

**DISTRICT COURT OF THE VIRGIN ISLANDS**

**DIVISION OF ST. CROIX**

**KALIF FLANDERS,**

**Petitioner,**

**v.**

**UNITED STATES OF AMERICA**

**Respondent.**

**1:11-cr-00004-2**

**TO: Kalif Flanders, 08217-094, *Pro se*  
USP Beaumont  
U.S. Penitentiary  
P.O. Box 26030  
Beaumont, TX 77720**

**REPORT AND RECOMMENDATION**

THIS MATTER came before the Court on the Order (ECF No. 236) of Chief Judge Wilma A. Lewis in Criminal No. 11-00004 referring Kalif Flanders' *pro se* Motion under 28 U.S.C. § 2255<sup>1</sup> to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (ECF No. 225) to the undersigned for a report and recommendation.

**I. Relevant Procedural History**

One year after Luis Orlando Encarnacion was killed in the field behind the Evelyn Williams Elementary School, Gillian Harper and Kalif Flanders were charged with his murder. Found guilty by a jury, the co-defendants were sentenced on several counts including murder in the first degree for which they were sentenced to life without parole.<sup>2</sup>

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<sup>1</sup> Citations to the United States Code and Virgin Islands Code are to the electronic versions that appear in Lexis.

<sup>2</sup> Harper and Flanders were sentenced to:

*Flanders v. United States*  
 1:11-cr-00004-2  
 Report and Recommendation  
 Page 2

Harper and Flanders timely appealed and the Third Circuit affirmed the judgments and convictions. *United States v. Flanders*, 635 Fed. Appx. 74 (3d Cir. 2016). Kalif Flanders (Flanders) did not apply for writ of certiorari to the Supreme Court.<sup>3</sup> On February 9, 2017, he timely filed the instant motion.

## II. Legal Standards

"Motions pursuant to 28 U.S.C. § 2255 are the presumptive means by which federal prisoners can challenge their convictions or sentences that are allegedly in violation of the Constitution." *Okereke v. United States*, 307 F.3d 117, 120 (3d Cir. 2002) (citing *Davis v. United States*, 417 U.S. 333, 343 (1974)).

Before ordering an answer, the court must review a § 2255 motion and "dismiss the motion" if it "plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief." U.S.C. Sec. 2255 Proc R 4.

A petitioner properly raises ineffective assistance of counsel arguments under § 2255 rather than on direct appeal. *See, e.g., Massaro v. United States*, 538 U.S. 500, 504 (2003) (explaining it is "preferable" that such claims be considered on collateral review

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|                                                                                                                |         |                              |                                           |                   |
|----------------------------------------------------------------------------------------------------------------|---------|------------------------------|-------------------------------------------|-------------------|
| Count 7                                                                                                        | Federal | 18 U.S.C. 924( c)(1)(A)(iii) | Poss. of Firearm During Crime of Violence | 10 years          |
| Count 3                                                                                                        | Federal | 18 U.S.C. 922(q)             | Possession of Firearm in School Zone      | 5 years           |
| Count 4                                                                                                        | Local   | 14 V.I.C. 2253(a)            | Unauthorized Firearm Possession           | 15 years          |
| Count 5                                                                                                        | Local   | 14 V.I.C. 922(a)(1); 923(a)  | Murder in the First Degree                | Life w/out Parole |
| Count 6                                                                                                        | Local   | 14 V.I.C. 297(2)             | Assault in the Third Degree               | Stay              |
| All terms to be served consecutive to each other. The federal sentences to be served first, in federal prison. |         |                              |                                           |                   |
| Amended Judgment (ECF No. 212) entered May 5, 2015 and <i>Flanders</i> , 635 Fed. Appx. 74 at *8.              |         |                              |                                           |                   |

<sup>3</sup> Gillian Harper's petition for rehearing was denied. *Harper v. United States*, 2016 U.S. LEXIS 7279 (December 5, 2016).

