

**For Publication**

**IN THE SUPREME COURT OF THE VIRGIN ISLANDS**

**GARY SIMMONDS** ) **S. Ct. Crim. No. 2021-0009**  
Appellant/Defendant ) Re: Super. Ct. Crim. No. 215/2005 (STX)  
)  
v. )  
)  
**PEOPLE OF THE VIRGIN ISLANDS** )  
Appellee/Prosecutor )  
)  
)  
\_\_\_\_\_ )

On Appeal from the Superior Court of the Virgin Islands  
Division of St. Croix  
Superior Court Judge: Hon. Harold W.L. Willocks

Argued: February 8, 2022  
Filed: June 1, 2022

Cite as 2022 VI 12

**BEFORE:** **RHYS S. HODGE**, Chief Justice; **IVE ARLINGTON SWAN**, Associate Justice; and **SIGRID M. TEJO**<sup>1</sup>, Designated Justice.

**ATTORNEYS:**

**Kelechukwu C. Onyejekwe, Esq.**  
Appellate Public Defender  
St. Thomas, U.S.V.I.  
*Attorney for Appellant,*

**Ian S.A. Clement, Esq.**  
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**OPINION OF THE COURT**

**HODGE, Chief Justice**

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<sup>1</sup> Associate Justice Maria M. Cabret is recused from this matter; the Honorable Sigrid M. Tejo has been designated in her place pursuant to title 4, section 24(a) of the Virgin Islands Code.

¶ 1 Appellant Gary Simmonds appeals the Superior Court’s amended judgment convicting and sentencing him for simple assault and battery pursuant to title 14, section 299 of the Virgin Islands Code. For the reasons that follow, we affirm the Superior Court’s amended judgment.

## I. BACKGROUND

¶ 2 On September 22, 2005, Gary Simmonds was found guilty and convicted in the Superior Court of the Virgin Islands on the sole count of aggravated assault and battery under title 14, section 298(5)<sup>2</sup> and title 16, section 91(b)(1) & (2)<sup>3</sup> of the Virgins Islands Code for hitting his wife about her face. (J.A. 45-48; 93.) Simmonds appealed his conviction to the Appellate Division of the United States District Court of the Virgin Islands on November 7, 2005. His sole argument on appeal was that section 298(5)’s gender-based classification scheme was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. (J.A. 21.)

¶ 3 On July 29, 2011, the Appellate Division remanded the case to the Superior Court because the Government’s appellate filings did not properly address how the statute’s gender classification was substantially related to a legitimate government interest. (J.A. 21.) *See generally Simmonds v. People*, 55 V.I. 1069 (D.V.I App. Div. 2011). On June 11, 2012, the Superior Court issued an

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<sup>2</sup> Title 14, section 298(5) states, in relevant part,

Whoever commits an assault and battery –  
(5) 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 or if during an act of domestic violence, as defined in  
16 V.I.C. § 91(b), be fined not less than \$1,000 or imprisoned not  
more than 5 years.

<sup>3</sup> Title 16, section 91(b)(1) & (2) states, “[d]omestic violence’ means the occurrence of any of the following acts, attempts or threats against a person who may be protected under this chapter pursuant to subsection (c) of this section: (1) Assault; (2) Battery . . . .”

opinion determining that the Government had failed to establish how the gender classification under section 298(5) was substantially related to a legitimate government interest and that subsection (5)'s provision stating "being an adult male, upon the person of a female" violated the Equal Protection Clause. (J.A. 64-92.) *See People v. Simmonds*, 58 V.I. 3 (V.I. Super. Ct. 2012).

¶ 4 On April 3, 2020, the Appellate Division affirmed the Superior Court's finding and vacated Simmonds's conviction and sentence under section 298(5). However, it also found that simple assault and battery under section 299 of title 14 was a lesser-included offense of section 298(5). Therefore, it ordered the Superior Court to enter a conviction and sentence pursuant to section 299 on remand. (J.A. 53-55.)

