No. 20-3570

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: DOUGLAS COLEY,

Movant.

O R D E R

Before: MERRITT, SILER, and SUTTON, Circuit Judges.

PER CURIAM. An Ohio jury convicted Douglas Coley of aggravated murder in 1998. The judge sentenced him to death. He now seeks habeas corpus relief from the federal courts for the fifth time, claiming new evidence throws the jury's verdict into doubt. Because he could have discovered the evidence decades ago, and because he cannot show by clear and convincing evidence that the evidence would have changed the jury's verdict, we deny permission to file a new habeas petition.

On the evening of January 3, 1997, Douglas Coley and Joseph Green kidnapped Samar El-Okdi in Toledo, Ohio. *Coley v. Bagley*, 706 F.3d 741, 747 (6th Cir. 2013). In an alley later that night, one of them shot her between the eyes from 12 to 18 inches away. She survived for several hours before succumbing to the wound. Police found her frozen body in the alley four days later.

Police arrested Coley and Green after El-Okdi's friend spotted them driving her car. Each man carried a gun. One officer saw a metallic object glint in Coley's hand as he approached Coley's vehicle. He saw Coley put the object down toward the center of the car near where he sat. Moments later, while another officer wrestled with Coley in the car's backseat, a third officer

found a brown-handled pistol with duct tape on one side of the grip on the car's floor beside Coley's left foot. Officers recovered a pearl-handled pistol from Green's pocket.

The brown-handled pistol turned out to be the murder weapon. Besides the arrest, two other pieces of evidence tied Coley to the murder weapon. His cousin, Tyrone Armstrong, testified that he had seen Coley and Green brandishing handguns at a party shortly before Christmas in 1996. Coley held a brown-handled pistol with duct tape on one side of the grip, while Green held a pearl-handled pistol. Coley's girlfriend, Penne Graves, also testified that she had seen him with the pistol at her house.

An independent piece of evidence pointed to Coley, not Green, as the one who pulled the trigger. Armstrong testified that Coley confessed to killing El-Okdi while he and Coley served prison time together.

An Ohio jury convicted Coley of the murder and recommended the death penalty, a punishment available when a defendant premeditated the murder or when he was the principal offender. Ohio Rev. Code § 2929.04(A)(7). The jury found that Coley had premeditated the murder and that he was the principal offender. The judge sentenced Coley to death.

Coley presents newly discovered evidence in the form of three affidavits. All focus on Armstrong's testimony. One affidavit comes from Darlean Woodmore, the woman who says she hosted the party Armstrong referenced. She says there were no guns at the party, and no one would have brought guns because there were children present. Party attendee Jeanetta Holly Jones's affidavit says the same thing: No one had guns, and the party's hostess (Marlean Woodmore, Darlean's twin sister) would not have permitted anyone to have guns around her children. Both women say Coley's lawyers did not contact them before the trial.

The third affidavit comes from Cornell Bruster, who testified at trial. Cornell says Coley's attorney, the prosecutor, and the judge thought he was his similarly named twin brother, *Colonel* Bruster. That mattered because Coley's attorney thought Colonel would lie if called to testify, and the prosecution intended to impeach Colonel with his own prior homicide conviction. Coley insisted the witness testify anyway. All of that resulted in Cornell testifying in narrative form, without prior consultation with Coley's lawyer, to focus his testimony on points that mattered for Coley's trial. If things hadn't gone awry, he says he would have testified to the same effect as Jones and Woodmore about the party Armstrong observed. But he admits he missed 45 minutes of the party when he left to burglarize a house.

We may authorize a second or successive petition when it makes a prima facie showing of "a factual predicate" (1) that "could not have been discovered previously through the exercise of due diligence," and (2) that, "if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2244(b)(2)(B)(i)–(ii); *In re Lott*, 366 F.3d 431, 432–33 (6th Cir. 2004) (per curiam). Coley's affidavits fail both requirements.

Previously undiscoverable? We have no reason to think Coley couldn't have discovered the evidence earlier, as early indeed as the trial. Coley could have identified the party's attendees and sought their testimony at any time before now. Nothing prevented him from doing so. It's especially hard to ignore the fact that he could have cleared up the apparent confusion about Cornell and Colonel Bruster *during trial* rather than waiting 22 years to raise the issue. *See In re Jones*, 652 F.3d 603, 606 (6th Cir. 2010) (per curiam).

Outcome altering? The affidavits would contradict Armstrong's description of the party, and no more. A reasonable factfinder could credit Coley's new witnesses over Armstrong and still conclude that Coley's proximity to the murder weapon at his arrest, his girlfriend's testimony that she had seen Coley with the gun, and Armstrong's description of Coley's confession, established Coley as the principal offender. That isn't enough to meet § 2244(b)(2)(B)(ii)'s requirement. *See Cowan v. Stovall*, 645 F.3d 815, 821 (6th Cir. 2011).

The petition has one more timeliness problem worth noting, even though we generally do not consider statutes of limitations on second-or-successive authorization. *In re McDonald*, 514 F.3d 539, 543–44 (6th Cir. 2008). All three affidavits were prepared in March 2018. Coley filed this motion in June 2020. Even if we took March 2018 as the earliest the evidence could have been discovered and even if we authorized Coley's petition, his delay would prevent relief under the one-year statute of limitations that applies to habeas petitions. 28 U.S.C. § 2244(d)(1); *see Davis v. Bradshaw*, 900 F.3d 315, 323–25 (6th Cir. 2018).

Accordingly, we **DENY** Coley's application for permission to file a § 2254 petition.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk