

NO. _____

**SUPREME COURT OF THE UNITED STATES
OF AMERICA**

GARY SIMMONDS,

Petitioner,

v.

PEOPLE OF THE VIRGIN ISLANDS,

Respondent.

**ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD
JUDICIAL CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

KELECHUKWU CHIDI ONYEJEKWE
Appellate Public Defender
Counsel of Record
Office of the Territorial Public Defender
P.O. Box 6040
St. Thomas, USVI 00804
Telephone: 340 774 8181
Facsimile: 340 774 3052
Counsel for Petitioner

QUESTION PRESENTED FOR REVIEW

The state court of last resort does not recognize a “lesser included offense” of a wholly unconstitutional statute. In the appeals court,

[Petitioner] contends that “a criminal court lacks jurisdiction to enter a conviction of a lesser included offense violating an unconstitutional statute.” Simmonds Br. 16. Contrary to his claim, a “court of appellate jurisdiction ... may remand [a case] and direct the entry of such appropriate judgment, decree, or order ... as may be just under the circumstance.” 28 U.S.C. § 2106. The Appellate Division has “appellate jurisdiction over the courts of the Virgin Islands.” 48 U.S.C. § 1613a (a).

Appx. B at 4.

Is the appeals court correct? Does 28 U.S.C. § 2106 or any federal statute authorize “a lesser included offense” of an unconstitutional statute, taken from another criminal code section not charged in the complaint, by a federal court noting its departure from the state court’s rule on the same statute?

LIST OF PARTIES

All parties to this proceeding are named in the caption of the case.

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**IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA**

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issues to review the judgment below.

OPINIONS BELOW

The United States Court of Appeals for the Third Judicial Circuit (“Third Circuit”) filed its Order denying Petitioner’s petition for rehearing by the panel and the Court en banc, on January 13, 2021; it is not published. **Appendix A.** The Third Circuit entered its Opinion dismissing in part for want of appellate jurisdiction and affirming in part the decision of the Appellate Division of the District Court on December 11, 2020. **Appendix B.** The Appellate Division of the District Court of the Virgin Islands entered its opinion on April 3, 2020. **Appendix C.** The District Court’s Remand Order and Memorandum Opinion finding 14 V.I.C § 298 unconstitutional appeared on July 29, 2011. **Appendix D.** The Superior Court’s June 11, 2012, Memorandum Opinion finding 14 V.I.C § 298 unconstitutional appeared. **Appendix E.** The one-count Complaint dated May 9, 2005, is Appendix **F.** The

Supreme Court of the Virgin Islands' opinion also finding 14 V.I.C § 298 unconstitutional appeared on March 5, 2014. *Webster v. People of the V.I.*, 60 V.I. 666 (2014). **Appendix G.**

STATEMENT OF THE BASIS OF THE COURT'S JURISDICTION

This Court lacks jurisdiction except to dismiss or otherwise correct the error created when the District Court discovered a “lesser included offense” of an unconstitutional statute. “When the lower federal court lacks jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit.” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 95 (1998) (internal quotations omitted).

We are “[f]reed from the view” expressed in *Ex parte Bain*, 121 U.S. 1, 30 L. Ed. 849, 7 S. Ct. 781 (1887), that “indictment omissions deprive a court of jurisdiction.” *United States v. Cotton*, 535 U.S. 625, 631, 122 S. Ct. 1781, 1784 (2002). But a lesser included offense of a wholly unconstitutional statute is not an omission in the indictment. *Ex parte Bain* is valid against jurisdiction.

The jurisdiction of this Court is invoked pursuant to Article III and 28 U.S.C. § 1254. Consideration for certiorari is sought pursuant to Rules 10(a) and (c). The United States Court of Appeals for the Third Circuit “[1] has decided an important federal question in a way that conflicts with a decision by a state court of last resort; [2] has so far departed from the accepted and usual course of judicial proceedings,

and [3] sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." Supreme Ct R 10.

This June 14, 2021 Petition is timely. It was filed prior to the expiration of the period allowed by Rule 13 and the Court's March 19, 2020 Order, extending the deadline to file this petition to 150 days from the appeals court's January 13, 2021 order denying a timely petition for rehearing. This Petition is filed on.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

US Const. Art. IV, § 3, Cl 2. Territory or property of the United States.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

US Const. Art. IV, § 3, Cl 2

US Const. Amend. 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

US Const. Amend. 5

US Const. Amend. 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

US Const. Amend. 6.

28 U.S.C.S. § 2106

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

28 U.S.C.S. § 2106

28 U.S.C.S. § 1257

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to

the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term “highest court of a State” includes the District of Columbia Court of Appeals.