*Flanders v. United States*  
1:11-cr-00004-2  
Report and Recommendation  
Page 3

where the record for such claims may be properly developed); *accord United States v. Garcia*, 516 F. App'x 149, 151 (3d Cir. 2013) ("It is well-settled that this Court ordinarily does not review claims of ineffective assistance of counsel on direct appeal.") (citing *United States v. Thornton*, 327 F.3d 268, 271 (3d Cir. 2003)).

*Pro se* pleadings are construed liberally and must be held to "less stringent standards than formal pleadings drafted by lawyers." *Haines v. Kerner*, 404 U.S. 519, 520 (1972). Nonetheless, "pro se litigants still must allege sufficient facts in their complaints to support a claim." *Mala v. Crown Bay Marina, Inc.*, 704 F.3d 239, 245 (3d Cir. 2013).

### **III. Discussion**

Flanders' § 2255 claims are nearly identical to the claims raised in his Rule 29 and Rule 33 motions and on appeal. Here, the claims are cloaked in ineffective assistance of counsel language. The Court will therefore examine each claim to ascertain whether counsel's performance was deficient, if Flanders was prejudiced by counsel's deficient performance, or both. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).<sup>4</sup>

#### **A. Failure to raise double jeopardy claim on appeal**

Flanders claims that his attorney failed to argue that double jeopardy resulted when the sentences in Counts Three, Four, and Seven were ordered to run consecutively to each other. The record shows that Flanders' attorney did not make this argument on appeal.

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<sup>4</sup> A court has discretion to dispose of a claim at either prong, as there is no required order to the *Strickland* inquiry. *Strickland*, 466 U.S. at 697 (explaining a court need not "determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies" or "address both components of the inquiry if the defendant makes an insufficient showing on one").

*Flanders v. United States*  
1:11-cr-00004-2  
Report and Recommendation  
Page 4

However, Harper's attorney argued that the sentences imposed were excessive and, in their opinion, the Third Circuit addressed the issue that Flanders' § 2255 motion raises:

Harper's sentences for possession of a firearm within a school zone [Count Three] and use of a firearm during a crime of violence [Count Seven] for which federal prosecution was possible *are required by statute to run consecutively with any other sentence*.<sup>5</sup> The District Court then determined that the record in this case called for a stiff sentence, and ordered the remaining sentences to run consecutively in order to reflect the seriousness of the crime, promote respect for the law, provide just punishment, and deter from further criminal conduct. Such reasoning evinces careful consideration, not abuse of discretion. Therefore, we uphold Harper's judgment of sentence.

*Flanders*, 635 Fed. Appx. 74 at \*9 (emphasis added).

*United States v. Hodge*, 870 F.3d 184 (3d Cir. 2017), further addresses Flanders' claim. In *Hodge*, the Court applied the *Blockburger*<sup>6</sup> test to 18 U.S.C. § 924(c) and 14 V.I.C. § 2253(a) and found "that there was no double jeopardy when Hodge was convicted of both the federal 18 U.S.C. § 924(c) count and the territorial 14 V.I.C. § 2253(a) count based on the same predicate offenses." *Hodge*, 870 F.3d at 195-196. According to *Hodge*, § 924(c) and § 2253(a) are not multiplicitous because § 924(c) requires a jury to find that the firearm was real and does not require that the firearm be unauthorized and a conviction under § 2253(a) may be found whether the weapon is real or an imitation and requires that the firearm be unauthorized. *Id.* at 195.<sup>7</sup> See also *United States v. Berrios*, 676 F.3d 118, 138-144 (3d Cir. April 10, 2012) (quoting *Missouri v. Hunter*, 459 U.S. 359, 366, (1983) "With respect

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<sup>5</sup> 18 U.S.C. § 924(a)(4); 18 U.S.C. § 924(c)(1)(D)(ii).

<sup>6</sup> *Blockburger v. United States*, 284 U.S. 299 (1932).

<sup>7</sup> Relief was granted in *Hodge* because the court found that on the facts of that particular case, charging the defendant with three separate counts under § 2253(a) was inappropriate. *Hodge*, 870 F.3d at 198-99.