¶ 5 Simmonds filed a petition for rehearing of the Appellate Division's decision on April 17, 2020. In his petition, Simmonds argued – for the first time – that the Appellate Division did not have jurisdiction over the case, that simple assault and battery cannot be a lesser included offense of an unconstitutional statute, and that the Appellate Division violated the doctrine of separation of powers by purportedly creating a crime. The Appellate Division denied the petition on April 24, 2020.

¶ 6 Six days later, Simmonds appealed the decision to the United States Court of Appeals for the Third Circuit, making the same argument as those in his petition for rehearing. On December 12, 2020, the Third Circuit determined that the Appellate Division had the "authority . . . to remand the case with direction to impose a conviction and sentence on a lesser included offense[,]" but did not address the correctness of the remand decision. (J.A. 34.) Simmonds then filed a petition for rehearing en banc on December 29, 2020, which the Third Circuit denied on January 13, 2021.<sup>4</sup>

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<sup>4</sup> On July 14, 2021, Simmonds also filed a petition for writ of certiorari to the Supreme Court of the United States. The United States Supreme Court denied certiorari on October 4, 2021.

(J.A. 50.) Finally, on March 17, 2021, the Superior Court entered an amended judgment, convicting Simmonds of the lesser included offense of simple assault and battery pursuant to title 14, section 299 of the Virgin Islands Code, and sentenced him to time served. (J.A. 44). Simmonds timely filed his notice of appeal with this Court on April 6, 2021. (J.A. 42.)

## **II. DISCUSSION**

### **A. Jurisdiction**

¶ 7 Before considering the merits of Simmonds’s appeal, this Court must first determine its jurisdiction over the matter. Today, this Court “[has] jurisdiction over all appeals arising from final judgments, final decrees or final orders of the Superior Court.” 4 V.I.C. § 32(a); *see also* 48 U.S.C. § 1613a(d). However, prior to establishment of this Court, appellate jurisdiction over final judgments of the Superior Court was vested in the Appellate Division, pursuant to section 23A of the Revised Organic Act of 1954, codified as 48 U.S.C. § 1613a. Importantly, section 23A(d) provides that “the establishment of the [Supreme Court] shall not result in the loss of jurisdiction of the [Appellate Division] over any appeal then pending in it.”

¶ 8 Here, the Appellate Division possessed jurisdiction over Simmonds’s initial appeal, which had been filed on November 7, 2005. In its July 29, 2011 remand order, the Appellate Division expressly stated that it was remanding the matter to the Superior Court for the limited purpose of making factual findings to assist it on appeal. The question before us, then, is whether the Appellate Division has since terminated the retained jurisdiction by ordering a remand to the Superior Court for sentencing under title 14, section 299 of the Virgin Islands Code on April 3, 2020.

¶ 9 We conclude that the Appellate Division’s most recent remand constitutes a case remand rather than a record remand as it had previously ordered. *See Hypolite v. People*, 51 V.I. 97, 102-03 (V.I. 2009). As we previously explained,

[a] “case” remand . . . returns the case to the trial court for all purposes. [The appellate] court retains no jurisdiction over the case and the appeal is terminated. If, after a case remand, a party is dissatisfied with the action of the trial court, the only course available to obtain review in [the appellate] court, is to file a new notice of appeal, once a final order or judgment is entered. That appeal is a new appeal, separate from the previous appeal that was terminated when the case was remanded.

*Id.* (quoting *Hodge v. McGowan*, 50 V.I. 296, 305 n.4 (V.I. 2008)). The Appellate Division remanded the case for a second time on April 3, 2020, to the Superior Court and issued an order directing it “to impose a conviction and sentence that reflect the lesser-included offense of simple assault and battery.” (J.A. 29.) Therefore, in this second remand, the Appellate Division returned the case for all purposes to the Superior Court and terminated the appeal. The Superior Court entered an amended judgment on March 17, 2021 pursuant to the Appellate Division’s order. To seek review of this amended judgment, Simmonds was required to file a new appeal to this Court, which he did. *See id.*; *see also* 48 U.S.C. § 1613a(d). Because that amended judgment contains an adjudication of guilt along with the corresponding sentence, it is an appealable final judgment under section 32(a). *Williams v. People*, 58 V.I. 341, 347 (V.I. 2013). Therefore, this Court possesses jurisdiction over this appeal.