28 U.S.C.S. § 1257

48 U.S.C. § 1611. District Court of the Virgin Islands; local courts; jurisdiction; practice and procedure

(a) District Court of the Virgin Islands; local courts. The judicial power of the Virgin Islands shall be vested in a court of record designated the “District Court of the Virgin Islands” established by Congress, and in such appellate court and lower local courts as may have been or may hereafter be established by local law.

(b) Jurisdiction. The legislature of the Virgin Islands may vest in the courts of the Virgin Islands established by local law jurisdiction over all causes in the Virgin Islands over which any court established by the Constitution and laws of the United States does not have exclusive jurisdiction. Such jurisdiction shall be subject to the concurrent jurisdiction conferred on the District Court of the Virgin Islands by section 22(a) and (c) of this Act [48 U.S.C. § 1612(a) and (c)].

(c) Practice and procedure. The rules governing the practice and procedure of the courts established by local law and those prescribing the qualifications and duties of the judges and officers thereof, oaths and bonds, and the times and places of holding court shall be governed by local law or the rules promulgated by those courts.

48 U.S.C. § 1611

48 U.S.C. § 1612. Jurisdiction of District Court

(a) Jurisdiction. The District Court of the Virgin Islands shall have the jurisdiction of a District Court of the United States, including, but not limited to, the diversity jurisdiction provided for in section 1332 of title 28, United States Code, and that of a bankruptcy court of the United States. The District Court of the Virgin Islands shall have exclusive jurisdiction over all criminal and civil proceedings in the Virgin Islands with respect to the income tax laws applicable to the Virgin Islands, regardless of the degree of the offense or of the amount involved, except the ancillary laws relating to the income tax enacted by the legislature of the Virgin Islands. Any act or failure to act with respect to the income tax laws applicable to the Virgin Islands which would constitute a criminal offense described in chapter 75 of subtitle F of the Internal Revenue Code of 1954 [1986] [26 U.S.C. §§ 7201 *et seq.*] shall constitute an offense against the government of the Virgin Islands and may be prosecuted in the name of the government of the Virgin Islands by the appropriate officers thereof in the District Court of the Virgin Islands without the request or consent of the United States attorney for the Virgin Islands, notwithstanding the provisions of section 27 of this Act [48 U.S.C. § 1617].

48 U.S.C. § 1612

28 U.S.C. § 1260

Final judgments or decrees rendered by the Supreme Court of the Virgin Islands may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of the Virgin Islands is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. § 1260.

Supreme Ct R 47

The term “state court,” when used in these Rules, includes the District of Columbia Court of Appeals, the Supreme Court of the Commonwealth of Puerto Rico, the courts of the Northern Mariana Islands, the local courts of Guam, and the Supreme Court of the Virgin Islands. References in these Rules to the statutes of a State include the statutes of the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, the Territory of Guam, and the Territory of the Virgin Islands.

Supreme Ct. R. 47

INTRODUCTION

A. The Structure of Virgin Islands Assault and Aggravated Assault Provisions and Simmonds' Charge

Assault and aggravated assault are two different crimes punished by two different provisions of the Virgin Islands Code. Aggravated assault is criminalized by 14 V.I.C. § 298 and assault is criminalized by 14 V.I.C. § 299.

Whoever commits an assault and battery—

- (1) upon an officer in the lawful discharge of the duties of his office, if it was known or declared to the offender that the person assaulted was an officer discharging an official duty;
- (2) in a court of justice or in any place of religious worship, or in any place where persons are assembled for the purpose of innocent amusement.
- (3) after having gone into the house of a private family and there commits the assault and battery;
- (4) being a person of robust health, upon one who is aged or decrepit;
- (5) being an adult male, upon the person of a female or child, or being an adult female, upon the person of a child;

14 V.I.C. § 298. Simple assault is defined in another section as follows:

Whoever commits—

- (1) a simple assault; or
 - (2) an assault or battery unattended with circumstances of aggravation—
- shall be fined not more than \$250 or imprisoned not more than six months, or both the imprisoned and fined.

14 V.I.C. § 299. Here is the one count Complaint against Simmonds:

Gary Simmonds, being an adult male, with unlawful violence and intent to injure, did assault and batter Tracia Simmonds, a female, by hitting her about the face; Gary Simmonds and Tracia Simmonds were husband and wife, an act of domestic violence, in violation of 14 V.I.C. §298(5) and 16 V.I.C. § 91(b)(1)(2), AGGRAVATED ASSAULT & BATTERY/DOMESTIC VIOLENCE

Appx. F.

