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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

RUBEN ORTIZ,

 Petitioner,

 v.

SCOTT FRAUENHEIM, Warden,

 Respondent.

No. 1:13-cv-00006-DAD-SKO HC

**ORDER DIRECTING CLERK OF COURT
TO REFUND FILING FEE**

(Doc. 35)

In an *ex parte* motion, Petitioner Ruben Ortiz, by his attorney Philip Brooks, seeks the return of a \$505.00 filing fee erroneously paid for Petitioner’s appeal. In a declaration filed in support of the motion, Petitioner’s attorney states that although counsel intended to request waiver of the filing fee based on Petitioner’s having proceeded *in forma pauperis* before the District Court, he mistakenly submitted the filing fee on Petitioner’s behalf.

The rules of appellate procedure provide, in pertinent part:

A party who was permitted to proceed in forma pauperis in the district-court action may proceed on appeal in forma pauperis without further authorization, unless:

(A) the district court—before or after the notice of appeal is filed—certifies that the appeal is not taken in good faith or finds that the party is not otherwise entitled to proceed in forma pauperis and states in writing its reasons for the certification or filing.

F.R.App.P. 24(a)(3).

Although the Court declined to issue a certificate of appealability, it did not find that the appeal was taken in bad faith or that Petitioner was otherwise not entitled to proceed *in forma*

1 *pauperis*. In such circumstances, Petitioner may proceed to file his notice of appeal *in forma*
2 *pauperis* without the need for a second application to proceed *in forma pauperis*. Petitioner will
3 then need to seek a certificate of appealability from the circuit court, however, before the appeal
4 may proceed. *See, e.g., Greenhill v. United States of America*, 2009 WL 1605651 at *2 (E.D.
5 Cal. June 8, 2009) (No. CR-F-94-5020 AWI, CV-F-97-5020 AWI); *Booth v. Attorney General*,
6 2009 WL 982045 at *1 (E.D. Cal. April 13, 2009) (No. 1:08-cv-01134-SMS HC); *Denton v.*
7 *Garcia*, 2008 WL 410600 at *1, n. 1 (E.D. Cal. Feb. 12, 2008) (No. CIV S-03-1558 RRB JFM P).

8 The Clerk of Court is hereby DIRECTED to refund to counsel Petitioner's filing fee in the
9 amount of \$505.00.

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11 IT IS SO ORDERED.

12 Dated: May 2, 2017

13 /s/ Sheila K. Olerto
14 UNITED STATES MAGISTRATE JUDGE
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