18 commendation, cannot under our cases be condemned as the infliction of punishment.” *Id.* at 838.
19 *Farmer* concerned risks to a prisoner’s safety, but its holding has been extended to serious health risks
20 from constitutionally inadequate medical care. To demonstrate deliberate indifference to serious
21 medical needs, “plaintiffs must show that prison officials were (a) *subjectively aware* of the serious
22 medical need and (b) failed to adequately respond.” *Rosati v. Igbinoso*, 791 F.3d 1037, 1039 (9th Cir.
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1 2015) (original emphasis; cleaned up).

2 An extension of the subjective awareness requirement is the principle that under the Eighth
3 Amendment there is no *respondeat superior* liability for supervisors. A supervisor cannot be held
4 liable “for the culpable action or inaction of his or her subordinates.” *Starr v. Baca*, 652 F.3d 1202,
5 1207 (9th Cir. 2011). However, a plaintiff “may state a claim against a supervisor for deliberate
6 indifference based upon the supervisor’s knowledge of and acquiescence in unconstitutional conduct
7 by his or her subordinates.” *Id.*

8 2. Claims against Defendant Guerrero

9 Guerrero maintains that none of Plaintiff’s exhibits show that he was subjectively aware of the
10 need for retinal surgery. (Memo. at 4.) None of them are addressed or copied to him. The consultation
11 reports name the requesting DOC medical staff person, none of whom is a named defendant in this
12 case. Furthermore, by statute it is not the Commissioner of the Department of Corrections who is
13 directly responsible for the adult correctional facility in which Plaintiff is housed, but the Director of
14 the Division of Corrections, which operates the facility and is charged with the “care, custody and
15 discipline” of CNMI inmates. (*Id.*, citing 1 CMC (N. Mar. I. Code) § 2281–2.) Guerrero points out
16 that the administrative regulations make the Division (not Department) of Corrections “responsible
17 for the health care of the prisoners in its custody.” NMIAC § 57-20.1-201. In sum, he argues that it
18 “was not Guerrero’s job” to “deal with day to day inmate medical issues,” and Plaintiff has not alleged
19 facts indicating that Guerrero had personal knowledge and responsibility. (Memo. at 5.)

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21 In support, Guerrero cites to *Mitchell v. Maynard*, 80 F.2d 1433 (10th Cir. 1996). *Mitchell*
22 concerned liability for injuries from a brutal beating by prison guards. The plaintiff failed to name as
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1 defendants any of the guards who participated in the beating, but named the prison warden and DOC
2 director. *Mitchell*, 80 F.2d at 1441. Noting that “supervisor status by itself is insufficient to support
3 liability[,]” the Tenth Circuit affirmed the district court’s dismissal for failure to state a claim because
4 the inmate “failed to sue the parties responsible for the beating and does not allege any personal
5 involvement of the parties before the court[.]” *Id.*

6 *Mitchell* is readily distinguishable from Manila’s case. Unlike an isolated and discrete instance
7 of prisoner abuse by guards, in which there is no reason to believe appointed officials were personally
8 involved, this case concerns protracted neglect of a serious medical need for surgery that would come
9 at significant expense to the government and require transporting the prisoner to another island or
10 another country for treatment. It is plausible to infer that someone higher up than a guard or even a
11 captain would have to make that call. Whereas in *Mitchell* the plaintiff could have been expected to
12 be able to name the guards who beat him or give descriptions leading to their identification, Manila
13 cannot be expected to know which administrator is responsible to approve and arrange off-island
14 medical treatment for inmates. Moreover, it is plausibly alleged, through Pixley’s letter to Pangelinan,
15 that by late December 2015 the Manila matter had come to the attention of the parole board and even
16 the governor. If so, it is fair to infer that the DOC commissioner also had personal knowledge.