### **B. Waiver**

¶ 10 Simmonds argues in his appellate brief (1) that the Appellate Division acted without jurisdiction, (2) that simple assault and battery is not a lesser included offense of aggravated assault under title 14, section 298(5) of the Virgin Islands Code, and (3) that the Appellate Division

violated the separation of powers doctrine. Because these arguments are the same ones that Simmonds raised in his appeal to the Appellate Division, and were conclusively adjudicated by that court on direct appeal, we decline his invitation to relitigate those same issues in a second direct appeal.

¶ 11 We have already held that when a matter that has already been litigated on a direct appeal to this Court, we will typically not disturb that earlier decision, particularly when the Superior Court has already relied upon it on remand. *See Hansen v. Bryan*, 68 V.I. 603, 609 (V.I. 2018) (holding that a prior decision of the Supreme Court determining that a motion was timely “is the law of the case, and shall not be disturbed” in a subsequent appeal after remand). This principle stems from the law of the case doctrine, which “binds a successor appellate panel in a second appeal in the same case to honor fully the original decision.” *Williams v. People*, 58 V.I. 341, 351 (V.I. 2013) (quoting *United States v. Matthews*, 643 F.3d 9, 13 (1st Cir. 2011)). Moreover, even “when a litigant could have raised an issue during an appeal of an earlier final judgment – yet did not – this Court will not consider that same issue as part of a second appeal.” *Rawlins v. People*, 59 V.I. 1069, 1072 (V.I. 2013). Consequently, regardless of whether an issue was raised and rejected or could have been raised and waived, “a defendant does not receive a second chance to support an argument he failed to support in a first appeal simply because he is resentenced.” *Id.* at 1073 (citation omitted). This rule “promotes predictability and finality by notifying parties of the matters that remain open on remand and committing the rest to final resolution.” *Id.*

¶ 12 In his appellate brief, Simmonds exclusively reargues issues that were considered and rejected in his first appeal. The situation is similar to the *Rawlins* case, where the appellant failed to raise a number of issues in his first direct appeal to this Court and we considered these issues waived when he filed a second direct appeal. In contrast here, the issues were rejected by the

Appellate Division, and not this Court. This difference, of course, is an important one in other contexts.

¶ 13 In one of our earliest cases, we held that decisions of the Appellate Division in other cases do not constitute binding precedents on this Court. *See In re People*, 51 V.I. 374, 389 n.9 (V.I. 2009). Likewise, we determined “that issues raised on direct appeal to the Appellate Division and the Third Circuit are not procedurally barred in a local habeas corpus action,” *Mosby v. Mullgrav*, 65 V.I. 261, 268 (V.I. 2016), as they would be if they had been adjudicated on direct appeal by this Court. *See Blyden v. Gov’t of the V.I.*, 64 V.I. 367, 377 (V.I. 2016). But here we are not concerned with the precedential effect of a decision the Appellate Division made in another case, or the preclusive effect of an Appellate Division decision in a criminal case in a subsequent civil case brought by the prisoner in the Superior Court. Rather, the issue before us is the effect of a decision of the Appellate Division issued in the *same* case.

¶ 14 We have had the occasion to consider a similar question once before. In *Hodge v. Bluebeard’s Castle, Inc.*, 62 V.I. 671 (V.I. 2015), this Court reviewed the correctness of an interlocutory order issued by the Appellate Division on appeal from a final judgment subsequently issued by the Superior Court, and ultimately concluded that the Appellate Division had misinterpreted Virgin Islands law. We did so, however, precisely because the Appellate Division had issued an interlocutory order rather than a final order, since the effect of the Appellate Division’s decision was not to conclusively resolve all issues between the parties by ordering the Superior Court to take a particular action—such as entering a particular judgment in favor of one party—but to instead to order additional proceedings in which the Superior Court possessed considerable discretion, not just with respect to how to proceed, but also how to rule. *Id.* at 682, 686-87.

