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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>DANIEL LAWRENCE SMITH,</p> <p>Plaintiff - Appellant,</p> <p>v.</p> <p>FIGEROE; et al.,</p> <p>Defendants - Appellees.</p>
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No. 10-17141

D.C. No. 2:07-cv-00837-WBS-CMK

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
William B. Shubb, District Judge, Presiding

Submitted October 25, 2011**

Before: TROTT, GOULD, and RAWLINSON, Circuit Judges.

Daniel Lawrence Smith, a California state prisoner, appeals pro se from the district court’s summary judgment in his 42 U.S.C. § 1983 action alleging that defendants violated his right of access to the courts. We have jurisdiction under 28 U.S.C. § 1291. We review de novo, *Jones v. Blanas*, 393 F.3d 918, 926

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

(9th Cir. 2004), and we affirm.

The district court properly granted summary judgment because Smith failed to raise a genuine dispute of material fact as to whether he suffered an actual injury as a result of the loss of the Keybo declaration. *See Lewis v. Casey*, 518 U.S. 343, 350-53 (1996) (access-to-courts claim requires plaintiff to show that defendants' conduct caused actual injury to a non-frivolous legal claim). Specifically, Smith did not raise a genuine dispute of material fact as to whether the declaration contained "newly discovered evidence" that would allow him to pursue a state habeas action. *In re Hardy*, 163 P.3d 853, 872 (Cal. 2007) (setting forth the requirements for pursuing a habeas action claiming actual innocence based on newly discovered evidence).

We do not consider issues that were not raised in the opening brief. *See Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999).

Smith's remaining contentions are unpersuasive.

AFFIRMED.