

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

-----x
ERIC DEBERRY,

Petitioner,

- against -

**ELLIOT SPITZER, New York State Attorney
General, and DALE ARTIS, Superintendent,**

Respondent.

-----x
GERSHON, United States District Judge:

Having reviewed the objections to Magistrate Judge Levy's Report & Recommendation dated February 17, 2011, I adopt the Report in its entirety and deny the petition for a writ of habeas corpus.

As Judge Levy describes, petitioner's Sixth Amendment right to present a defense was not violated where the witness, Mr. Velasquez, was known to defense counsel, who chose not to call him for tactical reasons. Treating the claim as a challenge to the trial court's ruling on the state motion to vacate the conviction, I agree with Judge Levy's analysis at footnote 3 of his Report & Recommendation. The objections to the other portions of the R&R are also without merit.

Because petitioner has not made a substantial showing of the denial of a constitutional right, a certificate of appealability will not issue. 28 U.S.C. § 2253. The Clerk of Court is directed to enter judgment for respondent.

SO ORDERED.

s/NG

NINA GERSHON

United States District Judge

Dated: May 17, 2012
Brooklyn, New York

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.
★ MAY 21 2012 ★
BROOKLYN OFFICE

ORDER

05 CV 5286 (NG)(RML)