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No. 16-3479

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
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DEBORAH S. HUNT, Clerk

RONALD DALE BACHMAN,	)	
	)	
Petitioner-Appellant,	)	
	)	
v.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO
	)	
JULIUS WILSON, Warden,	)	
	)	
Respondent-Appellee.	)	
	)	

Before: GIBBONS, BUSH, and LARSEN, Circuit Judges.

LARSEN, Circuit Judge. In 1995, Ronald Bachman, a state prisoner in Ohio, was convicted of eight sexual offenses against his minor daughter. In 2000 and again in 2005, he filed federal habeas petitions, in which he claimed that his appellate counsel had provided constitutionally ineffective assistance by failing to raise a claim regarding the erroneous submission of a trial exhibit to the jury. Those petitions were dismissed. In 2016, Bachman filed a Rule 60(b)(6) motion for relief from the district court's judgment dismissing his second habeas petition, again seeking to assert the ineffective assistance of appellate counsel (IAAC) claim that he had brought in both of his previous habeas petitions. The district court denied the motion. Because Bachman cannot show the extraordinary circumstances required for relief under Rule 60(b)(6), we AFFIRM.

I.

This case has a long and complicated history. In 1995, an Ohio jury found Bachman guilty of eight sexual offenses against his daughter, including rape and sexual battery. At trial, the court allowed the prosecution to admit into evidence part of an exhibit that contained records from Children's Hospital Medical Center of Akron. But somehow, the entire exhibit, not just the approved portion, went to the jury. The exhibit included an intake and summary form signed by Sherri Roberts, a social worker who had not testified at trial. The form contained the following handwritten statement regarding Bachman's daughter: "no motivation for pt. to make-up these allegations." Bachman's counsel raised no claim regarding the exhibit on direct appeal. The Stark County Court of Appeals affirmed Bachman's conviction, and, in January 1997, the Ohio Supreme Court denied leave to appeal.

In November 1999, Bachman filed an Ohio Appellate Rule 26(B) application to reopen his direct appeal. He alleged that his appellate counsel had rendered ineffective assistance by failing to raise as error that the jury had received the exhibit containing Roberts' opinion about his daughter's credibility. The Ohio Court of Appeals denied the application, and the Ohio Supreme Court dismissed Bachman's appeal.

A.

In July 2000, Bachman filed a federal habeas petition challenging his conviction. Bachman stated three grounds for relief, including the IAAC claim he had asserted in his Ohio Rule 26(B) application. The magistrate judge who considered the petition stated that, on the merits:

> Bachman's appellate counsel provided constitutionally ineffective assistance because she failed to assert as error the admission into evidence of the opinion of a social worker as to the veracity of the victim of the alleged child abuse. Because the Supreme Court of Ohio had identified the admission of such evidence as egregious, prejudicial, and reversible error, counsel's failure to raise that argument

> on appeal constituted performance below an objective standard of reasonableness that caused Bachman prejudice.

The magistrate nonetheless recommended that the petition be dismissed as untimely because Bachman had not filed his petition within a year after his direct appeal concluded. The district court agreed that the petition should be dismissed as untimely under 28 U.S.C. § 2244(d)(1). We denied Bachman a certificate of appealability (COA) in November 2003.

In April 2004, the State filed an action recommending that Bachman be classified as a sexual predator under Ohio's Sex Offender Registration and Notification (SORN) law. After a hearing, the state court entered a judgment designating Bachman a sexual predator and attached that designation to Bachman's underlying conviction. The Ohio Court of Appeals affirmed the designation on appeal, and the Ohio Supreme Court denied leave to appeal in March 2005.

After Ohio designated him a sexual predator, Bachman filed a Rule 60(b) motion seeking relief from the judgment in the 2000 federal habeas case. He argued, first, that the 2000 petition, which had included the IAAC claim, should not have been dismissed as untimely because the one-year limitations period under § 2244(d)(1) should not have begun until the Ohio Rule 26(B) proceedings had concluded. Second, he said that he should get relief from the judgment anyway because the limitations period began anew after direct review of his sexual predator designation. The district court rejected both arguments and denied the motion for relief from judgment. Bachman appealed to this court, and we granted him a COA on the question "whether the statute of limitations restarted anew when the State of Ohio annexed the result of the sexual predator classification proceeding to Bachman's sentence." *Bachman v. Bagley*, No. 05-3054 (6th Cir. May 4, 2006) (order).

