APPENDIXES

APPENDIX

A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-1903

PEOPLE OF THE VIRGIN ISLANDS

v.

GARY SIMMONDS,
Appellant

District Court no. 1-08-cr-00029-001

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, and PHIPPS, Circuit Judges

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/D. Brooks Smith
Chief Circuit Judge

Dated: January 13, 2021
Sb/cc: All Counsel of Record

APPENDIX

B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-1903

PEOPLE OF THE VIRGIN ISLANDS

v.

GARY SIMMONDS,
Appellant

Appeal from the District Court
of the Virgin Islands Appellate Division
District Court No. 1-08-cr-00029-001
District Judges: The Honorable Curtis V. Gomez
The Honorable Wilma A. Lewis

Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
on December 7, 2020

Before: SMITH, *Chief Judge*, CHAGARES and MATEY, *Circuit Judges*

(Filed: December 11, 2020)

OPINION*

SMITH, *Chief Judge*.

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* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

Gary Simmonds appeals the order of the Appellate Division of the District Court of the Virgin Islands remanding his case to the Superior Court of the Virgin Islands with instruction to impose a conviction and sentence for simple assault and battery. Because we lack jurisdiction over the Appellate Division's non-final order, we will dismiss the appeal in part. To the extent we have jurisdiction to review the discrete issue of the Appellate Division's exercise of subject matter jurisdiction, we will affirm.

I.

In May 2005, Tracia Walter-Simmonds reported to police that Simmonds, her husband, had hit her. Virgin Islands prosecutors charged Simmonds with aggravated assault and battery under V.I. Code Ann. tit. 14 § 298(5), which provides, *inter alia*, that an assault and battery[1] qualifies as "aggravated" if the defendant is male and the victim is female. After a bench trial, the Superior Court convicted Simmonds, imposed a six-month suspended sentence and one year of supervised probation, and ordered him to complete one hundred hours of community service and enroll in an anger management course.

At that time, decisions of the Superior Court were appealed to the Appellate Division of the District Court. *See* 48 U.S.C. § 1613a(a), (b). On appeal,

[1] Under Virgin Islands law, "[w]hoever uses any unlawful violence upon the person of another with intent to injure him, whatever be the means or the degree of violence used, commits an assault and battery." V.I. Code Ann. tit. 14 § 292.

Simmonds argued, among other things, that his conviction was unconstitutional because the aggravating factor discriminated against him on the basis of gender in violation of the Fourteenth Amendment to the United States Constitution. In April 2020, the Appellate Division concluded that the aggravated offense was unconstitutional. It vacated Simmonds's conviction and sentence and remanded his case to the Superior Court with instructions to enter a new conviction and sentence for the lesser included offense of simple assault and battery.

After the Appellate Division denied his request for rehearing, Simmonds filed this appeal. He challenges only the portion of the judgment directing a remand, contending that the Appellate Division lacked authority to direct that he be convicted of the lesser included offense.

II.

We cannot reach the merits of Simmonds's appeal unless we have jurisdiction to do so. Under 48 U.S.C. § 1613a(c), we "have jurisdiction of appeals from all final decisions of the district court on appeal from the courts established by local law." The decision before us does not qualify as an appealable final decision.

"[W]ith regard to the question of finality, we have treated appeals from the Appellate Division of the District Court of the Virgin Islands no differently than appeals taken from any other federal district court." *Ortiz v. Dodge*, 126 F.3d 545,

548 (3d Cir. 1997). We therefore consider whether the order "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Id.* at 547 (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)). Where, 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.[2] *Gov't of the V.I. v. Rivera*, 333 F.3d 143, 150 (3d Cir. 2003). Accordingly, we lack appellate jurisdiction to review this non-final order.

III.

Simmonds contends that "a criminal court lacks jurisdiction to enter a conviction of a lesser included offense violating an unconstitutional statute." Simmonds Br. 16. To the extent Simmonds is suggesting that the Appellate Division was acting without subject matter jurisdiction, we have jurisdiction to consider this limited question. *See Gov't of the V.I. v. Hodge*, 359 F.3d 312, 320 (3d Cir. 2004) (observing that we retain jurisdiction to review the limited question

[2] Neither party suggests, nor do we discern, any basis for invoking appellate jurisdiction pursuant to the collateral order doctrine. *See Gov't of the V.I. v. Rivera*, 333 F.3d 143, 150 n.16 (3d Cir. 2003). Moreover, although intervening legislative changes impacting the structure of the Virgin Islands court system mean that the parties will not return to our Court for review of Simmonds's future sentence, *see Defoe v. Phillip*, 702 F.3d 735, 737–39, 737 n.1 (3d Cir. 2012); 48 U.S.C. § 1613a(d), this procedural posture does not impact our conclusion that finality is absent. *Cf. Rivera*, 333 F.3d at 151 (the government's inability, by statute, to pursue a future appeal after imposition of a new sentence is a matter for the legislature and does not impact the conclusion that a final, appealable decision is absent).

of the Appellate Division's determination of its own subject matter jurisdiction). We exercise plenary review over this issue. *Id.* at 323.

Simmonds contends that, upon concluding that the aggravator was unconstitutional, the Appellate Division lost subject matter jurisdiction to take any action other than dismissing his case. 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). 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.[3] *See Humienny v. Gov't of the V.I.*, 79 F. Supp. 3d 548, 551 (D.V.I. 2015); *see also* V.I. R. Crim. P. 31(c)(1).

Simmonds relies upon *Moravian School Advisory Board v. Rawlins*, 70 F.3d 270, 287–88 (3d Cir. 1995), a civil case in which we held that, where the District

[3] As previously noted, 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.

Court lacked subject matter jurisdiction, it was required to dismiss the matter rather than transfer it to the territorial courts. But, as we have already concluded, the Appellate Division did not lack subject matter jurisdiction in Simmonds's case. *Moravian* is inapposite.

III.

For the foregoing reasons, we will dismiss the appeal for lack of appellate jurisdiction, except for the limited issue of reviewing the Appellate Division's exercise of subject matter jurisdiction. To that extent only, we will affirm.

APPENDIX

C

Simmonds v. People of the V.I., 2020 U.S. Dist. LEXIS 63619

United States District Court for the District of the Virgin Islands, St. Croix Division

November 2, 2012, Considered; April 3, 2020, Filed

D.C. Crim. App. No. 2008-0029; Super. Ct. Crim. No. 215/2005

Reporter

2020 U.S. Dist. LEXIS 63619 * | 2020 WL 1676927

GARY **SIMMONDS**, Appellant v. PEOPLE OF THE VIRGIN ISLANDS, Appellee

Subsequent History: Affirmed by, in part, Appeal dismissed by, in part People v. **Simmonds**, 2020 U.S. App. LEXIS 38789 (3d Cir. V.I., Dec. 11, 2020)

Prior History: **[*1]** On Appeal from the Superior Court of the Virgin Islands. The Honorable Darryl D. Donohue, Judge Presiding.

Simmonds v. People of the Virgin Islands, 2011 U.S. Dist. LEXIS 84012, 55 V.I. 1069 (July 29, 2011)

Core Terms

simple assault, battery, aggravated assault, sentence, lesser-included, police station, aggravation, vacate, assault and battery, adult female, adult male, unattended, violence, beating

Counsel: KELE ONYEJEKWE, ESQ., St. Croix, USVI, *for the Appellant.*

TIFFANY V. MONROSE, AAG ESQ., St. Croix, USVI, *for the Appellee.*

Judges: GÓMEZ, *Judge* and LEWIS, *Chief Judge*.

Opinion

MEMORANDUM OPINION

(April 3, 2020)

PER CURIAM,

Gary Simonds challenges his conviction in the Superior Court of the Virgin Islands for aggravated assault. For the reasons stated below, the Court will vacate Gary **Simmonds**'s conviction and remand the case to the Superior Court for imposition of a conviction and sentence for the lesser-included offense of simple assault and battery.

I. FACTUAL AND PROCEDURAL BACKGROUND

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** ("Simonds"), 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 **[*2]** 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). 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 enroll in an anger management course.

On November 24, 2008, **Simmonds** appealed his conviction to this Court. 2 **Simmonds** argues 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 **[*3]** admitting certain irrelevant testimony. On July 29, 2011, this Court held that the Government's appellate filings failed to articulate facts or arguments demonstrating that the statute's gender classification is substantially related to a legitimate government interest. *See* ***Simmonds*** *v. People of the Virgin Islands*, 55 V.I. 1069, 2011 WL 3290200 (D.V.I. App. Div. 2011). Having determined that the record was insufficient, the Court remanded the case for the Superior Court to conduct further fact finding. The Court also explicitly retained jurisdiction.

On June 11, 2012, in response to this Court's remand, the Superior Court issued a fifty-page memorandum opinion concluding that the Government failed to demonstrate how the statute's gender classification is substantially related to a legitimate government interest. *See* *Virgin Islands v.* ***Simmonds***, 58 V.I. 3 (V.I. Super. Ct. 2012).

II. JURISDICTION AND STANDARD OF REVIEW

This Court has jurisdiction over appeals of final judgments and orders of the Superior Court filed before January 29, 2007, the date on which the Supreme Court was certified to officially assume appellate jurisdiction over the Superior Court. *See* Revised Organic Act of 1954 23A, 48 U.S.C. § 1613a(d); *see also* *Joseph v. People of the V.I.*, 50 V.I. 873 (D.V.I. 2008), *aff'd*, 465 Fed. Appx. 138 (3d Cir. 2012).

Equal protection jurisprudence calls for intermediate scrutiny of statutes that employ gender classifications. *Orr v. Orr*, 440 U.S. 268, 279, 99 S. Ct. 1102, 59 L. Ed. 2d 306 (1979); *Hynson v. City of Chester Legal Dept.*, 864 F.2d 1026, 1029 (3d Cir. 1988). The Government **[*4]** bears the burden of justifying that a gender-specific statute does not carry the baggage of discrimination. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724, 102 S. Ct. 3331, 73 L. Ed. 2d 1090 (1982).

This Court's standard of review in examining the Superior Court's application of law, including conclusions concerning statutory interpretation and constitutional issues is *de novo*, while findings of fact are reviewed for clear error. *Ascencio v. Virgin Islands*, 54 V.I. 769 (D.V.I. 2010).

III. ANALYSIS

A. Constitutionality of 14 V.I.C. § 298(5)

Simple assault and battery, codified at 14 V.I.C. § 299 ("Section 299"), is defined as an "assault or battery unattended with circumstances of aggravation." 14 V.I.C. § 299(1)-(2). At the time of **Simmonds**'s conviction, the punishment for a conviction of simple assault and battery was a fine of no more than $50 or imprisonment for not more than 30 days or both. The aggravated assault and battery statute — 14 V.I.C. § 298 ("Section 298") — provides in relevant part that, "(w)hoever commits an assault and battery ... being an adult male, upon the person of a female or child, or being an adult female, upon the person of a child ... shall be fined not more than $500 or imprisoned not more than 1 year, or both." 14 V.I.C. § 298(5).

"Section 298(5), by its terms, escalates simple assault and battery to an aggravated assault and battery where the assault and battery is perpetrated by an adult male against an adult female." **[*5]** *Humienny v. Virgin Islands*, 79 F. Supp. 3d 548, 550, 62 V.I. 735 (D.V.I. 2015). "The statute, however, does not graduate simple assault to aggravated assault when an adult male perpetrates the offense against another adult male or if an adult female perpetrates the offense against another adult female." ***Simmonds***, 55 V.I. 1069 (D.V.I. 2011). "Nor does the statute graduate simple assault to aggravated assault when an adult

female perpetrates the offense against an adult male." *Day v. Virgin Islands*, D.C. Crim. App. No. 1997-63, 2015 U.S. Dist. LEXIS 138713, 2015 WL 5935849, at *4 (D.V.I. Oct. 7, 2015). If **Simmonds** and Walters-**Simmonds** had been the same gender, or if **Simmonds** were a female and Walters-**Simmonds** a male, then **Simmonds** would have faced criminal liability only for simple assault under Section 299. As such, men and women are treated differently under the aggravated assault statute.

This Court has previously found, on several occasions, that Section 298(5) violates the Equal Protection Clause of the Fourteenth Amendment. *See Day*, 2015 U.S. Dist. LEXIS 138713, 2015 WL 5935849, at *5; *Humienny*, 79 F. Supp. 3d at 550; *Rogers v. Virgin Islands*, 63 V.I. 1010, 2015 WL 5013953, at *7 (D.V.I. 2015); *Charleswell v. Virgin Islands*, D.C. Crim. App. No. 2006-28 (D.V.I. App. Div. 2013). A finding that a statute is facially unconstitutional makes that statute void ab *initio*. *See Alexander v. Cockrell*, 294 F.3d 626, 629 (5th Cir. 2002); *see also Vogel v. Pennsylvania*, 790 F.2d 368, 379 (3rd Cir. 1986). It is as though the statute was never passed. *Alexander*, 294 F.3d at 629.

The subsection under which **Simmonds** was convicted for aggravated assault was, in essence, never a valid law. *See id.* Because Section 298(5) is unconstitutional, the Court will vacate **Simmonds**'s judgment of conviction and sentence with respect **[*6]** to that sub-section of the statute.

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).

B. Admissibility of Certain Testimony of Police Officer Roger Roberts

With respect to the evidence presented at trial, **Simmonds** challenges the admissibility of **[*7]** certain inculpatory statements made by one of the People's witnesses, Police Officer Roger Roberts ("Roberts") during his trial testimony. Roberts was present at the police station when Walter-**Simmonds** arrived to report that **Simmonds** had hit her. Roberts testified that when Walter-**Simmonds** entered the police station "[s]he was crying and hysterical" and appeared "upset." JA 28:25-29:1. Upon entering the police station, Roberts testified that Walter-**Simmonds** "stated her husband is home beating the shit out of her. Pardon my French. She was calling 911 and they took it as a joke, so she came to the police station." [3] *Id.* at 29:21-24. Roberts also testified that he observed that Walter-**Simmonds** "had a big red mark on the left side of her face." *Id.* at 30:14.

Simmonds argues:

> The testimony offered by Officer Roberts of this crime — regarding how [Walter-**Simmonds**]'s husband was beating her — is absolutely irrelevant with respect to the issues before the jury. The testimony regarding a 'big red mark' and how somebody beat 'the shit out of [Walter-**Simmonds**] could not in any way serve to establish any of the elements of the crime of aggravated assault.

ECF No. 13 at 21-22.

As discussed above, simple **[*8]** assault is an "assault or battery unattended with circumstances of aggravation." 14 V.I.C. § 299(1)-(2) The Virgin Islands Code defines "assault and battery" as follows: "Whoever uses any unlawful violence upon the person of another with intent to injure him, whatever be the means or the degree of violence used, commits an assault and battery." 14 V.I.C. § 292. Accordingly, the People were required to prove that **Simmonds** used "unlawful violence" on Walter-**Simmonds** with the intent of injuring her. See 14 V.I.C. § 292.

"Unlawful violence" encompasses a wide variety of conduct, ranging from shooting someone, *see Viera v. People*, 2019 V.I. Supreme LEXIS 35, 2019 VI 22, 2019 WL 3287181, at *8 (V.I. 2019), to hitting someone with a pool cue, *see Boston v. People of the Virgin Islands*, 56 V.I. 634, 2012 WL 1522162, at *4 (V.I. 2012), to punching someone, *see Dunlop v. Virgin Islands*, S. Ct. Crim. No. 2008-0037, 2009 V.I. Supreme LEXIS 41, 2009 WL 2984052, at *3-4 (V.I. Sept. 15, 2009). Robert's testimony that Walter-**Simmonds** claimed that **Simmonds** was "beating" her along with his personal observation of injuries consistent with a "beating" describes conduct well within the heartland of "assault and battery," and as such, is relevant evidence. The Superior Court did not err in admitting it.

In light of all the evidence adduced at trial, the Court finds that there was sufficient evidence to support a conviction of the lesser included offense, simple assault. The Court will remand for the Superior Court **[*9]** to impose a judgment of conviction and sentence that reflects the lesser-included offense of simple assault and battery, unattended by any circumstance of aggravation. *See, e.g.*, *McGowen*, 56 V.I. at 10 (striking down the gender-based aggravating factor and reducing the count by operation of law to simple assault and battery).

IV. CONCLUSION

For the reasons stated above, the Court will vacate the conviction and sentence imposed and remand this case to the Superior Court with instructions to impose a conviction and sentence that reflect the lesser-included offense of simple assault and battery, unattended by any circumstances of aggravation. *See* *Josiah*, 641 F.2d at 1108. An appropriate judgment follows.

JUDGMENT

PER CURIAM,

For the reasons stated in the Memorandum Opinion of even date, it is hereby

ORDERED that the appellee's conviction and the sentence imposed for aggravated assault in this case are VACATED; and it is further

ORDERED that this case is **REMANDED** to the Superior Court of the Virgin Islands, which shall impose a conviction and sentence that reflects the lesser-included offense of simple assault and battery, unattended by any circumstances of aggravation.

SO ORDERED, this 3rd day of April, 2020.

Footnotes

[1] While the Honorable James S. Carroll, III, former judge of the Superior Court of the Virgin Islands, sat on the panel that considered this matter, he retired before the decision was issued.

[2] **Simmonds**'s notice of appeal was filed on November 7, 2005. However, his appeal was not properly administratively docketed by the Superior Court in this Court until November 7, 2008.

[3] **Simmonds** objected to the admission of this statement, arguing that it was inadmissible hearsay. The trial judge overruled his objection and admitted the statement as an excited utterance. **Simmonds** does not argue on appeal that this statement was inadmissible hearsay.

APPENDIX

D

Simmonds v. People of the Virgin Islands, 2011 U.S. Dist. LEXIS 84969

United States District Court for the District of the Virgin Islands, Division of St. Croix, Appellate Division

July 29, 2011, Decided; July 29, 2011, Filed

D.C. Cr. App. No. 2008-0029

Reporter
2011 U.S. Dist. LEXIS 84969 *

GARY **SIMMONDS**, Appellant v. PEOPLE OF THE VIRGIN ISLANDS, Appellee

Subsequent History: On remand at, Findings of fact/conclusions of law at People of the Virgin Islands v. **Simmonds**, 58 V.I. 3, 2012 V.I. LEXIS 24 (June 11, 2012)

Prior History: **[*1]** On Appeal from the Superior Court of the Virgin Islands. Super. Ct. Crim. No. 215/2005. The Honorable Darryl Dean Donohue, Judge Presiding. Considered: February 18, 2011.
Simmonds v. People of the Virgin Islands, 2011 U.S. Dist. LEXIS 84012, 55 V.I. 1069 (July 29, 2011)

Core Terms

further order, briefing

Counsel: Kele Onyejekwe, Esq., St. Croix, USVI, *For the Appellant*.

Maureen Phelan, Esq., St. Croix, USVI, *For the Appellee*.

Judges: GÓMEZ, *Chief Judge, District Court of the Virgin Islands*; FINCH, *Senior Sitting Judge, District Court of the Virgin Islands*; and THOMAS, *Judge of the Superior Court of the Virgin Islands, Division of St. Thomas and St. John, sitting by designation*.

Opinion

ORDER

(July 29, 2011)

AND NOW for reasons more fully stated in a Memorandum Opinion filed on even date, It is hereby,

ORDERED that this matter is **REMANDED** for further briefing and fact finding. It is further

ORDERED that said briefing shall be completed within ninety (90) days of this order. It is further

ORDERED that the Superior Court shall make all requisite fact finding and issue an order concerning such fact-finding within one-hundred and twenty (120) days from this order. It is further

ORDERED that we retain jurisdiction over this remand.

SO ORDERED this 29th day of **July 2011.**

Simmonds v. People of the Virgin Islands, 2011 U.S. Dist. LEXIS 84012

United States District Court for the District of the Virgin Islands, Division of St. Croix, Appellate Division

February 18, 2011, Considered; July 29, 2011, Filed

D.C. Criminal App. No. 2008-0029

Reporter
2011 U.S. Dist. LEXIS 84012 * | 55 V.I. 1069 **

GARY **SIMMONDS**, Appellant v. PEOPLE OF THE VIRGIN ISLANDS, Appellee

Subsequent History: Judgment entered by, Remanded by **Simmonds** v. People of the Virgin Islands, 2011 U.S. Dist. LEXIS 84969 (D.V.I., July 29, 2011)
Remanded by **Simmonds** v. People of the V.I., 2020 U.S. Dist. LEXIS 63619 (D.V.I., Apr. 3, 2020)

Prior History: **[*1]** On Appeal from the Superior Court of the Virgin Islands. Super. Ct. Crim. No. 215/2005. The Honorable Darryl Dean Donohue, Judge Presiding.

Core Terms

aggravated assault, adult, gender, battery, female

Headnotes/Summary

Summary

Appeal from aggravated assault conviction. The District Court, Appellate Division, Gómez, Finch, and Thomas, JJ., remanded the case for findings as to the constitutionality of the aggravated assault statute.

Headnotes
VIRGIN ISLANDS OFFICIAL REPORTS HEADNOTES
[Headnotes classified to Virgin Islands Digest]

VI1. 1. Constitutional Law § 11.38 > Equal Protection > Middle Tier Scrutiny

While the Fourteenth Amendment is clearly grounded as an instrument to safeguard against the iniquities of discrimination, the Fourteenth Amendment does not prohibit states from treating different classes of persons in different ways. Rather, where legislation makes explicit gender classifications, those classifications are subject to intermediate scrutiny. U.S. Const. amend. XIV.

VI2. 2. Virgin Islands § 9.10 > Federalism > Generally

Although technically not a "state," it is well established that Congress has chosen to give the Virgin Islands territorial government autonomy similar to that of the states.

VI3. 3. Constitutional Law § 11.09 > Equal Protection > Classifications Generally

Equal protection does not require things which are different in fact to be treated in law as though they were the same. The Equal Protection Clause prevents only irrational and unjustified classifications, not all classifications. U.S. Const. amend. XIV.

VI4. 4. Constitutional Law § 11.38 > Equal Protection > Middle Tier Scrutiny

To survive intermediate scrutiny under the Equal Protection Clause, the burden is on the Government to demonstrate that a challenged statute serves important governmental objectives and is substantially related to the achievement of those objectives. U.S. Const. amend. XIV.

VI5. 5. Constitutional Law § 11.01 > Equal Protection > Generally

The party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an exceedingly persuasive justification for the classification. The burden is met only by showing at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives. U.S. Const. amend. XIV.

VI6. 6. Constitutional Law § 11.38 > Equal Protection > Middle Tier Scrutiny

Intermediate scrutiny and the substantial relationship test ultimately control the courts' review over equal protection challenges to statutes that employ gender classifications. U.S. Const. amend. XIV.

VI7. 7. Constitutional Law § 11.47 > Equal Protection > Particular Cases

In a case where defendant argued that the Virgin Islands aggravated assault statute violated the Equal Protection Clause, the Government's brief was inadequate in that it failed to assert either a sufficient legitimate territorial interest that was advanced by the gender distinctions included in the plain language of the statute or factually demonstrate how this statute was substantially related to such an interest. In this instance, where factual findings related to the burden of proof were likely to be triggered, supplementing the record and additional briefing alone were inadequate; accordingly, the court remanded the case for further briefing and corresponding fact-finding before the trial court. U.S. Const. amend. XIV; 14 V.I.C. § 298(5).

Counsel: Kele Onyejekwe, Esq., St. Croix, USVI, *For the Appellant*.

Tiffany V. Monrose, AAG Esq., St. Croix, USVI, *For the Appellee*.

Judges: GÓMEZ, *Chief Judge, District Court of the Virgin Islands*; FINCH, *Senior Sitting Judge, District Court of the Virgin Islands*; and THOMAS, *Judge of the Superior Court of the Virgin Islands, Division of St. Thomas and St. John, sitting by designation*.

Opinion

[**1070] **MEMORANDUM OPINION**

(July 29, 2011)

In this appeal, we address whether the Virgin Islands aggravated assault statute violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution. For the reasons cited below, we remand.

I. FACTUAL AND PROCEDURAL BACKGROUND

On May 2, 2005, Mrs. Tracia Walters-**Simmonds** ("Mrs. **Simmonds**") went to the Schrader Command police station on St. Croix to complain that her husband, Gary **Simmonds** ("Mr. **Simmonds**", "**Simmonds**" or "Appellant") had struck her. (J.A. 28-29, Trial Tr. 16-17.) When Mrs. **Simmonds** arrived at the police station, her face was bruised and red.

[**1071] On the evening of the incident, police went to the **[*2] Simmonds**, home to investigate. Mr. **Simmonds**, who was a police officer at the time, was at the residence. He conversed with investigating Virgin Islands police officers and voluntarily went to the police station. After initially refusing to sign an advice of rights form, he gave a statement. Therein, he explained that the couple's fight originated from a disagreement concerning both an outstanding bill and Mrs. **Simmonds**' relationship with an ex-boyfriend. Mrs. **Simmonds** also gave a statement where she indicated that the argument had indeed escalated when Mr. **Simmonds** struck her about the face and body while they were in the bedroom and the bathroom of their residence.

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

A bench trial was held on September 22, 2005, concerning the single charge **[*3]** levied against **Simmonds**. At the conclusion of the evidence presented, the trial court found Mr. **Simmonds** guilty of aggravated assault in violation of 14 V.I.C. § 298(5). He was subsequently sentenced to a six-month suspended prison term, one year of supervised probation, 100 hours of community service and, *inter alia*, enrollment in an anger management course. This timely appeal followed.

II. JURISDICTION AND STANDARD OF REVIEW

This Court has jurisdiction to review judgments and orders of the Superior Court of the Virgin Islands in all criminal cases in which the defendant has been convicted, other than a plea of guilty. Revised Organic Act of 1954 § 23A, 48 U.S.C. § 1613a 2; Omnibus Justice Act of 2005, Act No. 6730 § 54(d)(1); Act No. 6687; 4 V.I.C. § 33 (2006).