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18 As to whether the commissioner of the Corrections Department or a subordinate director of the
19 Corrections *Division* had direct responsibility over major medical decisions, this is not a question that
20 can be decided at this stage of the litigation. It is not apparent from statutes and regulations in the
21 public record that the commissioner lacks authority to take control of such a decision and could not in
22 fact have been the ultimate decision maker in this instance. By statute, the commissioner is the top
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1 administrator of the Department of Corrections, 1 CMC § 2852, and the Department is “responsible
2 for *all* adult correctional services.” 1 CMC § 2853 (emphasis added). While the day-to-day operation
3 of the adult correctional facility may fall to the director of the Division of Corrections, 1 CMC §§
4 2881–2, nothing in the Department of Corrections’ enabling statute would prevent the commissioner
5 from taking charge of a major decision concerning medical services, for which by statute he or she is
6 ultimately responsible. Furthermore, the viability of the administrative regulations for the Division of
7 Corrections, to which Guerrero refers for support, has been seriously called into question. The
8 regulations (in title 57 of the Northern Mariana Islands Administrative Code) were promulgated in
9 1991, when authority for adult corrections was vested in the Department of Public Safety. *See Ray v.*
10 *Attao*, No. 1:18-cv-00017, 2018 WL 6837746, at *4 (Dec. 31, 2018). In 2004, the legislature created
11 a separate Department of Corrections and gave rulemaking authority to the secretary (since 2007, the
12 commissioner) of the new department. *Id.* at *5. In *Ray*, the CNMI Office of the Attorney General
13 argued persuasively that at least some of those regulations are no longer enforceable. On this record,
14 the Court does not view the Division of Corrections regulations as the final word on who was
15 responsible for prisoner medical services in the CNMI during the period at issue in this case.
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17 Whether Plaintiff’s medical crisis had come to the attention of the commissioner already during
18 Guerrero’s tenure, which must have ended in late November or early December 2015, is far from clear
19 from the Second Amended Complaint and attached exhibits. Plaintiff’s opposition brief, however,
20 alters the picture. It adds a new factual allegation: that Guerrero “arranged a hearing to the Board of
21 Parole for commutation of my sentence. He wants me to get release from D.O.C. custody, so that he
22 will not provide my serious medical need.” (Opp’n at 7.) Plaintiff further alleges that Commissioner
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1 Guerrero called him into his office, along with Cabrera, and told him to direct any questions about his
2 medical needs to then-Captain Cabrera, who was involved in arranging for his sentence to be
3 commuted. (*Id.* at 9.) In their reply brief, Defendants construe the Opposition as an attempt at
4 amending the complaint a third time. (Reply, ECF No. 43, at 1.) The Court agrees that these new,
5 material allegations require a further amendment.

6 Without any clear indication in the actual pleadings that Guerrero was subjectively aware of
7 Manila's condition during the remaining few weeks of his tenure as commissioner, the Second
8 Amended Complaint fails to state a claim against Defendant Guerrero personally and the claim against
9 him must be dismissed. Guerrero concedes that if the complaint is amended a third time to include the
10 new allegations in the Opposition, it may survive a Rule 12(b)(6) motion. (Reply 3.) Therefore, the
11 dismissal will be with leave to amend the complaint to allege Guerrero's role in seeking a commutation
12 of Plaintiff's sentence and his meeting with Guerrero and Cabrera.

14 3. Claims Against Defendant Cabrera

15 Cabrera correctly observes that in the Second Amended Complaint, Plaintiff holds her liable
16 for the delay in the cataract surgery, but not the retinal surgery. (Memo. at 5.) All the allegations relate
17 to the time she was DOC commissioner starting in March 2016, after the surgery on Plaintiff's left
18 retina. (*See* SAC at 3.) In the Opposition, Plaintiff tries to shift gears and make out a case against
19 Cabrera for the delay in retinal surgery, too, but the attempt fails. While the alleged meeting with
20 Commissioner Guerrero may at first seem to bolster Plaintiff's claim, it actually works in Cabrera's
21 favor. The new allegations in the Opposition show, not that Cabrera was failing to respond to the
22 medical emergency, but that she was actively involved in trying to get Plaintiff's sentence commuted
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1 pursuant to the Commissioner's instructions so he could travel on his own for treatment. This does not
2 make out a claim of deliberate indifference by Cabrera.

3 The focus, then, is on the delay in cataract surgery. Defendant Cabrera asserts that Plaintiff's
4 blindness in the left eye is the result of a second retinal tear that was caused by cataract surgery on an
5 eye that had previous repair for a torn retina. (Memo. at 6–7.) The pleadings, including doctors' notes,
6 do not support that narrative. From the Second Amended Complaint: "September 5, 2017, I underwent
7 cataract surgery. On October 11, 2017, Dr. Dennis Williams informed me that my retinal surgery is
8 unsuccessful and he will be sending my medical report to an eye-specialist in California for opinion."
9 (SAC at 3.) The pleadings do not indicate that a second tear occurred as a result of the cataract surgery.
10 Defendant Cabrera cites medical literature, of which he asks the Court to take judicial notice, which
11 states that cataract surgery is a risk factor for retinal detachment. (Memo. at 6.) That may be so, but
12 Plaintiff does not allege a new retinal tear following cataract surgery. Even if it were shown that a new
13 retinal tear was discovered, the fact that cataract surgery poses a risk of tearing the retina would not
14 mean conclusively, at this early stage of the litigation, that Manila's cataract surgery was primarily
15 responsible for the new tear.
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17 Plaintiff complains that he is now blind, but he also clearly complains that he had to wait more
18 than a year for surgery on cataracts that were obscuring his vision. Cataracts in one eye can be a serious
19 medical need, independent of any other condition. *Colwell v. Bannister*, 763 F.3d 1060, 1063 (9th Cir.
20 2014). Moreover, Commissioner Cabrera's alleged statement that cataract surgery is not a serious
21 medical need because it is not life-threatening may in itself show deliberate indifference if it indicates
22 a blanket DOC policy against cataract surgery. *See id.*
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1 For these reasons, the Motion to Dismiss Defendant Cabrera must be denied as to her role in
2 the delay of Manila’s cataract surgery. To the extent Plaintiff seeks to hold her responsible for the
3 delay in retinal surgery and the eventual failure of that surgery, the Motion to Dismiss is granted.

