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

DANIEL LAWRENCE SMITH,

No. CIV S-07-0837-WBS-CMK-P

Plaintiff,

vs.

FINDINGS AND RECOMMENDATIONS

FIGEROE, et al.,

Defendants.

_____ /

Plaintiff, a state prisoner proceeding pro se, brings this civil rights action pursuant to 42 U.S.C. § 1983. Pending before the court is defendants’ unopposed motion for summary judgment (Doc. 56).

I. BACKGROUND

A. Plaintiff’s Allegations

This action proceeds on the amended complaint filed on November 10, 2008. Plaintiff claims that, in January 2006, correctional officer Figeroe packed all of his legal documents and personal property into a large box to be transferred with plaintiff to another prison. He states that correctional officers Figeroe and Gordon “took full control and possession

1 of all plaintiff's legal materials. . . ." According to plaintiff, when he arrived at the new prison,
2 his property box was missing. Plaintiff claims that, without his legal documents, he is unable to
3 meet court filing deadlines in a number of pending cases. He states that he cannot "file all appeal
4 document(s) relevant to challenging the unjust conviction and unfair sentence in my criminal
5 case on time."

6 Plaintiff also alleges that defendants were aware of "exonerating evidence"
7 contained in the lost box of legal materials and, therefore, acted with malice and the intent of
8 denying plaintiff access to the courts. As to the "exonerating evidence," plaintiff states this
9 consisted of a declaration from an individual known as "Keybo" which was obtained on
10 plaintiff's behalf by a family member. According to plaintiff, "Keybo" stated that he was a
11 witness to the incident giving rise to plaintiff's conviction and that he was prepared to declare
12 that plaintiff was not the perpetrator. Plaintiff states that, as a result of the loss of the declaration
13 from "Keybo," he was prevented from submitting an amended habeas petition in the state court
14 and thereby pursuing a non-frivolous claim of actual innocence. Plaintiff further claims that
15 "[d]ue to the fact that Keybo is in transit, plaintiff have been informed by his family member that
16 they are unable to locate Keybo a second time."

17 On January 15, 2009, the court determined that the amended complaint stated a
18 cognizable claim for relief and directed defendants to respond.

19 **B. Defendants' Evidence**

20 Defendants submit evidence establishing the following undisputed facts:

- 21 1. Plaintiff was transferred from High Desert State Prison to Pleasant Valley
22 State Prison on February 1, 2006;
- 23 2. On January 31, 2006, plaintiff brought his legal materials to Building 2 at
24 High Desert State Prison where he observed defendant Figeroe and
25 another unknown correction officer place his materials into a box, then
26 label and seal the box;
3. Plaintiff then observed defendant Figeroe place the box on a cart with
those of other inmates being transferred that day;

1 must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome
2 of the suit under the governing law, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986);
3 T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass’n, 809 F.2d 626, 630 (9th Cir. 1987), and
4 that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict
5 for the nonmoving party, Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1436 (9th Cir. 1987).

6 In the endeavor to establish the existence of a factual dispute, the opposing party
7 need not establish a material issue of fact conclusively in its favor. It is sufficient that “the
8 claimed factual dispute be shown to require a jury or judge to resolve the parties’ differing
9 versions of the truth at trial.” T.W. Elec. Serv., 809 F.2d at 631. Thus, the “purpose of summary
10 judgment is to ‘pierce the pleadings and to assess the proof in order to see whether there is a
11 genuine need for trial.’” Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e) advisory
12 committee’s note on 1963 amendments).

