

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAY 27 2008

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

JAMES SMILEY BROWN,

Petitioner - Appellant,

v.

R. Q. HICKMAN,

Respondent - Appellee.

No. 07-15600

D.C. No. CV-00-00559-MCE

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Morrison C. England, District Judge, Presiding

Submitted May 20, 2008**

Before: PREGERSON, TASHIMA, and GOULD, Circuit Judges.

California state prisoner James Smiley Brown appeals from the district court's judgment denying his 28 U.S.C. § 2254 habeas petition challenging his jury-trial conviction for making terrorist threats and for being a convicted felon in

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

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

possession of a firearm. We have jurisdiction pursuant to 28 U.S.C. § 2253, and we affirm.

As a threshold matter, we reject the state's contention that Brown's claim was procedurally defaulted under *In re Dixon*, 41 Cal. 2d 756, 759 (1953). See *Park v. California*, 202 F.3d 1146, 1152-53 (9th Cir. 2000).

Brown contends that the district court erred by denying his claim that his right to due process and a fair trial was violated when he was observed by the jury while being removed from a sheriff's van in handcuffs and leg shackles. Brown's argument fails as he cannot demonstrate that actual prejudice resulted from the jury's brief and inadvertent observation of him in restraints. See *Ghent v. Woodford*, 279 F.3d 1121, 1132-33 (9th Cir. 2002).

Brown's request that we remand to the district court to reopen discovery and to conduct an evidentiary hearing is denied. See *Sims v. Brown*, 425 F.3d 560, 577 (9th Cir. 2005).

AFFIRMED.