Each section of the statute stands on its own. The sole count against Simmonds is the violation of §298(5). *United States v. Powell*, 469 U.S. 57, 62 (1984) (“Each count in an indictment is regarded as if it was a separate indictment.”). The Appellate Division of the District Court found §298(5) unconstitutional, explaining that it is “as if the statute did not exist.” *Simmonds v. People of the V.I.*, No. 2008-0029, 2020 U.S. Dist. LEXIS 63619, at *9 (D.V.I. Apr. 3, 2020). The subsection under which Simmonds was convicted for aggravated assault was, in essence, never a valid law. *See id.* The elements of the unconstitutional aggravated assault under 298(5) are (1) assault and (2) upon a female. Since 298(5) is unconstitutional, both assault and “upon a female” are unconstitutional. Both were found unconstitutional in the one-count Complaint and cannot be resurrected.

B. Only the Supreme Court of the Virgin Islands determines Virgin Islands Law. Both the Supreme Court and the Superior Court of the Virgin Islands have not recognized a lesser included offense of 14 V.I.C § 285(5).

Only the Supreme Court of the Virgin Islands determines local Virgin Islands law. Both the Supreme Court and the Superior Court of the Virgin Islands have not recognized the phantom “lesser included offense” of the unconstitutional 14 V.I.C. § 285(5). The Superior Court held that 14 V.I.C. §285(5) unconstitutional. *People of the V.I. v. Simmonds*, 58 V.I. 3, 42 (Super. Ct. 2012). *See also Simmonds v. People of the V.I.*, No. 2008-0029, 2020 U.S. Dist. LEXIS 63619, at *3 (D.V.I. Apr. 3, 2020). In that Opinion, on remand, the Presiding Judge of the Superior Court found no fact that supports an assault conviction or any further proceeding. *Id.*

The Virgin Islands Supreme Court has also found 14 V.I.C. §285(5) unconstitutional. *Webster v. People*, 60 V.I. 666, 676 (2014) (“Accordingly, by providing that any assault committed by a male upon a female is automatically aggravated in nature, 14 V.I.C. § 298(5) violates the Equal Protection Clause of the Fourteenth Amendment, and the Superior Court committed error in entering a conviction against Webster under this section.”). **Appx. G.** The Virgin Islands Supreme Court *did not* play prosecutor or legislator or enact into existence “a lesser

included offense” of an unconstitutional statute. The Appellate Division of the District Court cited the Supreme Court of the Virgin Islands’ decision in *Webster*. See *Simmonds v. People of the V.I.*, No. 2008-0029, 2020 U.S. Dist. LEXIS 63619, at *6 (D.V.I. Apr. 3, 2020) (“*But cf. Webster v. Virgin Islands*, 60 V.I. 666, 682 (V.I. 2014) (reversing defendant's aggravated assault conviction without instructing the trial court to enter a judgment on the lesser-included offense of simple assault.)”).

The appeals court in a *precedential opinion* requires all courts to look to the Supreme Court of the Virgin Islands for Virgin Islands law. *Defoe v. Phillip*, 702 F.3d 735, 743 (3d Cir. 2012). Inexplicably both the United States Court of Appeals for the Third Circuit and the Appellate Division of the District Court disregarded *Defoe*.

The Virgin Islands Supreme Court, the highest state court of the Virgin Islands, decided this question and did not call for a lesser included offense of assault:

The language of 14 V.I.C. § 298(5) was initially enacted in title 4, section 32 of the 1921 Codes, and reenacted when the Legislature repealed the 1921 Codes in 1957. *People v. Simmonds*, 58 V.I. 3, 14-17 (V.I. Super. Ct. 2012) (“According to ... the 1921 Codes, ‘[a]n assault and battery becomes aggravated [w]hen committed by an adult male upon the person of a female’”). The People makes no attempt to establish that its hypothesized rationale was the actual reason underlying the enactment of this sex-based classification when it was first enacted in 1921 or reenacted in 1957. Furthermore, the Superior

Court of the Virgin Islands has rejected this rationale on three separate occasions, recently noting that “nothing in the legislative history of 14 V.I.C. § 298(5) mentions physical differences between the genders or justifies penalizing men more severely for acts of which both sexes are capable.” *People v. Lake*, Super. Ct. Crim. No. 429/2011, 59 V.I. 178, 2013 V.I. LEXIS 59, *14, 2013 WL 5461816, at *5 (V.I. Super. Ct. Sept. 25, 2013) (holding that 14 V.I.C. § 298(5) violates equal protection) (quoting *People v. McGowan*, 56 V.I. 3, 19 (V.I. Super. Ct. 2012)); *see also Simmonds*, 58 V.I. at 40-42 (same); *Charleswell v. People*, D.C. Crim. App. No. 2006-28, slip. op. at 6 (D.V.I. App. Div. Nov. 5, 2013) (“the [c]ourt is unable to locate any statutory text or legislative history that articulates either of the Government's proposed rationales” justifying section 298(5)).