Generally, we review de *novo* questions of law, issues implicating rights protected under the U.S. Constitution, **[*4]** and the interpretation of [**1072] statute. *See Gov't of the V.I. v. Albert*, 89 F. Supp. 2d 658, 663, 42 V.I. 184 (D.V.I. App. Div. 2001). However, we afford the more deferential clear error review to factual determinations. *Id.*

III. ISSUE PRESENTED

In this appeal we are tasked with determining whether the Virgin Islands aggravated assault statute violates the Equal Protection Clause. 3

IV. ANALYSIS

A. Whether 14 V.I.C. § 298(5) violates the Equal Protection Clause of the Fourteenth Amendment 4

Simmonds argues that subsection 5 of the Virgin Islands aggravated assault statute at section 298 of title 14 of the V.I. Code discriminates on the basis of gender.

In pertinent part, 14 V.I.C. § 298(5) provides that, aggravated assault and battery occurs whenever a person "commits an assault and battery ... being an adult male, upon the person of a female or child, or being an adult female upon the person of a child." *Id.* The statute escalates a simple assault and battery 5 to an aggravated assault and battery 6 when an adult male perpetrates an assault and battery against an adult female. *See id.*

The statute, however, does not graduate simple assault to aggravated assault when an adult male perpetrates the offense against another adult male or if an adult female perpetrates the offense against another adult female. As such, men and women are plainly treated differently.

The Equal Protection Clause of the 14th Amendment to the United States Constitution provides in relevant part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny any person within its jurisdiction the equal protection of the laws.

[**1073] *Id.* [7]

VI[1-3] [1-3] While the Fourteenth Amendment is clearly grounded as an instrument to safeguard **[*6]** against the iniquities of discrimination, "the Fourteenth Amendment does not prohibit states from treating different classes of persons in different ways." [8] *See, e.g., Reed v. Reed*, 404 U.S. 71, 92 S. Ct. 251, 30 L. Ed. 2d 225 (1971); *see also Rinaldi v. Yeager*, 384 U.S. 305, 309, 86 S. Ct. 1497, 16 L. Ed. 2d 577 (1966) (The Equal Protection Clause "does not demand that a statute necessarily apply equally to all persons."). [9] Rather, where legislation makes explicit gender classifications, those classifications are subject to intermediate scrutiny. *Hynson v. Chester, Legal Dep't*, 864 F.2d 1026, 1029 (3d Cir. 1988).

VI[4-6] [4-6] To survive intermediate scrutiny, the burden is on the Government to demonstrate that a challenged statute serves important governmental objectives and is substantially related to the achievement of those objectives. *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 70, 121 S. Ct. 2053, 150 L. Ed. 2d 115 (2001); *see also Kirchberg v. Feenstra*, 450 U.S. 455, 461, 101 S. Ct. 1195, 67 L. Ed. 2d 428 (1981) (the burden is on the government to prove both the importance of its asserted objective and the substantial relationship between the classification and that objective). [10]

[**1074] In this litigation, the Government **[*9]** makes little effort to carry its burden. Although the Government acknowledges that it is saddled with the burden of proof [11]; it fails to assert any facts or arguments whatsoever to demonstrate that § 298(5) was spawned by a legitimate or important government objective and that a substantial relationship exists between the challenged statute and achieving the territory's legitimate goal.

Indeed, the Government does not so much as explicitly identify a government objective for the plain gender distinctions employed by § 298(5). Instead, the Government ratchets its argument to a litany of cases that, at best, show that several state statutes that also employ gender distinctions have survived equal protection challenges. The Government's burden, however, is not to demonstrate that similar statutes have been upheld. Rather the Government's burden is to demonstrate that this statute is "substantially-related" to **[*10]** a legitimate or important territorial objective.

The Government satisfying its burden of proof is neither trivial, nor technical. In the very same cases that the Government cites, statutes employing gender distinctions were successfully defended where the Government met its burden, by first asserting a legitimate state interest, then arguing facts, legislative history, data, inherent differences and common sense to support the presence of a substantial relationship between the gender distinction and the state's interest. [12] In this instance, [**1075] the Government's brief does not undertake any of the reasonable lifting that the governing standard of review requires. As such, we remand for further briefing and fact-finding before the Superior Court. [13]

V. CONCLUSION

VI[7] [7] The Government's brief is inadequate. **[*12]** It fails to either: assert a sufficient legitimate territorial interest that is advanced by the gender distinctions included in the plain language of title 14 section 298(5) of the V.I. Code or factually demonstrate how this statute is substantially related to such an interest. In this instance, where factual findings related to the burden of proof are likely to be triggered, supplementing the record and additional briefing alone are inadequate. We accordingly, remand for further briefing and corresponding fact-finding before the Superior Court. We explicitly retain jurisdiction over this remand.

Footnotes

1 Subsection (5) of 14 V.I.C. section 298, graduates a simple assault to an aggravated assault if it is committed by an adult male upon a female. *See* 14 V.I.C. § 298(5).

2 The complete Revised Organic Act of 1954 is found at 48 U.S.C. §§ 1541-1645 (1995 & Supp. 2003), *reprinted in* V.I. Code Ann. 73-177, Historical Documents, Organic Acts, and U.S. Constitution (1995 & Supp. 2003) (preceding V.I. Code. Ann. tit. 1); Act 6687 § 4 (2004); Act 6730 § 54 (2005) (amending Act 6687); 4 V.I.C. § 33 (2006).

3 The Appellant also raises evidentiary issues.

4 This issue is a question of first impression for this Court.

5 The punishment for **[*5]** simple assault and battery is a fine of no more than $50 or imprisonment for not more that 30 days or both. V.I. Code. Ann. tit. 14, § 299(2).

6 The punishment for aggravated assault and battery is a fine of not more than $500 or imprisonment for not more than one year or both. V.I. Code. Ann. tit 14, § 298(5).

7 The Equal Protection Clause of the 14th Amendment is made applicable to the Virgin Islands in Revised Organic Act of 1954, § 3.

8 Although technically not a "state" it is well established that Congress has chosen to give the Virgin Islands territorial government "autonomy similar to that of the states." *Harris v. Boreham*, 233 F.2d 110, 113-14 (3d Cir. 1956); *see also Gov't v. United Indus. Workers of N. Am.*, 987 F. Supp. 439, 444, 38 V.I. 170 (D.V.I. App. Div. 1997).

9 Equal protection also does not require ?things which are different in fact to be treated in law as though they were the same." *Rinaldi v. Yeager*, 384 U.S. 305, 309, 86 S. Ct. 1497, 16 L. Ed. 2d 577 (1966); *see also South Carolina Public Svc. Authority v. C&S Nat'l Bank*, 300 S.C. 142, 386 S.E.2d 775 (1989) ("the Equal Protection Clause prevents only irrational **[*7]** and unjustified classifications, not all classifications").

10 The Appellant argues that the U.S. Supreme Court has adopted a heightened standard of review in gender classification cases. The Appellant cites *Mississippi University for Women v. Hogan*, in support of the proposition that the standard of review has shifted from the government demonstrating only a substantial relationship between the classification and the objective, to the elevated burden of showing an "exceedingly persuasive justification." (Appellant's Brief at 18.) (citing 458 U.S. at 724.) However, the Appellant argues a distinction without a difference. The full quotation in *Mississippi University for Women v. Hogan*, reads:

> the party seeking **[*8]** to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an "exceedingly persuasive justification" for the classification. The *burden is **met only** by showing at least that the classification serves "important governmental objectives and that the discriminatory means employed" are "substantially related to the achievement of those objectives."*

458 U.S. at 724 (emphasis added) (internal citations omitted); *see also United States v. Virginia*, 518 U.S. 515, 532-533, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996) (citing *Mississippi Univ. for Women*, 458 U.S. at 724) (internal quotations and citations omitted) ("exceedingly persuasive" justification in gender classification cases is demonstrated where the government shows that "the challenged classifications serves important government objectives and that the discriminatory means employed are substantially related to the achievement of those objectives").

Hence, despite the shift in precedent that the Government attempts to argue, intermediate scrutiny and the substantial relationship test ultimately control the courts' review over equal protection challenges to statutes that employ gender classifications.

11 It is the Government's burden to "demonstrate that the classification based upon sex in § 298(5) serves an important government objective and is substantially related to the achievement of those objectives." (Appellant's Brief at 8.)

12 *See, e.g.*, *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 101 S. Ct. 1200, 67 L. Ed. 2d 437 (1981) (gender distinct statute was substantially related to the state interest of preventing underage illegitimate pregnancies to pass constitutional muster); *see also People v. Silva*, 27 Cal. App. 4th 1160, 33 Cal. Rptr. 2d 181 (Cal. 1994) (upholding against equal protection challenge to criminal domestic abuse statute criminalizing willful injury upon person of opposite sex with whom assailant **[*11]** cohabits; and noting "obvious" distinction that women are physically less able to defend themselves against their husbands than vice-versa); *see also Rostker v. Goldberg*, 453 U.S. 57, 79, 101, 101 S. Ct. 2646, 69 L. Ed. 2d 478 (1981) (requirement that men, but not women, register for draft did not create invidious gender classification "but rather realistically reflects the fact that the sexes are not similarly situated" [internal quotation marks omitted]); *Ramos v. Vernon*, 353 F.3d 171, 179 (2d Cir. 2003) ("in the context of the class-based equal protection framework, the [United States Supreme] Court has explicitly repudiated complete blindness with regard to gender-based laws, reasoning that, although such laws elicit some suspicion, the physical differences between the sexes are relevant and enduring").

Notably, while informative, we are not bound by the Superior Court's 1981 ruling in *Gov't of the V.I. v. Prescott*, 18 V.I. 110, 112 (Terr. Ct. 1981).

[13] **Simmonds** also raises evidentiary issues. We hold those issues in abeyance pending the Superior Court's findings of fact concerning whether the Government met its burden of proof regarding **Simmonds'** Equal Protection Challenge.

APPENDIX

E

People of the Virgin Islands v. Simmonds, 58 V.I. 3

Superior Court of the Virgin Islands, Division of St. Croix

June 11, 2012, Filed

Case No. SX-05-CR-215

Reporter

58 V.I. 3 * | 2012 V.I. LEXIS 24 ** | 2012 WL 2550958

PEOPLE OF THE VIRGIN ISLANDS, Plaintiff v. GARY **SIMMONDS**, Defendant

Prior History: Simmonds v. People of the Virgin Islands, 2011 U.S. Dist. LEXIS 84969 (D.V.I., July 29, 2011)

Core Terms

assault, battery, violence, aggravated, domestic, female, classification, Territory, gender, adult, gender-based, borrowed, sex, revision, deference, battered, elevated, inflicts, Municipality, perpetrated, quotations, probation, proffered, deter, cane, gender-neutral, exceedingly, classified, disgrace, arrest

Case Summary

Overview

The court stated that V.I. Code Ann. tit. 14, § 298(5), which elevated any assault and battery committed by an adult male on a female to aggravated assault and battery, employed a gender-based classification on its face. The reasons proffered by the People to justify the classification, the important government objectives determined in a prior court decision and the prevalence of gender-based domestic violence, did not survive intermediate scrutiny review. Thus, the statute violated the Equal Protection Clause of U.S. Const. amend. XIV.

Outcome

The court held that the statute violated equal protection.

LexisNexis® Headnotes

Constitutional Law > Equal Protection > General Overview

HN1 **Constitutional Law, Equal Protection**

The Fourteenth Amendment to the United States Constitution prohibits states, and by congressional extension territories, from denying equal protection of the law to any person within their respective jurisdictions. U.S. Const. amend. XIV, § 1; § 3 of the Revised Organic Act of the Virgin Islands, 48 U.S.C.S. § 1541 et seq. Claims alleging denial of equal protection in the Virgin Islands mirror claims brought against States under the Fourteenth Amendment. More like this Headnote

Shepardize® - Narrow by this Headnote (2)

Constitutional Law > Equal Protection > Nature & Scope of Protection

HN2 **Equal Protection, Nature & Scope of Protection**

The function of the Equal Protection Clause is simply to measure the validity of classifications created by state and territorial laws. Equal protection emphasizes disparity in treatment by a government between classes of individuals whose situations are arguably indistinguishable. Unlike other provisions of the Constitution, the Equal Protection Clause confers no substantive rights and creates no substantive liberties. The clause is offended only by laws that are invidiously discriminatory — only by classifications that are wholly arbitrary or capricious. More like this Headnote

Shepardize® - Narrow by this Headnote (1)

Constitutional Law > Equal Protection > Gender & Sex
Evidence > Burdens of Proof > Allocation
View more legal topics

HN3 **Equal Protection, Gender & Sex**

Statutes providing for different treatment on the basis of gender establish a classification subject to intermediate scrutiny under the Equal Protection Clause. The fact that a statute discriminates against males rather than against females does not exempt it from scrutiny or reduce the standard of review. The party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an exceedingly persuasive justification for the classification. The burden of justification is demanding and it rests entirely on the Government. The Government must show that the gender classification at issue serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives. If the government's objective is legitimate and important, the court next determines whether the requisite direct, substantial relationship between objective and means is present. The purpose of requiring that close relationship is to assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women. More like this Headnote

Shepardize® - Narrow by this Headnote (1)

Governments > Legislation > Interpretation
View more legal topics

HN4 **Legislation, Interpretation**

Where construction and interpretation of a penal statute is at issue, courts must construe such statutes strictly. The rule has long been settled in American jurisdictions that all such statutes must be construed strictly against the State and favorably to the liberty of the citizen. This rule is founded on the tenderness of the law for the rights of individuals and upon the plain principle that the power to decide what is a crime and the power to punish are vested in the legislative, not in the judicial department. More like this Headnote

Shepardize® - Narrow by this Headnote (0)

Criminal Law & Procedure > ... > Crimes Against Persons > Assault & Battery > General Overview

HN5 **Crimes Against Persons, Assault & Battery**

Under the Virgin Islands Code, a person commits assault if he (1) attempts to commit a battery; or (2) makes a threatening gesture showing in itself an immediate intention coupled with an ability to commit a battery. V.I. Code Ann. tit. 14, § 291 (1996). Battery requires a "touching" or some physical force and contact within the concept of the common law definition of battery. More like this Headnote

Shepardize® - Narrow by this Headnote (0)

Criminal Law & Procedure > ... > Assault & Battery > Simple Offenses > Elements
View more legal topics

HN6 **Simple Offenses, Elements**

Assault and battery involves the use of unlawful violence upon the person of another with intent to injure him, whatever be

the means or the degree of violence used. V.I. Code Ann. tit. 14, § 292. An assault or battery unattended with circumstances of aggravation is simple assault and battery. V.I. Code Ann. tit. 14, § 299. More like this Headnote

Shepardize® - Narrow by this Headnote (0)

Criminal Law & Procedure > ... > Assault & Battery > Aggravated Offenses > Elements

HN7 **Aggravated Offenses, Elements**

Assault and battery becomes aggravated if committed: (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) by a person of robust health, upon one who is aged or decrepit; (5) by an adult male, upon the person of a female or child, or being an adult female, upon the person of a child; (6) by an instrument or means which inflicts disgrace upon the person assaulted, such as a whip, cowhide or cane; (7) while being in disguise; (8) on a teacher or school employee on school grounds; or (9) on a caseworker, investigator, or other health and human services employee in the performance of an official duty. V.I. Code Ann. tit. 14, § 298(1)-(7), (8)-(9). More like this Headnote

Shepardize® - Narrow by this Headnote (1) 1

Criminal Law & Procedure > ... > Assault & Battery > Aggravated Offenses > Elements
View more legal topics

HN8 **Aggravated Offenses, Elements**

V.I. Code Ann. tit. 14, § 298 is predicated on an initial finding that the defendant did in fact commit a simple assault and battery, but it is coupled with an element of aggravation that also is unlawful. The term "aggravated assault and battery" is employed to describe an assault which has, in addition to the mere intent to commit it, another object which is also unlawful. The question of intent is one of fact, to be determined or inferred from the surrounding facts and circumstances of the crime. More like this Headnote

Shepardize® - Narrow by this Headnote (0)

Criminal Law & Procedure > ... > Assault & Battery > Aggravated Offenses > General Overview
View more legal topics

HN9 **Assault & Battery, Aggravated Offenses**

The Virgin Islands borrowed its assault and battery statutes, including its aggravated assault and battery statute, from the Territory of Puerto Rico in 1921. More like this Headnote

Shepardize® - Narrow by this Headnote (3)

Constitutional Law > Equal Protection > Gender & Sex

HN10 **Equal Protection, Gender & Sex**

Although the equal protection test for determining the validity of a gender-based classification is straightforward, it must be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions. More like this Headnote

Shepardize® - Narrow by this Headnote (0)

Governments > Legislation > Interpretation

HN11 **Legislation, Interpretation**

Judicial inquiry into legislative motives or purposes is a hazardous matter and the search for the "actual" or "primary" purpose of a statute is likely to be elusive. In some instances, legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports. But it is difficult or impossible for any court to determine the sole or dominant motivation behind the choices of a group of legislators. More like this Headnote

Shepardize® - Narrow by this Headnote (0)

Governments > Legislation > Interpretation

HN12 **Legislation, Interpretation**

Just as there is an element of futility in a judicial attempt to invalidate a law because of the bad motives of its supporters, a

judicial attempt to uphold a law because of the good motives of its supporters is similarly futile. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it. Individual legislators may have voted for the statute for a variety of reasons. Moreover, the individual statements of legislators have no bearing on a statute's interpretation particularly where the legislator did not sponsor the legislation in question. More like this Headnote

Shepardize® - Narrow by this Headnote (0)

Constitutional Law > Equal Protection > Gender & Sex

HN13 **Equal Protection, Gender & Sex**

Justifications offered in support of gender-based classifications must be genuine, not hypothesized or invented post hoc in response to litigation. They cannot rest on overbroad generalizations about the different talents, capacities, or preferences of males and females. Intentional discrimination on the basis of gender by state actors violates the Equal Protection Clause, particularly where the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women. Moreover, "benign" justifications proffered in defense of categorical exclusions will not be accepted automatically; a tenable justification must describe actual governmental purposes, not rationalizations for actions in fact differently grounded. More like this Headnote

Shepardize® - Narrow by this Headnote (1) 1

Criminal Law & Procedure > ... > Crimes Against Persons > Domestic Offenses > General Overview
Family Law > Family Protection & Welfare > General Overview

HN14 **Crimes Against Persons, Domestic Offenses**

The definition of a domestic violence victim includes any person who has been subjected to domestic violence by a spouse, former spouse, parent, child, or any other person related by blood or marriage, a present or former household member, a person with whom the victim has a child in common, or a person who is, or has been, in a sexual or otherwise intimate relationship with the victim. V.I. Code Ann. tit. 16, § 91(c). Under the revised definition, a wife battered by her husband would still qualify as a victim of domestic violence. But so would a father battered by his son or a mother by her daughter or a female roommate of another female roommate. Before the revision, a younger brother beaten by his older brother could not avail himself of the protections offered to domestic violence victims. By expanding the definition of "victim" beyond the opposite sex, the Territory extended protection to the entire domestic sphere. More like this Headnote

Shepardize® - Narrow by this Headnote (1)

Criminal Law & Procedure > ... > Crimes Against Persons > Domestic Offenses > General Overview
Family Law > Family Protection & Welfare > General Overview

HN15 **Crimes Against Persons, Domestic Offenses**

Domestic violence laws apply equally, and are equally enforced, whether the individuals involved are of the same or opposite genders. More like this Headnote

Shepardize® - Narrow by this Headnote (0)

Constitutional Law > ... > Case or Controversy > Constitutionality of Legislation > General Overview

HN16 **Case or Controversy, Constitutionality of Legislation**

In determining whether a statute is constitutional, courts examine the statute in terms of its immediate objective, its ultimate effect and its historical context and the conditions existing prior to its enactment. More like this Headnote

Shepardize® - Narrow by this Headnote (0)

Constitutional Law > Equal Protection > General Overview

HN17 **Constitutional Law, Equal Protection**

Courts need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation. Although the Equal Protection Clause does not countenance speculative probing into the purposes of a coordinate branch, courts have rejected one asserted purpose as impermissible, but then considered other purposes to determine if they could justify the statute. More like this Headnote

Shepardize® - Narrow by this Headnote (0)

Constitutional Law > Equal Protection > Gender & Sex

HN18 **Equal Protection, Gender & Sex**
Legislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing the stereotypes about the "proper place" of women and their need for special protection. Thus, even statutes purportedly designed to compensate for and ameliorate the effects of past discrimination must be carefully tailored for equal protection purposes. More like this Headnote

Shepardize® - Narrow by this Headnote (0)

Constitutional Law > Equal Protection > Gender & Sex
Criminal Law & Procedure > ... > Assault & Battery > Aggravated Offenses > General Overview

HN19 **Equal Protection, Gender & Sex**
Since the government's purpose can be just as well served by a gender-neutral classification as one that gender classifies and therefore carries with it the baggage of sexual stereotypes, the government cannot be permitted to classify on the basis of sex. Since V.I. Code Ann. tit. 14, § 298(5) employs a gender-based classification on its face and does not survive intermediate scrutiny review, the statute violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. More like this Headnote

Shepardize® - Narrow by this Headnote (1) 1

Constitutional Law > Equal Protection > General Overview

HN20 **Constitutional Law, Equal Protection**
The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution applies to the U.S. Virgin Islands through § 3 of the Revised Organic Act of the Virgin Islands, 48 U.S.C.S. § 1541 et seq. More like this Headnote

Shepardize® - Narrow by this Headnote (2)

Constitutional Law > Equal Protection > General Overview

HN21 **Constitutional Law, Equal Protection**
See § 3 of the Revised Organic Act of the Virgin Islands, 48 U.S.C.S. § 1541 et seq. More like this Headnote

Shepardize® - Narrow by this Headnote (0)

Constitutional Law > Equal Protection > Gender & Sex
View more legal topics

HN22 **Equal Protection, Gender & Sex**
Statutes discriminating against males are subject to the same scrutiny and standard of review for equal protection purposes as those discriminating against females. More like this Headnote

Shepardize® - Narrow by this Headnote (0)

Constitutional Law > Equal Protection > Gender & Sex
Evidence > Burdens of Proof > Allocation

HN23 **Equal Protection, Gender & Sex**
In equal protection cases, the burden rests on the government to show that classifications based on gender are substantially related to achieving important governmental objectives. Whether the justification proffered by the government is exceedingly persuasive is determined by the court. If accepted by the court, the government's justification is entitled to great deference. More like this Headnote

Shepardize® - Narrow by this Headnote (0)

Constitutional Law > Equal Protection > Gender & Sex

HN24 **Equal Protection, Gender & Sex**
In equal protection cases, government justification for gender-based classifications must be genuine, not hypothesized or invented post hoc in response to litigation. And it must not rely on overbroad generalizations about the different capacities of males and females. More like this Headnote

Shepardize® - Narrow by this Headnote (0)

Criminal Law & Procedure > ... > Domestic Offenses > Domestic Assault > Elements
Family Law > Family Protection & Welfare > General Overview

HN25 **Domestic Assault, Elements**
Domestic violence occurs when someone commits an act specified by statute, or an attempt or threat to commit that act, against a victim. V.I. Code Ann. tit. 16, § 91(b) (1996 & Supp. 2011). More like this Headnote

Shepardize® - Narrow by this Headnote (0)

Criminal Law & Procedure > ... > Domestic Offenses > Domestic Assault > General Overview
View more legal topics

HN26 **Domestic Offenses, Domestic Assault**
Assault and battery constitute acts of domestic violence. V.I. Code Ann tit. 16, § 91(b)(1)-(2). More like this Headnote

Shepardize® - Narrow by this Headnote (0)

Governments > Legislation > Interpretation

HN27 **Legislation, Interpretation**
When one jurisdiction borrows a statute from another, the judicial interpretations of that statute by the highest court of the borrowed jurisdiction accompany that statute. More like this Headnote

Shepardize® - Narrow by this Headnote (0)

Headnotes/Summary

Summary

Remand from district court for further briefing and findings of fact regarding constitutionality of statute elevating any assault and battery committed by an adult male on a female to aggravated assault and battery. The Superior Court, Donohue, J., held that the statute violated the Equal Protection Clause.

Headnotes
VIRGIN ISLANDS OFFICIAL REPORTS HEADNOTES
[Headnotes classified to Virgin Islands Digest]

VI1. 1. Constitutional Law § 11.01 > Equal Protection > Generally

The function of the Equal Protection Clause is simply to measure the validity of classifications created by state and territorial laws. Equal protection emphasizes disparity in treatment by a government between classes of individuals whose situations are arguably indistinguishable. Unlike other provisions of the Constitution, the Equal Protection Clause confers no substantive rights and creates no substantive liberties. The clause is offended only by laws that are invidiously discriminatory -- only by classifications that are wholly arbitrary or capricious. U.S. Const. amend. XIV.

VI2. 2. Constitutional Law § 11.38 > Equal Protection > Middle Tier Scrutiny

Statutes providing for different treatment on the basis of gender establish a classification subject to intermediate scrutiny under the Equal Protection Clause. The fact that a statute discriminates against males rather than against females does not exempt it from scrutiny or reduce the standard of review. The party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an exceedingly persuasive justification for the classification. The burden of justification is demanding and it rests entirely on the Government. The Government must show that the gender classification at issue serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives. If the government's objective is legitimate and important, the court next determines whether the requisite direct, substantial relationship between objective and means is present. The purpose of requiring that close relationship is to assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women. U.S. Const. amend. XIV.