*Flanders v. United States*  
1:11-cr-00004-2  
Report and Recommendation  
Page 5

to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.”).

To succeed on an ineffective assistance of trial counsel claim a movant must show both that 1.) counsel's representation was deficient and that 2.) the deficient performance “prejudiced the defense.” *Strickland*, 466 U.S. at 687. The Appellate Court decision and relevant case law show that Flanders would not have prevailed on the argument that his sentence triggers double jeopardy. Accordingly, Flanders was not prejudiced by counsel’s performance and is not entitled to relief due to ineffective assistance of counsel.

**B. *Rosemond v. United States***

Citing *Rosemond v. United States*, 134 S. Ct. 1240 (2014), Flanders argues that the jury was incorrectly charged because they were not instructed to find that he knew in advance that his co-defendant would be armed, that his counsel failed to cite *Rosemond* in his appeal, and that in light of *Rosemond* there was insufficient evidence to convict him.

Flanders and Harper were charged that “while aided and abetted by each other,” they knowingly used a firearm during the commission of a crime of violence.<sup>8</sup> Flanders argues that he did not know Harper was carrying a gun.<sup>9</sup> And, therefore, he is actually innocent of the § 924(c) charge because he did not have advance knowledge that a gun

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<sup>8</sup> Grand Jury Indictment (ECF No. 1) filed March 15, 2011.

<sup>9</sup> Flanders’ § 2255 motion includes an affidavit in which Harper purportedly admits the same. The affidavit is not sworn and is therefore not considered in the Court’s discussion.

*Flanders v. United States*  
 1:11-cr-00004-2  
 Report and Recommendation  
 Page 6

would be used in the crime. *Rosemond* informs the Court that “the Government makes its [§ 924(c)] case by proving that the defendant actively participated in the underlying drug trafficking or violent crime with advance knowledge that a confederate would use or carry a gun during the crime’s commission.” *Rosemond*, 134 S. Ct. 1240, 1243. Jury instructions must “require that the defendant knew in advance that one of his cohorts would be armed. . . [meaning] knowledge at a time the accomplice can do something with it—most notably, opt to walk away.” *Id.* at 1250.

The Harper-Flanders trial was held July 26 through August 8, 2011. *Rosemond* was decided on March 5, 2014. The Supreme Court has not overtly stated, and the circuits are not aligned on whether *Rosemond* is retroactively applicable.<sup>10</sup> Here, the Court will follow *Spataro* and consider whether the record supports Flanders’ claim of innocence. *Spataro v. Warden Fort DIX FCI*, 684 Fed. Appx. 117, 120 (3d Cir. 2017) (“even assuming that the trial court’s instructions violated *Rosemond*, when a petitioner claims he is incarcerated based on conduct that subsequently has been rendered non-criminal, we must consider whether the record supports his claim of innocence”) (citing *United States v. Tyler*, 732 F.3d 241, 247 (3d Cir. 2013)). Accordingly, the Court must determine “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *United States v.*

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<sup>10</sup> See, e.g., *Pagan v. United States*, 2015 U.S. App. LEXIS 23052 (2d Cir. 2015) (denying § 2255 motion as untimely because “even if *Rosemond* were construed as setting out a new rule of constitutional law, there is no indication that the Supreme Court intended any such rule to apply retroactively to cases on collateral review”) (citations omitted).

*Flanders v. United States*  
1:11-cr-00004-2  
Report and Recommendation  
Page 7

*Caraballo-Rodriguez*, 2013 U.S. App. LEXIS 16407 at \*16-17 (3d Cir. 2013) (quoting *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)). In this case, the Court must decide whether any rational trier of fact could find that Flanders had *advance knowledge* that Harper would use or carry a gun during the crime.