On the merits of that appeal, we held that "Bachman's designation as a sexual predator started the running of a ne[w] statute of limitations period with respect to challenges to the sexual

predator designation *only*—not with respect to his underlying conviction, such as those raised in the habeas petition at issue here." *Bachman v. Bagley*, 487 F.3d 979, 983 (6th Cir. 2007).[1] We relied on our published caselaw, which "allowed prisoners to challenge their resentencing and the rejection of a delayed direct appeal within a year of those decisions becoming final," but noted that "none of these decisions undermine[d] this court's rule that challenges to the underlying conviction and sentence must be made within one year of the conclusion of direct review of the original sentencing decision." *Id.* at 985 (citing *DiCenzi v. Rose*, 452 F.3d 465, 469 (6th Cir. 2006)).

B.

In July 2005, before we had rendered our decision in *Bagley* denying his 60(b)(6) motion for relief from the dismissal of his 2000 habeas petition, Bachman filed a second federal habeas petition. His 2005 petition alleged: (1) that his counsel had been ineffective during the sexual predator designation hearing and appeal, and (2) that SORN violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment. On October 22, 2007, while the magistrate was considering the 2005 petition, Bachman filed a motion to amend that petition; he sought to add the IAAC claim from his 2000 federal habeas petition, which had alleged his appellate counsel's ineffectiveness for failing to raise a claim regarding the trial exhibit on direct appeal. Bachman argued that he should be able to add the IAAC claim because the SORN designation amounted to a resentencing. And, in his view, the Supreme Court's decision in *Burton v. Stewart*, 549 U.S. 147

[1] We added in a footnote:

> This court does not decide whether Bachman is otherwise entitled to challenge his sexual predator designation through a petition for a writ of habeas corpus. *See Leslie v. Randle*, 296 F.3d 518, 522–23 (6th Cir. 2002) (holding that a prisoner did not satisfy the "in custody" requirement for filing a habeas petition with regard to his sexual predator designation under Ohio law).

Id. at 983 n.4.

(2007), had clarified that AEDPA's statute of limitations does not run until the conviction and sentence become final and that "an individual in custody . . . after resentencing may include not only claims related to the resentencing but also claims arising from the trial resulting in the underlying conviction." So, he reasoned, when Ohio designated him a sexual predator and attached that designation to his underlying conviction, that constituted a resentencing and resulted in a new judgment pursuant to which he was in custody. In Bachman's view, AEDPA's one-year limitations period to bring challenges to his 1995 conviction thus began anew.

The district court disagreed, denied the motion to amend, and dismissed the 2005 habeas petition for lack of jurisdiction. Relying on *Bagley*, the district court held that *Burton* did not apply to this case and that, just as it had been in 2000, Bachman's IAAC claim was time-barred. We denied Bachman a COA on October 30, 2008.

C.

On January 15, 2016, Bachman filed the 60(b)(6) motion at issue in this case. Unlike the earlier 60(b)(6) motion, this one sought relief from the judgment dismissing his 2005 habeas petition.[2] Bachman argued that new authority from the Supreme Court and this court had made clear that the district court had erred by denying his motion to amend and dismissing his 2005 habeas petition. He claimed that those decisions supported his argument that his 2004 sexual predator designation resulted in a resentencing that created a new judgment and, therefore, reset the statute of limitations and allowed him to collaterally attack his underlying conviction. He advanced three reasons why his case presented the "extraordinary circumstances" required for

[2] This is actually the second Rule 60(b)(6) motion Bachman has filed seeking relief from the district court's denial of his motion to amend and dismissal of his 2005 habeas petition. Bachman filed the first motion in 2011, relying on the Supreme Court's decision in *Magwood v. Patterson*, 561 U.S. 320 (2010). The district court denied the motion, and we denied a COA.

relief under Rule 60(b)(6): the decisional law had changed, courts had adopted his earlier arguments, and there was merit to the IAAC claim he had been attempting to assert for many years. The district court denied the Rule 60(b)(6) motion, and we granted Bachman a COA. Based on the change in decisional law and "the potential merit to Bachman's underlying [IAAC] claim," we said that "reasonable jurists could debate whether Bachman's Rule 60(b) motion should have been resolved differently."

II.

