

1 of this order in the Ninth Circuit Court of Appeals. If the court receives timely written notice of
2 plaintiff's intent not to file an amended complaint, this action will be dismissed with prejudice, and
3 plaintiff will be free to appeal the order of dismissal. See Edwards v. Marin Park, Inc., 356 F.3d
4 1058, 1063-1066 (9th Cir. 2004); Cato v. United States, 70 F.3d 1103, 1106 (9th Cir. 1995).

5 (3) Plaintiff **may do nothing in response to this order**. If plaintiff does not respond to this order by
6 filing either a timely amended complaint or a notice of intent not to amend, plaintiff will be deemed
7 to have consented to the dismissal of this action with prejudice under Rule 41(b) of the Federal
8 Rules of Civil Procedure for failure to prosecute and failure to comply with this court's order. See
9 Edwards, 356 F.3d at 1063-1066.

10 **Plaintiff is cautioned that failure to file an amended complaint within the time permitted by**
11 **this order may result in the dismissal of this action with prejudice.**

12 **Fact Allegations**

13 Plaintiff alleges that Lally and Keenan violated his due process rights by presenting "false and
14 misleading evidence" to the grand jury and by avoiding pointing out evidence favorable to plaintiff.
15 [Complaint 5]. The complaint further alleges that Keenan "testified falsely under oath" before the grand
16 jury and "took advantage of his position as a federal agent" in so testifying. [Complaint 3]. Plaintiff alleges
17 that after 15 months of incarceration, he has been denied his right to "a fast and speedy trial." [Complaint
18 5]. Plaintiff also alleges that he has been denied eye glasses to correct "poor vision" and has "dental issues."
19 [Complaint 5]. Plaintiff requests that the charges against him be dismissed, and that he be released from
20 prison. [Complaint 5].

21 **Discussion**

22 On its own motion or the motion of a party, the court "shall" dismiss a complaint that seeks relief
23 against a governmental entity or officer or employee of a governmental entity, or a complaint brought by
24 a prisoner with respect to prison conditions, if the complaint is frivolous, malicious, fails to state a claim
25 upon which relief may be granted, or seeks monetary relief from a defendant who is immune from such
26 relief. 28 U.S.C. §§ 1915A(b); 42 U.S.C. § 1997e(c)(1)-(2). A claim is frivolous if it lacks an arguable
27 basis in either law or fact. Denton v. Hernandez, 504 U.S. 25, 31 (1992); Neitzke v. Williams, 490 U.S. 319,
28

1 325 (1989). To withstand dismissal for failure to state a claim, “a complaint must contain sufficient factual
2 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’ A claim has facial plausibility
3 when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the
4 defendant is liable for the misconduct alleged.” Ashcroft v. Iqbal, — U.S.—, 129 S.Ct. 1937, 1949
5 (2009)(quoting and citing Bell Atlantic Corp. v. Twombly, 550 U.S.544, 556, 570 (2007)). “[A] plaintiff’s
6 obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and
7 a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough
8 to raise a right to relief above the speculative level, on the assumption that all the allegations in the
9 complaint are true (even if doubtful in fact).” Twombly, 550 U.S. at 555 (internal quotation marks and
10 ellipsis omitted). Where a complaint pleads facts that are merely consistent with a defendant’s liability, it
11 stops short of the line between possibility and plausibility of entitlement to relief.” Iqbal, 129 S.Ct. at 1949
12 (internal quotation marks and citation omitted).

13 To determine whether a complaint states a claim sufficient to withstand dismissal, a court considers
14 the contents of the complaint and its attached exhibits, documents incorporated into the complaint by
15 reference, and matters properly subject to judicial notice. Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551
16 U.S. 308, 322-323 (2007); Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001). The court must
17 accept as true all factual allegations contained in the complaint. That principle, however, “is inapplicable
18 to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory
19 statements, do not suffice.” Iqbal, 129 S.Ct. at 1950. A complaint filed pro se, however, is “to be liberally
20 construed,” and “however inartfully pleaded, must be held to less stringent standards than formal pleadings
21 drafted by lawyers.” Erickson v. Pardus, 551 U.S. 89, 93-94 (2007).

22 **Due process claims**

23 Plaintiff seeks release from confinement on the grounds that: (1) his indictment by a grand jury
24 violated his due process rights, rendering his imprisonment unlawful; and (2) the length of his imprisonment
25 is excessive, in violation of his right to a speedy trial.

26 For the reasons explained in the Report and Recommendation (“Report”) filed concurrently with this
27 memorandum and order, plaintiff’s due process claims should be dismissed in their entirety without leave
28 to amend and without prejudice. Accordingly, those claims are not analyzed here.

