

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RODRIQUEZ ARSENIO BETTY,
670246,

Petitioner,

v.

KENNETH MCKEE,

Respondent.

Case No. 11-cv-10451

HONORABLE STEPHEN J. MURPHY, III

**OPINION AND ORDER DENYING MOTION FOR EQUITABLE
TOLLING (docket no. 1) AND DISMISSING ACTION WITHOUT PREJUDICE**

Before the Court is Rodriguez Arsenio Betty's Motion for Equitable Tolling to Allow Petitioner's Pro Se Petition for Writ of Habeas Corpus to Proceed Timely, and brief in support. Betty, however, never filed a petition for a writ of habeas corpus. He also never paid the filing fee or submitted an application to proceed *in forma pauperis*. See 28 U.S.C. § 1914(a); 28 U.S.C. § 1915; Rule 3 of the Rules Governing § 2254 Cases. The Court, therefore, issued an Order to Correct Deficiency on February 9, 2011, requiring Betty to submit his petition and either pay the filing fee or submit a completed application to proceed *in forma pauperis*. The order provided that if Betty did not do so within 21 days, his case would be dismissed.

The time for complying with the Court's order has passed and Betty has failed to correct the deficiency. Accordingly, the Court will deny the motion and dismiss the action without prejudice. The matter is closed. Betty may submit a petition along with the \$5 filing fee or an application to proceed *in forma pauperis* if he wishes.

Before Betty may appeal this decision, a certificate of appealability must issue. See 28 U.S.C. § 2253(c)(1)(a); Fed. R. App. P. 22(b). A certificate of appealability may issue

“only if the applicant has made a substantial showing of the denial of a constitutional right.”
28 U.S.C. § 2253(c)(2). When a court denies a habeas petition on procedural grounds without addressing the merits, a certificate of appealability should issue if it is shown that jurists of reason would find it debatable whether the petitioner states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *See Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000). Reasonable jurists could not debate the correctness of the Court’s procedural ruling. Accordingly, the Court will not issue a certificate of appealability.

WHEREFORE, is it hereby **ORDERED** that petitioner’s motion for equitable tolling (docket no. 1) is **DENIED**.

IT IS FURTHER ORDERED that this action is **DISMISSED WITHOUT PREJUDICE**.

IT IS FURTHER ORDERED that the Court **DECLINES** to issue a certificate of appealability.

SO ORDERED.

s/Stephen J. Murphy, III
STEPHEN J. MURPHY, III
United States District Judge

Dated: March 8, 2011

I hereby certify that a copy of the foregoing document was served upon the parties and/or counsel of record on March 8, 2011, by electronic and/or ordinary mail.

s/Carol Cohron
Case Manager