Webster v. People of the V.I., 60 V.I. 666, 674-75 (2014).

C. This Court lacks jurisdiction except to dismiss. No federal statute, including 28 U.S.C. § 2106, grants jurisdiction for the district Court to create a “lesser included offense” of an unconstitutional state statute in conflict with the local court’s ruling on the same issue.

Article III of the Constitution and 28 U.S.C. § 1257(a) limit this Court's appellate jurisdiction over state courts to reviewing federal questions. *See D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 486, 103 S. Ct. 1303, 1317 (1983) (federal courts lack jurisdiction over state law), Stephen M. Shapiro, SUPREME COURT PRACTICE 208 (10th ed. 2013) (“[T]he Court lacks jurisdiction to review matters of state law. That principle in turn reflects the Article III limitations on federal judicial power, as well as the jurisdictional restrictions imposed on the Court

by 28 U.S.C. § 1257."); Brief of Court-Appointed Amicus Curiae Arguing Against Jurisdiction, *Montgomery v. Louisiana*, No. 14-280, 2015 U.S. S. Ct. Briefs LEXIS 2189, *18-20 (June 16, 2015), 577 U.S. 190 (2016). Section 2 of Article III grants this Court "appellate Jurisdiction" to review state cases "arising under" the Constitution, federal laws, or treaties "with such Exceptions, and under such Regulations as the Congress shall make." U.S. Const., art. III, § 2. 28 U.S.C. § 2106 authorizes a "court of appellate jurisdiction ... [to] remand ... and direct the entry of such appropriate judgment, decree, or order ... as may be just under the circumstance." But the court cannot extend its own jurisdiction outside the Constitutional or statutory grant. 28 U.S.C. § 1257.

"Every federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though the parties are prepared to concede it." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998). Here, the District Court declared a local statute unconstitutional but found a "lesser included offense" within that statute. Then, it remanded the case for the trial court to enter a conviction for that "lesser included offense," which is really a different crime under the Virgin Islands Code. The issue before the court is whether the District Court possessed jurisdiction to enter such an

order.

Section 1257(a) limits the Court's jurisdiction over "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had" to issues governed by binding federal law. "Save in exceptional circumstances not now present, we must accept as controlling the decision of the state courts upon questions of local law, both statutory and common." *Am. R. Express Co. v. Kentucky*, 273 U.S. 269, 272 (1927).

The Supreme Court of the Virgin Islands is the court of last resort in the territory. 28 U.S.C.S. § 1260. It is the state court. Supreme Ct R 47. 14 V.I.C. § 298(5) is a statute of the local legislature. It is part of the Virgin Islands Code. It is local law. It was initially enacted in title 4, section 32 of the 1921 Codes, and reenacted when the Legislature repealed the 1921 Codes in 1957. *People v. Simmonds*, 58 V.I. 3, 14-17 (V.I. Super. Ct. 2012). It is not federal law. The Virgin Islands Supreme Court reviewed §298(5) and found it unconstitutional but did not remand for a conviction of simple assault. *Webster v. People of the V.I.*, 60 V.I. 666, 674-75 (2014). There are no exceptional circumstances present in this case, therefore, we must accept as controlling the decision of the Virgin Islands Supreme Court upon questions of this local law, 14 V.I.C. § 298(5). *See Am. R. Express Co.*

v. Kentucky, 273 U.S. 269, 272 (1927).

The decisions of the Appellate Division and the Third Circuit requiring a remand for the trial court to enter a conviction for the lesser included offense of an unconstitutional statute cannot stand for another reason. Federal courts cannot render advisory opinions. The Supreme Court of the Virgin Islands is the highest court of the territory. It does not approve of “lesser included offenses” of an unconstitutional statute. Therefore, the District Court’s Order is likely an unenforceable advisory opinion.

“Federal courts are courts of limited jurisdiction.” *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (internal citations omitted). “It is to be presumed that a cause lies outside this limited jurisdiction.” *Id.* “They possess only that power authorized by Constitution and statute which is not to be expanded by judicial decree.” *Id.*; *McCulloch v. Maryland*, 17 U.S. 316, 4 Wheat. 316, 405, 4 L. Ed. 579 (1819). The court’s jurisdiction is further limited by the separation of powers doctrine of the Constitution requiring “each branch of the Government is limited to the exercise of those powers granted to it.” *Wellness Int’l Network, Ltd. v. Sharif*, 575 U.S. 665 (2015). “Every violation of the separation of powers involves an exercise of power in excess of the Constitution.” *Id.*