Before considering the merits of Bachman's appeal, we review briefly the relevant statutory provisions. 28 U.S.C. § 2254(a) provides that "a person in custody pursuant to the judgment of a State court" may petition "for a writ of habeas corpus" alleging that "he is in custody in violation of the Constitution or laws or treaties of the United States." Under § 2244(d)(1), a habeas petitioner has one year to apply for habeas relief, measured from the latest of several dates, including, for purposes of this case, "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). Petitioners can bring only a limited category of claims in second or successive habeas applications. If "[a] claim presented in a second or successive . . . application . . . was presented in a prior application," the court must dismiss it. 28 U.S.C. § 2244(b)(1). And any new claims in a second or successive application must either "rel[y] on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court" or rely on newly discovered facts that show the petitioner is innocent. 28 U.S.C. § 2244(b)(2).

Finally, Rule 60(b) of the Federal Rules of Civil Procedure gives the court discretion, upon a party's motion, to grant that party "relief from a final judgment . . . under a limited set of circumstances including fraud, mistake, and newly discovered evidence." *Gonzalez v. Crosby*,

545 U.S. 524, 528 (2005). The rule also contains a catchall provision that permits reopening of a judgment for "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6). A motion under Rule 60(b)(6) "must be made within a reasonable time." Fed. R. Civ. P. 60(c)(1).

III.

In this case, we are reviewing the district court's decision denying the Rule 60(b)(6) motion Bachman filed in 2016. That motion sought relief from the 2007 judgment that dismissed his 2005 habeas petition and denied his 2007 motion to amend that petition. "We review the denial of a Rule 60(b) motion for an abuse of discretion." *Miller v. Mays*, 879 F.3d 691, 698 (6th Cir. 2018). To find an abuse of discretion, we must have "a definite and firm conviction that the trial court committed a clear error of judgment." *Blue Diamond Coal Co. v. Trs. of UMWA Combined Benefit Fund*, 249 F.3d 519, 524 (6th Cir. 2001) (quoting *Davis v. Jellico Cmty. Hosp., Inc.*, 912 F.2d 129, 133 (6th Cir. 1990)). We review legal questions de novo. *Ford Motor Co. v. Mustangs Unlimited, Inc.*, 487 F.3d 465, 468 (6th Cir. 2007). "[W]e 'may affirm for any reason presented in the record.'" *Clark v. United States*, 764 F.3d 653, 660–61 (6th Cir. 2014) (quoting *Loftis v. United Parcel Serv., Inc.*, 342 F.3d 509, 514 (6th Cir. 2003)).

Rule 60(b)(6), the catchall provision, "applies only in 'exceptional or extraordinary circumstances where principles of equity mandate relief.'" *Miller*, 879 F.3d at 698 (quoting *West v. Carpenter*, 790 F.3d 693, 696–97 (6th Cir. 2015)). The Supreme Court has cautioned that "[s]uch circumstances will rarely occur in the habeas context." *Gonzalez*, 545 U.S. at 535. Deciding 60(b)(6) motions requires "a case-by-case inquiry," based on a consideration of "numerous factors, including the competing policies of the finality of judgments and the incessant command of the court's conscience that justice be done in light of all the facts." *Miller*, 879 F.3d at 698 (quotation omitted).

In this case, Bachman offers three arguments to support his claim that extraordinary circumstances justify relief: (1) the law has changed since he filed his 2005 petition, and sought to amend it in 2007, such that it is now clear that the district court should not have dismissed the challenge to his underlying conviction as untimely; (2) his IAAC claim has merit; and (3) he has diligently pursued relief in multiple proceedings.

A.

First, Bachman argues that the decisional law has changed. When the district court denied Bachman's 2007 motion to amend his 2005 habeas petition and dismissed that application, it did so, in relevant part, because it found Bachman's IAAC claim untimely. The district court relied on our published decision in *Bagley*, which had denied Bachman himself relief from an earlier judgment dismissing his 2000 petition as untimely. Because Bachman's underlying conviction became final in 1997, the district court found that he had not brought the IAAC claim in time to satisfy § 2244(d)(1)'s one-year statute of limitations. The district court rejected Bachman's argument that his 2004 designation as a sexual predator resulted in a new sentence and, therefore, a new judgment that restarted the one-year filing period under § 2244(d)(1). Bachman now argues that new caselaw shows that his designation as a sexual predator did restart the one-year filing period for bringing challenges to his underlying 1995 conviction.