In his Rule 29 motion and on appeal Flanders argued that there was insufficient evidence to convict him as principal or accomplice. *United States v. Harper*, 2014 U.S. Dist. LEXIS 101495 at \*17-19 (D.V.I. July 25, 2014); *Flanders*, 635 Fed. Appx. at 76. Respectively, the courts found:

Because there was evidence presented that Harper was armed, and further evidence that Harper was communicating with Flanders before and after the altercation, a jury could conclude that Flanders facilitated, abetted and/or encouraged carrying and usage of the firearm and related charges. The evidence presented at trial could thus support the theory that Flanders and Harper acted in concert, and that Flanders counseled and/or abetted Harper in the commission of the offenses charged.

*Harper*, 2014 U.S. Dist. LEXIS 101495 at \*21.

[B]ecause there is evidence that Harper was armed, and evidence that Flanders and Harper were in communication earlier that morning, a jury could reasonably conclude Flanders was aware that Harper was armed and Flanders assisted or encouraged Harper's commission of the charged offenses.

*Flanders*, 635 Fed. Appx. at 77.

Third Circuit review of sufficiency of the evidence is “highly deferential.” *United States v. Caraballo-Rodriguez*, 726 F.3d 418, 430 (3d Cir. 2013). “We do not weigh evidence or determine the credibility of witnesses in making this determination.” *United States v. Gambone*, 314 F.3d 163, 170 (3d Cir. 2003) (citation omitted). Rather, “we examine the

*Flanders v. United States*  
1:11-cr-00004-2  
Report and Recommendation  
Page 8

totality of the evidence, both direct and circumstantial and credit all available inferences in favor of the government." *United States v. Wrensford*, 866 F.3d 76, 92 (3d Cir. 2017) (citation and internal quotation marks omitted).

Evidence presented to the jury that Flanders knew or could have known *in advance* that Harper would be armed included witness testimony that Flanders went to the Encarnacion home the morning of May 13 looking for Luis Orlando and the two men left together, that they observed Flanders speaking on his phone shortly before he left with Luis Orlando, that mobile phone records showed that someone was speaking on a phone number associated with Flanders to someone on a phone number associated with Harper shortly before the murder, and that Flanders helped carry Luis Orlando from the field to the bush moments before Luis Orlando was shot. Direct examination of Jacqueline Lao (Luis Orlando's girlfriend) by Attorney Andrews:

Q. Was there a time that you, in the morning, went to the door to your house?

A. Yes.

Q. Why did you go to the door?

A. Someone was knocking.

Q. When you went to the door, what happened?

A. Someone was looking for him.

Q. When you say him, him who?

A. A friend.

Q. Who was the person looking for?

A. Orlando.

Trial Transcript, July 26, 2011, p. 111. Cross examination by Attorney Henderson:

Q. What time did this person [identified as Flanders] knock on your door?

A. It was about seven something. I'm not sure.

*Flanders v. United States*

1:11-cr-00004-2

Report and Recommendation

Page 9

Trial Transcript, July 26, 2011, p. 111. Direct examination of Migdalia Encarnacion (Luis

Orlando's mother) by Attorney Andrews:

Q. Okay. All right. Now, the last day you said you saw him [Luis Orlando], which is May 13th?

A. Um-hum.

Q. Can you tell us where he was when you saw him?

A. He was inside the house, getting dressed.

Q. I see. And what was he doing before he was getting dressed, if you know?

A. He were looking for clothes to put on to leave.

Q. Do you know why he was looking for clothes to leave?

A. No.

Q. Okay. Where were you when he was doing that?

A. I was by the kitchen standing.

Q. What were you doing standing by the kitchen?

A. I was coming from my room.

Q. Okay.

A. Getting ready to go work. And I was coming to the living room when I stopped by the kitchen, because I were going to go outside by the porch to look for my working shirt. And at the time when I there, I stopped because I see a guy. I see a guy outside waiting for him. And I didn't --

Q. When you say waiting for him, waiting for whom?

A. Waiting for my son.

....

Q. Okay. And do you remember what time of day this was when you saw the guy outside?

A. It was earlier, like seven something in the morning.

....

Q. The person that was outside, what was that person doing, if anything?

A. He was standing. He was leaning by my Explorer, my Explorer car I have in the driveway.

Q. Okay.

A. And he was leaning on it, and he was on the phone at the time.

....

