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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DONNY E. MAXWELL,

Petitioner - Appellant,

v.

M. C. KRAMER; ATTORNEY
GENERAL,

Respondents - Appellees.

No. 08-15831

D.C. No. 1:07-CV-00548-OWW

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Oliver W. Wanger, District Judge, Presiding

Submitted February 16, 2010**

Before: FERNANDEZ, GOULD, and M. SMITH, Circuit Judges.

* 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).

California state prisoner Donny E. Maxwell appeals from the district court's order dismissing his 28 U.S.C. § 2254 habeas petition as untimely, and we vacate and remand.

On appeal, respondents concede that Maxwell's petition was timely. From the record, it is apparent that Maxwell was entitled to tolling between June 5, 2006, and February 7, 2007, while his state habeas petitions were pending. *See* 28 U.S.C. § 2244(d)(2); *see also Evans v. Chavis*, 546 U.S. 189, 191 (2006). Accordingly, his petition was timely. We vacate the dismissal and remand to the district court for consideration of the merits of Maxwell's petition. Maxwell's request to strike the supplemental excerpts of record is denied as moot.

VACATED AND REMANDED.