We agree with Bachman that the law has changed. First, in *Burton v. Stewart*, the Supreme Court noted: "Final judgment in a criminal case means sentence. The sentence is the judgment." 549 U.S. at 156 (quoting *Berman v. United States*, 302 U.S. 211, 212 (1937)). Three years later, the Supreme Court held in *Magwood v. Patterson*, 561 U.S. 320 (2010), that Magwood's "resentencing led to a new judgment," such that his "first application challenging his new sentence under the 1986 judgment is not 'second or successive' under § 2244(b)." 561 U.S. at 331, 342.

"[B]oth § 2254(b)'s text and the relief it provides indicate that the phrase 'second or successive' must be interpreted with respect to the judgment challenged." *Id.* at 332–33.

In 2015, we answered a question that the Supreme Court had left open in *Magwood*. We held that the second or successive count restarts after resentencing even "if the new petition challenges the original, undisturbed *conviction*." *King v. Morgan*, 807 F.3d 154, 157 (6th Cir. 2015). Then, in *Crangle v. Kelly*, 838 F.3d 673 (6th Cir. 2016) (per curiam), we resolved the statute of limitations question that this case presents. Although *King* had addressed only whether a new sentence restarted the second or successive count, we held in *Crangle*:

> The interpretation of "judgment" in *Magwood* and *King* applies with equal force to § 2244(d)(1)(A) and § 2254(a). Accordingly, because "[t]he sentence is the judgment," *Burton v. Stewart*, 549 U.S. 147, 156, 127 S. Ct. 793, 166 L.Ed.2d 628 (2007) (quotation omitted), a new sentence not only permits a challenge to either the new sentence or the undisturbed conviction, but also restarts AEDPA's one-year window to challenge that judgment.

Id. at 678. We recognized, therefore, that *Magwood* and *King* had abrogated *Bagley*. *Id.*

The State argues that *Bagley* is still the law, citing our general rule that a later panel of this court cannot overrule an earlier published decision. *See Moreland v. Robinson*, 813 F.3d 315, 325 (6th Cir. 2016). That rule does not hold, however, if "an inconsistent decision of the United States Supreme Court requires modification of the decision." *Id.* (quoting *Rutherford v. Columbia Gas*, 575 F.3d 616, 619 (6th Cir. 2009)). In *Crangle*, we recognized that *Magwood*'s treatment of sentences and judgments under AEDPA was inconsistent with the approach we had articulated in *Bagley*, such that *Bagley* was no longer good law. 838 F.3d at 678. That was not improper.

But just because the law has changed, does not mean that the change applies in Bachman's case. Bachman cannot benefit from the decisions in *Magwood*, *King*, and *Crangle* without first showing that he was resentenced.

It is undisputed that an Ohio state court adjudicated Bachman a sexual predator and that the designation "attach[ed]" to his sentence for the underlying conviction. Ohio Rev. Code Ann. § 2950.09(C)(2)(c)(iii) (West 2003). It is also settled law in this court that Bachman's sexual predator designation is not custodial for purposes of AEDPA. *Leslie v. Randle*, 296 F.3d 518, 522–23 (6th Cir. 2002); *see also Hautzenroeder v. Dewine*, 887 F.3d 737, 740–41 (6th Cir. 2018) (finding that Ohio's 2007 amendment to the sexual predator designation did not alter the determination in *Leslie* that such a designation is non-custodial in the AEDPA context). On that latter basis, the district court, in denying Bachman's 60(b)(6) motion in this case, held that Bachman had not been resentenced.[3]

It is not clear, under the state procedures in this case, what happened when Ohio attached Bachman's SORN designation to his underlying sentence, i.e., whether the SORN designation became part of the original judgment or is a completely separate judgment. In addition, we have not yet decided whether a *non-custodial* change to a petitioner's sentence results in a new sentence and a new judgment under *Magwood* and *Crangle*. *See In re Stansell*, 828 F.3d 412, 419 (6th Cir. 2016) ("[W]e do not imply that *any* change to a petitioner's sentence reopens the door to successive habeas filings. . . . We need not decide what happens if a state court alters the non-custodial aspects of the petitioner's sentence . . . ."). But we need not answer those questions here, because even assuming that the attachment of the sexual predator designation to his original sentence

