

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 14-12100-RGS

DANA DUDLEY

v.

KELLY RYAN

ORDER ON REPORT AND RECOMMENDATION
OF THE MAGISTRATE JUDGE

December 1, 2014

STEARNS, D.J.

I agree with Magistrate Judge Kelley's Report and her conclusion that the state trial court's refusal to give an instruction on larceny from the person as a lesser included offense of unarmed robbery did not violate petitioner's due process rights (or any other right guaranteed by Federal law). *See Niziolek v. Ashe*, 694 F.2d 282, 290 (1st Cir. 1982). Given the presentation of the facts at trial, the judge offered the only two options on which a rational jury could have made a finding of guilt -- armed robbery or, as it found, unarmed robbery. The Recommendation of the Magistrate

Judge is ADOPTED and the petition is DISMISSED with prejudice. The Clerk will enter judgment for the Respondent and close the case.¹

SO ORDERED.

/s/ Richard G. Stearns

UNITED STATES DISTRICT JUDGE

¹ Petitioner is advised that any request for the issuance of a Certificate of Appealability pursuant to 28 U.S.C. § 2253 of the court's Order dismissing his petition is also DENIED, the court seeing no meritorious or substantial basis supporting an appeal.