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2015 JAN 14 PM 3:00

U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY **74** DEPUTY

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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 PHILONG HUYNH,

12 Petitioner,

13 v.

14 J. LIZARRAGA, Warden,

15 Respondent.
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17

Civil No. 14-2452 BEN (RBB)

ORDER:

**(1) DENYING APPLICATION TO
PROCEED *IN FORMA PAUPERIS*
AS MOOT**

**(2) DISMISSING CASE WITHOUT
PREJUDICE AND WITH LEAVE
TO AMEND**

18 On October 14, 2014, Petitioner, a state prisoner proceeding pro se, submitted a
19 Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, together with a request
20 to proceed *in forma pauperis*. (ECF Nos. 1-2.) The Court dismissed the action on
21 October 22, 2014, because Petitioner had failed to provide the Court with sufficient
22 proof of his inability to pay the \$5.00 filing fee. Petitioner also did not alleged
23 exhaustion of his state judicial remedies. (ECF No. 3.) Petitioner was given until
24 December 16, 2014, to either pay the \$5.00 filing fee or submit adequate proof of his
25 inability to pay, and to submit a First Amended Petition that alleged exhaustion. (*Id.*)

26 On December 19, 2014, Petitioner submitted a second motion to proceed in forma
27 pauperis and a First Amended Petition. (ECF Nos. 4-5). On December 31, 2014,
28 Petitioner also paid the \$5.00 filing fee. (ECF No. 6.)

1 (C) the date on which the constitutional right asserted was initially
2 recognized by the Supreme Court, if the right has been newly recognized
3 by the Supreme Court and made retroactively applicable to cases on
4 collateral review; or

5 (D) the date on which the factual predicate of the claim or claims
6 presented could have been discovered through the exercise of due
7 diligence.

8 28 U.S.C. § 2244(d)(1)(A)-(D).

9 The statute of limitations does not run while a properly filed state habeas corpus
10 petition is pending. 28 U.S.C. § 2244(d)(2); *see Nino v. Galaza*, 183 F.3d 1003, 1006
11 (9th Cir. 1999). *But see Artuz v. Bennett*, 531 U.S. 4, 8 (2000) (holding that “an
12 application is ‘properly filed’ when its delivery and acceptance [by the appropriate court
13 officer for placement into the record] are in compliance with the applicable laws and
14 rules governing filings.”). However, absent some other basis for tolling, the statute of
15 limitations does run while a federal habeas petition is pending. *Duncan v. Walker*, 533
16 U.S. 167, 181-82 (2001).

17 CONCLUSION

18 For the foregoing reasons, the Court **DENIES** as moot Petitioner’s motion to
19 proceed *in forma pauperis* and **DISMISSES** this case without prejudice and with leave
20 to amend. To proceed with this case Petitioner must, **no later than March 6, 2015**,
21 submit a Second Amended Petition that alleges exhaustion of his state judicial remedies.
22 If Petitioner does not allege exhaustion by March 6, 2015, this case will remain
23 dismissed and Petitioner will have to file a new petition which will be given a new case
24 number. ***The Clerk of Court is directed to mail Petitioner a blank Second Amended
25 28 U.S.C. § 2254 Petition form together with a copy of this Order.***

26 **IT IS SO ORDERED.**

27 DATED: January 12, 2015

28 
HON. ROGER T. BENITEZ
United States District Judge