[3] The district court provided two additional bases for deciding that there were not extraordinary circumstances in this case: that Bachman's IAAC claim in his 2007 amended petition did not satisfy the second or successive requirements of § 2254, and that his IAAC claim was untimely. It appears that those bases were predicated on the district court's decision that the SORN designation did not result in Bachman being resentenced, even though the resentencing discussion comes after the second or successive and timeliness discussions. Because we assume in this case that Bachman was resentenced in 2004 and, therefore, that his resentencing restarted both the second or successive count and the one-year statute of limitations clock, we affirm the district court but on other grounds presented in the record. *See Clark*, 764 F.3d at 660–61.

opened the door for Bachman to attack his underlying conviction, Bachman still has not shown that the district court abused its discretion in denying him relief under Rule 60(b)(6).[4]

"It 'is well established that a change in decisional law is usually not, by itself, an "extraordinary circumstance" meriting Rule 60(b)(6) relief.'" *McGuire v. Warden, Chillicothe Corr. Inst.*, 738 F.3d 741, 750 (6th Cir. 2013) (quoting *Stokes v. Williams*, 475 F.3d 732, 735 (6th Cir. 2007)). Instead, a change in the law must typically be "coupled with some other special circumstance" in order to warrant relief under Rule 60(b)(6). *GenCorp, Inc. v. Olin Corp.*, 477 F.3d 368, 373 (6th Cir. 2007) (quoting *Blue Diamond*, 249 F.3d at 524). If this were not the rule, the interest in finality would be seriously compromised.

In *Gonzalez*, the Supreme Court denied the habeas petitioner's Rule 60(b)(6) motion which had sought the benefit of a new interpretation of AEDPA's limitations period. 545 U.S. at 536. Rejecting the argument that the new ruling sufficed to meet Rule 60(b)(6)'s demands, the Court pronounced it "hardly extraordinary that . . . after petitioner's case was no longer pending, this Court arrived at a different interpretation." *Id.* So, too, in this case. After Bachman's petition was no longer pending, the Supreme Court and this court arrived at a different interpretation of §§ 2244(d)(1) and 2254(a). That alone is not enough. Bachman must show that some other circumstances warrant granting him the extraordinary relief he seeks.

B.

Bachman argues that his case is extraordinary because his underlying IAAC claim is meritorious. *Cf. Henness v. Bagley*, 766 F.3d 550, 557–59 (6th Cir. 2014). In making this claim, Bachman relies almost exclusively on his assertion that the federal magistrate, "the only judge to

[4] That it is not clear whether the change in decisional law would apply in this case is itself a factor that weighs against finding that extraordinary circumstances mandate relief. *See GenCorp, Inc.*, 477 F.3d at 374–75.

consider Mr. Bachman's claim for habeas relief on the merits[,] found it meritorious." That statement is not quite right, however. Bachman first raised his IAAC claim in an Ohio Appellate Rule 26(B) application to reopen his direct appeal. The state appellate court denied the application, and the Ohio Supreme Court dismissed his appeal. Under our caselaw, those decisions constituted decisions on the merits. *See Hand v. Houk*, 871 F.3d 390, 415–16 (6th Cir. 2017); *Kelly v. Lazaroff*, 846 F.3d 819, 831 (6th Cir. 2017). Be that as it may, the federal magistrate judge did find Bachman's claim meritorious. The magistrate stated:

> Had appellate counsel raised as error the admission into evidence of Roberts's written statements, the [state] court of appeals would have been compelled, based on the syllabus law as set forth in [*State v. Boston*, 545 N.E.2d 1220 (Ohio 1989)] and [*State v. Moreland*, 552 N.E.2d 894 (Ohio 1990)], to find prejudicial and reversible error. Counsel's failure to make that argument did affect the outcome of the appeal and, therefore, caused Bachman prejudice.

We explore the strength of this conclusion below.

To succeed on an IAAC claim, "a petitioner must show that his appellate counsel's failure to raise a claim was objectively unreasonable and that he was prejudiced as a result." *Hand*, 871 F.3d at 416 (citing *Strickland v. Washington*, 466 U.S. 668, 690 (1984)). When, as here, a state court has adjudicated a claim on the merits, federal courts may grant state prisoners habeas relief only if the state court's adjudication was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," 28 U.S.C. § 2254(d)(1), or was "based on an unreasonable determination of the facts in light of the evidence presented in the State court," *id.* § 2254(d)(2). "This is no easy task for the habeas petitioner." *Hand*, 871 F.3d at 407.