13 In resolving the summary judgment motion, the court examines the pleadings,
14 depositions, answers to interrogatories, and admissions on file, together with the affidavits, if
15 any. See Fed. R. Civ. P. 56(c). The evidence of the opposing party is to be believed. See
16 Anderson, 477 U.S. at 255. All reasonable inferences that may be drawn from the facts placed
17 before the court must be drawn in favor of the opposing party. See Matsushita, 475 U.S. at 587.
18 Nevertheless, inferences are not drawn out of the air, and it is the opposing party’s obligation to
19 produce a factual predicate from which the inference may be drawn. See Richards v. Nielsen
20 Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), aff’d, 810 F.2d 898, 902 (9th Cir.
21 1987). Finally, to demonstrate a genuine issue, the opposing party “must do more than simply
22 show that there is some metaphysical doubt as to the material facts Where the record taken
23 as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no
24 ‘genuine issue for trial.’” Matsushita, 475 U.S. at 587 (citation omitted).

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1 **III. DISCUSSION**

2 In their motion for summary judgment, defendants argue: (1) plaintiff cannot
3 demonstrate an actual injury sufficient to prevail on his First Amendment claim of access to the
4 courts; and (2) defendants are entitled to qualified immunity.

5 **A. Actual Injury**

6 Prisoners have a First Amendment right of access to the courts. See Lewis v.
7 Casey, 518 U.S. 343, 346 (1996); Bounds v. Smith, 430 U.S. 817, 821 (1977); Bradley v. Hall,
8 64 F.3d 1276, 1279 (9th Cir. 1995) (discussing the right in the context of prison grievance
9 procedures). This right includes petitioning the government through the prison grievance
10 process. See id. Prison officials are required to “assist inmates in the preparation and filing of
11 meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance
12 from persons trained in the law.” Bounds, 430 U.S. at 828. The right of access to the courts,
13 however, only requires that prisoners have the capability of bringing challenges to sentences or
14 conditions of confinement. See Lewis, 518 U.S. at 356-57. Moreover, the right is limited to
15 non-frivolous criminal appeals, habeas corpus actions, and § 1983 suits. See id. at 353 n.3 &
16 354-55. Therefore, the right of access to the courts is only a right to present these kinds of claims
17 to the court, and not a right to discover claims or to litigate them effectively once filed. See id. at
18 354-55.

19 As a jurisdictional requirement flowing from the standing doctrine, the prisoner
20 must establish an actual injury. See id. at 349. “Actual injury” is prejudice with respect to
21 contemplated or existing litigation, such as the inability to meet a filing deadline or present a
22 non-frivolous claim. See id.; see also Phillips v. Hust, 477 F.3d 1070, 1075 (9th Cir. 2007).
23 Delays in providing legal materials or assistance which result in prejudice are “not of
24 constitutional significance” if the delay is reasonably related to legitimate penological purposes.
25 Lewis, 518 U.S. at 362.

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1 Defendants argue that plaintiff cannot show an actual injury. As defendants state,
2 the essence of plaintiff’s First Amendment claim is that, had defendants not intentionally lost or
3 destroyed his legal materials – including the “Keybo” declaration – he would have been able to
4 use the “Keybo” declaration as new evidence of his actual innocence to support an amended
5 petition. According to plaintiff, because he was not able to submit such new evidence, he was
6 unable to amend his habeas petition. Defendants assert that, even assuming the “Keybo”
7 declaration went to plaintiff’s actual innocence, it could not have served as “new evidence” to
8 support an amended habeas petition. Citing Townsend v. Sain, 372 U.S. 293, 317 (1963),
9 defendants correctly note that “new evidence” is “limited to what which ‘could not reasonably
10 have been presented at trial.’” See also In re Hardy, 41 Cal.4th 977, 1016 (2007); People v.
11 Shipman, 62 Cal.2d 226 (1965); Cal. Penal Code § 1473.6(b). Here, the undisputed evidence
12 establishes that plaintiff knew about the contents of the “Keybo” declaration at the time of trial.
13 Thus, it could not have been considered “new evidence.” The court agrees with defendants that,
14 because plaintiff was not deprived of any arguable basis to seek amendment of his habeas
15 petition, he did not suffer any actual injury with respect to his access to the courts. See Phillips
16 v. Hust, 477 F.3d 1070 (9th Cir. 2007).

