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6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE DISTRICT OF ARIZONA

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9 Lamar Simmons,

No. CV-12-01148-PHX-FJM

10 Petitioner,

**ORDER**

11 vs.

12 Janice K. Brewer, et al.,

13 Respondents.

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17 The court has before it petitioner’s second amended petition for writ of habeas corpus  
18 pursuant to 28 U.S.C. § 2254 (doc. 10), respondent’s response (doc. 17), and petitioner’s  
19 reply (doc. 27), the report and recommendation of the United States Magistrate Judge (doc.  
20 33) and petitioner’s objections (doc. 35). We also have before us petitioner’s motion to stay  
21 or in the alternative to dismiss without prejudice (doc. 34).

22 Petitioner pled guilty to two counts of burglary, two counts of sexual assault, and one  
23 count of aggravated assault. He was sentenced to a term of 21 years imprisonment for each  
24 burglary count, a concurrent term of 15 years for the aggravated assault count, and a term of  
25 21 years for each sexual assault count, both consecutive to the sentences imposed for the  
26 burglary counts. Petitioner contends that the sentence was a result of ineffective assistance  
27 of counsel and violates his constitutional rights.

28 Petitioner filed a notice of post-conviction relief (“PCR”) on December 2, 1993, but

1 he did not file a petition. The notice was dismissed on July 21, 1994. On February 13, 2009,  
2 petitioner filed a second notice of PCR, and a petition for PCR on May 20, 2009. The court  
3 denied the PCR petition as untimely.

4 Petitioner filed a third notice and petition for post-conviction relief on January 11,  
5 2011, which was also dismissed as untimely. He filed the present petition for writ of habeas  
6 corpus on May 30, 2012.

7 The Magistrate Judge found that the one-year statute of limitations established by the  
8 Antiterrorism and Effective Death Penalty Act (“AEDPA”), 28 U.S.C. § 2244, ran on April  
9 24, 1997. Because petitioner did not file his petition for writ of habeas corpus until 15 years  
10 after the limitations period expired, the Magistrate Judge concluded that the petition is  
11 untimely and barred by the statute of limitations. Accordingly, the Magistrate Judge  
12 recommends that the petition be denied and dismissed with prejudice.

13 Petitioner’s only objection to the report and recommendation is the same argument  
14 presented in his motion to stay or in the alternative to dismiss without prejudice (doc. 34).  
15 He argues that he filed a new notice of post-conviction relief in state court on September 19,  
16 2013, based on new federal case law, Martinez v. Ryan, 132 S. Ct. 1309 (2012), and he asks  
17 that the instant petition be stayed or dismissed without prejudice pending the state court’s  
18 ruling.

19 Martinez held that inadequate assistance of counsel at an initial-review collateral  
20 proceeding may establish cause for a prisoner’s procedural default of a claim of ineffective  
21 assistance at trial. Id. at 1320. This exception may apply if “there was no counsel [in the  
22 initial-review collateral] or counsel in that proceeding was ineffective.” Id. Petitioner’s  
23 reliance on Martinez is misplaced. First, petitioner asked to represent himself at the initial-  
24 review proceeding. See doc. 17-1 at 20. Moreover, Martinez applies to excuse a procedural  
25 default. It does not address equitable tolling of the AEDPA statute of limitations. Because  
26 Martinez does not apply in this case, the motion to stay or dismiss without prejudice is denied  
27 (doc. 34).

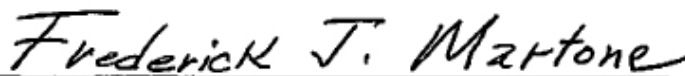
28 Pursuant to Rule 8(b), Rules Governing § 2254 Cases, we accept the recommended

1 decision of the United States Magistrate Judge. Therefore, **IT IS ORDERED DENYING**  
2 **AND DISMISSING** with prejudice the second amended petition for writ of habeas corpus  
3 (doc. 10).

4 **IT IS FURTHER ORDERED DENYING** petitioner's motion to stay or alternatively  
5 dismiss without prejudice (doc. 34).

6 **IT IS FURTHER ORDERED DENYING** a certificate of appealability and leave  
7 to proceed *in forma pauperis* on appeal because dismissal of the habeas petition is required  
8 by the expiration of the statute of limitations and jurists of reason would not find the ruling  
9 debatable.

10 DATED this 9<sup>th</sup> day of October, 2013.

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13 **Frederick J. Martone**  
14 **Senior United States District Judge**