¶ 15 That is not the case here. The Appellate Division’s April 3, 2020 opinion was not an interlocutory order, but a final order. The Appellate Division did not permit the Superior Court to reexamine any evidence or find different facts or give the Superior Court the discretion to choose whether or not to convict and sentence Simmonds under title 14, section 299 of the Virgin Islands Code. Rather, the Appellate Division mandated that the Superior Court enter a conviction and sentence under that statute.

¶ 16 The Superior Court here adhered to the Appellate Division’s order and entered Simmonds’s conviction under section 299. Thus, Simmonds’s case on appeal before this Court is the same as what the Appellate Division reviewed. For these reasons, we find the law of the case doctrine applicable here and we decline to “reconsider[] issues which have been adjudicated in a previous appeal in the *same case*.” *V.I. Taxi Assoc. v. V.I. Port Authority*, 67 V.I. 643, 670 (V.I. 2017) (citation omitted) (emphasis added).

¶ 17 As previously stated, Simmonds’s arguments in the current appeal are the same and on occasion track word for word those presented to the Appellate Division in his petition for rehearing. Simmonds is asking us to revisit questions that have been answered by the Appellate Division and the Third Circuit. The Appellate Division denied his petition for rehearing and maintained its order that the Superior Court enter a conviction and sentence of simple assault and battery under section 299. Simmonds continued the appeals process to the Third Circuit as established under title 48, section 1613a(c) of the United States Code and the Third Circuit affirmed the Appellate Division’s jurisdiction over the subject matter. 48 U.S.C. § 1613a(c) (“The United States Court of Appeals for the Third Circuit shall have jurisdiction of appeals from all final decisions of the district court on appeal from the courts established by local law.”).



¶ 18 We recognize, of course, that Simmonds does have a right to appeal the Superior Court’s amended judgment to this Court. However, that he may appeal the amended judgment to this Court does not mean that he has another chance to re-argue the same issues he presented to the Appellate Division in his first appeal and that were already addressed by that tribunal. Rather, the sole issue that remains available to Simmonds in this appeal is the length of his sentence. However, Simmonds failed to raise any issue with his sentence, and thus waived its review. *See Rawlins*, 59 V.I. at 1072. In this context, therefore, there is nothing for this Court to do. Thus, we affirm Simmonds’s conviction.<sup>5</sup>

### III. CONCLUSION

¶ 19 This Court finds that the arguments Simmonds raises in his appellate brief are not properly before this Court, in that they were already conclusively adjudicated by the Appellate Division in an earlier appeal in this same case. Simmonds also waived the sole issue available for review in this appeal – his sentence. Therefore, we affirm the Superior Court’s amended judgment.

**Dated this 1st day of June 2022.**

**BY THE COURT:**

/s/ Rhys S. Hodge  
**RHYS S. HODGE**  
**Chief Justice**

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<sup>5</sup> In reaching this decision, we emphasize that Simmonds possesses other forms of obtaining review of his conviction. For instance, he may seek post-conviction relief through a local or federal petition for writ of habeas corpus. *Rawlins*, 59 V.I. at 1073-74; *see also Mosby v. Mullgrav*, 65 V.I. 261, 266-67 (V.I. 2016) (“A habeas corpus petition could raise issues that were, or could have been raised on direct appeal to the Appellate Division or the Third Circuit, without proving extenuating circumstances, provided that the issues involve a question law rather than a question of fact.”).

**ATTEST:**

**VERONICA J. HANDY, ESQ.**  
**Clerk of the Court**

**By: /s/ Reisha Corneiro**  
**Deputy Clerk**

**Dated: June 1, 2022**