Q. I see. All right, so, tell us again, the person was doing what next to the Explorer?

A. He was leaning on it, in the front of it.

Q. Did you see him do anything else?

A. He was in the phone.

Q. He was?

*Flanders v. United States*

1:11-cr-00004-2

Report and Recommendation

Page 10

A. In the phone.

Q. What do you mean by that?

A. He was talking in the phone to somebody.

....

Q. And had you ever seen that person before?

A. No.

Q. Okay. And you think if you saw him again, you could recognize that person?

A. Yes.

Q. Okay. I'm going to ask you if you could look around the courtroom, take your time, and tell me if you see the person that came by your house?

A. Yes.

Q. Do you see him?

A. Yes.

Q. Can you point him out and tell us what he's wearing?

A. He's over there with a blue shirt, with the low haircut.

....

MR. ANDREWS: Judge, I'll ask that the record reflect the identification of defendant Kalif Flanders.

Trial Transcript, July 27, 2011, pp. 76-82. The witness's testimony continues and establishes that she saw Kalif Flanders in front of her house speaking on the phone for five to ten minutes beginning at approximately 7:10 or 7:15 the morning of May 13, 2010. Shortly thereafter, Ms. Encarnacion testified, her son Luis Orlando left with Flanders.

Testimony from an AT&T representative showed that during a similar timeline, calls were exchanged between a phone attributed to Flanders and a phone attributed to Harper.

Direct examination by Attorney Andrews:

Q. . . . let's go to the 7:01 call, a.m., what is the duration of that call?

A. That's basically eight seconds.

Q. And the 7:16, how long was that call?

A. That was four seconds.

....

Q. Okay. Tell us what's happening at the 7:16 a.m. with respect to this phone number here?

*Flanders v. United States*

1:11-cr-00004-2

Report and Recommendation

Page 11

A. 7:16, basically it doesn't have any lapse time on that.

Q. Okay. With respect to these two numbers, what does that tell us?

....

A. 8882 [Flanders] made a call to 9484 [Harper].

Q. And, um-hum?

A. And basically in the same 7:16, the 9484 called back.

Q. Called back, okay.

....

Q. All right. You were saying that this second one was a call back from the 9484 number?

A. That's correct.

Q. How long was that call?

A. Fifteen seconds.

Q. All right. And what's happening here at 7:20, as far as these two phone numbers?

A. Basically the 9484 call the 8882.

Q. How long was the call?

A. That was for two hours and twenty seven minutes.

Q. Is that two hours or two minutes?

A. No, that's two minutes. Two minutes and twenty seven seconds, I should say.

Q. And that's happening on 7:20 on May 13?

A. That's correct.

Q. Five minutes later, what's happening here with this call?

A. Basically, the 8882 called back the 9484.

Q. And the call is for how long?

A. Nine seconds.

Q. And the 7:26?

A. Basically the 8882 called another number, 514-1465.<sup>11</sup>

Q. And elapse time?

A. Nineteen seconds.

Q. Let's go to 7:27, what's happening here?

A. 514-1465 is trying to call the 642-8882.

Q. Did it connect?

A. No.

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<sup>11</sup> This information supported testimony that Luis Orlando phoned a relative from Flanders' phone minutes before he was murdered. "Who is 514-1465? That's the number that Rakeem Hendrickson told you was his phone call, and that 7:26 call is the call between himself and the victim." Trial Transcript, August 3, 2011, p. 132.

*Flanders v. United States*  
1:11-cr-00004-2  
Report and Recommendation  
Page 12

Trial Transcript, August 1, 2011, pp. 118-121. At 7:36 that morning, a 911 call was made from the school grounds reporting that a shot had been fired. Trial Transcript, July 29, 2011, p. 39.

