

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DEREK MARTINEZ,

Petitioner,

vs.

SCOTT FRAUENHEIM, Warden,
Pleasant Valley State Prison,

Respondent.

No. 2:12-cv-02273-JKS

ORDER
[Re: Briefing Schedule upon Limited Remand]

This Court denied Derek Martinez, a state prisoner proceeding *pro se*, habeas relief and a certificate of appealability on May 12, 2015. Docket Nos. 70, 71. Martinez timely filed a notice of appeal, Docket No. 72, and the Ninth Circuit Court of Appeals granted a certificate of appealability with respect to: 1) whether the prosecutor committed misconduct manipulating the witness; and 2) whether Martinez can demonstrate, in light of new evidence, that he is actually innocent of the offense, Docket No. 12 (Ninth Cir. Case No. 15-16082). On appeal, Martinez moved in September 2016 to supplement the record with DNA testing and reporting that resulted from state court litigation conducted from prior to the filing of his federal Petition through 2016. Docket No. 30 (Ninth Cir. Case No. 15-16082). The Ninth Circuit denied the request without prejudice to counsel seeking a written indication from this Court that it would be inclined to consider the new evidence in the first instance in a Rule 60(b) motion, if the Court of Appeals issued a limited remand. Docket No. 33 (Ninth Cir. Case No. 15-16082).

Martinez then requested that the Ninth Circuit hold the appeal in abeyance to allow him to seek an indicative ruling in this Court and remand the matter for consideration of the Rule 60(b) motion. Docket No. 51 (Ninth Cir. Case No. 15-16082). The Ninth Circuit denied Martinez's

request for a limited remand without prejudice to filing a renewed motion in the event this Court issued an indicative ruling in his favor, and stayed the appellate proceedings pending this Court's decision on the indicative ruling motion. Docket No. 53 (Ninth Cir. Case No. 12-16082). Martinez moved in this Court pursuant to Federal Rule of Civil Procedure 62.1(a) for an indicative ruling, and the Court granted the request after finding that Martinez's motion to vacate raises a substantial issue. Docket No. 85. The record on appeal indicates that the Ninth Circuit granted Martinez's motion for a limited remand to permit this Court to consider newly-discovered evidence in support of his claim for actual innocence. Docket No. 57 (Ninth Cir. Case No. 12-16082).

IT IS THEREFORE ORDERED THAT Martinez shall have up to and including July 5, 2017, to file a motion to vacate this Court's judgment pursuant to Federal Rule of Procedure 60(b). Respondent shall have up to and including August 4, 2017, to file an opposition. Martinez shall have up to an including August 18, 2017, to file a reply.

The Clerk of Court is directed to serve a copy of this Order on the Ninth Circuit Court of Appeals.

Dated: June 5, 2017.

/s/James K. Singleton, Jr.
JAMES K. SINGLETON, JR.
Senior United States District Judge