Bachman has not shown that his IAAC claim can meet either standard. First, Bachman does not grapple at all with the deferential standard of review by which a federal court would be required to review the state's adjudication of his claim. Indeed, he did not even include the state

court's decision denying his Rule 26(B) application in the record in this case. And he makes no argument as to which prong of § 2254(d) the State's adjudication failed to satisfy or why. The magistrate judge who considered the issue appears to have relied upon § 2254(d)(1)—that the state court's adjudication was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." If that is Bachman's claim, then federal review of the state court decision would be subject to double deference, given the deferential standards of both AEDPA and *Strickland*. *See Cullen v. Pinholster*, 563 U.S. 170, 189–90 (2011).

Second, as Bachman himself acknowledges in his reply brief, under Ohio law, any error surrounding the admission of the social worker's opinion testimony would be subject to harmless-error review, which is a case-specific, fact-intensive inquiry. *See, e.g.*, *State v. Eisermann*, No. 100967, 2015 WL 758989, at *11 (Ohio Ct. App. Feb. 19, 2015); *State v. Weaver*, 898 N.E.2d 1023, 1038–39 (Ohio Ct. App. 2008). Yet Bachman does not, and the magistrate did not, discuss the other evidence presented at Bachman's trial. Without evidence of what happened at trial, which has not been provided here, we cannot conclude that Bachman has demonstrated the merit of his IAAC claim. The merits of Bachman's IAAC claim cannot, therefore, count in favor of finding the extraordinary circumstances required for relief.

C.

Finally, Bachman argues that his diligence in asserting his claim, and his prescience in making the arguments that the Supreme Court and this court eventually adopted in *Magwood*, *King*, and *Crangle*, constitute special circumstances that warrant granting him relief under Rule 60(b)(6). Bachman relies heavily on the Ninth Circuit's decision in *Phelps v. Alameida*, 569 F.3d

1120 (9th Cir. 2009), to support this argument. We, of course, are not bound by the decisions of the Ninth Circuit, but we examine *Phelps* to the extent that it has the power to persuade.

In *Phelps*, the district court dismissed the petitioner's first habeas application as untimely. Fifteen months after Phelps's appeal of that dismissal became final, the Ninth Circuit clarified the law in a way that would have made his original petition undeniably timely. Phelps filed a Rule 60(b) motion, which the district court construed as a second or successive habeas petition and dismissed. Eleven months after the appeal of that judgment became final, the Supreme Court decided *Gonzalez*, and, under *Gonzalez*, it was clear that Phelps's 60(b) motion should not have been treated as a second or successive petition. Phelps then filed another 60(b) motion. The Ninth Circuit granted Phelps relief under 60(b)(6) based on:

> the lack of clarity in the law at the time of the district court's original decision, the diligence Phelps ha[d] exhibited in seeking review of his original claim, the lack of reliance by either party on the finality of the original judgment, the short amount of time between the original judgment becoming final and the initial motion to reconsider, the close relationship between the underlying decision and the now controlling precedent that resolved the preexisting conflict in the law, and the fact that Phelps d[id] not challenge a judgment on the merits of his *habeas* petition but rather a judgment that ha[d] prevented review of those merits.

Id. at 1140.

This case has some similarities to *Phelps*. Like Phelps, Bachman presented arguments that were rejected in his case but that courts eventually adopted. Bachman also challenges a procedural decision that had prevented the district court from reviewing the merits of his IAAC claim. Bachman has also pursued relief by means of multiple avenues since his sexual predator designation in 2004, but, unlike Phelps, Bachman is asking us to grant him relief from the judgment dismissing his second federal habeas petition; a federal court would have already decided the merits of his IAAC claim had he filed his first habeas petition within the limitations period.

This case is different from *Phelps* in other important ways. First, we relied on several published cases in *Bagley* in holding that Bachman's IAAC claim in his 2000 petition was untimely. *See* 487 F.3d at 982–85. And the district court in this case relied on *Bagley*, a published and binding decision, in denying Bachman's motion to amend. When the district court decided this case, then, the timeliness issue was apparently settled. By contrast, the issue presented in *Phelps* was before three Ninth Circuit panels at the same time; two of the panels reached conclusions opposite to Phelps's panel before the Ninth Circuit ultimately published a case adopting the view that Phelps, and the other two panels of the court, had originally championed. 569 F.3d at 1136.