Fourth-grader Devante Petersen testified that a man matching Flanders' description<sup>12</sup> not only beat Luis Orlando, he helped Harper carry him into the bush, and that almost immediately thereafter, he heard a gunshot. Direct examination by Attorney Baptiste:

Q. . . .Okay. Now, as this fight was taking place, after the fight took place, what else did you observe?

A. I heard, they took him into the bushes, and then I heard a gunshot.

Q. Okay. Now, did you see them take this individual to the bush?

A. Yes.

Q. Now, you said that there were two people beating up the third person. Could you describe the other person they were beating up?

A. I think it was clear skin, he was clear skin.

Q. Okay.

A. Had on a blue shirt, jeans pants, long jeans pants. I think sneakers.

Trial Transcript, July 27, 2011, p. 154.

The evidence of the communication that Flanders had with Harper prior to Luis Orlando's murder combined with his behavior during and after the crime—helping carry Luis Orlando into the bush, being transported home with Harper (who, the witness said,

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<sup>12</sup> Throughout the trial, the individual seen with Luis Orlando, from meeting him at his home to dragging him into the bush, is consistently described as a man wearing a dark shirt and a black cap. *See, e.g.*, “do you remember how those guys looked, what was the description of how those guys looked? One I thought had braids, and one, I assume had hair like mine. . . . Like, it could have been like a hat, or hair like mine. . . . Why you say that? It was black.” Trial Transcript, July 27, 2011, p. 152. *See also* Trial Transcript at July 26, 2011, pp. 78, 100-01; July 27, 2011, pp. 81, 130, 152-53; July 28, 2011, pp. 23, 97.

*Flanders v. United States*

1:11-cr-00004-2

Report and Recommendation

Page 13

had a gun in the “right back pocket” of his pants), changing his appearance, lying about when he lost his phone, and misrepresenting his whereabouts on May 13, 2010<sup>13</sup>— is sufficient to show that a rational trier of fact could find that Flanders had advance knowledge that Harper would carry or use a gun during the crime.

Whether Flanders’ counsel was ineffective for failing to include *Rosemond* in his brief or arguments before the Court of Appeals is irrelevant given that Flanders was not prejudiced by the omission of this particular case law.

#### **IV. Conclusion**

Based upon the foregoing, IT IS HEREBY RECOMMENDED that Kalif Flanders’ Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (ECF No. 225) be **DENIED** without an evidentiary hearing.<sup>14</sup> It is further recommended that a certificate of appealability be **DENIED**.<sup>15</sup>

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<sup>13</sup> Trial Transcript, July 28, 2011, p. 117, 139; August 3, 2011, pp. 107, 114, 115, 130-138.

<sup>14</sup> The question of whether to order an evidentiary hearing when considering a motion to vacate a sentence under § 2255 “is committed to the sound discretion of the district court.” *Government of Virgin Islands v. Forte*, 865 F.2d 59, 62 (3d Cir.1989). A § 2255 evidentiary hearing “is unnecessary when the ‘files and records of the case conclusively show that the prisoner is entitled to no relief.’” *United States v. Padilla-Castro*, 426 F. App’x 60, 63 (3d Cir.2011) (quoting 28 U.S.C. § 2255(b)). Here, the record in this case conclusively shows that Flanders is not entitled to relief.

<sup>15</sup> When a district court issues a final order on a § 2255 motion, it must make a determination whether it will permit a certificate of appealability. 3d Cir. L.A.R. 22.2; Fed. R. App. P. 22(b)(1). A district court will issue a certificate of appealability only upon a finding of a “substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). Here, the record fails to show a violation of Flanders’ constitutional rights. Accordingly, a certificate of appealability should be denied.

*Flanders v. United States*

1:11-cr-00004-2

Report and Recommendation

Page 14

Any objections to this Report and Recommendation must be filed in writing within fourteen (14) days of receipt of this notice. Failure to file objections within the specified time shall bar the aggrieved party from attacking such Report and Recommendation before the assigned District Court Judge. 28 U.S.C. § 636(b)(1); LRCi 72.3.

ENTER:

Dated: April 2, 2018

/s/ George W. Cannon, Jr.

GEORGE W. CANNON, JR.

MAGISTRATE JUDGE