

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: Surreply Briefing]

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, 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).

Martinez then filed a Motion to Vacate Judgment in which counsel requested that a hearing be held on September 29, 2017, at 8:30 a.m. in the Eastern District of California Courtroom in Sacramento. Docket No. 87. On August 2, 2017, Respondent opposed the motion, Docket No. 88, and Martinez replied on September 5, 2017, Docket No. 93. Respondent has now filed a motion requesting that he be given an opportunity to respond to Martinez's argument, raised for the first

time on reply, that a miscarriage of justice overrides Congress's bar on second or successive habeas petitions. Docket No. 94.

IT IS THEREFORE ORDERED THAT the hearing scheduled for September 29, 2017, is **VACATED**.

IT IS FURTHER ORDERED THAT Respondent shall have up to and including October 9, 2017, to file a surreply to Martinez's Reply in Support of his Motion to Vacate Judgment, which addresses Martinez's argument, raised for the first time in reply, that a miscarriage of justice overrides Congress's bar on second or successive habeas petitions. No other arguments will be considered.

Dated: September 28, 2017.

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