

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

DEC 06 2007

DONNIE BROWDER,

Petitioner - Appellant,

v.

BRIAN E. BELLEQUE, Superintendent of
Oregon State Penitentiary,

Respondent - Appellee.

No. 07-35165

D.C. No. CV-04-00387-HA

MEMORANDUM*

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

Appeal from the United States District Court
for the District of Oregon
Ancer L. Haggerty, District Judge, Presiding

Submitted December 4, 2007**
Portland, Oregon

Before: O'SCANNLAIN, GRABER, and CALLAHAN, Circuit Judges.

Petitioner Donnie Browder appeals from the district court's dismissal of his petition for writ of habeas corpus. On de novo review, Fields v. Calderon, 125 F.3d 757, 759-60 (9th Cir. 1997), we affirm.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

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

1. To the extent that Petitioner raises arguments previously rejected by this court in Browder v. Belleque, 216 F. App'x 646 (9th Cir. 2007) (unpublished decision), those arguments are foreclosed.

2. To the extent that Petitioner challenges the Board of Parole's 2003 order denying his administrative appeal, we are barred from reviewing that order because of the "procedural default rule." Harris v. Reed, 489 U.S. 255, 260 (1989). The Oregon Court of Appeals denied review on an "adequate and independent state ground." Id. (internal quotation marks omitted); see also Coleman v. Thompson, 501 U.S. 722, 735 n.1 (1991) (noting that failure to exhaust state remedies is an adequate and independent state ground procedurally barring federal habeas review (citing Harris, 489 U.S. at 269-70 (O'Connor, J., concurring))). The Oregon Court of Appeals dismissed Petitioner's state court judicial review of the 2003 order for three reasons. The third reason given by the Oregon Court of Appeals was that Petitioner had failed to exhaust his administrative remedies by filing his administrative appeal more than three years after the Board's 1999 order, instead of within the 45 days required by Oregon Administrative Rule 255-080-0005(2). See Or. Rev. Stat. § 144.335(1)(b) (requiring that Petitioner exhaust his administrative remedies before seeking judicial review). Although the first two reasons given by the Oregon Court of Appeals may have been called into question

by the Oregon Supreme Court's decision in Richards v. Board of Parole & Post-Prison Supervision, 118 P.3d 261 (Or. 2005), that case in no way affected the requirement of exhaustion of administrative remedies. See id. at 264-65 (noting that the petitioner in that case properly exhausted his administrative remedies). Petitioner has demonstrated neither cause and prejudice nor a fundamental miscarriage of justice. Coleman, 501 U.S. at 750.

AFFIRMED.