VI3. 3. Statutes § 7.36 > Generally > Penal Statutes

Where construction and interpretation of a penal statute is at issue, courts must construe such statutes strictly. The rule has long been settled in American jurisdictions that all such statutes must be construed strictly against the State and favorably to the liberty of the citizen. This rule is founded on the tenderness of the law for the rights of individuals and upon the plain principle that the power to decide what is a crime and the power to punish are vested in the legislative, not in the judicial department.

VI4. 4. Assault and Battery § 15.10 > Elements > Generally

Under the Virgin Islands Code, a person commits assault if he (1) attempts to commit a battery; or (2) makes a threatening gesture showing in itself an immediate intention coupled with an ability to commit a battery. Battery requires a "touching" or some physical force and contact within the concept of the common law definition of battery. 14 V.I.C. § 291.

VI5. 5. Assault and Battery § 15.10 > Elements > Generally

Assault and battery involves the use of unlawful violence upon the person of another with intent to injure him, whatever be the means or the degree of violence used. An assault or battery unattended with circumstances of aggravation is simple assault and battery. 14 V.I.C. §§ 292, 299.

VI6. 6. Assault and Battery § 3.30 > Aggravated > Elements

The aggravated assault and battery statute is predicated on an initial finding that the defendant did in fact commit a simple assault and battery, but it is coupled with an element of aggravation that also is unlawful. The term "aggravated assault and battery" is employed to describe an assault which has, in addition to the mere intent to commit it, another object which is also unlawful. The question of intent is one of fact, to be determined or inferred from the surrounding facts and circumstances of the crime. 14 V.I.C. § 298.

VI7. 7. Assault and Battery § 1.00 > Generally

The Virgin Islands borrowed its assault and battery statutes, including its aggravated assault and battery statute, from the Territory of Puerto Rico in 1921. 14 V.I.C. § 298.

VI8. 8. Constitutional Law § 11.01 > Equal Protection > Generally

Although the equal protection test for determining the validity of a gender-based classification is straightforward, it must be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions.

VI9. 9. Statutes § 7.27 > Generally > Legislative History or Intent

Judicial inquiry into legislative motives or purposes is a hazardous matter and the search for the "actual" or "primary" purpose of a statute is likely to be elusive. In some instances, legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports. But it is difficult or impossible for any court to determine the sole or dominant motivation behind the choices of a group of legislators.

VI10. 10. Statutes § 7.27 > Generally > Legislative History or Intent

Just as there is an element of futility in a judicial attempt to invalidate a law because of the bad motives of its supporters, a judicial attempt to uphold a law because of the good motives of its supporters is similarly futile. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it. Individual legislators may have voted for the statute for a variety of reasons. Moreover, the individual statements of legislators have no bearing on a statute's interpretation particularly where the legislator did not sponsor the legislation in question.

VI11. 11. Constitutional Law § 11.01 > Equal Protection > Generally

Justifications offered in support of gender-based classifications must be genuine, not hypothesized or invented post hoc in response to litigation. They cannot rest on overbroad generalizations about the different talents, capacities, or preferences of males and females. Intentional discrimination on the basis of gender by state actors violates the Equal Protection Clause, particularly where the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women. Moreover, "benign" justifications proffered in defense of categorical exclusions will not be accepted automatically; a tenable justification must describe actual governmental purposes, not rationalizations for actions in fact differently grounded. U.S. CONST. amend. XIV.

VI12. 12. Domestic Violence § 1.00 > Generally

Domestic violence laws apply equally, and are equally enforced, whether the individuals involved are of the same or opposite genders.

VI13. 13. Statutes § 7.08 > Generally > Constitutionality

In determining whether a statute is constitutional, courts examine the statute in terms of its immediate objective, its ultimate effect and its historical context and the conditions existing prior to its enactment.

VI14. 14. Constitutional Law § 11.01 > Equal Protection > Generally

Courts need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation. Although the Equal Protection Clause does not countenance speculative probing into the purposes of a coordinate branch, courts have rejected one asserted purpose as impermissible, but then considered other purposes to determine if they could justify the statute. U.S. CONST. amend. XIV.

VI15. 15. Constitutional Law § 11.01 > Equal Protection > Generally

Legislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing the stereotypes about the "proper place" of women and their need for special protection. Thus, even statutes purportedly designed to compensate for and ameliorate the effects of past discrimination must be carefully tailored for equal protection purposes.

VI16. 16. Constitutional Law § 11.47 > Equal Protection > Particular Cases

Since the government's purpose can be just as well served by a gender-neutral classification as one that gender classifies and therefore carries with it the baggage of sexual stereotypes, the government cannot be permitted to classify on the basis of sex. Since subsection (5) of the aggravated assault and battery statute, which elevates any assault and battery committed by an adult male on a female to aggravated assault and battery, employs a gender-based classification on its face and does not survive intermediate scrutiny review, the statute violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. U.S. CONST. amend. XIV; 14 V.I.C. § 298(5).

VI17. 17. Constitutional Law § 11.38 > Equal Protection > Middle Tier Scrutiny

Statutes discriminating against males are subject to the same scrutiny and standard of review for equal protection purposes as those discriminating against females.

VI18. 18. Constitutional Law § 11.01 > Equal Protection > Generally

In equal protection cases, the burden rests on the government to show that classifications based on gender are substantially related to achieving important governmental objectives. Whether the justification proffered by the government

is exceedingly persuasive is determined by the court. If accepted by the court, the government's justification is entitled to great deference.

VI19. 19. Constitutional Law § 11.01 > Equal Protection > Generally

In equal protection cases, government justification for gender-based classifications must be genuine, not hypothesized or invented post hoc in response to litigation. And it must not rely on overbroad generalizations about the different capacities of males and females.

VI20. 20. Statutes § 1.45 > Generally > Legislation Borrowed From Other Jurisdictions

When one jurisdiction borrows a statute from another, the judicial interpretations of that statute by the highest court of the borrowed jurisdiction accompany that statute.

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Judges: DONOHUE, *Presiding Judge*

Opinion by: DARRYL DEAN DONOHUE, SR.

Opinion

[*7] MEMORANDUM OPINION

(June 11, 2012)

THIS MATTER was remanded by the Appellate Division of the United States District Court for the District of the Virgin Islands for further briefing and findings of fact regarding the constitutionality of Title 14, Section 298(5) of the Virgin Islands Code. This statute elevates any assault and battery committed by an adult male on a female to aggravated assault and battery. On its face, Section 298(5) establishes a classification based on gender that is subject to intermediate scrutiny under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, as applied to the Virgin [**2] Islands in the Revised Organic Act. For the reasons explained below, the Court finds that the People have failed to show that Section 298(5) serves important government objectives and that the statute is substantially related to the achievement of those objectives.

I. BACKGROUND

Gary **Simmonds** assaulted his wife, Tracia **Simmonds**, during an argument in May 2005. Tracia **Simmonds** immediately went to the Ann Schrader Command precinct on St. Croix to report the assault. Virgin Islands police arrested Gary **Simmonds** later that day for "slapping his wife in the face, therefore causing visible injuries." (V.I.P.D. Arrest Rep. **[*8]** no. 05A08300 ¶ 61, filed May 2, 2005.) At the time, Gary **Simmonds** was 33 years old, had a medium build, weighed 197 pounds, and stood 5'9" tall. He was sober and unarmed. *Id.* ¶¶ 11, 14-15, 31-35, 56. Gary **Simmonds** was charged with one count of aggravated assault and battery as an act of domestic violence. (Information, filed May 10, 2005.) He pled not guilty. On September 22, 2005, Gary **Simmonds** was tried by this Court in a bench trial. (*See generally* Trial Tr. Sept. 22, 2005.) Four witnesses testified on behalf of the People. Gary **Simmonds** did not put on a case.

Based on [**3] the testimony and evidence presented at trial, the Court found that Tracia **Simmonds** and Gary **Simmonds** were married. *Id.* at 131:13-14. At the time of the assault, Gary **Simmonds** was an adult male and Tracia **Simmonds** was an adult female. *Id.* at 131:14-17. People's Exhibits 1 and 2 were photographs that showed a red, swollen area around the eye region on the left side of Tracia **Simmonds**'s face. *Id.* at 131:8-10. Based on Tracia **Simmonds**'s dark-skinned complexion, the blow to her face could not have been weak in order to cause the degree of redness depicted. *Id.* at 131:11-12. Despite her testimony, Tracia **Simmonds** was not the initial aggressor.[1] *Id.* at 130:18-19. The police officers' testimonies that Gary **Simmonds** assaulted Tracia **Simmonds** without provocation were more credible. *Id.* at 131:3-6. The People proved beyond a reasonable doubt that on May 2, 2005, Gary **Simmonds** used unlawful **[*9]** violence on Tracia **Simmonds** with the intent to injure her and therefore was guilty of aggravated assault and battery. *Id.* at 132:9-13.

Gary **Simmonds** was sentenced to six months incarceration, suspended, and one year of probation. (Judgment of Dec. 6, 2005.) The Court also ordered **Simmonds** to complete an anger management program for batterers because he was in contact with Tracia **Simmonds** after the trial. (Sent. Tr. 11:22-24, Nov. 2, 2005. *Accord* Order, Nov. 17, 2005, ***Simmonds** v. **Simmonds***, SX-05-DV-373 (dismissing with prejudice Gary **Simmonds**'s domestic violence action brought against Tracia **Simmonds**).) In August 2006, the Office of Probation petitioned to revoke **Simmonds**'s probation because Tracia **Simmonds** had obtained a permanent restraining order against him in a civil domestic violence action. (*See* Pet. for Prob. Revoc., filed Aug. 29, 2006 (attaching permanent restraining order entered Aug. 26, 2006 in ***Simmonds** v. **Simmonds***, SX-06-DV-269).) The Court held a hearing and found cause for revoking **Simmonds**'s probation. The Court sentenced **Simmonds** to time served and extended his probation for six months. (Judgment of Dec. 4, 2006.) Gary **Simmonds** was discharged from probation in April 2007. (Order, Sept. 17, 2010.)

Simmonds appealed his conviction to the Appellate Division, [**6] claiming that the aggravated assault and battery statute denied him equal protection based on his gender. 2 *See generally* ***Simmonds** v. People*, 55 V.I. 1069 (D.V.I. App. Div. 2011). The Appellate Division noted **Simmonds**'s constitutional challenge but remanded that question to this Court "for further briefing and corresponding fact-finding," because the People had failed on appeal "to assert any facts or arguments whatsoever to demonstrate that § 298(5) was spawned by a legitimate or important government objective and that a substantial relationship exists between the challenged statute and achieving the [T]erritory's legitimate goal." *Id.* at 1074. On remand, the Court ordered briefing on the constitutionality of the statute and scheduled a hearing. Both parties filed briefs in support of **[*10]** their positions. However, neither party appeared when this matter came on for hearing.

II. EQUAL PROTECTION

VI[1] [1] ***HN1*** The Fourteenth Amendment to the United States Constitution prohibits States, and by congressional extension Territories, from denying equal protection of the law to any person within their respective jurisdictions. U.S. CONST. amend. XIV, § 1; Revised Organic Act of 1954, § 3, 48 U.S.C. § 1561 (2009), *reprinted in* V.I. CODE ANN., Hist. Docs, Org. Acts, and U.S. CONST., at 209 (1995) (preceding V.I. CODE ANN. tit. 1). 3 Claims alleging denial of equal protection in the Virgin Islands mirror **[*11]** claims brought against States under the Fourteenth Amendment. *See In re Brown*, 439 F.2d 47, 51, 8 V.I. 313 (3d Cir. 1971). ***HN2*** "The function of the Equal Protection Clause ... is simply to measure the validity of classifications created by state [and territorial] laws." *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 59-60, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973) (Stewart, J., concurring). " 'Equal protection' ... emphasizes disparity in treatment by a [government] between classes of individuals whose situations are arguably indistinguishable." *Ross v. Moffitt*, 417 U.S. 600, 609, 94 S. Ct. 2437, 41 L. Ed. 2d 341 (1974). [**8] "Unlike other provisions of the Constitution, the Equal Protection Clause confers no substantive rights and creates no substantive liberties." *Rodriguez*, 411 U.S. at 59-60. The "Clause is offended only by laws that are invidiously discriminatory — only by classifications that are wholly arbitrary or capricious." *Id.*

VI[2] [2] ***HN3*** Statutes providing for different treatment on the basis of gender establish a classification subject to intermediate scrutiny under the Equal Protection Clause. *Orr v. Orr*, 440 U.S. 268, 99 S. Ct. 1102, 59 L. Ed. 2d 306 (1979); *Hynson v. City of Chester, Legal Dept.*, 864 F.2d 1026, 1029 (3d Cir. 1988). The fact that a statute "discriminates against males rather than against females does not exempt it from scrutiny or reduce the standard of review." *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 723, 102 S. Ct. 3331, 73 L. Ed. 2d 1090 (1982) (citing *Caban v. Mohammed*, 441 U.S. 380, 394, 99 S. Ct. 1760, 60 L. Ed. 2d 297 (1979); *Orr*, 440 U.S. at 279). [**12] "[T]he party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an 'exceedingly persuasive justification' for the classification." *Id.* at 724 (citing *Kirchberg v. Feenstra*, 450 U.S. 455, 461, 101 S. Ct. 1195, 67 L. Ed. 2d 428 (1981); *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 273, 99 S. Ct. 2282, 60 L. Ed. 2d 870 (1979)). "The burden of justification **[*12]** is demanding and it rests entirely on the [Government]." *United States v. Virginia*, 518 U.S. 515, 533, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996) (citation omitted). The Government must show that the gender classification at issue "serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.' " *Id.* (quoting *Miss. Univ. for Women*, 458 U.S. at 724). "If the [government]'s objective is legitimate and important, [the Court] next determine[s] whether the requisite direct, substantial relationship between objective and means is present." *Miss. Univ. for Women*, 458 U.S. at 725. "The purpose of requiring that close relationship is to assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, [**13] assumptions about the proper roles of men and women." *Id.* at 725-26.

VI[3] [3] Additionally, ***HN4*** where, as here, construction and interpretation of a penal statute is at issue, courts must construe such statutes strictly. *United States v. Giles*, 300 U.S. 41, 57 S. Ct. 340, 81 L. Ed. 493, *reh. denied*, 300 U.S. 687, 57 S. Ct. 505, 81 L. Ed. 888 (1973); *United States v. Resnick*, 299 U.S. 207, 57 S. Ct. 126, 81 L. Ed. 127 (1937). "The rule has long been settled in American jurisdictions that all such statutes must be construed strictly against the state and favorably to the liberty of the citizen. This rule is founded on the tenderness of the law for the rights of individuals and upon the plain principle that the power to decide what is a crime and the power to punish are vested in the legislative, not in the judicial department." *Braffith v. People of the V.I.*, 26 F.2d 646, 648-49, 1 V.I. 582 (3d Cir. 1928) (internal quotations and citations omitted).

III. AGGRAVATED ASSAULT AND BATTERY STATUTE

Simmonds challenges the constitutionality of the Virgin Islands aggravated assault and battery statute as denying equal protection of the law to males based on their gender. This statute elevates simple assault and battery to aggravated assault and battery if the act is committed by an adult male on a female. Males [**14] face harsher punishment than females for the same action. Because on its face the statute contains a classification that distinguishes on the basis of gender, it is subject to scrutiny under the Equal Protection Clause.

VI[4,5] [4, 5] HN5 Under the Virgin Islands Code, a person commits assault if he "(1) attempts to commit a battery; or (2) makes a threatening gesture **[*13]** showing in itself an immediate intention coupled with an ability to commit a battery." V.I. CODE ANN. tit. 14, § 291 (1996). Battery requires "a 'touching' or some physical force and contact within the concept of the common law definition of battery." *Government v. Hamilton*, 334 F. Supp. 1382, 1384, 8 V.I. 298 (D.V.I. App. Div. 1971), *appeal dismissed*, 475 F.2d 529, 9 V.I. 574 (3d Cir. 1973). HN6 Assault and battery involves the use of "unlawful violence upon the person of another with intent to injure him, whatever be the means or the degree of violence used ... ." V.I. CODE ANN. tit. 14, § 292. An assault or battery "unattended with circumstances of aggravation" is simple assault and battery. *Id.* § 299.

HN7 Assault and battery becomes aggravated if committed:

(1) upon an officer in the lawful discharge of the duties of his office, if it was known or declared to the offender [**15] 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) [by] a person of robust health, upon one who is aged or decrepit;

(5) [by] an adult male, upon the person of a female or child, or being an adult female, upon the person of a child;

(6) by an instrument or means which inflicts disgrace upon the person assaulted, such as a whip, cowhide or cane;

(7) while being in disguise;

(8) on a teacher or school employee on school grounds; or

(9) on a caseworker, investigator, or other health and human services employee in the performance of an official duty.

Id. § 298(1)-(7); Act No. 7267, 29th Leg., Reg. Sess. § 6 (V.I. 2011) (to be codified at V.I. CODE ANN. tit. 14, § 298(8)-(9)), *available at* VI LEGIS 7267 (Westlaw).

VI[6] [6] HN8 "Section 298 is predicated on an initial finding that the defendant did in fact commit a simple assault and battery, but it is coupled with an element of aggravation that also is unlawful ... ." *Government v. Frett*, 14 V.I. 315, 320 (Terr. Ct. 1978). [**16] "The term 'aggravated assault and **[*14]** battery' is employed to describe an assault which has, in addition to the mere intent to commit it, another object which is also unlawful ... ." *Government v. Hodge*, 7 V.I. 73, 79 (D.V.I. App. Div. 1968). "[T]he question of intent is one of fact, to be determined or inferred from the surrounding facts and circumstances of the crime." *Edwards v. Government*, 47 V.I. 605, 614 (D.V.I. App. Div. 2005) (citing *Drew v. Drew*, 971 F. Supp. 948, 951, 37 V.I. 61 (D.V.I. App. Div. 1997)).

Although Virgin Islands courts have examined the language and purpose of the aggravated assault and battery statute, to date no court has had occasion to consider its origin. Therefore, in order to place **Simmonds**'s constitutional challenge in the proper context, the Court must first consider the language, purpose, and origin of the challenged statute. *See* *Skilling v. United States*, 130 S. Ct. 2896, 2926, 177 L. Ed. 2d 619 (2010).

A. Initial Codification of Aggravated Assault and Battery

"The first codification of the laws of the Virgin Islands subsequent to the transfer of this territory from the Kingdom of Denmark to the United States of America was the 1921 code ... ." *Paiewonsky v. Paiewonsky*, 315 F. Supp. 752, 754, 8 V.I. 52 (D.V.I. 1970). [**17] Separate codes were enacted for the Municipality of St. Thomas and St. John and for the Municipality of St. Croix. *See generally* ST. THOMAS/ST. JOHN MUN. CODE (1921); ST. CROIX MUN. CODE (1921) (hereinafter "1921 CODES"), *microformed on* Codes, Ordinance, Laws, and Resolutions of the Virgin Islands: 1917-1954, call no. LL-0301 (Library of Congress), *repealed by* V.I. CODE ANN. tit. 1, § 5 (1957 ed.). "The codes as adopted in each of the two municipalities contained some variations and differences, but they were substantially similar." *Paiewonsky*, 315 F. Supp. at 754. Assault and battery, including aggravated assault and battery, were among the offenses initially codified in 1921. 4 *See* 1921 CODES tit. IV, ch. 5, §§ 27-33. **[*15]** According to Title 5, Section 32, of the 1921 CODES, "[a]n assault and battery becomes aggravated ... [w]hen committed by an adult male upon the person of a female ... ." *Id.* § 32.

In 1957, the Legislature repealed the 1921 Codes, adopting instead a comprehensive code governing the entire Territory. V.I. Code Ann. tit. 1, § 5 (1996). "All available laws, including the 1921 Codes ... were classified according to subject matter, carefully edited, and arranged into 34 titles. Many changes in style and substance were made." *Id.* at xi (reprinting Preface to First Edition). The 1957 Code retained the earlier assault and battery statutes, including the aggravated assault and battery statute. 5 *See generally* V.I. Code Ann. tit. 14, §§ 291-92, 298-99 (revision **[*16]** notes) (1964 ed.). Section 298, the current aggravated assault and battery statute "derive[s] from ... section 32 of [**20] the 1921 Codes ... . Changes were made in form and phraseology [only]." *Id.* § 298 (revision note). As Section 298 only differs from Section 32 in format and not substance, the text of the aggravated assault and battery statute sheds no light on the constitutional question presented here. The origin of this statute is illuminating, however. As with many of the laws that comprised the 1921 Codes, the Virgin Islands borrowed the aggravated assault and battery statute from another jurisdiction. The origin of the aggravated assault and battery statute is critical to the Court's analysis of **Simmonds**'s constitutional challenge since "the language of a Virgin Islands statute **[*17]** which has been taken from the statutes of another jurisdiction is to be construed to mean what the highest court of the jurisdiction from which it was taken had, prior to its enactment in the Virgin Islands, construed it to mean." *Berkeley v. W. Indies Enter., Inc.*, 480 F.2d 1088, 1092, 10 V.I. 619 (3d Cir. 1973).

B. Origin of the Aggravated Assault and Battery Statute

The 1921 Codes are considered to have been "taken largely from the Codes of the Territory of Alaska." *Burch v. Burch*, 195 F.2d 799, 805, 2 V.I. 559 (3d Cir. 1952). *Accord Mun. of St. Croix v. Stakemann*, 1 V.I. 60, 64 (D.V.I. 1924) ("It is a matter of local history that the greater part of the Code of Law of the two Municipalities ... has been adopted from 'The Compiled Laws of the Territory of Alaska, of 1913.'"). But the 1921 Codes did not merely duplicate the Alaskan codes. Some laws were modified before being incorporated in the 1921 Codes, presumably to adapt those laws to this jurisdiction. 6 In one instance, Danish law was retained [**23] and merged with Alaskan law. 7 Even where a Virgin Islands statute mirrored Alaskan law, Alaska, itself, may have borrowed its statute from another jurisdiction. 8 Thus, while the 1921 Codes were borrowed largely from the Territory of Alaska, Alaska is not the only jurisdiction the Virgin Islands borrowed from. Statutes were taken from other **[*18]** jurisdictions such as Montana, Iowa, New York, and as further discussed below, Puerto Rico. 9

This diverse confluence on the 1921 Codes is relevant here in large part because the Virgin Islands aggravated assault and battery cannot be traced back to the Territory of Alaska. The term "aggravated" does not appear within the 1913 Alaskan Penal Code. None of Alaska's assault and battery statutes resemble the statutes enacted in the 1921 Codes. 10 Thus, the Territory of Alaska was not the source of the Virgin Islands aggravated assault and battery statute. The State of New York and the State of California also did not codify assault and battery in language resembling the 1921 Codes. 11 But nearly identical language does appear in the penal codes of the State of Texas and the Territories of Arizona and Puerto Rico. The Court will consider each jurisdiction in order to determine the origin of our aggravated assault and battery statute.

i. Assault and Battery Laws in Texas, Arizona, and Puerto Rico

In 1856, the State of Texas adopted a comprehensive penal code as part of an overall revision of the State's criminal laws. *See generally* Tex. **[*19]** Penal Code (1856 ed.) (hereinafter "1856 Penal Code"). Simple and aggravated assault were codified as separate offenses. 12 *See generally id.* tit. XVII, [**27] ch. 1-2, art. 475-89. Factors elevating simple assault to aggravated assault were also enumerated by statute. 13 One such factor was an assault and battery "committed by an adult male upon the person of a female or child, or by an adult female upon the person of a child." Tex. Penal Code Ann. tit. 15, art. 1022(5) (1911 ed.). Assault and battery remained substantially unchanged through three subsequent revisions to Texas's penal code prior to 1921. 14 *See* Tex. Penal Code tit. **[*20]** XV, ch. 1-2 (1879 ed.); Tex. Penal Code tit. XV, ch. 1-2 (1895 ed.); Tex. Penal Code tit. XV, ch. 1-2 (1911 ed.). 15

In [**31] 1901, the Territory of Arizona borrowed portions of Texas's assault and battery statutes, including Texas's aggravated assault and battery statute. 16 *See State v. Romero*, 61 Ariz. 249, 148 P.2d 357 (1944). **[*21]** According to the 1901 Arizona Penal Code, an assault and battery became aggravated "[w]hen committed by an adult male upon the person of a female or child, or by an adult female upon the person of a child." 17 Terr. Ariz. Rev. Stat., Penal Code, part I, tit. VIII. ch. IX, §§ 207(3) (1901). The Territory of Puerto Rico 18 also borrowed its assault and battery statutes, **[*22]** including its aggravated assault and battery statute, from Texas in 1904. *See generally* P.R. Laws Ann., tit. 33, §§ 821-28 (1937 ed.). 19 *Accord* **[*23]** *People v. Diaz*, 62 P.R.R. 477, 480, 62 D.P.R. 499 (1943) ("[T]here is the offense of assault and battery, defined and punished by the Act of March 10, 1904, incorporated into our Penal Code. This statute was taken from the Penal Code of Texas, § 587 et seq.") (internal citation omitted); *Lange v. People*, 24 P.R.R. 796, 797, 24 D.P.R. 854 (1917) ("[S]ections 1 to 8, inclusive, of the later law [Act of 1904] are literal copies of articles 587, 593, 594, 595, 598, 601, 602 and 603 of the Texas Penal Code."). As with [**32] Texas and Arizona, Puerto Rico also elevated assaults and batteries "committed by an adult male upon the person of a female or child, or by an adult female upon the person of a child" to aggravated assaults and batteries. P.R. Laws Ann. tit. 33, § 826(5) (1937 ed.). Puerto Rico made no further amendments to its assault and battery statutes before 1921.