17 **B. Qualified Immunity**

18 Government officials enjoy qualified immunity from civil damages unless their
19 conduct violates “clearly established statutory or constitutional rights of which a reasonable
20 person would have known.” Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). In general,
21 qualified immunity protects “all but the plainly incompetent or those who knowingly violate the
22 law.” Malley v. Briggs, 475 U.S. 335, 341 (1986). In ruling upon the issue of qualified
23 immunity, the initial inquiry is whether, taken in the light most favorable to the party asserting
24 the injury, the facts alleged show the defendant’s conduct violated a constitutional right. See
25 Saucier v. Katz, 533 U.S. 194, 201 (2001). If, and only if, a violation can be made out, the next
26 step is to ask whether the right was clearly established. See id. This inquiry “must be undertaken

1 in light of the specific context of the case, not as a broad general proposition” Id. “[T]he
2 right the official is alleged to have violated must have been ‘clearly established’ in a more
3 particularized, and hence more relevant, sense: The contours of the right must be sufficiently
4 clear that a reasonable official would understand that what he is doing violates that right.” Id. at
5 202 (citation omitted). Thus, the final step in the analysis is to determine whether a reasonable
6 officer in similar circumstances would have thought his conduct violated the alleged right. See
7 id. at 205.

8 When identifying the right allegedly violated, the court must define the right more
9 narrowly than the constitutional provision guaranteeing the right, but more broadly than the
10 factual circumstances surrounding the alleged violation. See Kelly v. Borg, 60 F.3d 664, 667
11 (9th Cir. 1995). For a right to be clearly established, “[t]he contours of the right must be
12 sufficiently clear that a reasonable official would understand [that] what [the official] is doing
13 violates the right.” See Anderson v. Creighton, 483 U.S. 635, 640 (1987). Ordinarily, once the
14 court concludes that a right was clearly established, an officer is not entitled to qualified
15 immunity because a reasonably competent public official is charged with knowing the law
16 governing his conduct. See Harlow v. Fitzgerald, 457 U.S. 800, 818-19 (1982). However, even
17 if the plaintiff has alleged a violation of a clearly established right, the government official is
18 entitled to qualified immunity if he could have “. . . reasonably but mistakenly believed that
19 his . . . conduct did not violate the right.” Jackson v. City of Bremerton, 268 F.3d 646, 651 (9th
20 Cir. 2001); see also Saucier, 533 U.S. at 205.

21 The first two steps in the qualified immunity analysis involve purely legal
22 questions. See Trevino v. Gates, 99 F.3d 911, 917 (9th Cir. 1996). The third inquiry involves a
23 legal determination based on a prior factual finding as to the government official’s conduct. See
24 Neely v. Feinstein, 50 F.3d 1502, 1509 (9th Cir. 1995). In resolving these issues, the court must
25 view the evidence in the light most favorable to plaintiff and resolve all material factual disputes
26 in favor of plaintiff. Martinez v. Stanford, 323 F.3d 1178, 1184 (9th Cir. 2003).

1 As discussed above, the undisputed facts establish that plaintiff cannot show an
2 actual injury. Therefore, there was no First Amendment violation. Further, the evidence shows
3 that plaintiff cannot establish that defendants were responsible for the loss and/or destruction of
4 his legal materials. As defendants note, other correctional officers had responsibility for and
5 custody over plaintiff's materials after defendants. Plaintiff has not presented any evidence
6 showing that defendants' conduct resulted in the loss and/or destruction of his property.

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8 **IV. CONCLUSION**

9 Based on the foregoing, the undersigned recommends that defendants' unopposed
10 motion for summary judgment (Doc. 56) be granted and that all other pending motions be denied
11 as moot.

12 These findings and recommendations are submitted to the United States District
13 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 14 days
14 after being served with these findings and recommendations, any party may file written
15 objections with the court. Responses to objections shall be filed within 14 days after service of
16 objections. Failure to file objections within the specified time may waive the right to appeal.
17 See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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19 DATED: July 29, 2010

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21 **CRAIG M. KELLISON**
22 UNITED STATES MAGISTRATE JUDGE
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