

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 15-50522

United States Court of Appeals
Fifth Circuit

FILED

February 22, 2017

Lyle W. Cayce
Clerk

TOMAS VIZCARRA,

Petitioner - Appellant

v.

KENNETH REAGANS, Warden,

Respondent - Appellee

Appeal from the United States District Court
for the Western District of Texas
USDC No. 3:10-CV-159

Before REAVLEY, ELROD, and GRAVES, Circuit Judges.

PER CURIAM:*

This defendant was convicted of murder, and the date of final conviction was March 2, 1999. The time for habeas collateral attack expired on March 2, 2000. The defendant did not file for habeas until more than seven years later. However, with the Supreme Court allowing a claim for actual innocence to go forward with some consideration of time; the Court sent back the case to this court for consideration of *McQuiggin v. Perkins*, 133 S. Ct. 1924 (2013). The

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

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Court had held in *Schlup v. Delo*, 115 S. Ct. 851 (1995) that the time requirement does not prevent correcting a fundamental miscarriage of justice if a petitioner makes a credible showing of actual innocence. We decide in this case that there has been no credible showing of actual innocence and affirm the judgment.

Martha Carzoli was an important witness for the prosecution, since she was the one who testified that she actually saw the defendant as he shot and killed the deceased. The evidence of innocence is based on an affidavit she signed on November 14, 2006 saying that she now is not sure that the person responsible for the shooting was Tomas Vizcarra. She disclaims naming anyone else as the shooter and only that she is not really sure of the identification she originally made.

Carzoli had no uncertainty about what she had seen or what she said in 1994 and 1997. She had been busily working as a waitress on the night of the shooting. The following day, October 15, 1994, she went to the El Paso Police Department and made a full statement about what she had seen the night before. She described what the defendant had been wearing and how he walked up to the victim and shot him in the head. She made a lengthy report about what happened from the beginning to end. Another man had come into the bar with the defendant, one she knew and one never seen before. Carzoli positively identified the shooter as the stranger wearing dark blue pants and a dark blue windbreaker. She told about the effort to keep the defendant from escaping and how, when she was in the parking lot trying to hold him for the police, he told her to shut up and not say anything. Then Carzoli testified at length before the jury in February of 1997. She identified the defendant in the courtroom. She testified that the defendant had many tattoos and she had seen him come back in the bar, taking out a gun from his pocket as he walked,

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and shoot the victim. She said that she had a good view of all of the action. She had given the same testimony before the grand jury.

With this record, we conclude that this defendant has no credible evidence of innocence and affirm.

AFFIRMED.