4 4. Statute of Limitations

5 In their Reply, for the first time, Defendants raise a statute of limitations defense. (Reply at 3.)
6 For section 1983 claims, the forum state’s statute of limitations for personal injury actions applies.
7 *Klein v. City of Beverly Hills*, 865 F.3d 1276, 1278 (9th Cir. 2017). In the CNMI, the period is two
8 years. *See* 7 CMC § 2503; *Pangelinan v. Wiseman*, Civil. No. 08-0004, 2008 WL 11389559, at *4 (D.
9 N. Mar. I. May 8, 2008). Defendants argue that the causes of action accrued no later than December
10 17, 2015, when Dr. Robertson noted that further delay in repair of the retinal detachment would result
11 in permanent damage. (Reply at 3.) That date is more than two years prior to the docketing of
12 Plaintiff’s complaint on February 9, 2018. Defendants assert they are bringing this defense to the
13 Court’s attention only now because it was not apparent prior to Plaintiff’s Opposition. (*Id.*)

15 The Court declines to entertain this basis for a Rule 12(b)(6) dismissal. Plaintiff, proceeding
16 without counsel, would need to be given ample opportunity to learn about this legal concept and
17 compose a thoughtful response. Because a statute of limitations defense is not jurisdictional, the Court
18 is not obligated to address it immediately. *Day v. McDonough*, 547 U.S. 198, 205 (2006). The accrual
19 date – the point in time when Plaintiff discovered (or should have discovered) that damage from the
20 delay was irreversible – is not at all clear. The foremost problem with the defense, however, is that it
21 appears Plaintiff wrote a letter to the Court on December 6, 2017, complaining of inadequate treatment
22 of his vision problems, and the Clerk wrote back to him on January 2, 2018, informing him that the
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1 Court cannot give legal advice and enclosing forms to file a complaint *in forma pauperis*. (ECF No.
2 2-2.) From these documents, it appears Plaintiff tried to complain to the Court before the statute of
3 limitations ran, even under Defendants' accrual theory. That said, the Court is not ruling on whether
4 the statute of limitations has run, and Defendants remain free to raise it as an affirmative defense in
5 their responsive pleadings.

6 V. CONCLUSION


7 For the reasons previously stated, the Court rules as follows:

- 8 (1) Defendant Roberto Guerrero's motion to dismiss is GRANTED, with leave for Plaintiff to
9 amend to allege *any and all facts presently in his knowledge* bearing on when and how
10 then-Commissioner Guerrero found out about Plaintiff's need for retinal surgery, and any
11 actions Guerrero took thereupon, including but not limited to the November meeting
12 between Plaintiff, Guerrero, and Cabrera. This is the last opportunity the Court will give
13 Plaintiff to amend his complaint to conform to his best recollection of the relevant events.
14
- 15 (2) Defendant Georgia Cabrera's motion to dismiss is DENIED with respect to the
16 claim concerning delay in cataract surgery and GRANTED with respect to any
17 allegation of liability for the delay in surgery for retinal detachment.
- 18 (3) Plaintiff is granted leave to file a Third Amended Complaint consistent with the Court's
19 ruling. **The Third Amended Complaint must be filed within 14 days after Plaintiff**
20 **receives this Decision and Order.** The Third Amended Complaint will be deemed timely
21 filed if Plaintiff mails it (by placing it in outgoing prison mail or giving it to a corrections
22 officer for mailing) within 14 days after he receives this Decision and Order. Plaintiff must
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1 state, on the first page of the Third Amended Complaint, (1) the date on which he received
2 this Decision and Order and (2) the date he is mailing it. Plaintiff should keep in mind that
3 an amended complaint supersedes all prior complaints, which thereafter are treated as if
4 they did not exist. *Ramirez v. Cnty. of San Bernardino*, 806 F.3d 1002, 1008 (9th Cir.
5 2015). **Any material in the Second Amended Complaint that Plaintiff wishes to remain**
6 **part of his pleadings will have to be restated in the Third Amended Complaint. Any**
7 **previously submitted exhibits (including letters and consultation reports) that**
8 **Plaintiff wishes to remain before the Court will have to be resubmitted with the Third**
9 **Amended Complaint.**

10 (4) All Defendants, including Defendant Jose Pangelinan, must respond to the Third Amended
11 Complaint within the time prescribed by Rule 15(a)(3) of the Federal Rules of Civil
12 Procedure.
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14 IT IS SO ORDERED this 10th day of May, 2019.

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17 RAMONA V. MANGLONA
18 Chief Judge
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