In a criminal case, the prosecutor brings charges by information or indictment without which the court cannot preside over the case. *See Ex parte Bain*, 121 U.S. 1, 13, 7 S. Ct. 781, 788 (1887) (“If there is nothing before the court which the prisoner, in the language of the Constitution, can be ‘held to answer,’ he is then entitled to be discharged so far as the offence originally presented to the court by the indictment is concerned.”); *United States v. Cotton*, 535 U.S. 625, 627, 122 S. Ct. 1781, 1783 (2002) (“Freed from the view that indictment omissions deprive a court of jurisdiction.”). Where the crime charged in the indictment no longer exists, the citizen has nothing to answer. *Montgomery v. Louisiana*, 577 U.S. 190, 136 S. Ct. 718, 731 (2016). (“unconstitutional law is void and is as no law.”). *Albrecht v. United States*, 273 U.S. 1, 8, 47 S. Ct. 250, 252 (1927) (“A person may not be punished for a crime without a formal and sufficient accusation even if he voluntarily submits to the jurisdiction of the court.”).

In this case, the District Court declared § 298(5) unconstitutional, the violation of which is the sole crime charged in the Complaint. **Appx. 5.** There is nothing before the court that Simmonds can be held to answer. There is no omission from the Complaint as in *Bain and Cotton*. Because the statute violated is unconstitutional, there is no fact within the Complaint that constitutes a crime. Hence, there is no basis

for the District Court to find a lesser included offense of the unconstitutional statute. *See* 136 S. Ct. at 731. Besides, the Supreme Court of the Virgin Islands and the Superior Court of the Virgin Island have both not remanded for a trial to enter a simple assault conviction. The practice of the local court of last resort controls. The District Court lacked jurisdiction to enter the remand order.

Violating a void statute such as section 298(5) cannot, is not, and could never be a crime. *See Ex parte Siebold*, 100 U.S. 371, 376, 25 L. Ed. 717 (1879). Therefore, a criminal court lacks jurisdiction to enter a conviction of a lesser included offense of an unconstitutional statute. *See, e.g., State v. Floyd F. (In re N.G.)*, 2018 IL 121939, ¶ 36, 425 Ill. Dec. 547, 562-63, 115 N.E.3d 102, 117-18 (citing 100 U.S. at 376).

This Court warned us:

An unconstitutional law is void and is as no law. A penalty imposed pursuant to an unconstitutional law is no less void because the prisoner's sentence became final before the law was held unconstitutional. There is no grandfather clause that permits States to enforce punishments the Constitution forbids. To conclude otherwise would undercut the Constitution's substantive guarantees.

Montgomery v. Louisiana, 136 S. Ct. 718, 731 (2016) (quoting *Ex parte Siebold*, 100 U.S. 371, 376-77 (1879)) (emphasis added).

An unconstitutional statute is like thin air. Fundamentally, the remand order in Simmonds's case was void because the statute creating the crime is unconstitutional; like thin air, it cannot contain a lesser included offense. Absent the unconstitutional charge against Simmonds, there is no "formal and sufficient" accusation against him. *See Albrecht v. United States*, 273 U.S. 1, 8, 47 S. Ct. 250, 252 (1927). Where the information solely contains thin air, this Court is powerless to create its own crime.

STATEMENT OF THE CASE

The following is culled mostly from the court of appeals. **Appx. B.** On May 2, 2005, Tracia Walter-Simmonds ("Walter-Simmonds") went to the Schrader Command police station in St. Croix and reported that her husband, Gary Simmonds ("Simmonds"), had hit her. When Walter-Simmonds arrived at the police station, her face was bruised and red. Later that evening, Simmonds went to the police station. While at the station, Simmonds told officers that he and his wife had been in a fight over a bill and Walter-Simmonds's relationship with an ex-boyfriend. Walter-Simmonds also gave a statement to officers that she and her husband had been involved in an argument that escalated

when Simmonds struck her several times in the face and body.

On May 9, 2005, the People of the Virgin Islands filed a one-count criminal information against Simmonds for aggravated assault and battery as an act of domestic violence in violation of 14 V.I.C. § 298(5) and 16 V.I.C. § 91(b)(1) &(2).

The sole charge on the “Complaint” states:

Gary Simmonds, being an adult male, with unlawful violence and intent to injure, did assault and batter Tracia Simmonds, a female, by hitting her about the face; Gary Simmonds and Tracia Simmonds were husband and wife, an act of domestic violence, in violation of 14 V.I.C. §298(5) and 16 V.I.C. § 91(b)(1)(2), AGGRAVATED ASSAULT & BATTERY/DOMESTIC VIOLENCE

Appx. E.

On September 22, 2005, a bench trial was held on the charge. During the trial, the People called four witnesses: Police Officer Roger Roberts, Tracia Walter-Simmonds, Minreva Saldana, and Police Officer Antoinette Sargent. Gary Simmonds did not put on a case. After the close of evidence, the Superior Court judge found Gary Simmonds guilty of aggravated assault and battery. Gary Simmonds was sentenced to a six-month suspended prison term with one year of supervised probation and ordered to complete 100 hours of community service and to enroll in an anger management course.

