

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION**

ROBERT W. KELLEY,)	
)	
Petitioner,)	
)	
v.)	Case No. 4:19-cv-0194-KOB-HNJ
)	
DEWAYNE ESTES, Warden, et al.,)	
)	
Respondents.)	

MEMORANDUM OPINION

This action proceeds as a petition for a writ of *habeas corpus* filed pursuant to 28 U.S.C. § 2254 by Robert W. Kelley, a prisoner proceeding *pro se*. On February 14, 2019, the magistrate judge entered a report recommending the petition be denied as time barred and/or unexhausted. (Doc. 4). The petitioner filed objections to the report and recommendation on February 26, 2019. (Doc. 5).

Relying on *Martinez v. Ryan*, 566 U.S. 1 (2012), the petitioner argues equitable relief is available to a petitioner to excuse a procedural default where the default is the result of having ineffective post-conviction counsel, or no post-conviction counsel, to assist him. He contends that “*Martinez* allows him to present his claims before Hon. Court” due to the absence of “post-conviction

counsel to help assist him in properly presenting & arguing his claims of Ineffective Assistance of trial counsel before the state court.” (Doc. 5 at 1-2).

The petitioner’s reliance on *Martinez* is misplaced. The *Martinez* decision limited its reach to state law regimes mandating that claims of ineffective assistance of counsel must be raised in an initial-review collateral proceeding. 566 U. S. at 17. In *Martinez*, Arizona law did not allow ineffective assistance of counsel claims on direct appeal; rather, Arizona required filing of such claims in state collateral proceedings. (*Id.* at 6). Under such circumstances, “this makes the initial-review collateral proceeding a prisoner’s ‘one and only appeal’ as to an ineffective-assistance claim,” and therefore this process “may justify an exception to the constitutional rule that there is no right to counsel in collateral proceedings.” (*Id.* at 8-9) (*quoting Coleman v. Thompson*, 501 U. S. at 755-76 (1991)).

The *Martinez* court explained:

By deliberately choosing to move trial-ineffectiveness claims outside of the direct-appeal process, where counsel is constitutionally guaranteed, the State significantly diminishes prisoners’ ability to file such claims. It is *within the context of this state procedural framework* that counsel’s ineffectiveness in an initial-review collateral proceeding qualifies as cause for a procedural default.

566 U. S. at 13 (emphasis added).

But the State of Alabama does not employ the “procedural framework” adopted by Arizona, so *Martinez* does not apply to the petitioner’s claims here. Alabama allows litigants to advance ineffective assistance of counsel claims on

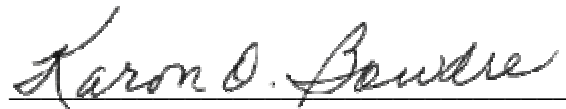
direct appeal when they have counsel. *See Williams v. State*, 2017 WL 3976601 at *3 (11th Cir. 2017) (“Alabama does not bar a prisoner from raising [a claim of ineffective assistance of trial counsel] on direct appeal.... Instead, ‘any claim that counsel was ineffective must be raised as soon as practicable, either at trial, *on direct appeal*, or in the first Rule 32 petition, whichever is applicable’”) (*quoting* Ala. R. Crim. P. 32.2(d)) (emphasis added). Therefore, the petitioner cannot assert a post-conviction ineffective assistance claim to excuse time-barred and unexhausted claims.

Accordingly, after careful consideration of the record in this case, including the magistrate judge’s report and the petitioner’s objections, the court hereby **ADOPTS** the report of the magistrate judge and **ACCEPTS** his recommendations. In accordance with the recommendation, the court finds that the petition in this matter is due to be denied as time-barred and/or unexhausted, and this matter is due to be dismissed.

The court will enter a separate Final Order.

The Clerk is **DIRECTED** to serve a copy of this memorandum opinion, and the accompanying Final Judgment, on the petitioner.

DONE and ORDERED this 19th day of August, 2019.

Handwritten signature of Karon O. Bowdre in black ink, written in a cursive style.

KARON OWEN BOWDRE
CHIEF UNITED STATES DISTRICT JUDGE