At the time the 1921 Codes were enacted, at least three jurisdictions, the State of Texas, the Territory of Arizona, and the Territory of Puerto Rico, each criminalized assault and battery, including aggravated assault and battery, by statute. All three elevated to aggravated assaults and batteries "committed by an adult male upon the person of a female or child, or by an adult female upon the person of a child." Tex. Penal Code Ann. tit. 15, art. 1022(5) (1915 ed.); Terr. Ariz. Rev. Stat., Penal Code, part I, tit. VIII, ch. IX, § 215(3) (1901 ed.); P.R. Laws tit. 33, § 826(5) (1937 ed.). Arizona and Puerto Rico took their statutes from Texas. The language of the gender-based classification is identical in all three statutes. Thus, that specific subsection does not shed light on the origin of the Virgin Islands statute. Comparing the entire aggravated assault and battery statute from each jurisdiction to the Virgin Islands statute does yield a definitive answer. Key differences among the three statutes reveals the jurisdiction the Virgin Islands took its statute from.

At the time it was first enacted, the Virgin Islands aggravated assault and battery statute enumerated [**39] ten aggravating factors. *See generally* 1921 Codes, tit. IV, ch. 5, § 32(1)-(10). The Arizona statute only listed six. Thus, Arizona was not the jurisdiction from which the Virgin Islands took its aggravated assault and battery statute. Both the Texas and the Puerto Rico statutes, however, enumerated the same aggravating factors and the same number of factors as the Virgin Islands statute. Moreover, Texas's and Puerto Rico's aggravating factors mirror each other — and **[*24]** the Virgin Islands' — both in the ordering and the placement of the ten factors. Further, the text of those ten factors is identical, except for one word that appears only in the Puerto Rico statute and the Virgin Islands statute.

Under Puerto Rico law, an assault and battery became aggravated "[w]hen the instrument or means used is such as inflicts disgrace upon the person assaulted, as an assault or battery *with a whip, cowhide or cane*." P.R. Laws Ann. tit. 33, § 826(6) (1937 ed.) (emphasis added). In Texas however, the same assault and battery became aggravated "[w]hen the instrument or means used is such as inflicts disgrace upon the person assaulted, as an assault or battery *with a whip or cowhide*." Tex. Penal Code [**40] Ann. tit. 15, art. 1022(6) (1915 ed.) (emphasis added). Neither Texas nor Arizona included the word "cane." Puerto Rico added that term to its statute. The statute adopted in the Virgin Islands in 1921 also included the term cane. *See* 1921 Codes tit. IV, ch. 5, § 32(6).

But more than the term "cane" compels the conclusion that the Virgin Islands borrowed its aggravated assault and battery statute from Puerto Rico. While Puerto Rico did take its assault statutes from Texas, it also modified Texas law before adoption. *See Diaz*, 62 P.R.R. at 480 ("[A]lthough the statute of Puerto Rico is a copy of that of Texas, it is a fact that our Legislature, for reasons unknown to us, omitted § 588 of the Penal Code of Texas ... ."). 20 The assault and battery chapter in the Puerto Rico penal code comprised eight sections. Of the eight sections Puerto Rico borrowed from Texas, all but one appeared in the 1921 Codes. *See* 1921 Codes, ch. 5, §§ 27-33 (1921). Between the seven sections shared by Puerto Rico and the Virgin Islands, only a few words differ. 21

VI[7] [7] **[*25]** Having reviewed corollary statutes in force circa 1921 from Texas, Arizona, and Puerto Rico, the Court concludes that Puerto Rico's assault and battery statutes, particularly its aggravated assault and battery statute, most closely mirrors the statutes enacted by the Virgin Islands in 1921. Only Puerto Rico and the Virgin Islands elevated assaults committed with a cane to aggravated assault and battery. Accordingly, the Court finds that ***HN9*** the Virgin Islands borrowed its assault and battery statutes, including its aggravated assault and battery statute, from the Territory of Puerto Rico in 1921.

C. Judicial Interpretations of the Borrowed Statute

Having identified the jurisdiction from which Section 298(5) was borrowed, the Court must now consider the interpretations Puerto Rico gave the aggravated assault and battery statute prior to 1921. *Berkeley*, 480 F.2d 1088. Because Puerto Rico borrowed its statute from Texas in 1904, the Court will also note any decisions from Texas's highest court prior to 1904 where informative. [**43] *People v. Colón*, 25 P.R.R. 586, 586, 25 D.P.R. 629 (1917) ("This statute was copied from Texas ... . The ordinary presumption would follow that we adopted the statute with the construction put upon it by the courts of Texas ... .").

As interpreted by Texas's and Puerto Rico's highest courts, aggravated assault and battery by an adult male on a female does not require serious or great bodily injury or actual wounding; bruising would suffice. *El Pueblo v. Abino*, 21 P.R.R. 266, 267, 21 D.P.R. 281 (1914); *Waechter v. State*, 34 Tex. Crim. 297, 30 S.W. 444, 444 (1895) (affirming father's conviction for pushing and kicking his daughter), *cited with approval in People v. Oriols*, 27 P.R.R. 195, 196, 27 D.P.R. 208 (1919). Absent physical injury, the prosecution must show a sense of shame or constraint, and a lack of consent. *Hawes v. State*, 44 S.W. 1094 (Tex. Crim. App. 1898). An indecent assault by adult male on a female is an aggravated assault and battery. *See, e.g.*, *George v. State*, 11 Tex. Ct. App. 95, 95 (1881) ("[V]iolent and indecent familiarity with the person of a female, **[*26]** against her will, with intent to have improper connection with her, is an aggravated assault."), *cited in Colón*, 25 P.R.R. at 586. *But see Slawson v. State*, 39 Tex. Crim. 176, 45 S.W. 575 (1898) [**44] (interpreting assault and battery with instrument or means that inflicts disgrace to include indecent assaults).

Husbands can be prosecuted for assaulting or battering their wives. *Owen v. State*, 7 Tex. Ct. App. 329 (1879). But husbands can also defend themselves against assaults by their wives. *Leonard v. State*, 27 Tex. Ct. App. 186, 11 S.W. 112, 112 (1889) ("There may not he much gallantry or chivalry in repelling with force assaults made by the wife. Still, at law, a husband has the right to defend himself, even against attacks of his wife; and, unless greater force is used than is necessary to repel the violence, he would not be guilty of an assault or battery.").

An adult male cannot be charged with simple assault on a female. *Ross v. State*, 45 S.W. 808 (Tex. Crim. App. 1898) (upholding jury verdict of simple assault against father who disciplined daughter as lesser-included offense of aggravated assault). *Accord Uren v. State*, 27 Ariz. 491, 232 P. 398, 399 (1925) ("[A]n adult male person is incapable of committing a simple assault or a simple battery upon the person of a female. Any assault or any battery, however slight, is under this statute an aggravated one."). Similarly, a man does not become an adult [**45] for purposes of the statute until he is "over twenty-one years of age." *Colón*, 25 P.R.R. at 586 (citing, *inter alia*, *Schenault v. State*, 10 Tex. Ct. App. 410, 411 (1881) ("[O]ne cannot be convicted of an aggravated assault or battery on a female or a child until arriving at the age of twenty-one years ... .") (additional citations omitted)); *Ellers v. State*, 55 S.W. 813 (Tex. Crim. App. 1900). Whether a male was over the age of twenty-one at the time the offense occurred is a fact to be proven at trial. *Colón*, 25 P.R.R. at 586-87. *Accord Davis v. State*, 76 S.W. 466, 467 (Tex. Crim. App. 1903) ("We are not authorized to indulge any presumption against appellant. If he is convicted of any offense, it must be upon evidence; and here we find no evidence to sustain the fact that he was an adult male ... ."), *cited in Colón*, 25 P.R.R. at 586. The trier of fact may also infer adulthood and sex if apparent at trial. *Tracy v. State*, 44 Tex. 9 (1875).

D. Subsequent Amendments to the Statute

The Virgin Islands has amended its aggravated assault and battery statute four times since it was incorporated into the Code in 1957. The **[*27]** Legislature first amended Section 298 in 1967 to increase the minimum sentence [**46] to not less than thirty days of imprisonment for anyone "who has been once convicted of an assault and battery with deadly weapons under circumstances not amounting to an intent to kill or maim ... ." Act No. 1914, § 3, 1967 V.I. Sess. L. p. 107-08.

In 1971, the Legislature deleted three of Section 298's ten aggravating factors and relocated them under assault in the third degree. *See* Act No. 2937, §§ 2-3, 1970 V.I. Sess. L. p. 427-28. *Compare* 14 V.I.C. § 297 (1964 ed.) *with id.* § 297(1)-(5) (1996 ed.). Other than renumbering Section 298(10), regarding assaults committed while in disguise, as Section 298(7), the Legislature did not alter the other subsections.

The Legislature next amended Section 298 in 2010 as part of the "The Domestic Violence Prevention Act of 2010." *See generally* Act. No. 7180, 2010 V.I. Sess. L. 107 (codified in scattered sections of V.I. CODE ANN. tit. 14, 16, 28). The penalty for an aggravated assault committed during an act of domestic violence was increased to a fine of not less than one thousand dollars or imprisonment for not less than five years. 14 V.I.C. § 298 (Supp. 2011).

Lastly, in 2011, the Legislature amended Section 298 to add two new aggravating factors. [**47] *See generally* Act No. 7267, 29th Leg., Reg. Sess. § 6 (V.I. 2011) (to be codified at V.I. CODE ANN. tit. 14, § 298(8)-(9)), *available at* VI LEGIS 7267 (Westlaw). Under the current statute, assault and battery becomes aggravated when committed on a teacher or school employee while on school grounds or on a caseworker, investigator, or other health and human services employee in the performance of an official duty.

IV. PROFFERED JUSTIFICATION FOR GENDER CLASSIFICATION

VI[8] [8] The People proffered two bases to justify the gender-based classification in the aggravated assault and battery statute: (1) the important government objectives determined in a prior court decision; and (2) the prevalence of gender-based domestic violence. *HN10* "Although the test for determining the validity of a gender-based classification is straightforward, it must be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions." *Miss. Univ. for Women*, 458 U.S. at 724-25. Below, the Court will consider both bases.

[*28] A. Court-Determined Government Objectives

The first justification the People [**48] put forth did not actually articulate an important government objective for Section 298(5). Rather, the People direct the Court to the government objectives determined by the Territorial Court of the Virgin Islands in *Government v. Prescott*, 18 V.I. 110 (Terr. Ct. 1981). (People's Br. 3-4, filed Sept. 16, 2011.) In April 1981, Elmira Espinosa accused Rudolph Prescott of committing assault and battery upon her. *Government v. Prescott*, 18 V.I. 152, 153 (Terr. Ct. 1982). Prescott was arrested and charged with one count of aggravated assault and battery in violation of Title 14, Section 298(5) of the Virgin Islands Code. *Id.* Before trial, he moved to dismiss the charge, claiming the statute denied him equal protection of the law based on his gender. *Prescott*, 18 V.I. at 111. In support, he averred that

> a midget of a man could be assaulted and pounded, battered and bruised by a woman of amazon proportions and it would result in the woman being only charged with a simple assault and battery ... . [S]hould the same midget of a man, however, hit this woman of mammoth, gigantic or amazon proportions and inflict little or no damage upon her he could be, and would be ... guilty of aggravated [**49] assault and battery ... .

Id. (internal quotations and citations omitted). This result, he argued, represented "blatant, arbitrary, sexual discrimination of the worst sort." *Id.* (internal quotation omitted). The court did not agree. *Id.*

In reaching its conclusion, the *Prescott* court examined a decision from the Texas Court of Criminal Appeals and a decision from the Territorial Court of the Virgin Islands that had considered and rejected the identical argument raised by Prescott. *Id.* at 112-13 (discussing *Buchanan v. State*, 480 S.W.2d 207 (Tex. Crim. App. 1972), *appeal dismissed*, 409 U.S. 814, 93 S. Ct. 175, 34 L. Ed. 2d 71 (1972), and *Government of the Virgin Islands v. Smith* (Div. St. Thomas / St. John 1979/166) (unreported). Texas, like the Virgin Islands, criminalized assault and battery by an adult male on a female as aggravated assault and battery. Male defendants in both cases claimed that the respective aggravated assault and battery statutes denied them equal protection of the law based on their gender. Both courts found females generally smaller and weaker than males. As a result, females were more likely to suffer serious injury if assaulted or **[*29]** battered by males. Preventing such injury, both courts concluded, [**50] was a legitimate government objective and a rational way of achieving that objective was to increase the punishment against males. Both cases persuaded the *Prescott* court that Section 298(5) was constitutional.

Because *Prescott* found justification for Section 298(5), the People maintain that those findings are "entitled to great deference." (People's Br. 3 (citing *Michael M. v. Super. Ct. of Sonoma Cty.*, 450 U.S. 464, 470, 101 S. Ct. 1200, 67 L. Ed. 2d 437 (1981) (plurality opinion)).) **Simmonds** disputes that contention. According to him, *Prescott* is not owed any deference at all because the decision "was not valid even when it was entered." (Def. Br. 25, filed Sept. 30, 2011.) The People are correct that court findings regarding the justification for a statute are entitled to great deference. *Michael M.*, 450 U.S. at 470 (citing *Reitman v. Mulkey*, 387 U.S. 369, 373-74, 87 S. Ct. 1627, 18 L. Ed. 2d 830 (1967)). But the government's justifications are only entitled to deference if the court actually accepts the justification. *Id.* ("The justification for the statute *offered by* the State, *and accepted by* the [**51] Supreme Court of California, is that the legislature sought to prevent illegitimate teenage pregnancies. That finding ... is entitled to great deference.") (emphasis added). Here, there are no findings in *Prescott* that this Court must defer to. *Prescott* did not state what justifications, if any, the government offered, which it accepted, regarding Section 298(5). *Prescott* did not, for example, refer to any legislative history for Section 298 or subsequent amendments to the statute. *Prescott* did not discuss the adult male aggravating factor in comparison with any other enumerated factor in the same statute. *Prescott* did agree with the Texas Court of Criminal Appeals that the statute "failed to achieve its objective in every instance ... ." *Prescott*, 18 V.I. at 112. The court, nevertheless, concluded that "the general classification embodied in the statute was reasonably calculated to achieve the overall objective." *Id.* What that objective was, however, *Prescott* did not state.

The People mistakenly construe *Prescott*'s holding as findings. A court's holding is its "determination of a matter of law pivotal to its decision." BLACK'S LAW DICTIONARY 800 (9th ed. 2009). A finding, however, [**52] is a "determination by a judge ... of a fact supported by the evidence in the record ... ." BLACK'S LAW DICTIONARY 708 (9th ed. 2009). While *Prescott* did hold the gender-based classification to be constitutional, *Prescott* did not state any findings as to Section 298. In just over two pages, the court presented the defendant's argument, expressed **[*30]** appreciation for differences between men and women, 22 summarized the opinions in *Buchanan* and *Smith*, and then adopted *Smith*'s reasoning as support for denying Prescott's motion to dismiss. *Prescott*, 18 V.I. at 113 ("This Court adopts, in toto, *the reasoning of* my colleague in *Government v. Smith* ... .") (emphasis added). Because *Prescott* expressly relied on *Smith* to reach its decision, the Court will consider that decision as well. 23

Like *Prescott*, the defendant in *Smith* also claimed that Section 298(5) "created a classification based upon sex which [ran] afoul of the Fourteenth Amendment and denie[d] him equal protection of the law." *Government v. Smith*, No. ST-79-CR-166 (V.I. Terr. Ct. Mem. Op. at 2 (Jan. 3, 1980)) (unreported). Smith contended that the Virgin Islands Legislature initially included the gender classification when it adopted the aggravated assault and battery statute in 1921 because at the time "females were considered to be the weaker of the two sexes and were liable to suffer more harm when assaulted." *Id.* at 3. "[A]lthough this might have been the case in 1921," the defendant argued, "it no longer holds true today." *Id.* The court agreed that Section 298 derived from the original aggravated assault and battery statute enacted in 1921. *Id.* at 4. But the court noted that the Legislature amended Section 298 in 1971 to delete three of the original ten aggravating factors. *Id.* Subsection five was reinstated without change. *Id.* That "indicat[ed] legislative approval of the judicial interpretations of that provision rendered [**54] up to that date." *Id.* (citing Sutherland, *Statutes and Statutory Construction* § 45.21 (4th ed. 1973)). The court concluded that Section 298(5) "exemplifies a considered legislative judgment that females warrant a special protection from male attackers ... ." *Id.* The defendant needed more than "changing attitudes about the equality of the sexes" to prove Section 298(5) unconstitutional. *Id.* at 4. That he did not have. The court held that the defendant "clearly failed to establish that 14 V.I.C. § 298(5) works arbitrarily to place persons in categories on the basis of criteria wholly **[*31]** unrelated to the purpose of the statute." *Id.* at 5 (citing *Reed v. Reed*, 404 U.S. 71, 92 S. Ct. 251, 30 L. Ed. 2d 225 (1971)).

Both *Prescott* and *Smith* subjected Section 298(5) to a rational basis review. *Prescott*, 18 V.I. at 112 ("[S]tatutes which affect a particular class must be based on rational distinctions or classifications ... .") (citing *Rinaldi v. Yeager*, 384 U.S. 305, 308-09, 86 S. Ct. 1497, 16 L. Ed. 2d 577 (1966) (applying rational basis review to statute withholding only wages of incarcerated inmates who are not on suspended sentences to reimburse cost of transcript preparation)); *Smith*, at 3 ("Defendant vies for the application of a stricter standard of review [**55] ... because a sex based classification is involved ... . This court concludes ... that 'rational basis' is the standard by which this gender based equal protection claim must be gauged.") (citing *Benjamin v. Cleburne Truck & Body Sales, Inc.*, 424 F. Supp. 1294, 13 V.I. 545 (D.V.I. 1976) (applying rational basis review to restatement principle allowing husbands but not wives to bring suit for loss of consortium)). Yet almost four years before *Smith*, and five years before *Prescott*, the Supreme Court of the United States held in *Craig v. Boren* that "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." 24 *Craig v. Boren*, 429 U.S. 190, 197, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976). Three years later, the Supreme Court, in three separate opinions handed down in 1979, reaffirmed that standard of review for classifications based on gender. *Pers. Adm'r of Mass. v. Feeney*,

442 U.S. 256, 273, 99 S. Ct. 2282, 60 L. Ed. 2d 870 (1979) ("[T]his Court's recent cases teach that [gender-based] classifications must bear a close and substantial relationship to important governmental objectives, and are in many settings unconstitutional.") (citations omitted); *Caban v. Mohammed*, 441 U.S. 380, 388, 99 S. Ct. 1760, 60 L. Ed. 2d 297 (1979) [**56] ("Gender-based distinctions must serve important governmental objectives and must be substantially related to achievement of those objectives in order to withstand judicial scrutiny under the Equal Protection Clause **[*32]** .") (internal quotation omitted); *Orr v. Orr*, 440 U.S. 268, 279, 99 S. Ct. 1102, 59 L. Ed. 2d 306 (1979) ("To withstand scrutiny under the Equal Protection Clause, classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.") (internal quotations omitted). The Court reaffirmed that standard a year later. *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150, 100 S. Ct. 1540, 64 L. Ed. 2d 107 (1980) ("[O]ur precedents require that gender-based discriminations must serve important governmental objectives and that the discriminatory means employed must be substantially related to the achievement of those objectives.") (citations omitted). Of particular import, the Court in *Wengler* also held that the burden in cases challenging gender-based classifications was "on those defending the discrimination to make out the claimed justification ... ." *Id.* at 151. The Court reaffirmed this burden-placement less than a year later. *Kirchberg v. Feenstra*, 450 U.S. 455, 461, 101 S. Ct. 1195, 67 L. Ed. 2d 428 (1981) [**57] ("[T]he burden remains on the party seeking to uphold a statute that expressly discriminates on the basis of sex to advance an 'exceedingly persuasive justification' for the challenged classification.") *But see Michael M.*, 470 U.S. at 468-69 ("[T]he Court has had some difficulty in agreeing upon the proper approach and analysis in cases involving challenges to gender-based classifications ... . Our cases have held, however, that the traditional minimum rationality test takes on a somewhat 'sharper focus' when gender-based classifications are challenged.") (citations omitted).

Craig, *Caban*, [**58] *Feeney*, and *Orr* were all decided prior to both *Smith* and *Prescott*. Despite binding Supreme Court precedent mandating heightened scrutiny for gender-based classifications, both *Smith* and *Prescott* applied rational basis review in their decisions. Moreover, in line with *Wengler*, neither *Smith* nor *Prescott* should have placed the burden on the defendant. While *Smith* found justification for Section 298(5), which *Prescott* impliedly adopted, any deference owed those findings is reduced by the failure to apply the proper standard of review.

B. Prevalence of Gender-Based Domestic Violence in the Virgin Islands

The second basis the People offer to justify the gender classification in the aggravated assault and battery statute is "the historical acceptance of domestic violence perpetrated on women in the Caribbean ... ." (People's **[*33]** Br. 6.) Section 298(5) serves to combat domestic violence perpetrated against women, the People assert. In support, the People direct the Court to the remarks of a senator, a lecture given by a judge, and reports in the local newspapers. *Id.* at 6-8. The Court will examine each below.

The People's first support for the domestic violence function Section 298(5) serves is [**59] the remarks of Virgin Islands Senator Terrence Nelson at an April 2010 hearing on the Domestic Violence Prevention Act before the Committee on Public Safety, Homeland Security, and Justice. (*See generally* App. to People's Br. (transcript of *The Domestic Violence Prevention Act of 2010: Hearing on B. No. 28-0177 Before the Comm. on Pub. Safety, Homeland Sec., and Just.*, 28th Leg. (V.I. Apr. 21, 2010)).) In 2010, the Legislature of the Virgin Islands enacted "The Domestic Violence Prevention Act of 2010." Act. No. 7180, 2010 V.I. Sess. L. 107 (codified in scattered sections of V.I. CODE ANN. tit. 14, 16, 28.) The Act allocated funds to raise public awareness about domestic violence and passed legislation to protect victims of domestic violence from retaliation by landlords and employers. The Act also made any aggravated assault and battery committed as an act of domestic violence a felony. *Id.* § 3(a)(2) (codified at V.I. CODE ANN. tit. 14, § 298 (Supp. 2011)). During debate on the legislation, Senator Terrence Nelson "made several remarks regarding the history of domestic violence in the Territory." (People's Br. 6.) Those remarks, the People infer, reveal the important government [**60] objective Section 298(5) serves in combatting domestic violence. *Id.*

VI[9] [9] ***HN11*** Judicial inquiry into legislative "motives or purposes are a hazardous matter and the search for the 'actual' or 'primary' purpose of a statute is likely to be elusive." *Michael M.*, 450 U.S. at 469 (internal quotations omitted). In some instances, "legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977). But "[i]t is difficult or impossible for any court to determine the 'sole' or 'dominant' motivation behind the choices of a group of legislators." *Palmer v. Thompson*, 403 U.S. 217, 225, 91 S. Ct. 1940, 29 L. Ed. 2d 438 (1971). Here, the Senator's own remarks actually contradict the People's assertion. During the hearing, Senator Nelson acknowledged that he "heard it mentioned that domestic abuse is culturally accepted in the Caribbean." (App. to People's Br. 22.) But he immediately rejected that **[*34]** notion. "I don't think it's something we should say ... because I don't think it's something we accept," the Senator stated. *Id.* "It has happened. [**61] It has happened around the world, unfortunately, also." *Id.* Another Senator, Wayne James, also commented earlier in the hearing that it was "not uncommon in the Virgin Islands to hear people, men in particular[,] say that somebody has to be in charge of the house. And being in charge of the house entails physically disciplining people on occasion. From partner down to children." *Id.* at 8. Senator James explained that "it never occurred to [him] that what [he] grew up with as culturally acceptable was illegal." *Id.* at 7. "It was commonplace to sort of make remarks about women and what they were wearing and how they looked. That was just the way." But Senator James prefaced his remarks with reference to the controversy involving Anita Hill and Clarence Thomas. *Id.* That controversy concerned sexual harassment, not domestic violence. *See, e.g.*, David Kairys, *The Thomas-Hill Sex Harassment Hearings*, 1 Temp. Pol. Civ.

Rts. L. Rev. 107 (1992). No senator stated during the hearing that domestic violence against women was historically accepted in the Caribbean or in the U.S. Virgin Islands in particular, the location most relevant here.

VI[10] [10] The Court cannot uphold, or strike down, Section 298(5) [**62] based solely on Senator Nelson's remarks. ***HN12*** Just as "there is an element of futility in a judicial attempt to invalidate a law because of the bad motives of its supporters," *Palmer*, 403 U.S. at 225, a judicial attempt to uphold a law because of the good motives of its supporters is similarly futile. "What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it ... ." *United States v. O'Brien*, 391 U.S. 367, 384, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968). "[I]ndividual legislators may have voted for the statute for a variety of reasons." *Michael M.*, 450 U.S. at 470. Moreover, the individual statements of legislators have no bearing on a statute's interpretation particularly where the legislator did not sponsor the legislation in question. *McCaughn v. Hershey Chocolate Co.*, 283 U.S. 488, 493-94, 51 S. Ct. 510, 75 L. Ed. 1183 (1931).

The People attempt to find additional support for Section 298(5)'s domestic violence function in the remarks of the Honorable Madam Justice Désirée Bernard, Judge of the Caribbean Court of Justice, given during a public lecture series held in November 2006 at the University of the West Indies in Mona, Jamaica. (People's Br. 6-7 (citing Hon. Mme. **[*35]** Justice Désirée [**63] Bernard, Carib. Ct. J., Confronting Gender-Based Violence in the Caribbean, Remarks at the Fifth Biennial Lucille Mathurin Mair Public Lecture (Nov. 29, 2006), *available at* http://www.caribbeancourtofjustice.org/old/papers_addresses.html).) The People cite Justice Bernard to underscore "[t]he historical acceptance of domestic violence perpetrated on women in the Caribbean ... ." *Id.* at 6. But here, too, the proffered support actually detracts from the People's claimed assertion.