1 **Claims regarding vision and dental needs**

2 Plaintiff alleges that he “suffers from poor vision and is deteriorating at the present time. He
3 requires ocular glasses to correct and improve his vision, which has also been denied since July 2009, and
4 also has the same situation regarding dental issues.” [Complaint 6].

5 To state a conditions-of-confinement claim under the Eighth Amendment based on inadequate
6 medical care, plaintiff must show that defendants were deliberately indifferent to his serious medical needs.
7 Helling v. McKinney, 509 U.S. 25, 32 (1993); Estelle v. Gamble, 429 U.S. 97, 106 (1976); Hallett v.
8 Morgan, 296 F.3d 732, 744-745 (9th Cir. 2002). Deliberate indifference may be shown where the defendants
9 intentionally denied, delayed, or interfered with the plaintiff’s medical care, or by the manner in which the
10 medical care was provided. Estelle, 429 U.S. at 104-105; Hallett, 296 F.3d at 732. Where, however, a
11 defendant has “based his actions on a medical judgment that either of two alternative courses of treatment
12 would be medically acceptable under the circumstances, plaintiff has failed to show deliberate indifference,
13 as a matter of law.” Jackson v. McIntosh, 90 F.3d 330, 332 (9th Cir.), cert. denied, 519 U.S. 1029 (1996);
14 see Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir. 1989). Rather, a plaintiff must show that the course of
15 treatment “was medically unacceptable under the circumstances,” and that defendants “chose this course
16 in conscious disregard of an excessive risk to plaintiff’s health.” Jackson, 90 F.3d at 332 (citing Williams
17 v. Vincent, 508 F.2d 541, 543-44 (2d Cir. 1974) and Farmer v. Brennan, 511 U.S. 825, 835-838 (1994)).
18 Mere negligence or medical malpractice does not constitute a constitutional violation. Estelle, 429 U.S.
19 at 105-106; Hallett, 296 F.3d at 744.

20 Plaintiff’s allegations that he was denied glasses and has dental “issues” are too vague and
21 conclusory to establish a facially plausible claim for deliberate indifference to plaintiff’s serious medical
22 need. Moreover, he has not requested any relief to remedy these alleged deprivations. In addition, nothing
23 in the complaint suggests that Lally or Keenan had any involvement in decisions relating to plaintiff’s vision
24 or dental needs. See Iqbal, 129 S.Ct. at 1949 (stating that a Bivens defendant “is only liable for his or her
25 own misconduct,” and that “[t]he inquiry into causation must be individualized and focus on the duties and
26 responsibilities of each individual defendant whose acts or omissions are alleged to have caused a
27 constitutional deprivation”)(quoting Leer v. Murphy, 844 F.2d 628, 633 (9th Cir.1988)); Harper v. City of
28 Los Angeles, 533 F.3d 1010, 1026 (9th Cir. 2008) (stating that a civil rights plaintiff must “demonstrate that

1 the defendant's conduct was the actionable cause of the claimed injury. To meet this causation requirement,
2 the plaintiff must establish both causation-in-fact and proximate causation.”) (internal citations omitted).

3 For these reasons, the complaint fails to state a cognizable federal claim based on the denial of vision
4 or dental care.

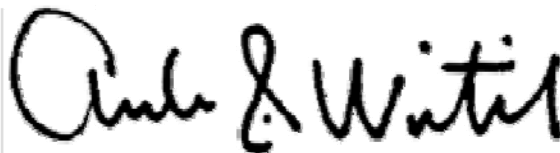
5 **Leave to amend**

6 A pro se litigant must be given leave to file an amended complaint unless it is absolutely clear that
7 the defective complaint cannot be cured by amendment. See Lucas v. Dep’t of Corr., 66 F.3d 245, 248 (9th
8 Cir. 1995) (per curiam) (explaining that “unless it is absolutely clear that no amendment can cure the
9 defect,” a pro se litigant is entitled to notice of the complaint’s deficiencies and an opportunity to amend).
10 The Report recommends that plaintiff not be granted leave to amend his defective due process claims.
11 Plaintiff, however, may be able to plead additional facts regarding his vision and dental care that will
12 “nudge[] [those] claims across the line from conceivable to plausible.” Twombly, 550 U.S. at 570.
13 Therefore, plaintiff is granted leave to amend his complaint as his vision and dental claims **only** (and, if
14 necessary, to add as defendants any individual(s) who caused the alleged constitutional deprivations).

15 **Conclusion**

16 The complaint is **dismissed with leave to amend** in accordance with the instructions at the
17 beginning of this order.

18
19
20 November 29, 2010



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22 ANDREW J. WISTRICH
United States Magistrate Judge