

MAY 27 2008

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WALLACE ERVIN,

Petitioner - Appellant,

v.

JOHN MARSHALL; et al.,

Respondents - Appellees.

No. 07-16145

D.C. No. CV-05-02004-DFL

MEMORANDUM\*

Appeal from the United States District Court  
for the Eastern District of California  
David F. Levi, District Judge, Presiding

Submitted May 20, 2008\*\*

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

California state prisoner Wallace Ervin appeals pro se from the district court's order dismissing his 28 U.S.C. § 2254 petition as untimely. We have jurisdiction pursuant to 28 U.S.C. § 2253, and we affirm.

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\* 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).

Ervin contends he is entitled to statutory tolling of the Antiterrorism and Effective Death Penalty Act's one-year statute of limitations pursuant to 28 U.S.C. § 2244(d)(2). However, because the California Superior Court rejected Ervin's habeas petition as untimely, it was not "properly filed," and he is not entitled to statutory tolling under § 2244(d)(2). *See Pace v. DiGuglielmo*, 544 U.S. 408, 417 (2005).

**AFFIRMED.**