In her remarks, Justice Bernard commented that

> [t]he most common and frequently-encountered form of violence occurs in domestic situations; research indicates that women are more likely to be abused, killed or injured within a family setting. It ranges from slaps and kicks to more serious assaults as wounding with knives and other implements sometimes resulting in death. These assaults may be sporadic or consistent on a daily or weekly basis, and invariably are unpredictable with no reference to any act committed by the woman. They may be the result of alcohol or drug consumption by the husband or partner in a family relationship or a personality defect with the abuser seeing the need to inflict pain on the [**64] person closest to him.

(Bernard 2.) One reason why domestic violence persists, Bernard explained, is because of "the historical philosophy of women's subordination and inferiority to men. Women were, and many still are, conditioned to believe in the superiority of their male partners in any relationship." *Id.* Another explanation is that "[i]n marital and common law relationships wives convince themselves that their vows or conjugal duties include occasional punishment from their spouses or partners ... ." *Id.* at 3. These "duties," Bernard pointed out, are "frequently glorified in calypsoes and dance hall music." *Id.* This sort of pervasive acceptance of gender-based domestic violence, the People claim, "can be stymied by ... programs and legislation to discourage and eliminate gender-based violence." (People's Br. 7.) One objective of Section 298(5) is to combat pervasive acceptance of gender-based violence.

VI[11] [11] The People are correct that legislation can serve to discourage and eliminate gender-based domestic violence. But the People have not shown how the gender-based classification employed in the Virgin Islands aggravated assault and battery statute was enacted with the goal of discouraging [**65] and eliminating domestic violence. ***HN13*** Justifications offered in **[*36]** support of gender-based classifications "must be genuine, not hypothesized or invented *post hoc* in response to litigation." *Virginia*, 518 U.S. at 533. They cannot rest "on overbroad generalizations about the different talents, capacities, or preferences of males and females." *Id.* "Intentional discrimination on the basis of gender by state actors violates the Equal Protection Clause, particularly where ... the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women." *J.E.B. v. Alabama ex. rel. T.B.*, 511 U.S. 127, 130-31, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994). Moreover, "'benign' justifications proffered in defense of categorical exclusions will not be accepted automatically; a tenable justification must describe actual [governmental] purposes, not rationalizations for actions in fact differently grounded." *Virginia*, 518 U.S. at 535-36 (citing *Wiesenfeld*, 420 U.S. at 648, n.16).

Unfortunately, domestic violence remains a difficult and disturbing social problem that must he eradicated. But as **Simmonds** correctly pointed out, "[d]omestic violence is a problem for everybody — men, [**66] women, children." (Def. Br. 21.) It is not a problem unique to the Virgin Islands or the Caribbean. *See, e.g.*, Emily J. Sack, *Battered Women & the State: The Struggle for the Future of Domestic Violence Policy*, 2004 Wis. L. Rev. 1657, 1666 ("[U]ntil approximately twenty-five years ago, the [American] criminal justice system did not recognize domestic violence as an issue of concern, much less focus on methods to attack it."). Indeed, the People's assertion that Caribbean peoples have historically accepted gender-based domestic violence is troubling.

Geographically, the Virgin Islands is situated within the Caribbean Sea. Over the years, people from across the Caribbean region immigrated here in search of a better life.[25] Common histories, comparable struggles, and **[*37]** other corollary experiences around the region have imparted many traditions, values, and beliefs shared by all Caribbean peoples, including Virgin Islanders.[26] But not every Virgin Islander initially called the Caribbean home. Some trace their roots directly back to Europe.[27] Others relocated here from the mainland.[28] "The diverse ethnicity of the Virgin Islands people ... includes Amerindian, African, European, and Caribbean/West [**67] Indian heritages ... ." V.I. Code Ann. tit. 3, § 408(a)(3) (1995). Notwithstanding this unique diversity, the People assert that this purported historical acceptance of domestic violence by one group (albeit the largest) — people of Caribbean descent — justifies a criminal statute that, by definition, must apply to all

groups of people living in the Virgin Islands. However, Section 298(5) does not criminalize only assaults and batteries committed by Caribbean males on females. It criminalizes assaults and batteries committed by any adult male regardless of his cultural background, ethnic heritage, or even citizenship. Thus, the People's assertion of a Caribbean "historical acceptance" of domestic violence is an exceedingly unpersuasive justification for the gender-based classification at issue here.

The last basis the People offer in support of a domestic violence function for Section 298(5) is the volume of domestic violence perpetrated against women. The People point out that "[s]ince the beginning of 2011, there [were] eleven (11) cases charging women with committing acts of domestic violence in the St. Thomas/St. John district. **[*38]** During the same period of time, there [were] fifty-two cases of domestic violence pending against men." (People's [**70] Br. 7.) It is this "high[er] incidence of domestic violence committed against women," the People argue, that "necessitate[s] the special protection of women against men in the higher form of punishment for men as a deterrent." *Id.* The Court need only "look at the local newspaper to see [the] continuing relevance" of Section 298(5). *Id.* at 8. **Simmonds** rejects this assertion. The People's point, he argues, "is that men cause more acts of domestic violence than women. Therefore, this law is necessary to protect women." (Def. Br. 24.) **Simmonds** claims that "[t]he research is now overwhelming that women are as likely to abuse." *Id.* at 31 (citing Amanda J. Schmesseer, Note, *Real Men May Not Cry, But They are Victims of Domestic Violence: Bias in Application of Domestic Violence Laws*, 58 Syracuse L. Rev. 171, 191-92 (2007)). Section 298(5) perpetuates this problem, **Simmonds** asserts, and contradicts the Territory's "gender neutral policy for solving the issues of gender relations." *Id.* at 15. "The evil is violence not gender ... ." *Id.* at 32.

VI[12] [12] The Virgin Islands first enacted laws addressing domestic violence in 1984. *See generally* Act No. 5013, § 9, 1984 V.I. Sess. L. p. 342, 347. That legislation [**71] defined domestic violence victims as

> emancipated minors or persons 18 years of age or older of the opposite sex who have resided together or who currently are residing in the same living quarters or persons who together are the parents of one or more children, regardless of their marital status or whether they have lived together at any time.

Id. § 9. To receive the protections of the statute, a victim of domestic violence had to be the opposite gender of the perpetrator. Six years later, the Legislature substantially revised the Territory's domestic violence laws. *See generally* Act No. 5646, § 4, 1990 V.I. Sess. L. p. 365, 369. The Territory declared the stated goals of the domestic violence laws to be: maximum protection, prompt remedy, effective police assistance, public awareness, and equal enforcement of the criminal laws. V.I. Code Ann. tit. 16, § 90(a)(1)-(5) (1999). In furtherance of those goals, ***HN14*** the definition of a domestic violence victim was revised to include

> any person who has been subjected to domestic violence by a spouse, former spouse, parent, child, or any other person related by blood or **[*39]** marriage, a present or former household member, a person with whom the victim [**72] has a child in common, or a person who is, or has been, in a sexual or otherwise intimate relationship with the victim.

Id. § 91(c). Under the revised definition, a wife battered by her husband would still qualify as a victim of domestic violence. But so would a father battered by his son or a mother by her daughter or a female roommate of another female roommate. Before the revision, a younger brother beaten by his older brother could not avail himself of the protections offered to domestic violence victims. By expanding the definition of "victim" beyond opposite sex, the Territory extended protection to the entire domestic sphere. ***HN15*** Domestic violence laws apply equally, and are equally enforced, whether the individuals involved are of the same or opposite genders. *See, e.g.*, *Nibbs v. People*, 52 V.I. 276 (2009) (domestic violence involving two brothers); *Murrell v. Virgin Islands*, 51 V.I. 1095 (D.V.I. App. Div. 2009) (domestic violence involving male and female); *Laudat v. Virgin Islands*, 48 V.I. 892 (D.V.I. App. Div. 2007) (domestic violence involving son and mother). (*Accord* App. to People's Br. 17-18 (testimony of Clema Lewis, Co-Director, Women's Coalition of St. Croix) ("[W]e've [**73] had several cases where we were able to get Restraining Orders for same sex ... . They're treated like heterosexual couples.").)

The People fail to explain the inconsistency between gender-neutral domestic violence laws and equal enforcement of the criminal laws with the gender-specific aggravated assault and battery statute. Section 298(5), **Simmonds** argues, "is not gender neutral and is at war with th[at] policy." (Def. Br. 16.) Instead, Section 298(5) "*predetermined*, based on information obtained prior to 1921, that males are the problem and females are not ... ." *Id.* (emphasis in original). That stands in direct contradiction to the gender-neutral goals of domestic violence laws. Even Justice Bernard, whom the People relied upon, acknowledged, at the outset of her address, the gender-neutral aspect to domestic violence: "[w]hen one considers the whole issue of gender-based violence one immediately conjures up in one's mind violence against women *despite the gender-neutral term* ... ." (Bernard 1 (emphasis added).) This term, she explained, "include[s] the all-pervasive scourge of violence committed *against both male and female victims.*" *Id.* (emphasis added). Justice Bernard [**74] did stress, however, that "in the overwhelming majority of incidents of violence women are the victims." *Id.* But she also **[*40]** cautioned that "[w]ith increasing frequency, males (boys *and adult men*) are becoming victims of violence perpetrated *against them by females.*" *Id.* (emphasis added).

V. CONCLUSION

VI[13,14] [13, 14] ***HN16*** In determining whether a statute is constitutional, courts examine the statute "in terms of its 'immediate objective,' its 'ultimate effect' and its 'historical context and the conditions existing prior to its enactment.' " *Reitman v. Mulkey*, 387 U.S. 369, 373, 87 S. Ct. 1627, 18 L. Ed. 2d 830 (1967). The Court has examined both justifications proffered by the People. Neither are exceedingly persuasive. While deterring and preventing violence is undoubtedly a legitimate and

important objective for the Territory, HN17 courts "need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation." Weinberger v. Wiesenfeld, 420 U.S. 636, 648 n.16, 95 S. Ct. 1225, 43 L. Ed. 2d 514 (1975) (citing Jimenez v. Weinberger, 417 U.S. 628, 634, 94 S. Ct. 2496, 41 L. Ed. 2d 363 (1974); U.S. Dept. of Agriculture v. Moreno, 413 U.S. 528, 536-537, 93 S. Ct. 2821, 37 L. Ed. 2d 782 (1973); [**75] Eisenstadt v. Baird, 405 U.S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972)). Although "[t]he Equal Protection Clause does not countenance ... speculative probing into the purposes of a coordinate branch," McGinnis v. Royster, 410 U.S. 263, 277, 93 S. Ct. 1055, 35 L. Ed. 2d 282 (1973), courts have "rejected one asserted purpose as impermissible, but then considered other purposes to determine if they could justify the statute." Michael M., 450 U.S. at 472 n.7. Thus, the Court also considered the origin and background the aggravated assault and battery statute in its analysis.

Here, the People claim that the objective for Section 298(5) is to protect women from violence, including domestic violence, by men. But the People have not explained how a statute, more than 150 years old, can have as its objective the eradication of domestic violence, something that only became a concern in recent years. While the Virgin Islands did amend Section 298 four times subsequent to its recodification in 1957 in the Virgin Islands Code, none of those amendments reveals a legislative determination to make aggravated assaults by males on females in the context of domestic violence the purpose for section 298(5)'s gender-based **[*41]** classification. Historically, this type of [**76] statute was used as a shield to deter assaults from being committed in certain locations — private homes, courts of justice, places of worship, or places where people gather for innocent amusement — or against certain persons society wanted to protect, such as police officers, children, or older persons. Women were also among the persons protected by the statute. The Legislature's recent amendments to Section 298 further reinforce this purpose: an assault and battery committed on a teacher or social worker is now elevated to aggravated assault and battery.

If Section 298's goal is to deter violence, particularly domestic violence as the People claim, then the statute fails to achieve that goal because assault and battery as an act of domestic violence committed against a male by a female or another male, unattended by aggravating circumstances, can only be prosecuted as simple assault and battery, a misdemeanor offense. The Constitution guarantees equal protection based on gender. Classifications based on gender must have legitimate objectives that are substantially related to the statute's purpose. Here, there is no legitimate basis for punishing males more severely than females for [**77] committing the same criminal act: assault and battery. Moreover, if the objective was to deter men from committing acts of violence, including domestic violence, against women by increasing the punishment for assault and battery, that objective fails when males commit assault in the first, second, or third degree on females. Gender is not a factor in the commission of those more serious offenses. *See, e.g.*, 14 V.I.C. §§ 295-97.

VI[15,16] [15, 16] HN18 "Legislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing the stereotypes about the 'proper place' of women and their need for special protection. Thus, even statutes purportedly designed to compensate for and ameliorate the effects of past discrimination must be carefully tailored." Orr v. Orr, 440 U.S. 268, 283, 99 S. Ct. 1102, 59 L. Ed. 2d 306 (1979) (internal citation omitted). Here, HN19 since the government's purpose can be just as well "served by a gender-neutral classification as one that gender classifies and therefore carries with it the baggage of sexual stereotypes, the [government] cannot be permitted to classify on the basis of sex." *Id.* Accordingly, the Court finds that the People have failed to show that important [**78] government objectives are served by the Virgin Islands aggravated assault statute and have not shown that the statute is **[*42]** substantially related to the achievement of those objectives. Since the statute employs a gender-based classification on its face and does not survive intermediate scrutiny review, the statute violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

FINDINGS OF FACT

I. GOVERNING LAW

A. Equal Protection

(1) HN20 The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution applies to the U.S. Virgin Islands through the Revised Organic Act of 1954, as amended. Rev. Org. Act § 3 (1954).

(2) HN21 "No law shall be enacted in the Virgin Islands which shall deprive any person of life, liberty, or property without due process of law or deny to any person therein equal protection of the laws." Rev. Org. Act § 3 (1954).

(3) Statutes employing a classification based on gender are subject to intermediate scrutiny. Hynson v. City of Chester, Legal Dept., 864 F.2d 1026, 1029 (3d Cir. 1988)).

(4) VI[17] [17] HN22 Statutes discriminating against males are subject to the same scrutiny and standard of review as those discriminating against females. [**79] Miss. Univ. for Women v. Hogan, 458 U.S. 718, 102 S. Ct. 3331, 73 L. Ed. 2d 1090 (1982); Orr v. Orr, 440 U.S. 268, 99 S. Ct. 1102, 59 L. Ed. 2d 306 (1979); Craig v. Boren, 429 U.S. 190, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976).

(5) *VI[18]* [18] *HN23* The burden rests on the government to show that classifications based on gender are substantially related to achieving important governmental objectives. *United States v. Virginia*, 518 U.S. 515, 533, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996).

(6) Whether the justification proffered by the government is exceedingly persuasive is determined by the court. *United States v. Virginia*, 518 U.S. 515, 533, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996).

(7) If accepted by the court, the government's justification is entitled to great deference. *Michael M. v. Super. Ct. of Sonoma Cty.*, 450 U.S. 464, 470, **[*43]** 101 S. Ct. 1200, 67 L. Ed. 2d 437 (1981) (plurality opinion).

(8) *VI[19]* [19] *HN24* Government justification for gender-based classifications "must be genuine, not hypothesized or invented post hoc in response to litigation. And it must not rely on overbroad generalizations about the different ... capacities ... of males and females." *United States v. Virginia*, 518 U.S. 515, 533, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996).

B. Domestic Violence Laws

(9) In 1984, the Virgin Islands recognized domestic violence as a problem and enacted legislation to remedy it. *See generally* Act No. 5013, 1984 V.I. Sess. L. p. 342, 347-54 *codified as amended* [**80] *at* V.I. CODE ANN. tit. 16, § 91 et seq.

(10) Civil and criminal remedies are available to deter, prevent, and punish acts of domestic violence. V.I. CODE ANN. tit. 16, §§ 94, 96-99a (1996).

(11) *HN25* Domestic violence occurs when someone commits an act specified by statute, or an attempt or threat to commit that acts, against a victim. V.I. CODE ANN. tit. 16, § 91(b) (1996 & Supp. 2011).

(12) Courts look to the definition of criminal offenses found within the Virgin Islands Code for guidance when interpreting acts of domestic violence. *Drew v. Drew*, 971 F. Supp. 948, 951, 37 V.I. 61 (D.V.I. App. Div. 1997).

(13) *HN26* Assault and battery constitute acts of domestic violence. Act. No. 5646, § 4, 1990 V.I. Sess. L.p. 365, 369, *codified at* V.I. CODE ANN. tit. 16, § 91(b)(1)-(2).

(14) A victim of domestic violence is "any person who has been subjected to domestic violence by a spouse, former spouse, parent, child, or any other person related by blood or marriage, a present or former household member, a person with whom the victim has a child in common, or a person who is, or has been, in a sexual or otherwise intimate relationship with the victim." Act No. 5646, § 4, 1990 V.I. Sess. L.p. 365, 369, *codified at* V.I. CODE ANN. tit. 16, § 91(c) [**81] (1996).

(15) Previously, domestic violence victims were only "emancipated minors or persons 18 years of age or older of the opposite sex who have **[*44]** resided together or who currently are residing in the same living quarters or persons who together are the parents of one or more children, regardless of their marital status or whether they have lived together at any time." Act No. 5013, § 9, 1984 V.I. Sess. L.p. 342, 347.

(16) "The legislative purpose of the Virgin Islands Domestic Violence Statute is to aid and protect victims of domestic violence by providing them with effective remedies." *Goodwin v. Goodwin*, 23 V.I. 80, 89 (Terr. Ct. 1987) (citing Act No. 5013, § 9, 1984 V.I. Sess. L.p. 342, 347-54).

(17) Domestic violence laws serve to develop greater understanding throughout the community of incidents and causes of domestic violence and serve to deter and punish domestic violence against family members and others personally involved with offenders through equal enforcement of the criminal law. Act No. 5646, § 3, 1990 V.I. Sess. L.p. 365, 368-69, *codified at* V.I. CODE ANN. tit. 16, § 90(a)(4)-(5).

(18) The Office of the Attorney General employs a "no-drop policy" for all criminal actions [**82] involving domestic violence. (App. to People's Br. 46 (transcript of *The Domestic Violence Prevention Act of 2010: Hearing on B. No. 28-0177 Before the Comm. on Pub. Safety, Homeland Sec., and Just.*, 28th Leg. (V.I. Apr. 21, 2010) (testimony of Wilson Campbell, Asst. Att'y Gen. of the Virgin Islands)).)

(19) If a police officer has probable cause to believe that suspect committed an offense involving domestic violence, the officer must arrest the suspect and is authorized to make the arrest without a warrant. V.I. CODE ANN. tit. 16, § 94(a) (1996).

(20) Domestic violence laws apply equally whether the individuals involved are of the same or opposite genders. (App. to People's Br. 17-18 (transcript of *The Domestic Violence Prevention Act of 2010: Hearing on B. No. 28-0177 Before the Comm. on Pub. Safety, Homeland Sec., and Just.*, 28th Leg. (V.I. Apr. 21, 2010) (testimony of Clema Lewis, Co-Director, Women's Coalition of St. Croix)).) *See also, e.g.*, *Nibbs v. People*, 52 V.I. 276 (2009) (brother-brother); *Murrell v. Virgin*

Islands, 51 V.I. 1095 (D.V.I. App. Div. 2009) (male-female); *Laudat v. Virgin Islands*, 48 V.I. 892 (D.V.I. App. Div. 2007) (son-mother).

[*45] C. Virgin Islands Assault and [83] Battery Statutes**

(21) A person commits assault when he attempts to commit a battery or when he shows in a threatening gesture an immediate intention to commit a battery coupled with the ability to commit that battery. V.I. CODE ANN. tit. 14, § 291 (1996).

(22) Unlawful violence against another with intent to injure, regardless of the degree of violence or the means used, constitutes assault and battery. V.I. CODE ANN. tit. 14, § 292 (1996).

(23) "[I]n order that an assault may also become a battery, there must be a 'touching' or some physical force and contact within the concept of the common law definition of battery." *Government v. Hamilton*, 334 F. Supp. 1382, 1384, 8 V.I. 298 (D.V.I. 1971).

(24) Assault, or assault or battery, unattended by aggravating circumstances, constitutes simple assault and battery. V.I. CODE ANN. tit. 14, § 299 (1996).

(25) Simple assault and battery becomes aggravated when committed: (1) on an officer discharging an official duty; (2) in a court, place of religious worship, or place persons gather for innocent amusement; (3) in a private home; (4) on a person aged or decrepit; (5) by an adult male on a female or child or by adult female on a child; (6) by an instrument [**84] or means that inflicts disgrace; (7) while in disguise; (8) on a teacher or school employee on school grounds; or (9) on a caseworker, investigator, or other health and human services employee in the performance of an official duty. V.I. CODE ANN. tit. 14, § 298(1)-(7) (1996 & Supp. 2011); Act No. 7267, 29th Leg., Reg. Sess. § 6 (V.I. 2011) (to be codified at V.I. CODE ANN. tit. 14, § 298(8)-(9)), *available at* VI LEGIS 7267 (Westlaw).

(26) "All defenses that may be raised in criminal prosecutions generally are ... available in a prosecution for an aggravated assault and battery." *Government v. Hodge*, 7 V.I. 73, 81 (D.V.I. 1968).

(27) Self-defense or defense of another does not constitute assault or assault and battery when reasonable force is used. V.I. CODE ANN. tit. 14, § 293(a)(6) (1996); *Government v. Stull*, 280 F. Supp. 460, 6 V.I. 347 (D.V.I. 1968).

(28) Aggravated assault and battery is a misdemeanor offense punishable by imprisonment of not more than one year, fine of not more **[*46]** than five hundred dollars, or both. V.I. CODE ANN. tit. 14, §§ 2, 298 (1996 & Supp. 2011).

(29) In 2010, the Virgin Islands enacted "The Domestic Violence Prevention Act of 2010," which increased aggravated assault and battery [**85] as an act of domestic violence to a felony offense, punishable by imprisonment of not more than five years or fine of not more than one thousand dollars. The Domestic Violence Prevention Act of 2010, No. 7180, § 3(a)(2), 2010 V.I. Sess. L.p. 107, 109-10, *codified at* V.I. CODE ANN. tit. 14, § 298 (Supp. 2011).

Source of the Virgin Islands Assault and Battery Statutes

(30) In 1921, the Territory of the Virgin Islands enacted separate Codes of Law for the Municipality of St. Thomas and St. John and for the Municipality of St. Croix. *See generally* St. Thomas & St. John Mun. Code (1921), *repealed by* V.I. CODE ANN. tit. 1, § 5 (1957); St. Croix Mun. Code (1921), *repealed by* V.I. CODE ANN. tit. 1, § 5 (1957) (hereinafter "1921 CODES").

(31) Assault and battery, including aggravated assault and battery, were among the crimes codified in the 1921 CODES. *See* ST. THOMAS/ST. JOHN MUN. CODE, tit. IV, ch. 5, § 32 (1921); St. Croix Mun. Code tit. IV, ch. 5, § 32 (1921).

(32) The 1921 CODES were borrowed in large part from the 1913 Laws of the Territory of Alaska. *Burch v. Burch*, 195 F.2d 799, 2 V.I. 559 (3d Cir. 1952); John D. Merwin, *The U.S. Virgin Islands Come of Age: A Saga of Progress in the Law*, 47 A.B.A. J. 778, 779 (1961).

(33) [**86] Because the Territory of Alaska did not criminalize assault and battery by adult males on females as aggravated assault and battery, the Virgin Islands could not have borrowed its statute from Alaska. *See* COMPILED L. OF TERR. OF ALASKA tit. XIV, ch. 2, § 1905 (1913).

(34) When the 1921 CODES were enacted, at least three jurisdictions codified assault and battery by an adult male on a female as aggravated assault and battery: the State of Texas, the Territory of Arizona, and the Territory of Puerto Rico. *See generally* TEX. PENAL CODE ANN. tit. 15, art. 1022(5) (1915 ed.); TERR. ARIZ. REV. STAT., Penal Code, part I tit. VIII, ch. IX, § 215(3) (1901 ed.); 1904 P.R. Laws 50, § 6(5) (codified at P.R. LAWS tit. 33, § 821 (1937 ed.)).

[*47]

(35) The aggravated assault and battery statute enacted by the Virgin Islands in the 1921 Codes is substantially similar to the aggravated assault and battery statutes of all three jurisdictions.

(36) The Territory of Arizona borrowed its criminal assault and battery statutes, including its aggravated assault and battery statute, from the State of Texas. *Compare, e.g.*, Tex. Penal Code Ann. tit. 15, art. 1022(1)-(10) (1915 ed.) *with* Terr. Ariz. Rev. Stat. Penal [**87] Code, part I. tit. VIII, ch. IX, § 215(1)-(6) (1901 ed.). *See State v. Romero*, 61 Ariz. 249, 148 P.2d 357 (1944).

(37) The Territory of Puerto Rico also borrowed its criminal assault and battery statutes, including its aggravated assault and battery statute, from the State of Texas. *Compare, e.g.*, Tex. Penal Code Ann. tit. 15, ch. 1-2, art. 1008-1023 (1915 ed.) (comprising seventeen sections) *with* 1904 P.R. Laws 48-50, §§ 1-8 (codified at P.R. Laws tit. 33, § 821-828 (1937 ed.)) (comprising eight sections). *Accord People v. Diaz*, 62 P.R.R. 477, 62 D.P.R. 499 (1943); *People v. Colón*, 25 P.R.R. 586, 25 D.P.R. 629 (1917); *Lange v. People*, 24 P.R.R. 796, 24 D.P.R. 854 (1917).

(38) Of the three jurisdictions, the assault and battery statutes, and in particular the aggravated assault and battery statute, in force in the Territory of Puerto Rico mirrored the statute enacted by Virgin Islands in 1921.

(39) The Virgin Islands borrowed its assault and battery statutes, including its aggravated assault and battery statute, from the Territory of Puerto Rico.