On November 24, 2008, Simmonds appealed his conviction to the Third Circuit. Simmonds argued that (1) the gender-based classification scheme in 14 V.I.C. § 298(5) violates the Equal Protection Clause; and (2) the Superior Court erred admitting certain irrelevant testimony.

Decisions of the Superior Court were appealed to the Appellate Division of the District Court. *See* 48 U.S.C. § 1613a(a), (b). There, Simmonds argued, among other things, that his conviction was unconstitutional because § 298(5) discriminated against him based on gender in violation of the Fourteenth Amendment to the United States Constitution. The District Court agreed with Simmonds *and* remanded the case to the Superior Court for further fact finding. *Simmonds v. People of the V.I.*, No. 2008-0029, 2020 U.S. Dist. LEXIS 63619, at *9 (D.V.I. Apr. 3, 2020). The Superior Court also found the section unconstitutional this time, and in addition, found no fact upon which to convict Simmonds. *People of the V.I. v. Simmonds*, 58 V.I. 3, 42 (Super. Ct. 2012) (“findings of fact.”).

In April 2020, the Appellate Division again concluded that the statute was unconstitutional. The court vacated Simmonds's conviction and sentence but remanded his case to the Superior Court with instructions for it to enter a new conviction and sentence for “the lesser included offense of simple assault and

battery.” The court acknowledged that this conflicts with the practice of the Supreme Court of the Virgin Islands:

In accordance with the weight of authority, the Court will vacate Simmonds's aggravated assault conviction. That result does not necessarily allow Simmonds to avoid a conviction for the lesser included offense of simple assault, provided sufficient evidence has been adduced by the People. "Where a conviction of aggravated assault and battery is vacated by a court on the basis that the aggravating factor is unconstitutional, Virgin Islands courts have turned to the lesser-included offense of simple assault and battery." Day, 2015 U.S. Dist. LEXIS 138713, 2015 WL 5935849, at *5; see also *People of the Virgin Islands v. McGowen*, 56 V.I. 3, 10 (V.I. Super. Ct. Jan. 11, 2012); see generally *United States v. Petersen*, 622 F.3d 196, 205-07, 54 V.I. 929 (3d Cir. 2010); *Virgin Islands v. Josiah*, 641 F.2d 1103, 1108 (3d Cir. 1981) ("When the evidence is insufficient to support the greater offense, but sufficient to support a conviction on the lesser-included offense, an appellate court may vacate the sentence and remand for entry of judgment of conviction and resentencing under the lesser-included offense."). *But cf. Webster v. Virgin Islands*, 60 V.I. 666, 682 (V.I. 2014) (reversing defendant's aggravated assault conviction without instructing the trial court to enter a judgment on the lesser-included offense of simple assault).

Simmonds v. People of the V.I., No. 2008-0029, 2020 U.S. Dist. LEXIS 63619, at *6 (D.V.I. Apr. 3, 2020) (emphasis supplied).

After the Appellate Division denied his request for rehearing, Simmonds filed an appeal at the United States Court of Appeals for the Third Circuit. He challenged the portion of the judgment directing a remand because the Appellate Division

lacked authority to direct that he be convicted of the lesser included offense. The Third Circuit declined Appellate jurisdiction under 48 U.S.C. § 1613a(c) but held that 28 U.S.C. § 2106 permitted the Appellate Division's remand order. The Court further held that it lacked jurisdiction to reverse this decision of the Appellate Division of the District Court. *People of the V.I. v. Simmonds*, 837 F. App'x 109, 112 n.3 (3d Cir. 2020) ("we lack jurisdiction to opine on the correctness of the remand decision. We limit our analysis solely to the Appellate Division's conclusion that it retained subject matter jurisdiction to remand."). The appeals court stated:

The Appellate Division therefore was within its authority — and had subject matter jurisdiction — to remand the case with direction to impose a conviction and sentence on a lesser included offense. Indeed, in past cases where a conviction of aggravated assault and battery is vacated on grounds that the aggravating factor is unconstitutional, the Appellate Division has directed a remand for application of the lesser included offense of assault and battery. *See Humienny v. Gov't of the V.I.*, 79 F. Supp. 3d 548, 551, 62 V.I. 735 (D.V.I. 2015); see also V.I. R. Crim. P. 31(c)(1).

People of the V.I. v. Simmonds, 837 F. App'x 109, 111-12 (3d Cir. 2020). Rather than supervise the district court, the appeals court cites to another district court opinion saying exactly the same thing, perpetuating the existence of "the lesser included offense" of an unconstitutional statute.

