

1 limitation period. The Court and all parties appear to agree that Petitioner's claim of actual innocence
2 hinges on whether the hospital acted with gross negligence in placing the feeding tube in the victim. If
3 it did, Petitioner has a viable claim of actual innocence since the hospital's gross negligence would
4 foreclose criminal culpability for Petitioner. If it did not, then Petitioner would still be criminally
5 liable for the victim's death and no claim of actual innocence could be sustained.

6 As the Court indicated in its previous order, the Court's review of the record has given rise to
7 serious concerns concerning whether the parties have presented sufficient evidence upon which to
8 make a factual determination vis-à-vis the hospital's degree of negligence. The parties were offered
9 the opportunity to indicate whether, should an evidentiary hearing be scheduled, additional relevant
10 and probative evidence would be presented. Petitioner indicated that he would present such evidence.
11 Accordingly, the evidentiary hearing was scheduled with enough time for both parties to gather
12 evidence to support their respective positions.

13 Now, Respondent has filed a motion for reconsideration arguing that, for a variety of legal
14 reasons, the Court need not conduct an evidentiary hearing nor even concern itself with the issue of the
15 hospital's gross negligence. Respondent's motion for reconsideration, however, ignores the reality of
16 the Ninth Circuit's remand order. The Ninth Circuit's order was explicit and, in the Court's view,
17 provides no latitude for the Court to fashion new and innovative alternatives to avoid doing precisely
18 what the remand order requires the Court to do, i.e., to make a factual determination regarding whether
19 Petitioner's has established actual innocence under McQuiggin. The Ninth Circuit has ordered this
20 Court to make specific findings under McQuiggin and, given the state of the record in this case, the
21 scheduled evidentiary hearing is the appropriate means to accomplish that end. Respondent's
22 arguments to the contrary notwithstanding, the Court sees no other way to proceed at this point other
23 than with the evidentiary hearing already scheduled.

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1 For the foregoing reasons, the Court HEREBY ORDERS that Respondent's motion for
2 reconsideration (Doc. 100), is DENIED.

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4 IT IS SO ORDERED.

5 Dated: April 6, 2015

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE

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