(40) In 1957, the Virgin Islands repealed the 1921 Codes and replaced them with a comprehensive code governing the entire Territory. *See generally* V.I. Code Ann. tit. 1 (1996) (noting source in historical [**88] annotation).

(41) "All available laws, including the 1921 Codes ... were classified according to subject matter, carefully edited, and arranged into 34 titles" when preparing the Virgin Islands Code. V.I. Code Ann. at xi (reprinting first edition preface) (1995).

(42) The assault and battery statutes, including the aggravated assault and battery statute, were incorporated in Virgin Islands Code from the 1921 Codes without significant modification. *See generally* V.I. Code Ann. tit. 14, § 298 **[*48]** (1996) (noting the 1921 Codes as historical source).

(43) The current aggravated assault and battery statute derives from the version enacted in 1921 that was borrowed from the Territory of Puerto Rico.

Judicial Interpretation of Borrowed Statutes

(44) ***VI[20]*** [20] ***HN27*** When one jurisdiction borrows a statute from another, the judicial interpretations of that statute by the highest court of the borrowed jurisdiction accompany that statute. *Berkeley v. W. Indies Enter., Inc.*, 480 F.2d 1088, 10 V.I. 619 (3d Cir. 1973); *People v. Colón*, 25 P.R.R. 586, 586 (1917).

(45) A male must be twenty-one years old or older to be prosecuted for aggravated assault and battery on a female as "an adult male." *Schenault v. State*, 10 Tex. Ct. App. 410 (1881); [**89] *People v. Colón*, 25 P.R.R. 586 (1917).

(46) An adult male commits an aggravated assault and battery against a female by using, or threatening to use, unlawful violence against her. Unlawful violence includes indecent assault. *George v. State*, 11 Tex. Ct. App. 95 (1881).

DONE AND SO ORDERED this 11th day of June, 2012.

ORDER

The Court having rendered a Memorandum Opinion this date, in accordance with that Opinion, it is hereby

ORDERED that a copy of this Order and accompanying Memorandum Opinion shall be directed to Appellate Division of the United States District Court for the District of the Virgin Islands;

ORDERED that a copy of this Order and accompanying Memorandum Opinion shall be directed to counsels of record in this matter.

DONE AND SO ORDERED this 11 day of June, 2012.

Footnotes

1 In her statement to police, Tracia **Simmonds** reported:

> My husband started beating me in the face. He broke off a towel rack in the bathroom. We exchange [sic] words. I went to [**4] the bedroom. We had a physical altercation. He continue [sic] beating me. I called 911 and then I manage [sic] to get away and I went to the police station.

(Trial Tr. 63:5-9 Sept. 22, 2005.) In court, however, **Simmonds** denied that her husband beat her. *Id.* at 66:3-4. She explained: "My husband slapped me. We exchange [sic] blows. I hit him. He hit me, you know, back and forth." *Id.* at 66:8-9. When asked why she never told the police or the prosecutor that she was the initial aggressor, Tracia **Simmonds** attributed it to nervousness. *Id.* at 56:17-22. She noted on cross-examination that neither the police nor anyone at the Attorney General's Office inquired as to who hit first. *Id.* at 67:8-9 & 71:10-16. In June 2005, **Simmonds** sent a notarized letter to the Attorney General's Office, noting that her husband's actions were inexcusable but requesting that the case be dismissed. *Id.* at 59:1-24. The People called Minerva Saldana, a paralegal in the Domestic Violence Unit at the Virgin Islands Department of Justice, as a rebuttal witness to explain that the first time **Simmonds** said she was the initial aggressor was after learning "what might happen." *Id.* at 79:1-3. Tracia **Simmonds** "didn't want [**5] her husband to lose his job." *Id.* at 81:13.

2 The Supreme Court of the Virgin Islands officially assumed appellate jurisdiction over the Superior Court of the Virgin Islands on January 29, 2007. *Hypolite v. People*, 51 V.I. 97 (2009). Appeals filed prior to that date remain with the Appellate Division of the District Court of [**7] the Virgin Islands. 48 U.S.C. § 1613a(d) (2009); *Maynard v. Virgin Islands*, 392 Fed. App'x 105, 111 n.8 (3d Cir. 2010) (unpub.); *Joseph v. People*, 50 V.I. 873 (D.V.I. App. Div. 2008).

3 Congress first guaranteed equal protection in the Virgin Islands through the Organic Act of 1936. *See* Organic Act of 1936, § 34, 49 Stat. 1807, 1815 (1936) (partially repealed by numerous legislative acts). *Accord Alton v. Alton*, 207 F.2d 667, 670 n.8, 2 V.I. 600 (3d Cir. 1953) ("While the Organic Act of the Virgin Islands ... did not extend the Constitution to the Islands, it does contain a Bill of Rights which includes a due process and equal protection clause.") (internal citations omitted). But in subsequent revisions, Congress extended the Equal Protection Clause directly to the Virgin Islands, declaring that it "shall have the same force and effect there as in the United States or in any State of the United States ... ." Revised Organic Act of 1954, § 3, 48 U.S.C. § 1561 (2009), *reprinted in* V.I. CODE ANN., Hist. Docs, Org. Acts, and U.S. CONST., at 209 (1995) (preceding [**9] V.I. Code Ann. tit. 1). The Revised Organic Act also retained the earlier equal protection clause provided in the Organic Act. *Compare id.* ("No law shall be enacted in the Virgin Islands which shall deprive any person of life, liberty, or property without due process of law or deny to any person therein equal protection of the laws.") *with* Organic Act of 1936, § 34, 49 Stat. 1807, 1815 (1936) (repealed 1982) ("No law shall be enacted in the Virgin Islands which shall deprive any person of life, liberty, or property without due process of law or deny to any person therein equal protection of the laws."). *Accord In re Brown*, 439 F.2d 47, 51 n.9, 8 V.I. 313 (3d Cir. 1971). Thus, technically, Congress guaranteed equal protection to the Virgin Islands twice: expressly and by extension. **Simmonds** asserts that this distinction makes a difference. (*See generally* Def. Br. 16-18, filed Sept. 30, 2011.) He argues that "[i]f Article 3 is read to grant the same rights as the 14th Amendment, then the ROA will be surplusage." *Id.* at 17. "[T]here is a presumption against interpreting statutes in a manner to make a whole section of a statute superfluous." *Id.* (citations omitted). Because the express guarantee of [**10] equal protection in the Revised Organic Act "operates to more strictly forbid deprivation of equal protection in a small territory such as ours," **Simmonds** argues, "this Court ... should apply a strict scrutiny standard of review ... ." *Id.* The Revised Organic Act could be read both to prohibit the Virgin Islands, by extension of the Fourteenth Amendment, from denying equal protection of existing laws, and also to prohibit, through the Section 3, the enactment of any law that would deny equal protection. In "interpreting a statute, courts should endeavor to give meaning to every word which Congress used and therefore should avoid an interpretation which renders an element of the language superfluous." *Birdman v. Office of the Governor*, 677 F.3d 167, 176, 56 V.I. 973 (3d Cir. 2012) (quoting *Rosenberg v. XM Ventures*, 274 F.3d 137, 141 (3d Cir. 2001)). But judicial application of the canons and principles of statutory interpretation is not perfunctory. "The canon requiring a court to give effect to each word '*if possible*' is sometimes offset by the canon that permits a court to reject words 'as surplusage' if 'inadvertently inserted or if repugnant to the rest [**11] of the statute.' " *Chickasaw Nation v. United States*, 534 U.S. 84, 94, 122 S. Ct. 528, 151 L. Ed. 2d 474 (quoting Karl Llewellyn, *The Common Law Tradition*, 525 (1960)). "[N]umerous examples exist of Congress conferring, through a territory's organic act or constitution, rights that are greater than those afforded by the United States Constitution." *Murrell v. People*, 54 V.I. 338, 351 n.6 (2010). Here, however, the Appellate Division did not task this Court on remand with determining whether Congress intended to confer greater equal protection rights in the Virgin Islands through the Territory's organic acts. Thus, **Simmonds** arguments to that end are not before this Court for consideration.

4 Pertinent portions of Chapter Five of Title IV of the 1921 CODES read as follows:

> Section 27.—The use of any unlawful violence upon the person of another with intent to injure him, whatever be the means or the degree of violence used, is an assault and battery. Any attempt to commit a battery, [**18] or any threatening gesture showing in itself an immediate intention, coupled with an ability to commit a battery, is an assault ... .
>
> Section 32.—An assault and battery becomes aggravated when committed under any of the following circumstances:

(1) When committed 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) When committed 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) When the person committing the offense goes into the house of a private family and is there guilty of an assault and battery;

(4) When committed by a person of robust health upon one who is aged or decrepit;

(5) When committed by an adult male upon the person of a female or child, or by an adult female upon the person of a child;

(6) When the instrument or means used is such as inflicts disgrace upon the person assaulted, as an assault or battery with a whip, cowhide or cane;

(7) When a serious bodily injury is inflicted upon the person assaulted;

(8) When committed with dealy [sic] weapons [**19] under circumstances not amounting to an intent to kill or maim;

(9) When committed with premeditated design, and by the use of means calculated to inflict great bodily injury;

(10) When committed by any person or persons in disguise.

Section 33.—The punishment for an aggravated assault, or aggravated assault and battery, shall be by fine not exceeding five hundred dollars, or imprisonment in jail not exceeding one year, or by both such fine and imprisonment.

1921 Codes, tit. IV, ch. 5, §§ 27, 32-33.

5 Pertinent portions from the first edition of the Virgin Islands Code read as follows:

§ 291. Assault defined

Whoever—

(1) attempts to commit a battery; or

(2) makes a threatening gesture showing in itself an immediate intention [**21] coupled with an ability to commit a battery—

commits an assault.

§ 292. Assault and battery defined

Whoever uses any unlawful violence upon the person of another with intent to injure him, whatever be the means or the degree of violence used, commits an assault and battery ... .

§ 298. Aggravated assault and battery

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;

(6) by an instrument or means which inflicts disgrace upon the person assaulted, such as a whip, cowhide or cane; or

(7) which inflicts serious bodily injury upon the person assaulted;

(8) with deadly weapons under circumstances not [**22] amounting to an intent to kill or maim;

(9) with premeditated design and by the use of means calculated to inflict great bodily harm; or

(10) while being in disguise—

shall be fined not more than $500 or imprisoned not more than 1 year, or both.

§ 299. Simple assault and battery

Whoever commits—

(1) a simple assault; or

(2) an assault or battery unattended with circumstances of aggravation—

shall be fined not more than $50 or imprisoned not more than 30 days, or both.

V.I. CODE ANN. tit. 14, §§ 291-92, 298-99 (1957 ed.).

6 *See, e.g.*, *Giurdanella v. Giurdanella*, 358 F.2d 321, 325, 5 V.I. 475 (3d Cir. 1966) ("[I]n enacting the 1921 codes the Colonial Councils omitted from their draft several portions of section 1105 of the Alaska Compiled Laws which they evidently did not regard as appropriate for the Virgin Islands."); *People v. Demming*, 1 V.I. 116, 125 (D.V.I. 1927) ("While our local Code was taken in large part from the Alaskan Code, the section dealing with this point was not adopted verbatim.").

7 *See Burch*, 195 F.2d at 805-06 ("Under the Danish law ... divorce upon grounds analogous to incompatibility of temperament had been recognized ... . Since these were grounds then unknown to the Alaska law but recognized under the Danish law then in force in the Islands it would seem most [**24] likely that they were added to preserve that existing law.").

8 *See, e.g.*, *Mun. of St. Croix v. Stakemann*, 1 V.I. 60, 64-65 (D.V.I. 1924) ("This Alaskan Code is frequently assumed to be of Oregonian origin ... . But some parts ... were subsequently adopted by Congress from other States ... . [T]he statutes concerning Eminent Domain from which ours are adopted were borrowed from the Civil Code of Procedure of Montana. Sundry provisions of the laws concerning Interest and Usury, copied in our local Codes from the Alaskan laws had been previously adopted from ... the Revised Statutes of Texas of 1895.").

9 *See, e.g.*, *Foreign Commerce v. Tonn*, 789 F.2d 221, 228 (3d Cir. 1986) (Hunter, J., dissenting) ("I am prepared to grant the Majority's assumption that the Virgin Islands statute is patterned after the Iowa statute. Although I have not been able to locate legislative history stating that § 952 has its roots in the Iowa statute, this seems a reasonable conclusion in light of the similarity in language and Iowa's apparent status as the only jurisdiction with such a statute in 1921."); *People v. Charles*, 1 V.I. 201, 211 (D.V.I. 1929) ("We are entitled to go back to the common law in [**25] such matters. It was done in New York, a code state, from which a large part of this code (1921) was actually, though indirectly, taken.").

10 Territorial Alaska's penal code defined assault and battery as follows:

That whoever, not being armed with a dangerous weapon, unlawfully assaults or threatens another in a menacing manner, or unlawfully strikes or [**26] wounds another, shall be fined not more than five hundred dollars or imprisoned in the county jail not more than six months or both.

COMPILED L. OF TERR. OF ALASKA, tit. XIV, ch. 2, § 1905 (1913). Annotations to this section refer the reader to an earlier compilation known as Carter's Code. *See id.* Carter's Code assigned Ohio as the source of Alaska's assault and battery statute. *See* L. OF ALASKA, part 1, ch. II § 25 (1907) (Thomas H. Carter, ed.). *Accord* 3 ANN. REV. STAT. OF OHIO, tit. 1, ch. 3, § 6823 (1906) (Clement Bates, ed.). The Ohio and Alaska assault and battery statutes are nearly identical. Neither, however, tracks the statutes enacted in the 1921 CODES.

11 *See, e.g.*, N.Y. PENAL L. art. 20, § 244 (1911 ed.); CAL. PENAL CODE tit. VIII, ch. IX, § 240-43 (1872 ed.), *reprinted in* 4 James M. Kerr, *Codes of Cal.* 286-89 (2d ed. 1921).

12 See State v. Pierce, 26 Tex. 114, 116 (1861) ("It seems to have been the intention of the code to treat simple assaults and aggravated assaults as distinct offenses ... . An indictment for an aggravated assault should charge the offense as such, setting forth also the circumstances constituting the aggravation.").

13 See State v. Lutterloh, 22 Tex. 210, 213 (1858) ("Our laws, previous to the adoption of the code, recognized the grades of common and of aggravated assault, but never before attempted to draw, so precisely, the distinction between them. The latter always included the former.").

14 The 1911 [**28] Texas Penal Code assault and battery chapter read, in pertinent part:

> Article 1008. [587] "Assault and battery" defined.—The use of any unlawful violence upon the person of another with intent to injure him, whatever be the means or the degree of violence used, is an assault and battery. Any attempt to commit a battery, or any threatening gesture showing, in itself or by words accompanying it, an immediate intention, coupled with an ability to commit a battery, is an assault.
>
> Art. 1009. [588] Intent presumed, and "injury" defined.—When an injury is caused by violence to the person, the intent to injure is presumed; and it rests with the person inflicting the injury to show the accident or innocent intention. The injury intended may be either bodily pain, constraint, a sense of shame or other disagreeable emotion of the mind ... .
>
> Art. 1017. [596] "Battery," how used.—The word "battery" is used in this Code in the same sense as "assault and battery."
>
> Art. 1018. [597] Degrees of assault.—An assault is either a simple assault, an aggravated assault, or an assault with intent to commit some other offense ... .
>
> Art. 1022. [601] Definition.—An assault and battery becomes aggravated when committed [**29] under any of the following circumstances:
>
> 1. When committed 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. When committed 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. When the person committing the offense goes into the house of a private family and is there guilty of an assault and battery.
>
> 4. When committed by a person of robust health or strength upon one who is aged or decrepit.
>
> 5. When committed by an adult male upon the person of a female or child, or by an adult female upon the person of a child.
>
> 6. When the instrument or means used is such as inflicts disgrace upon the person assaulted, as an assault or battery with a whip or cowhide.
>
> 7. When a serious bodily injury is inflicted upon the person assaulted.
>
> 8. When committed with deadly weapons under circumstances not amounting to an intent to murder or maim.
>
> 9. When committed with premeditated design, and by the use of means calculated to inflict great bodily injury.
>
> 10. When committed by any person [**30] or persons in disguise.
>
> Art. 1023. [602] Aggravation may be of different degrees.—The circumstances of aggravation, mentioned in the preceding article, are of different degrees, and the jury are to consider these circumstances in forming their verdict and assessing the punishment.

TEX. PENAL CODE ANN. tit. 15, art. 1008-09, 1017-18, 1022-23 (1911 ed.).

15 Texas amended its assault and battery statutes in 1858, two years after adoption. *See generally* "An Act supplementary to and amendatory of an act entitled an act to adopt and establish a Penal Code for the State of Texas, approved 28th August, 1856," adopted Feb. 12, 1858, *reprinted in* 4 H.P.N. Gammel, *The Laws of Texas 1822-1897*, 1028-1061 (1898). The only difference between the 1856 statute and 1858 revision was scrivener's errors. In 1871, Texas added a tenth factor to its aggravated assault and battery statute for assaults "committed by any person or persons in disguise." *See* "An Act to Amend the Penal Code for the State of Texas," adopted Nov. 6, 1871, *reprinted in* 7

H.P.N. Gammel, *The Laws of Texas 1822-1897*, 21-23 (1898). The State subsequently deleted this factor in 1925. *See* Tex. Penal Code Ann., tit. XV, art. 1147 (1925 ed.).

16 Congress created the Territory of Arizona in 1863 from land within the Territory of New Mexico. *See* Act of Feb. 24, 1863, § 1, 12 Stat. 664, 664-65. Because the new territory was formerly part of New Mexico, Congress continued New Mexico's territorial laws until a local legislature was established. *Id.* § 2. One year after the Territory was formed, the legislature discarded New Mexican law, replacing it with the Howell Code. *See, e.g.*, *John W. Masury & Son v. Bisbee Lumber Co.*, 49 Ariz. 443, 68 P.2d 679, 686 (1937) ("One of the first businesses of the legislative authorities of the new territory was to adopt a code of laws, commonly referred to as the Howell Code of 1864."). The Howell Code "was a code long in effect with few modifications, and influential throughout all of the history of Arizona." John S. Goff, *William T. Howell and the Howell [**33] Code of Arizona*, 11 Am. J. Legal Hist. 221, 221 (1967). Under the Howell Code, "[a]ssault and battery is the unlawful beating of another." Howell Code ch. X, § 51 (1864), *reprinted in The Compiled Laws of the Territory of Arizona Including the Howell Code and the Session Laws from 1864 to 1871* 77 (Coles Bashford, ed.) (1871). Assault and battery under the Howell Code and remained substantially unchanged until Arizona revised its statutes in 1901.

17 Assault and battery under the 1901 Revised Statutes of the Arizona Territory read, in pertinent part:

> 207. An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another ... .
>
> 209. A battery is any willful and unlawful use of force or violence upon the person of another ... .
>
> 215. An aggravated assault is an assault under any of the following circumstances:
>
> 1. When the person committing the offense goes into the house of a private family and is there guilty of an assault or battery.
> 2. When committed by a person of robust health or strength upon one who is decrepit.
> 3. When committed by an adult male upon the person of a female or child, or by an adult female upon the person of a child.
> 4. [**34] When the instrument or means used is such as to inflict disgrace upon the person assaulted, as an assault or battery with a whip or cowhide.
> 5. When a serious bodily injury is inflicted upon the person assaulted.
> 6. When committed with a premeditated design and by the use of means calculated to inflict great bodily injury.
> 7. When committed by any person or persons in disguise.
>
> 216. An aggravated battery is a battery committed under any of the circumstances mentioned in the preceding Section.
>
> 217. An aggravated assault or an aggravated battery is punishable by a fine of not less than one hundred dollars nor exceeding two thousand dollars, or by imprisonment in the territorial prison not less than one nor exceeding five years, or both.

Terr. Ariz. Rev. Stat., Penal Code, part I, tit. VIII, ch. IX, §§ 207, 209, 215-17 (1901).

18 The United States acquired the territory of Puerto Rico from Spain in 1898. Initially, Congress continued the local laws in effect to the extent they were compatible with federal law and the Constitution. *See* An Act Temporarily to provide revenues and a civil government for Porto Rico [sic], and for other purposes, ch. 191, § 8, 31 Stat. 77, 79 (1900) (commonly referred [**35] to as the Foraker Act). Congress also authorized the Territorial legislature to amend, alter, modify, or repeal local laws or ordinances. *Id.* § 15. In 1901, the Puerto Rican legislature appointed a code commission. *See, e.g.*, Dora Nevares Muñiz, *Evolution of Penal Codification in Puerto Rico: A Century of Chaos*, 51 Rev. Jur. U.P.R. 87, 107-08 (1982). The commission's efforts culminated in the adoption of a code, including a penal code, in 1902. *See generally* Rev. Stat. and Codes of P.R. (1902). The 1902 penal code was taken largely "from the California Penal Code of 1873, as amended up to 1901." Muñiz, *supra*, at 111 (internal quotation omitted). California's penal code was in turn modeled after an 1865 draft penal code for New York. *Id.* at 112. *See also* Eulalio A. Torres, *The Puerto Rico Penal Code of 1902-1975: A Case Study of American Legal Imperialism*, 45 Rev. Jur. U.P.R. 1, 20 (1976). Assault and battery, but not aggravated assault and battery, were among the offenses codified in the 1902 code. *See* Rev. Stat. and Codes of P.R., Penal Code, tit. XII, ch. VII, §§ 232, 234 (1902 ed.). However, two years later, Puerto Rico repealed the 1902 assault and battery statutes and adopted [**36] in their place statutes taken from the State of Texas. *See* An Act to Define and Punish Simple Assault, Simple Assault and battery, Aggravated Assault and Battery, and to Repeal Section

237 of the Penal Code, 1904 P.R. Laws 48-51 (subsequently codified at P.R. Laws tit. 33, §§ 821-28 (1937 ed.)). *Accord Ex Parte González*, 7 P.R.R. 451, 453-54, 7 P.R. Dec. 465 (1904) (noting repeal of 1902 assault and battery statutes by 1904 act).

19 According to the Puerto Rico Penal Code, assault and battery were defined, in pertinent part, as follows:

> Section 821.—The use of any unlawful violence upon the person of another with intent to injure him, whatever be the means or the degree of violence used, is an assault and battery. Any attempt to commit a battery, or any threatening gesture showing in itself an immediate intention, coupled with an ability to commit a battery, is an assault ... .
>
> Section 826.—An assault and battery becomes aggravated when committed under any of the following circumstances:
>
> 1. When committed 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. When committed [**37] 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. When the person committing the offense goes into the house of a private family and is there guilty of an assault and battery;
> 4. When committed by a person of robust health or strength upon one who is aged and decrepit;
> 5. When committed by an adult male upon the person of a female or child, or by an adult female upon the person of a child;
> 6. When the instrument or means used is such as inflicts disgrace upon the person assaulted, as an assault or battery with a whip, cowhide or cane;
> 7. When a serious bodily injury is inflicted upon the person assaulted;
> 8. When committed with deadly weapons under circumstances not amounting to an intent to kill or maim;
> 9. When committed with premeditated design, and by the use of means calculated to inflict great bodily injury;
> 10. When committed by any person or persons in disguise.
>
> Section 827.—The circumstances of aggravation mentioned in the preceding section are of different degrees, and the court is to consider these circumstances in forming the judgment and for assessing the punishment.

P.R. Laws Ann. tit. 33, § 821, [**38] 826-27 (1937 ed.)).

20 For example, Texas and Territorial Arizona's assault and battery statutes each provided that an assault and battery "may be committed by use of any [**41] part of the body of the person committing the offense, as of the hand, foot, head, or by the use of any inanimate object, as a stick, knife, or anything else capable of inflicting the slightest injury ... ." Tex. Penal Code Ann. tit. 15, art. 1011 (1915 ed.); Terr. Ariz. Rev. Stat., Penal Code, part I, tit. VIII, ch. IX, § 211 (1901). The Puerto Rico assault and battery chapter omitted such language.

21 For example, under the Puerto Rico code, "the exercise of the right of moderate restraint or correction given by law to the parents over the child, the guardian over the ward, the master over his apprentice, whenever the former be authorized by the father or guardian of the later so to do" was a defense to assault or assault and battery. P.R. Laws Ann. tit. 33, § 822(1) (1937 ed.). The corollary version adopted by the Virgin Islands added the phrase "or minor servant" and broadened "father" to "parent" generally. *See* 1921 Codes, tit. IV, ch. 5, § 28(I). The only other differences between the Puerto Rico and the Virgin Islands statutes involved the punishment imposed. *Compare id.* § 31 ("The punishment for a simple assault ... shall *by fine not exceeding* fifty dollars.") (emphasis added) [**42] *with* P.R. Laws Ann. tit. 33, § 825 (1937 ed.) ("The punishment for a simple assault ... shall be *a fine of not less than one nor more than* fifty dollars.") (emphasis added).

22 The court noted that "[t]hough there are many who would say that in today's world women seek to be considered the equal of men in any and all respects, this Court is of the opinion that there are basic differences regarding which it says 'Vive La Difference.'" *Prescott*, 18 V.I. at 111. The Court then denied Prescott's motion to dismiss. *Id.*

23 Because *Prescott* relied on *Smith*, an unreported opinion, the Court [**53] retrieved a copy of that decision from the original criminal file in storage.

24 Justice Powell noted in a concurring opinion in *Craig* that "the Court has had difficulty in agreeing upon a standard of equal protection analysis that can be applied consistently to the wide variety of legislative classifications." *Craig v. Boren*, 429 U.S. 190, 210, 97 S. Ct. 451, 50 L. Ed. 2d 397 n.* (1976) (Powell. J., concurring). But he also acknowledged that "the relatively deferential 'rational basis' standard of review normally applied takes on a sharper focus when we address a gender-based classification." *Id.* As discussed above, subsequent decisions confirmed the standard-of-review for classifications based on gender.