REASONS FOR ALLOWANCE OF THE WRIT

I. The appeal court has decided an important federal question in a way that conflicts with a decision by a state court of last resort.

The appeals court held that 28 U.S.C § 2106 authorized the court to answer the question presented in this case—whether the district court possessed federal jurisdiction to create a lesser included offense of an unconstitutional statute. There is no question that § 2106 is an important federal statute and that its scope raises an equally important question. Deploying it, as the appeals court has done, in a manner that conflicts with the decision of the state court of last resort, invokes this Court’s review powers.

Two Virgin Islands local courts found the same statute unconstitutional but did not remand with instructions to enter a conviction for a lesser included offense. *See Appx G*. In disregarding the practice of the state court of last resort, the appeals court raised a recurring issue that requires this Court’s review. The district court referenced the contrary decision of the local Supreme Court matter-of-factly in its opinion:

Where a conviction of aggravated assault and battery is vacated by a court on the basis that the aggravating factor is unconstitutional, Virgin Islands courts have turned to the lesser-included offense of simple

assault and battery." Day, 2015 U.S. Dist. LEXIS 138713, 2015 WL 5935849, at *5; see also *People of the Virgin Islands v. McGowen*, 56 V.I. 3, 10 (V.I. Super. Ct. Jan. 11, 2012); see generally *United States v. Petersen*, 622 F.3d 196, 205-07, 54 V.I. 929 (3d Cir. 2010); *Virgin Islands v. Josiah*, 641 F.2d 1103, 1108 (3d Cir. 1981) ("When the evidence is insufficient to support the greater offense, but sufficient to support a conviction on the lesser-included offense, an appellate court may vacate the sentence and remand for entry of judgment of conviction and resentencing under the lesser-included offense."). But cf. Webster v. Virgin Islands, 60 V.I. 666, 682 (V.I. 2014) (reversing defendant's aggravated assault conviction without instructing the trial court to enter a judgment on the lesser-included offense of simple assault).

Simmonds v. People of the V.I., No. 2008-0029, 2020 U.S. Dist. LEXIS 63619, at *6 (D.V.I. Apr. 3, 2020). This practice in the Virgin Islands requires this Court's review because the court of appeals is active in perpetuating it.

II. The Appeals court has so far departed from the accepted and usual course of judicial proceedings by creating an unequal system of justice where the District Court applies the law depending on the party before the court.

The appeals court has so far departed from the accepted and usual course of judicial proceedings. First, only a valid statute carries a sentence, and second, the appeals court taught us that the Supreme Court of the Virgin Islands is the controlling authority over local law. To add salt into injury, the court of appeals cites to the

district court's decisions that create lesser included offenses of an unconstitutional statute as its authority.

In the decision under review, the appeals court writes: “[w]here, as here, the Appellate Division vacates a criminal sentence and remands the matter for further proceedings, the matter is ongoing and there is no “final decision” for our jurisdictional purposes.” *People of the V.I. v. Simmonds*, 837 F. App'x 109, 111 (3d Cir. 2020). But an *unconstitutional* statute carries only a void sentence, there nothing to vacate. Furthermore, in *Defoe v. Phillip*, 702 F.3d 735, 743 (3d Cir. 2012) the Court stated: “Upon its establishment, the Virgin Islands Supreme Court became the final authority on local law.... As a result, when the District Court faces a novel question of Virgin Islands law, it must predict how the Supreme Court will resolve that question. *Id.* And we must make similar predictions.” How the Supreme Court of the Virgin Islands resolves this matter of 14 V.I.C. § 298(5) was decided in *Webster v. People*, 60 V.I. 666, 682 (2014).

In *Webster v. People*, 60 V.I. 666, 682 (2014) the Supreme Court of the Virgin Islands decided this very question and held that section 298(5) of title 14 of the Virgin Islands Code violates the Equal Protection Clause of the Fourteenth Amendment. As the Appellate Division recognizes, the Supreme Court of the

Virgin Islands did not turn prosecutor and did not resurrect a lesser included offense of the void and unconstitutional statute. Surprisingly, rather than look at the Virgin Islands Supreme Court—remember *Defoe*’s “we must make similar predictions”—the appeals court turned to a decision of the district court, *Humienny v. Gov’t of the V.I.*, 79 F. Supp. 3d 548, 551, 62 V.I. 735 (D.V.I. 2015).

Humienny states that “where a conviction of aggravated assault and battery is vacated by a court, on the basis that the aggravating factor is unconstitutional, Virgin Islands courts have turned to the lesser-included offense of simple assault and battery.” *Humienny v. Gov’t of the V.I.*, 79 F. Supp. 3d 548, 551 (D.V.I. 2015) (emphasis supplied). This cannot be correct as the term “aggravating factor” is unknown to Virgin Islands assault statutes. *Humienny*’s “Virgin Islands courts” did not include the Supreme Court of the Virgin Islands and it did not include the 50-page opinion of the Superior Court’s Presiding Judge in this matter explaining the statute’s unconstitutionality. Therefore, only one court—the Appellate Division of the District Court—has made a practice of these probably incorrect statements in derogation of *Defoe*.