More importantly, in *Phelps*, the subsequent decisions showed that the dismissals in his case had been "indisputably" wrong. *Id.* at 1123. In Bachman's case, by contrast, it is not clear that the district court's decision was wrong even given the change in decisional law—it is not clear whether Bachman's underlying sentence changed when Ohio "attach[ed]" his sexual predator designation; furthermore, even if the sentence changed, it is not clear whether that non-custodial change resulted in a new sentence and a new judgment. These factors, taken together, mean that there is a stronger interest in finality in this case—as does the fact that Bachman is seeking to raise an IAAC claim that challenges an evidentiary matter in his 1995 trial. *See GenCorp*, 477 F.3d at 374–75.

Even crediting Bachman for his diligence in pursuing relief, that one factor cannot overcome the interest in finality that requires reserving Rule 60(b)(6) relief for the "extraordinary" case. *Miller*, 879 F.3d at 698 (quotation omitted). And that is all the more true given Bachman's

failure to show that his underlying IAAC claim has merit, a question the Ninth Circuit seemed not to consider in *Phelps*.[5]

This case is similar to *Wright v. Warden, Riverbend Maximum Security Institution.*, 793 F.3d 670 (6th Cir. 2015) (per curiam). In that case, Wright filed a 60(b)(6) motion, seeking to assert a procedurally defaulted ineffective assistance claim twenty-five years after the Tennessee Supreme Court had affirmed his conviction and six years after a federal court had denied his habeas petition. His motion was based on the Supreme Court's decisions in *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013). We said that Wright was diligent in pursuing relief from the judgment, but we explained that his claim was weak given the deferential standard for habeas review of state court decisions. On the whole, therefore, we said that "equity weigh[ed] against reopening Wright's case." *Id.* at 673.

Here, Bachman is seeking to assert a procedurally defaulted IAAC claim in his second-in-time habeas application based on *Magwood*, *King*, and *Crangle*.[6] He filed this 60(b)(6) motion in

[5] The Ninth Circuit did not discuss the merits of Phelps' underlying claim. It is not clear whether the parties there made any arguments regarding the merits in their briefing. Bachman, however, has specifically pointed to the purported merits of his IAAC claim as a reason supporting his claim of extraordinary circumstances justifying relief. And, although we have rejected the argument that "we must, as a matter of course, consider the merits" of a Rule 60(b)(6) petitioner's claim, *Miller*, 879 F.3d at 702, we have often considered the merits as part of Rule 60(b)(6) balancing. See *id.* at 702–06 (concluding that petitioner had not "presented such a clear case of ineffective assistance that it overcomes the other relevant equitable factors weighing against Rule 60(b)(6) relief"); *Wright v. Warden, Riverbend Maximum Sec. Inst.*, 793 F.3d 670, 673 (6th Cir. 2015) (per curiam) (noting that the weakness of the underlying ineffective assistance claim was an "important" factor weighing against granting relief); *see also Henness*, 766 F.3d at 557–59 (explaining that petitioner's underlying claim did not satisfy *Strickland* and, therefore, did not show that extraordinary circumstances mandated relief); *Cox v. Horn*, 757 F.3d 113, 124–25 (3d Cir. 2014) ("A court need not provide a remedy under 60(b)(6) for claims of dubious merit that only weakly establish ineffective assistance . . . .").

[6] It is worth noting again that the only reason Bachman needs to rely on a change in decisional law and to argue that he was resentenced is because he failed to timely file his first habeas petition, which asserted the same IAAC claim, under § 2244(d)(1).

January 2016, nineteen years after his state conviction became final and over seven years after the district court's judgment denying the motion to amend and dismissing the habeas petition became final. And, although a magistrate judge once said that Bachman's IAAC claim had merit, as discussed above, Bachman has not shown that it does, especially in light of the deference a federal court would be required to show the state court's decision denying the claim. Bachman's diligence and his reliance upon *Phelps* do not persuade us that extraordinary circumstances mandate relief in this case. *See Wright*, 793 F.3d at 673; *see also Miller*, 879 F.3d at 698.

* * *

Although the law has changed, Bachman has not shown that extraordinary circumstances justify relief from the district court's judgment. Because the district court also found a lack of extraordinary circumstances, we AFFIRM its judgment, although for different reasons.