25 *See, e.g.*, *Frett-Smith v. Vanterpool*, 511 F.3d 396, 398 (3d Cir. 2007) ("Smith was born in Tortola, British Virgin Islands ... and spent much of her childhood in St. Thomas ... . She became a naturalized United States citizen in 1975."); *Hodge v. Hodge*, 14 V.I. 238 (Terr. Ct. 1977) (noting plaintiff moved from Antigua to St. Croix); V.I. CODE ANN. tit. 1, § 181(a) (1995) ("The fourth [**68] Friday in August and the following ten (10) days thereafter shall be observed, each year, as the Caribbean Friendship Week Festival throughout the Virgin Islands. Such festival shall emphasize the bonds of friendship between all peoples of the Caribbean."); *id.* § 171(a) (designating second Monday in October as Columbus Day and Puerto Rico Friendship Day); *id.* § 195(a) ("Three Kings Day shall be celebrated on January 6 each year, on the island of St. Croix. The celebration shall emphasize and maintain the Hispanic heritage and culture existing in the Virgin Islands, especially on the island of St. Croix."). *See also* Act. No. 1076, pmbl., 1964 V.I. Sess. L. p. 20 ("Whereas for over a hundred years people from various parts of the West Indies have been coming to the Virgin Islands ... have intermarried with Virgin Islanders ... [and] in many cases have become American citizens ... .") (designating first Monday in September as West Indies Solidarity Day) (codified at V.I. CODE ANN. tit. 1, § 171(c) (1997)).

26 *See, e.g.*, Act. No, 1076, pmbl., 1964 V.I. Sess. L. p. 20 ("Whereas even before the arrival of these [West Indian] immigrants on our shores the Virgin Islands was closely linked [**69] to other parts of the West Indies by bonds of culture, African heritage and common background ... .").

27 *See, e.g.*, V.I. CODE ANN. tit. 1, § 185 (1995) ("The Governor of the Virgin Islands is hereby authorized and directed in each year to proclaim the calendar week in July ending with Bastille Day, the 14th day of the month as French Heritage Week.").

28 *See, e.g.*, *Ballentine v. United States*, 486 F.3d 806, 808, 48 V.I. 1059 (3d Cir. 2007) ("Ballentine was born in Missouri ... [but later] transferred to the United States Virgin Islands [where he] took permanent residence ... ."); *Homer v. Lorillard*, 6 V.I. 645, 647 (St. Croix Mun. Ct. 1968) ("Plaintiff ... moved to St. Croix from Brooklyn, New York ... with the intention of making her home here.").

APPENDIX

F

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

PEOPLE OF THE VIRGIN ISLANDS,	CRIMINAL NO. 215/2005
Plaintiff	**CHARGE (S):**
vs.	**AGGRAVATED ASSAULT & ASSAULT AND BATTERY DOMESTIC VIOLENCE**
GARY SIMMONDS	14 V.I.C. § 298(5)
#37 CONSTITUTION HILL	16 V.I.C. §91(b)(1)&(2)
CHRISTIANSTED, ST. CROIX 00820	
Defendant.	

COMPLAINT

COMES NOW **THE PEOPLE OF THE VIRGIN ISLANDS** charges that on or about May 2, 2005, in the vicinity of #660-59 Strawberry Hill, in Christiansted, in the Judicial District of St. Croix, Virgin Islands:

COUNT ONE

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 are 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.**

WHEREFORE, the People request that the Defendant be summoned to appear and be dealt with according to law.

PEOPLE OF THE VIRGIN ISLANDS

ALVA A. SWAN
ATTORNEY GENERAL

DATED: MAY 9th, 2005 **BY:** FOR

CORNELIUS EVANS
DEPUTY ATTORNEY GENERAL
DEPARTMENT OF JUSTICE
6040 ESTATE CASTLE COAKLEY
CHRISTIANSTED, ST. CROIX
U.S. VIRGIN ISLANDS 00820

APPENDIX

G

Webster v. People of the Virgin Islands, 60 V.I. 666

Supreme Court of the Virgin Islands

November 15, 2012, Argued; March 5, 2014, Decided; March 5, 2014, Filed

S. Ct. Crim. No. 2012-0012

Reporter

60 V.I. 666 * | 2014 V.I. Supreme LEXIS 22 ** | 2014 WL 879562

PATRICK L. WEBSTER, JR., Appellant/Defendant v. PEOPLE OF THE VIRGIN ISLANDS, Appellee/Plaintiff

Prior History: [**1] Re: Super. Ct. Crim. No. 247/2011 (STT). On Appeal from the Superior Court of the Virgin Islands.

Core Terms

assault, disturbing the peace, aggravated assault, unauthorized use, convictions, classification, sex-based, battery, bedroom, female, rational basis review, domestic violence, aggravated, attacker, sex, intermediate scrutiny, plain error, male, statutory classification, stereotypes, demanding, sentence, stronger, violates, asserts, argues

Case Summary

Procedural Posture

After a bench trial in the Superior Court of the Virgin Islands, defendant was convicted of aggravated assault and battery under V.I. Code Ann. tit. 14, § 298(5), disturbing the peace under V.I. Code Ann. tit. 14, § 622(1), and unauthorized use of a vehicle under V.I. Code Ann. tit. 14, § 1382. Defendant appealed.

Overview

The court held that by providing that any assault committed by a male upon a female was automatically aggravated in nature, § 298(5) violated the Equal Protection Clause of the Fourteenth Amendment. Even if the legislature enacted § 298(5) with the objective of providing greater protections to women who were attacked by physically stronger men, because the statute failed to take into account the relative physical prowess of the attacker and the victim, the court could not say that the discriminatory means employed were substantially related to the achievement of those objectives. Next, there was sufficient evidence to support the conviction under § 622(1). It was clear that defendant disturbed the peace or quiet of the victim, his mother, by waking her up in the middle of the night to demand the keys to her car and then attacking her when she refused to turn them over. Finally, the evidence was sufficient to support the conviction under § 1382. Although the victim testified that she was happy to give defendant the keys, she also testified that she did so only after he physically attacked her; thus, the trial court could properly find that her consent was not genuine.

Outcome

The court reversed defendant's conviction for aggravated assault, but affirmed his convictions for disturbing the peace and unauthorized use of a vehicle.

▼ LexisNexis® Headnotes

Criminal Law & Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

HN1 Appellate Jurisdiction, Final Judgment Rule
See V.I. Code Ann. tit. 4, § 32(a). More like this Headnote

Shepardize® - Narrow by this Headnote (0)

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > General Overview

HN2 Reviewability, Preservation for Review
See V.I. Sup. Ct. R. 4(h). More like this Headnote

Shepardize® - Narrow by this Headnote (0)

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Definition of Plain Error

HN3 Plain Error, Definition of Plain Error
Under plain error review, there must be an error, that was plain, that affected the defendant's substantial rights. Even then, the appellate court will only reverse where the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. More like this Headnote

Shepardize® - Narrow by this Headnote (8) 3

Constitutional Law > Bill of Rights > State Application

HN4 Bill of Rights, State Application
The Fourteenth Amendment applies to the Virgin Islands Government to the same extent it applies to the governments of the 50 states under § 3 of the Revised Organic Act of the Virgin Islands, 48 U.S.C.S. § 1541 et seq. More like this Headnote

Shepardize® - Narrow by this Headnote (1)

Constitutional Law > Equal Protection > General Overview

HN5 Constitutional Law, Equal Protection
The Equal Protection Clause of the Fourteenth Amendment is essentially a direction that all persons similarly situated should be treated alike. More like this Headnote

Shepardize® - Narrow by this Headnote (3)

Constitutional Law > Equal Protection > Gender & Sex
View more legal topics

HN6 Equal Protection, Gender & Sex
While most statutory classifications—such as those contained in tax policy and economic regulations—must meet only rational basis review, an explicitly sex-based statutory classification—like those based on race, national origin, or alienage—must satisfy heightened constitutional scrutiny. More like this Headnote

Shepardize® - Narrow by this Headnote (0)

Constitutional Law > Equal Protection > Gender & Sex
View more legal topics

HN7 Equal Protection, Gender & Sex
In the case of a sex-based classification, the heightened level of scrutiny is intermediate. Unlike rational basis review—where it is the defendant's burden to negate every conceivable basis that might support the government's statutory classification—intermediate scrutiny requires the People to carry the burden of establishing that there is an exceedingly persuasive justification for the classification by showing that it serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives. The court must closely examine the People's justifications free of fixed notions concerning the roles and abilities of males and females, as generalizations and stereotypes about the respective characteristics of men and women cannot satisfy intermediate scrutiny. More like this Headnote

Shepardize® - Narrow by this Headnote (2) 1

Constitutional Law > Equal Protection > Judicial Review > Standards of Review

HN8 Judicial Review, Standards of Review

A justification hypothesized or invented post hoc in response to litigation cannot meet intermediate scrutiny under the Equal Protection Clause. Instead, a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded. More like this Headnote

Shepardize® - Narrow by this Headnote (0)

Constitutional Law > Equal Protection > Gender & Sex
Criminal Law & Procedure > ... > Assault & Battery > Aggravated Offenses > General Overview

HN9 Equal Protection, Gender & Sex

While it is undoubtedly true that the legislature can take into account physical differences when classifying crimes relating to physical violence, V.I. Code Ann. tit. 14, § 298(5) does not do this. Instead, this provision makes any assault committed by a man upon a woman an aggravated assault regardless of the physical differences between the attacker and the victim, providing no additional protections to a man assaulted by a physically stronger woman, or a woman assaulted by a physically stronger woman. By using sex as a proxy for the relative physical characteristics of the attacker and the victim, § 298(5) rests entirely on archaic and stereotypic notions that have been specifically rejected by the United States Supreme Court in equal protection cases. More like this Headnote

Shepardize® - Narrow by this Headnote (0)

Constitutional Law > Equal Protection > Gender & Sex

HN10 Equal Protection, Gender & Sex

If the statutory objective is to "protect" members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate. Legislative classifications such as this carry the inherent risk of reinforcing stereotypes about the "proper place" of women and their need for special protection. More like this Headnote

Shepardize® - Narrow by this Headnote (0)

Constitutional Law > Equal Protection > Gender & Sex

HN11 Equal Protection, Gender & Sex

When governmental objectives are as well-served by a sex-neutral law that does not carry with it the baggage of sexual stereotypes, the government cannot be permitted to classify on the basis of sex. More like this Headnote

Shepardize® - Narrow by this Headnote (0)

Constitutional Law > Equal Protection > Gender & Sex
Criminal Law & Procedure > ... > Assault & Battery > Aggravated Offenses > General Overview

HN12 Equal Protection, Gender & Sex

Even if the legislature enacted V.I. Code Ann. tit. 14, § 298(5) with the objective of providing greater protections to women who are attacked by physically stronger men, because the statute fails to take into account the relative physical prowess of the attacker and the victim, the court cannot say that the discriminatory means employed are substantially related to the achievement of those objectives for purposes of equal protection. More like this Headnote

Shepardize® - Narrow by this Headnote (0)

Constitutional Law > Equal Protection > Gender & Sex
Criminal Law & Procedure > ... > Assault & Battery > Aggravated Offenses > General Overview

HN13 Equal Protection, Gender & Sex

By providing that any assault committed by a male upon a female is automatically aggravated in nature, V.I. Code Ann. tit. 14, § 298(5) violates the Equal Protection Clause of the Fourteenth Amendment. More like this Headnote

Shepardize® - Narrow by this Headnote (1)

Governments > Courts > Judicial Precedent

HN14 **Courts, Judicial Precedent**
It is expected that the trial court knows and applies settled law. More like this Headnote

Shepardize® - Narrow by this Headnote (1)

Constitutional Law > Equal Protection > Gender & Sex
View more legal topics

HN15 **Equal Protection, Gender & Sex**
In the case of sex-based statutory classifications, the United States Supreme Court has repeatedly instructed that courts must apply heightened constitutional scrutiny, requiring a careful examination of whether an exceedingly persuasive justification motivated the legislature's use of this otherwise impermissible classification. More like this Headnote

Shepardize® - Narrow by this Headnote (1)

Constitutional Law > ... > Case or Controversy > Constitutionality of Legislation > General Overview
Criminal Law & Procedure > ... > Standards of Review > Plain Error > Definition of Plain Error

HN16 **Case or Controversy, Constitutionality of Legislation**
It is self-evident that basing a conviction on an unconstitutional statute is both "plain" and an "error" as the United States Supreme Court defines those terms. More like this Headnote

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Criminal Law & Procedure > ... > Standards of Review > Plain Error > Definition of Plain Error

HN17 **Plain Error, Definition of Plain Error**
To affect substantial rights under the plain error rule, the error must have affected the outcome of the trial. More like this Headnote

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Criminal Law & Procedure > ... > Standards of Review > Plain Error > General Overview

HN18 **Standards of Review, Plain Error**
The plain-error exception should be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result. More like this Headnote

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Criminal Law & Procedure > Appeals > Standards of Review > General Overview
Evidence > Weight & Sufficiency

HN19 **Appeals, Standards of Review**
In reviewing a challenge to the sufficiency of the evidence presented at trial, an appellate court must view the evidence in the light most favorable to the People, and affirm the conviction if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. More like this Headnote

Shepardize® - Narrow by this Headnote (17) 1

Criminal Law & Procedure > ... > Disruptive Conduct > Disorderly Conduct & Disturbing the Peace > General Overview

HN20 **Disruptive Conduct, Disorderly Conduct & Disturbing the Peace**
See V.I. Code Ann. tit. 14, § 622(1). More like this Headnote

Shepardize® - Narrow by this Headnote (0)

Criminal Law & Procedure > ... > Miscellaneous Offenses > Joyriding > General Overview

HN21 **Miscellaneous Offenses, Joyriding**
See V.I. Code Ann. tit. 14, § 1382. More like this Headnote

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Evidence > Weight & Sufficiency

HN22 Evidence, Weight & Sufficiency
A sufficiency challenge is not a vehicle to relitigate credibility arguments that were unpersuasive to the trier of fact. More like this Headnote

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Criminal Law & Procedure > Trials > Witnesses > General Overview
Evidence > Weight & Sufficiency

HN23 Trials, Witnesses
The testimony of a single witness is sufficient to support a conviction even if it is contradicted by the accused. More like this Headnote

Shepardize® - Narrow by this Headnote (1)

Criminal Law & Procedure > ... > Double Jeopardy > Double Jeopardy Protection > Multiple Punishments

HN24 Double Jeopardy Protection, Multiple Punishments
Under V.I. Code Ann. tit. 14, § 104, despite the fact that an individual can be charged and found guilty of violating multiple provisions of the Virgin Islands Code arising from a single act or omission, that individual can ultimately only be punished for one offense. More like this Headnote

Shepardize® - Narrow by this Headnote (2) 1

Headnotes/Summary

Summary

Appeal from convictions for aggravated assault and battery, disturbing the peace, and unauthorized use of a vehicle. The Supreme Court, Cabret, J., affirmed in part and reversed in part.

Headnotes
VIRGIN ISLANDS OFFICIAL REPORTS HEADNOTES
[Headnotes classified to Virgin Islands Digest]

VI1. 1. Appeal and Error § 34.40 > Plain Error > Tests

Under plain error review, there must be an error, that was plain, that affected the defendant's substantial rights. Even then, the appellate court will only reverse where the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.

VI2. 2. Constitutional Law § 11.01 > Equal Protection > Generally

The Equal Protection Clause of the Fourteenth Amendment is essentially a direction that all persons similarly situated should be treated alike. U.S. Const. amend. XIV.

VI3. 3. Constitutional Law § 11.01 > Equal Protection > Generally

While most statutory classifications — such as those contained in tax policy and economic regulations — must meet only rational basis review, an explicitly sex-based statutory classification — like those based on race, national origin, or alienage — must satisfy heightened constitutional scrutiny. U.S. Const. amend. XIV.

VI4. 4. Constitutional Law § 11.38 > Equal Protection > Middle Tier Scrutiny

In the case of a sex-based classification, the heightened level of scrutiny is intermediate. Unlike rational basis review — where it is the defendant's burden to negate every conceivable basis that might support the government's statutory classification — intermediate scrutiny requires the People to carry the burden of establishing that there is an exceedingly persuasive justification for the classification by showing that it serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives. The court must closely examine the People's justifications free of fixed notions concerning the roles and abilities of males and females, as generalizations and stereotypes about the respective characteristics of men and women cannot satisfy intermediate scrutiny.

[*667] ***VI5.*** 5. Constitutional Law § 11.38 > Equal Protection > Middle Tier Scrutiny

A justification hypothesized or invented post hoc in response to litigation cannot meet intermediate scrutiny under the Equal Protection Clause. Instead, a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded. U.S. Const. amend. XIV.

VI6. 6. Constitutional Law § 11.47 > Equal Protection > Particular Cases

While it is undoubtedly true that the legislature can take into account physical differences when classifying crimes relating to physical violence, the aggravated assault statute does not do this. Instead, this provision makes any assault committed by a man upon a woman an aggravated assault regardless of the physical differences between the attacker and the victim, providing no additional protections to a man assaulted by a physically stronger woman, or a woman assaulted by a physically stronger woman. By using sex as a proxy for the relative physical characteristics of the attacker and the victim, the provision rests entirely on archaic and stereotypical notions that have been specifically rejected by the United States Supreme Court in equal protection cases. U.S. Const. amend. XIV; 14 V.I.C. § 298(5).

VI7. 7. Constitutional Law § 11.01 > Equal Protection > Generally

If the statutory objective is to "protect" members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate. Legislative classifications such as this carry the inherent risk of reinforcing stereotypes about the "proper place" of women and their need for special protection.

VI8. 8. Constitutional Law § 11.01 > Equal Protection > Generally

When governmental objectives are as well-served by a sex-neutral law that does not carry with it the baggage of sexual stereotypes, the government cannot be permitted to classify on the basis of sex.

VI9. 9. Constitutional Law § 11.47 > Equal Protection > Particular Cases

Even if the legislature enacted the section of the aggravated assault statute providing that any assault committed by a male upon a female is automatically aggravated in nature with the objective of providing greater protections to women who are attacked by physically stronger men, because the statute fails to take into account the relative physical prowess of the attacker and the victim, the court cannot say that the discriminatory means employed are substantially related to the achievement of those objectives for purposes of equal protection. U.S. Const. amend. XIV; 14 V.I.C. § 298(5).

VI10. 10. Constitutional Law § 11.47 > Equal Protection > Particular Cases

The section of the aggravated assault statute providing that any assault committed by a male upon a female is automatically aggravated in nature violates **[*668]** the Equal Protection Clause of the Fourteenth Amendment. U.S. Const. amend. XIV; 14 V.I.C. § 298(5).

VI11. 11. Common Law § 1.00 > Generally

It is expected that the trial court knows and applies settled law.

VI12. 12. Constitutional Law § 11.38 > Equal Protection > Middle Tier Scrutiny

In the case of sex-based statutory classifications, the United States Supreme Court has repeatedly instructed that courts must apply heightened constitutional scrutiny, requiring a careful examination of whether an exceedingly persuasive justification motivated the legislature's use of this otherwise impermissible classification.

VI13. 13. Appeal and Error § 34.20 > Plain Error > Situations Constituting

The trial court's error in entering a conviction under a statute containing an explicit sex-based classification in violation of equal protection was plain under current law. Furthermore, there was no doubt that this error affected defendant's substantial rights and that affirming the conviction under a facially unconstitutional statute would clearly affect the integrity and public reputation of judicial proceedings.

VI14. 14. Appeal and Error § 34.20 > Plain Error > Situations Constituting

It is self-evident that basing a conviction on an unconstitutional statute is both "plain" and an "error" as the United States Supreme Court defines those terms.

VI15. 15. Appeal and Error § 34.40 > Plain Error > Tests

To affect substantial rights under the plain error rule, the error must have affected the outcome of the trial.

VI16. 16. Appeal and Error § 34.10 > Plain Error > Generally

The plain-error exception should be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.

VI17. 17. Appeal and Error § 37.20 > Questions Considered on Appeal > Particular Cases

Defendant waived an argument that was never fully articulated, let alone supported by argument and citation to legal authority, and another argument that was not raised until his reply brief. Sup. Ct. R. 22(m).

VI18. 18. Offenses § 11.13 > Particular Crimes > Disorderly Conduct

There was sufficient evidence to support a conviction for disturbing the peace. It was clear that defendant disturbed the peace or quiet of the victim, his mother, by waking her up in the middle of the night to demand the keys to her car and then attacking her when she refused to turn them over. 14 V.I.C. § 622(1).

[*669] VI19. 19. Highways § 5.11 > Motor Vehicles > Criminal Offenses

There was sufficient evidence to support a conviction for unauthorized use of a vehicle. As the victim testified that she was happy to give defendant the keys to her car, but also testified that she did so only after he physically attacked her, the trial court could properly find that her consent was not genuine; moreover, the trial court properly credited the victim's testimony over defendant's. 14 V.I.C. § 1382.

VI20. 20. Evidence § 31.10 > Weight and Sufficiency > Generally

A sufficiency challenge is not a vehicle to relitigate credibility arguments that were unpersuasive to the trier of fact.

VI21. 21. Evidence § 31.30 > Weight and Sufficiency > Criminal Cases

The testimony of a single witness is sufficient to support a conviction even if it is contradicted by the accused.

VI22. 22. Criminal Law § 25.26 > Judgment and Sentence > Multiple Convictions

Despite the fact that an individual can be charged and found guilty of violating multiple provisions of the Virgin Islands Code arising from a single act or omission, that individual can ultimately only be punished for one offense. 14 V.I.C. § 104.

VI23. 23. Criminal Law § 25.26 > Judgment and Sentence > Multiple Convictions

Trial court's imposition of concurrent sentences for disturbing the peace and unauthorized use of a vehicle did not violate the statute regarding acts or omissions punishable under different provisions because defendant's actions in waking his mother to demand her car keys and later taking the vehicle without her consent did not constitute "a single act or omission" for the purposes of the provision. 14 V.I.C. § 104.

Counsel: KELE ONYEJEKWE, ESQ., Appellate Public Defender, St. Thomas, USVI, *Attorney for Appellant*.

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Judges: HODGE, *Chief Justice*; CABRET, *Associate Justice*; and SWAN, *Associate Justice*.

Opinion by: MARIA M. CABRET

Opinion

OPINION OF THE COURT

(March 5, 2014)

CABRET, *Associate Justice*. Patrick Webster, Jr., was convicted in the Superior Court of aggravated assault and battery and disturbing the peace, both as acts of domestic violence, and unauthorized use of a vehicle. **[*670]** Webster appeals, arguing that the aggravated assault statute contains unconstitutional sex-based classifications and that the evidence was insufficient to establish the other charges. For the reasons that follow, we reverse Webster's assault conviction and affirm his convictions for disturbing the peace and unauthorized use of a vehicle.

I. FACTUAL AND PROCEDURAL BACKGROUND

On May 4, 2011, at approximately 1 a.m., Webster went into the bedroom of his mother Vernice Webster while she was sleeping to ask for the keys to her car. When she [**2] refused, Webster searched the room for the keys while his mother went to the kitchen. When he could not find the keys, Webster grabbed Vernice by the throat and the wrap she was wearing, pulling her back into the bedroom and then repeatedly pushing her down onto her bed, demanding the keys. Still refusing to give Webster the keys, Vernice returned to the kitchen, ending up on the floor with Webster standing over her holding a wine bottle. 1 Webster once again dragged his mother into the bedroom and threw her onto her mattress several more times. Vernice finally retrieved the keys from a bathroom cabinet and gave them to Webster, who disabled the house phone and took Vernice's cell phone before leaving with the car.

After he left, Vernice went to a neighbor to call 911. Once police arrived, they noticed bruises and minor scratches on her collarbone and forearm, and observed that the bedroom was "ransacked." The responding officers took Vernice to her sister's house for the night because she was afraid that Webster would return to the house. She returned home in the morning with Officer Vernon Williams, where they [**3] found the car outside and Webster asleep in his bedroom. Williams then arrested Webster. The following day, Vernice went to the hospital complaining of back pain caused by the altercation.

On May 23, 2011, the People filed a five-count Information against Webster, charging him with third-degree assault, the use of a dangerous weapon during the commission of a third degree assault, aggravated assault and battery, and disturbing the peace — all charged as acts of domestic violence under 16 V.I.C. § 91(b) — as well as the unauthorized use of a vehicle. The Superior Court held a bench trial on November 2, **[*671]** 2011, during which the People called Vernice, who testified to the events of May 4, 2011, Carolyn Watley, a 911 District Manager who laid the foundation for admitting the 911 recording into evidence, Denise Berry, the Custodian of Medical Records at Schneider Regional Medical Center, who laid the foundation for the admission of Vernice's medical records from the day after the incident, and Officers Adora John and Alester Carty, who responded to Vernice's 911 call. After this testimony, the People rested and Webster moved for a judgment of acquittal, arguing that the evidence was insufficient [**4] to support a conviction on any of the charges. The court reserved decision on third-degree

assault and the use of a dangerous weapon during this crime, and denied the motion on the remaining counts. Webster then testified that Vernice had agreed to give him the keys but could not find them, causing Webster and Vernice to search through the house. After this testimony, the defense rested.

After the trial concluded, the court held that there was not enough evidence to support a conviction for third-degree assault with a deadly weapon or the use of a dangerous weapon during a crime of violence, but entered convictions against Webster for aggravated assault and battery, disturbing the peace, and unauthorized use of a vehicle. The court also found that aggravated assault and disturbing the peace were acts of domestic violence as defined by 16 V.I.C. § 91(b). In a January 27, 2012 Judgment and Commitment, the Superior Court sentenced Webster to a suspended ten-month prison sentence and a $1,000 fine for aggravated assault and battery, a concurrent sixty-day sentence for disturbing the peace, a concurrent one-year suspended sentence for unauthorized use of a vehicle, and placed him on supervised [**5] probation for one year. Webster filed a timely notice of appeal on February 8, 2012.