The doctrine against judicial creation of crimes is a variant of the separation of powers doctrine. See *Bouie v. Columbia*, 378 U.S. 347, 354 (1964) (“The

fundamental principle that the required criminal law must have existed when the conduct in issue occurred, must apply to bar retroactive criminal prohibitions emanating from courts as well as from legislatures.”) (Internal quotations omitted). It is the role of the executive branch, the prosecutor in this case, to bring assault charges, not this Court. *See United States v. MacEwan*, 445 F.3d 237, 251 (3d Cir. 2006) (“Conversely, in discussing prosecutors' powers, we have stated that ‘the decision whether to prosecute and what charges to file generally rests within the prosecutor's broad discretion.’ *United States v. Esposito*, 968 F.2d 300, 306 (3d Cir. 1992).”).

Therefore, the appeals court erroneously undertook the prosecutor’s role contrary to the separation of powers doctrine and to the doctrine against judicial creation of crimes. The remand order of the District Court should not stand.

III. The Court of appeals has abandoned its supervisory role and actively perpetuates and sanctions such a departure by a lower court as to call for an exercise of this Court’s supervisory power.

Obviously, the court of appeal abandoned its supervisory role by: (1) creating a law of lesser included offenses of an unconstitutional statute (2) disregarding the practice of the Supreme Court of the Virgin Islands even after publishing a

“precedential Opinion” directing its supremacy over local law (3) continuing to cite the opinions of the district court as authority for lesser included offenses of unconstitutional statutes without analysis or discussion of its merits and (4) the Court has failed to follow the precedent set out by this court in *Siebold* and *Montgomery*. On the broader level, the appeals court’s failure to supervise the trial court endangers the rule of law. *Defoe v. Phillip*, 702 F.3d 735, 743 (3d Cir. 2012), we are told, is precedential. Obviously, this depends on the party before the Court. There is expectation of equal justice before the court. The Third Circuit continues its ideology of territorial *exceptionalism* which has been rejected by this Court.

This Court has held repeatedly that a territorial court must observe national constitutional and statutory norms including respecting the hierarchy of courts and the supremacy of the Constitution. *See, e.g., Kepner v. United States*, 195 U.S. 100, 133 (1904) (“We have no doubt that Congress must be held to have intended to have used these words in the well settled sense as declared and settled by the decisions of this court.”); *Serra v. Mortiga*, 204 U.S. 470, 474 (1907) (“It is further settled that the guarantees which Congress has extended to the Philippine Islands are to be interpreted as meaning what the like provisions meant at the time when Congress made them applicable to the Philippine Islands.”).

The Court protected the right of Guamanians to have, within Guam's court system, the right of review by an Article III court. *Guam v. Olsen*, 431 U.S. 195, 201(1977) ("we should be reluctant without a clear signal from Congress to conclude that it intended to allow the Guam Legislature to foreclose appellate review by Art. III courts, including this Court, of decisions of territorial courts in cases that may turn on questions of federal law."). Likewise, this Court rejected the contention that "unique circumstances of legal practice in the Virgin Islands," justified discriminating against non-resident attorneys seeking to practice in the Virgin Islands. *Barnard v. Thorstenn*, 489 U.S. 546, 558-59 (1989). This Court wrote:

In sum, we hold that petitioners neither advance a substantial reason for the exclusion of nonresidents from the Bar, nor demonstrate that discrimination against nonresidents bears a close or substantial relation to the legitimate objectives of the court's Rule. When the Privileges and Immunities Clause was made part of our Constitution, commercial and legal exchange between the distant States of the Union was at least as unsophisticated as that which exists today between the Virgin Islands and the mainland United States. Nevertheless, our Founders, in their wisdom, thought it important to our sense of nationhood that each State be required to make a genuine effort to treat nonresidents on an equal basis with residents. By extending the Privileges and Immunities Clause to the Virgin Islands, Congress has made the same decision with respect to that Territory.


Id. The court of appeals has again abandoned its supervisory role and invokes this Court's supervisory powers.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may consider summary reversal.

Respectfully submitted,

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Kelechukwu Chidi Onyejekwe
Appellate Public Defender
Counsel of Record
Office of the Territorial Public Defender
P.O. Box 6040
St. Thomas, Virgin Islands 00804
Telephone: 340 774 8181
Facsimile: 340 774 3052
Counsel for Petitioner