II. JURISDICTION

HN1 "The Supreme Court [has] jurisdiction over all appeals arising from final judgments, final decrees or final orders of the Superior Court, or as otherwise provided by law." 4 V.I.C. § 32(a). The Superior Court's January 27, 2012 Judgment and Commitment is a final order over which we may exercise jurisdiction. *George v. People*, S. Ct. Crim. No. 2012-0114, 59 V.I. 368, 2013 V.I. Supreme LEXIS 37, *10, 2013 WL 3742533, at *3 (V.I. July 15, 2013) (citing *Brown v. People*, 56 V.I. 695, 698 (V.I. 2012)).

III. DISCUSSION

Webster argues that his conviction for aggravated assault must be reversed because the statute under which he was convicted, 14 V.I.C. § 298(5) **[*672]**, violates constitutional principles assuring equal protection of the laws. He further asserts that the evidence was insufficient to support his convictions for disturbing the peace and unauthorized use of a vehicle. We address each argument in turn.

A. 14 V.I.C. § 298(5)

VI[1] [1] For the first time on appeal, Webster argues that because 14 V.I.C. § 298(5) enhances simple assault to aggravated assault based only on the respective sexes of the attacker and the victim, it violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. 2 [**6] Because he did not raise this argument before the Superior Court, we review it only for plain error. V.I.S.Ct.R. 4(h) (***HN2*** "Only issues and arguments fairly presented to the Superior Court may be presented for review on appeal; provided, however, that when the interests of justice so require, the Supreme Court may consider and determine any question not so presented."). ***HN3*** "Under plain error review, there must be an error, that was plain, that affected the defendant's substantial rights." *Cascen v. People*, S. Ct. Crim. No. 2012-0007, 2014 V.I. Supreme LEXIS 3, *35, 2014 WL 68882, at *9 (V.I. Jan. 8, 2014). "Even then, this Court will only reverse where the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* (citing *Williams v. People*, S. Ct. Crim. No. 2012-0035, 59 V.I. 1043, 2013 V.I. Supreme LEXIS 82, *9, 2013 WL 5933656, at *3 (V.I. Nov. 5, 2013) and quoting in part from *Francis v. People*, 52 V.I. 381, 390-91 (V.I. 2009)) (internal quotation marks omitted). In conducting this review, we must first determine whether the Superior Court erred by entering a conviction against Webster under an unconstitutional statute.

The Superior Court entered the conviction under section 298, which enumerates nine aggravating circumstances that enhance a simple assault to an aggravated assault. *See* 14 V.I.C. § 299(2) ("[w]hoever commits ... an assault or battery unattended with circumstances of aggravation" commits only simple assault). Webster was convicted under the aggravating circumstance providing that "[w]hoever commits an assault **[*673]** and battery ... being an adult male, upon the person of a female ... shall be fined not more than $500 or imprisoned not more than 1 year." 14 V.I.C. § 298(5). Webster argues that by making his sex an aggravating factor, section 298(5) denies him equal protection of the law.

VI[2,3] [2, 3] ***HN5*** "The Equal Protection Clause of the Fourteenth Amendment [**8] 'is essentially a direction that all persons similarly situated should be treated alike.'" *Lawrence v. Texas*, 539 U.S. 558, 579, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003) (quoting *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985)). Here, it is evident that section 298(5) creates a sex-based classification on its face, upgrading an assault from simple to aggravated in all instances in which the defendant is male and the victim is female. ***HN6*** While most statutory classifications — such as those contained in tax policy and economic regulations — must meet only rational basis review, *see Heller v. Doe*, 509 U.S. 312, 320, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993) (rational basis review is satisfied by "any reasonably conceivable state of facts that could provide a rational basis for the classification"), an explicitly sex-based statutory classification — like those based on race, national origin, or alienage — must satisfy heightened constitutional scrutiny. *Orr v. Orr*, 440 U.S. 268, 278-79, 99 S. Ct. 1102, 59 L. Ed. 2d 306 (1979) (citing *Reed v. Reed*, 404 U.S. 71, 75, 92 S. Ct. 251, 30 L. Ed. 2d 225 (1971)); *see also City of Cleburne*, 473 U.S. at 440.

VI[4] [4] ***HN7*** In the case of a sex-based classification, this heightened level of scrutiny is intermediate. *United States v. Virginia*, 518 U.S. 515, 524, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996). Unlike rational [**9] basis review — where it is the defendant's burden to "negat[e] every conceivable basis that might support the government's statutory classification," *McIntosh v. People*, 57 V.I. 669, 686 n.15 (V.I. 2011) — intermediate scrutiny requires the People to carry the burden of establishing that there is an "exceedingly persuasive justification" for the classification by showing that it "serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Virginia*, 518 U.S. at 524 (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724, 102 S. Ct. 3331, 73 L. Ed. 2d 1090 (1982)). We must closely examine the People's justifications "free of fixed notions concerning the roles and abilities of males and females," as generalizations and stereotypes about the respective characteristics of **[*674]** men and women cannot satisfy intermediate scrutiny. *Mississippi Univ. for Women*, 458 U.S. at 724-25; *see also Virginia*, 518 U.S. at 533.

VI[5] [5] The People concedes that it bears the burden of demonstrating the constitutionality of section 298(5) and asserts that "the statute identifies men because of the demonstrable fact that they are physically different from women." [**10] The People also contends that "[t]he Government's objective in having a gender based statute is to protect women from physically aggressive and overpowering men as was the situation in this case." The People further insists that the "[L]egislature could easily have determined that assaults and batteries by physically larger and stronger men are more likely to cause greater physical injuries to women than similar assaults by females." While the People may be correct that the Legislature *could* have enacted section 298(5) with the aim of protecting women from assaults by physically larger and stronger men, ***HN8*** a justification "hypothesized or invented *post hoc* in response to litigation" cannot meet intermediate scrutiny. *Virginia*, 518 U.S. at 533. Instead, "a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded." *Id.* at 535-36.

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. 3 *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 [**11] ... [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) **[*675]** 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)).

VI[6-9] [6-9] Even if we were to assume that the People's hypothesized rationale for section 298(5) was the true motivation behind its enactment, the statute would still fail intermediate scrutiny. ***HN9*** While it is undoubtedly true that the Legislature "can take into account ... physical differences when classifying crimes relating to physical violence," section 298(5) does not do this. Instead, this provision makes any assault committed by a man upon a woman an aggravated assault regardless of the physical differences between the attacker and the victim, providing no additional protections to a man assaulted by a physically stronger woman, or a woman assaulted by a physically stronger woman. By using sex as a proxy for the relative physical characteristics of the attacker and the victim, section 298(5) rests entirely on "archaic and stereotypic [**13] notions" that have been specifically rejected by the United States Supreme Court. *Mississippi Univ. for Women*, 458 U.S. at 725. As the Supreme Court explained, ***HN10*** "if the statutory objective is to ... 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate." *Id.* Legislative classifications such as this "carry the inherent risk of reinforcing stereotypes about the 'proper place' of women and their need for special protection." *Orr*, 440 U.S. at 283. Finally, it would seem apparent that if the Legislature's objective was to take into account "physical differences when classifying crimes relating to physical violence," this purpose would have been better served by enacting a statute that actually takes into account physical differences in classifying violent crimes. And ***HN11*** when governmental objectives are as well-served by a sex-neutral law that does not "carr[y] with it the baggage of sexual stereotypes," the government "cannot be permitted to classify on the basis of sex." *Id.* Therefore, ***HN12*** even if the Legislature enacted 14 V.I.C. § 298(5) with the objective of providing greater protections [**14] to women who are attacked by physically stronger men, because the statute fails to take into account the relative physical prowess of the attacker and the victim, we cannot say that the **[*676]** "discriminatory means employed are substantially related to the achievement of those objectives." *Virginia*, 518 U.S. at 524.

In arguing that section 298(5) does not violate equal protection, the People relies heavily on *Gov't of the V.I. v. Prescott*, 18 V.I. 110 (V.I. Super. Ct. 1981), which rejected an identical equal protection challenge to section 298(5). But *Prescott* requires little comment. As noted by later Superior Court opinions explicitly rejecting *Prescott*, it applied rational basis review long after the United States Supreme Court held that sex-based statutory classifications must satisfy intermediate scrutiny. *See Lake*, 2013 V.I. LEXIS 59, at *17, 2013 WL 5461816, at *6 (observing that "the *Prescott* Court utilized a rational basis review"); *Simmonds*, 58 V.I. at 31 ("*Prescott* ... subjected Section 298(5) to a rational basis review."). The same can be said of the other cases the People relies on in support of section 298(5). *See, e.g., Buchanan v. State*, 480 S.W.2d 207, 209 (Tex. Crim. App. 1972) ("In the instant case, [**15] we have no difficulty in perceiving a rational basis for the different treatment afforded to adult males in the case of assaults or batteries committed upon adult females."). The only recent case cited is *State v. Wright*, 349 S.C. 310, 563 S.E.2d 311 (S.C. 2002), in which the South Carolina Supreme Court upheld a sex-based sentencing enhancement. But despite

appropriately identifying intermediate scrutiny, the *Wright* court relied almost entirely on cases utilizing rational basis review in upholding that statute. *See id.* at 313-15 (citing *Buchanan*, 480 S.W.2d at 209; *State v. Gurganus*, 39 N.C. App. 395, 250 S.E.2d 668, 672-73 (N.C. 1979); *People v. Silva*, 27 Cal. App. 4th 1160, 33 Cal. Rptr. 2d 181, 185-86 (Cal. Ct. App. 1994); *Muller v. Oregon*, 208 U.S. 412, 420-23, 28 S. Ct. 324, 52 L. Ed. 551 (1908)); *see also Wright*, 563 S.E.2d at 314 (Toal ▾, C.J., concurring in result only) ("the cases relied upon by the majority are based on out-dated generalizations of the sexes no longer favored" in equal protection jurisprudence).

VI[10] [10] Accordingly, ***HN13*** 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 [**16] a conviction against Webster under this section.

Despite this error, because Webster failed to raise the constitutionality of section 298(5) before the Superior Court, we will only exercise our discretion to reverse his conviction if the Superior Court's error was plain and affected Webster's substantial rights, and affirming Webster's **[*677]** conviction would "seriously affect[ ] the fairness, integrity, or public reputation of judicial proceedings." *Cascen*, 2014 V.I. Supreme LEXIS 3, at *35, 2014 WL 68882, at *9; *see also Rawlins v. People*, 58 V.I. 261, 271 n.4 (V.I. 2013) (issue of constitutionality of a portion of a Virgin Islands statute was subject to plain error review where "the record contain[ed] no evidence that [the defendant] ever objected to [the statute] on constitutional grounds").

VI[11-14] [11-14] While this Court has not previously addressed the constitutionality of 14 V.I.C. § 298(5), 4 ***HN14*** "it is expected that [the Superior Court] knows and applies settled law." *Hightree v. People*, 55 V.I. 947, 954 (V.I. 2011). ***HN15*** In the case of sex-based statutory classifications, the United States Supreme Court has repeatedly instructed that courts must apply heightened constitutional scrutiny, requiring a careful examination of whether an "exceedingly [**17] persuasive justification" motivated the Legislature's use of this otherwise impermissible classification. *See Virginia*, 518 U.S. at 524, 531 (courts must apply "skeptical scrutiny" to sex-based discrimination); *Mississippi Univ. for Women*, 458 U.S. at 725 ("Care must be taken in ascertaining whether the statutory objective ... reflects archaic and stereotypic notions."); *Orr*, 440 U.S. at 278 (a "statutory scheme provid[ing] that different treatment be accorded ... on the basis of ... sex ... establishes a classification subject to scrutiny under the Equal Protection Clause") (citing *Reed*, 404 U.S. at 75). Given this longstanding precedent from the United States Supreme Court, the Superior Court's error in entering a conviction under section 298(5) — a statute containing an explicit sex-based classification — is plain under current law. 5 *See United States v. Knowles*, 29 F.3d 947, 951 (5th Cir. 1994) **[*678]** (***HN16*** "It is self-evident that basing a conviction on an unconstitutional statute is both 'plain' and an 'error' as [the United States Supreme Court] defines those terms."); *United States v. Coil*, 442 F.3d 912, 916 (5th Cir. 2006) ("A conviction based upon an unconstitutional statute is both [**18] 'plain' and 'error.'"); *Crutchfield v. State*, 627 P.2d 196, 199 (Alaska 1980) ("If the regulation is unconstitutional, [the defendant's] conviction, to the extent that it is based on the regulation, constitutes plain error.").

VI[15,16] [15, 16] Furthermore, there is no doubt that this error affected Webster's substantial rights, *see Fahie v. People*, S. Ct. Crim. No. 2011-0004, 59 V.I. 505, 2013 V.I. Supreme LEXIS 43, *9, 2013 WL 4405034, at *3 (V.I. Aug. 14, 2013) (***HN17*** "[t]o affect ... substantial rights, the error must [have] affected the outcome of the trial"), and that affirming Webster's conviction under a facially unconstitutional statute would clearly affect the integrity and public reputation of judicial proceedings. *See United States v. Young*, 470 U.S. 1, 15, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985) (***HN18*** "[T]he plain-error exception [should be] 'used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.'" (quoting *United States v. Frady*, 456 U.S. 152, 163, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982))); *White v. United States*, 399 F.2d 813, 822 (8th Cir. 1968) [**20] ("[I]t would be improper to affirm a conviction if the statute under which the prosecution is brought is unconstitutional and ... imprisonment under such circumstances would be a clear miscarriage of justice."). Accordingly, because the Superior Court committed plain error in entering a conviction against Webster under a statute that violates the Equal Protection Clause of the Fourteenth Amendment, we reverse Webster's conviction for aggravated assault under 14 V.I.C. § 298(5).

B. Sufficiency of the Evidence

Webster also challenges the sufficiency of the evidence supporting his convictions for disturbing the peace and unauthorized use of a vehicle. ***HN19*** "In reviewing a challenge to the sufficiency of the evidence presented at trial, we must view the evidence in the light most favorable to the People, and affirm the conviction if any rational trier of fact could have found the **[*679]** essential elements of the crime beyond a reasonable doubt." *Cascen*, 2014 V.I. Supreme LEXIS 3, at *10, 2014 WL 68882, at *3 (quoting *George*, 2013 V.I. Supreme LEXIS 37, at *25, 2013 WL 3742533, at *6) (internal quotation marks omitted).

1. *Disturbing the peace*

VI[17] [17] Webster's arguments concerning this conviction are varied and largely incomprehensible. Without citing any case law, he first asserts [**21] that the Superior Court denied him due process of law in entering this conviction. This argument is never fully articulated, let alone supported "by argument and citation to legal authority," and therefore is waived. V.I.S.Ct.R. 22(m). He then asserts that "the prosecutor did not charge ... disturbance of the peace in violation of title 14, section 622 of the Virgin Islands Code." But the People did charge Webster with disturbing the peace in violation of 14 V.I.C. § 622(1). Webster

next argues that disturbing the peace in this case was not an act of domestic violence as defined by 16 V.I.C. § 91(b)(11) — which provides that threatening conduct can constitute domestic violence — because the People failed to prove that Webster threatened Vernice. But the People charged Webster with disturbing the peace as an act of domestic violence under 16 V.I.C. § 91(b)(10) — providing that harassing conduct can constitute domestic violence — and Webster makes no arguments regarding section 91(b)(10) until his reply brief. Therefore, any argument in this regard is also waived. *Christopher v. People*, 57 V.I. 500, 513 n.7 (V.I. 2012). Despite Webster's waiver of these arguments, because he mentions in passing [**22] his belief that "the prosecutor ... did not prove" the elements of disturbing the peace, we construe his arguments as a challenge to the sufficiency of the evidence.

VI[18] [18] Webster was convicted of disturbing the peace in violation of 14 V.I.C. § 622(1), which provides:

> ***HN20*** Whoever maliciously and willfully ... disturbs the peace or quiet of any village, town, neighborhood or person, by loud or unusual noise, or by tumultuous offensive conduct, or threatening, traducing, quarreling, challenging to fight or fighting ... shall be fined not more than $100 or imprisoned not more than 90 days, or both.

Accordingly, in order to obtain a conviction in this case, the People were required to prove that Webster (1) maliciously and willfully disturbed **[*680]** Vernice's "peace or quiet," (2) "by loud or unusual noise, or by tumultuous offensive conduct, or threatening, traducing, quarreling, challenging to fight or fighting." Vernice testified that Webster woke her up at 1 a.m. demanding the keys to her car, and when she refused, an altercation ensued, during which Webster "ransacked" Vernice's bedroom in search of the keys. When he failed to find the keys, Webster grabbed Vernice by a piece of her clothing and [**23] pulled her into the bedroom, throwing her down onto her mattress several times, still demanding the keys. This testimony was sufficient to support Webster's conviction for disturbing the peace, as it is clear that Webster's conduct disturbed Vernice's peace or quiet by waking Vernice up in the middle of the night to demand the keys to her car, and then attacking her when she refused to turn them over. *Murrell v. People*, 54 V.I. 327, 332-33 (V.I. 2010) (holding that the evidence was sufficient to sustain a conviction for disturbing the peace where the defendant committed "an actual criminal assault"); *see also State v. Poe*, 139 Idaho 885, 88 P.3d 704, 715 (Idaho 2004) ("The word 'quarreling' [in a statute substantially identical to 14 V.I.C. § 622] means engaging in 'an angry dispute or altercation.' "); *State v. Starsky*, 106 Ariz. 329, 475 P.2d 943, 945 (Ariz. 1970) ("one may be guilty of disturbing the peace [under a similarly worded statute] if he engages in ... violent conduct"). We therefore affirm Webster's conviction for disturbing the peace.

2. *Unauthorized use of a vehicle*

Webster next argues that the evidence was insufficient to support his conviction for the unauthorized use of a vehicle under 14 V.I.C. § 1382. [**24] Section 1382 provides that ***HN21*** "[a] person not entitled to possession of a vehicle who, without the consent of the owner and with intent to deprive him, temporarily or otherwise, of the vehicle or its possession, takes, uses or drives the vehicle is guilty of a felony." Webster's sufficiency challenge rests solely on the contention that the People failed to prove he was not entitled to possess the car because Vernice purportedly testified she was happy to give the keys to Webster.

VI[19] [19] At trial, Vernice testified that she had initially refused to let Webster take the car when he asked for the keys. After her refusal, Webster continued to demand the keys and began searching Vernice's bedroom. When he failed to find the keys, Webster grabbed her by a piece of her clothing, pulled her into the bedroom, threw her down onto her mattress, and demanded the keys. Vernice testified that after Webster **[*681]** continued demanding the keys and repeatedly throwing her down onto her mattress, she finally gave the keys to him and was "happy" to do so "because I asked him to stop and he did not stop." Based on this testimony, the Superior Court — sitting as the trier of fact — found Webster "was not authorized to use the [**25] vehicle"[6] and that Vernice only gave Webster the keys because "she did not know what was going to happen to her if she did not give him the keys," and therefore "this was not a true consent." Although Webster is correct that Vernice testified that she was happy to give him the keys, she also testified that she gave Webster the keys only after he physically attacked her. Therefore, we cannot say the Superior Court's finding that Vernice did not give "true consent" to Webster's use of the car was "completely devoid of minimum evidentiary support or [had] no rational relationship to the supportive evidentiary data." *In re Estate of Small*, 57 V.I. 416, 430 (V.I. 2012) (identifying the standard for holding a finding of fact to be clearly erroneous); *see also Williams v. People*, 55 V.I. 721, 731 (V.I. 2011) (defining consent as the "acquiescence by a person of age or with requisite mental capacity who is not under duress or coercion").

VI[20-23] [20-23] And even though Webster gave a vastly different account of what occurred that night during his testimony — asserting that Vernice agreed to allow him to use the car immediately after his initial request — the Superior Court credited Vernice's testimony over Webster's, and ***HN22*** "[a] sufficiency challenge is not a vehicle to relitigate credibility arguments that were unpersuasive" to the trier of fact. *Billy v. People*, 57 V.I. 455, 466 (V.I. 2012); *see also Connor v. People*, S. Ct. Crim. No. 2011-0021, 59 V.I. 286, 2013 V.I. Supreme LEXIS 31, *5, 2013 WL 3421061, at *2 (V.I. July 2, 2013) (holding that ***HN23*** the testimony [**27] of a single witness is sufficient to support a conviction "even if it is contradicted by the accused"). Therefore **[*682]**, we have no trouble concluding that the evidence was sufficient to support Webster's conviction for unauthorized use of a vehicle.[7]

IV. CONCLUSION

Section 298(5) of title 14 of the Virgin Islands Code violates the Equal Protection Clause of the Fourteenth Amendment by making all assaults committed by a male against a female aggravated assault. Consequently, the Superior Court committed plain error in convicting Webster under this statute. However, the evidence was sufficient to support his convictions for disturbing the peace and unauthorized use of a vehicle. Therefore, we reverse Webster's conviction for aggravated assault, but affirm his convictions for disturbing the peace and unauthorized use of a vehicle.

Footnotes

1 Vernice testified that she could not recall how she ended up on the floor.

2 ***HN4*** The Fourteenth Amendment applies to the Virgin Islands Government to the same extent it applies to the [**7] governments of the fifty states under section 3 of the Revised Organic Act of 1954. 48 U.S.C. § 1561, *reprinted in* V.I. CODE ANN., Historical Documents, Organic Acts, and U.S. Constitution at 87-88 (1995 & Supp. 2013) (preceding V.I. CODE ANN. tit. 1) ("extend[ing] to the Virgin Islands" the Due Process and Equal Protection Clauses of the Fourteenth Amendment, which "shall have the same force and effect there as in the United States or in any State of the United States").

3 Prior to 1957, "[s]eparate codes were enacted [**12] for the Municipality of St. Thomas and St. John and for the Municipality of St. Croix." *Simmonds*, 58 V.I. at 14. "In 1957, the Legislature repealed the 1921 Codes, adopting instead a comprehensive code governing the entire Territory... . The 1957 Code retained the earlier assault and battery statutes, including the aggravated assault and battery statute." *Id.* at 15.

4 *See Marcelle v. People*, 55 V.I. 536, 541-42 (V.I. 2011) (declining to address the constitutionality of 14 V.I.C. § 298(5) where the defendant only challenged the sufficiency of the evidence on appeal); *Azille v. People*, S. Ct. Crim. No. 2011-0033, 59 V.I. 215, 2012 V.I. Supreme LEXIS 46, at *20, 2012 WL 1959632, at *6 (V.I. May 2, 2012) (declining to address the constitutionality of 14 V.I.C. § 298(5) where the defendant "concede[d] the Court should not address this argument" and reversing on other grounds).

5 This situation is distinct from that presented in *Hightree v. People*, 55 V.I. 947, 953-55 (V.I. 2011), and *Sonson v. People*, S. Ct. Crim. No. 2009-0109, 59 V.I. 590, 2012 V.I. Supreme LEXIS 90, *30, 2013 WL 4812493, at *8-9 (V.I. Sept. 9, 2013), in which both appellants argued for the first time on appeal that the Virgin Islands firearm registration scheme violated the Second Amendment. In declining to exercise our discretion to review those claims, we emphasized that the United States Supreme Court has unequivocally stated that reasonable firearm [**19] registration schemes are not constitutionally suspect as a result of that Court's decisions in *District of Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010). *See Hightree*, 55 V.I. at 955 (noting that "language in both decisions of the Supreme Court indicat[es] that the Court did not intend to invalidate all gun regulatory schemes"); *Sonson*, 2012 V.I. Supreme LEXIS 90, at *31, 2013 WL 4812493, at *9 ("Both [*Heller* and *McDonald*] expressly authorized the regulation of handguns.").

6 Webster asserts in his reply brief that the evidence was insufficient because the Superior Court "made no findings of fact regarding Webster being entitled to possession of the vehicle." But the court did explicitly find based on Vernice's testimony that Webster [**26] "was not authorized to use the vehicle." Webster also insists that as Vernice's son, he was "impliedly permitted to use his mother's car as a matter of public policy," citing provisions of the Virgin Islands Code requiring minimum liability car insurance. But not only did Webster waive this argument by failing to raise it with the Superior Court, he also fails to explain how these provisions entitled him to use a vehicle owned by his mother, nor did he ever dispute the ownership of the vehicle at trial. V.I.S.CT.R. 4(h) ("Only issues and arguments fairly presented to the Superior Court may be presented for review on appeal.").

7 Webster contends that his sentence violates 14 V.I.C. § 104. ***HN24*** Under section 104, "despite the fact that an individual can be charged and found guilty of violating multiple provisions of the Virgin Islands Code arising from a single act or omission, that individual can ultimately only be punished for one offense." *Williams v. People*, 56 V.I. 821, 832 (V.I. 2011). Because we reverse his assault conviction on other grounds, the only sentences that could implicate section 104 are the concurrent sentences imposed for disturbing the peace and unauthorized use of a vehicle. But like so many of his arguments, Webster entirely fails to clarify why he believes these sentences violate section 104. Regardless, the Superior Court's imposition of concurrent sentences for disturbing the peace and unauthorized use of a vehicle does not violate section 104 here because Webster's actions in waking his mother to demand the keys and later taking the vehicle

without [**28] her consent do not constitute "a single act or omission" for the purposes of 14 V.I.C. § 104. *Cf. Galloway v. People*, 57 V.I. 693, 712 (V.I. 2012) (holding that 14 V.I.C. § 104 was not implicated where defendant's "decision to drive his vehicle while under the influence occurred at an earlier time and place than his subsequent failure to stop at the red light").