IN THE

COURT OF APPEALS

OF VIRGINIA

Record No. 2846-01-1

LOLITA EDWARDS,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF APPELLANT ON REHEARING EN BANC

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Questions Presented

I. Whether the assault and battery of a law enforcement officer is a lesser-included offense of attempted capital murder of a law enforcement officer. This question was addressed to the Trial Court at App. 48-54, 71 & 73-74 and, to the extent not so addressed, need not have been because a trial court lacks the authority to find an accused guilty of an offense other than the one charged or a lesser-included offense. *Lowe v. Commonwealth,* 33 Va. App. 583, 589, 535 S.E.2d 689 (2000).[1]

[1] The Appellee's Petition for Rehearing En Banc prayed only that the issue it lost be reheard. The Court's order is to rehear the "judgment" which includes the issue, "Whether Ms. Edwards left the scene of an accident." Ms. Edwards does not understand the Court to intend to rehear that issue; however, out of an abundance of caution, she incorporates herein all of the arguments on that issue from her opening and reply briefs.

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BRIEF OF APPELLANT ON REHEARING EN BANC

Argument

Whether the assault and battery of a law enforcement officer is a lesser-included offense of attempted capital murder of a law enforcement officer.

A. The Issue Is Not Procedurally Barred.

"The Due Process Clauses of the Constitution of the United States and the Constitution of Virginia mandate that an accused be given proper notification of the charges against him. U.S. Const. amend. XIV; Va. Const. art. 1, § 8." *Commonwealth v. Dalton,* 259 Va. 249, 253, 524 S.E.2d 860, 862 (2000). " It is firmly established, therefore, that an accused cannot be convicted of a crime that has not been charged, unless the crime is a lesser-included offense of the crime charged." *Id*. "An offense is not a lesser-included offense of a charged offense unless all its elements are included in the offense charged. Stated differently, an

offense is not a lesser-included offense if it contains an element that the charged offense does not contain." *Id*. (citation omitted).

The Commonwealth's argument would require an objection based on *Dalton* to be stated with mathematical precision or else be waived. There is a kernel of truth to the Commonwealth's argument, namely that under certain limited circumstances the issue may be waived. However, the Commonwealth's contention that mere silence amounts to a waiver of this issue is wrong. This Court's decisions properly recognize that in this context, '[a]cquiescence requires something more than a mere failure to object." *Lowe v. Commonwealth,* 33 Va. App. 583, 589, 535 S.E.2d 689, 692 (2000); *Fontaine v. Commonwealth*, 25 Va. App. 156, 165, 487 S.E.2d 241, 244 (1997).

At the conclusion of the Commonwealth's evidence, Ms. Edwards moved to strike the charge of attempted capital murder of a police officer on the grounds she had been too intoxicated to premeditate and that she had not had the specific intent to kill. App. 41 & 44. The trial court agreed that she had not had the specific intent to kill and granted the motion. App. 48-49.

The Commonwealth then made a motion for the court to consider convicting Ms. Edwards of "any of the assault and battery offenses." App. 50. Ms. Edwards met this motion with the correct argument – namely, that assault and battery of a police officer is not a lesser-included offense of attempted capital murder of a police officer. App. 51. Ms. Edwards correctly cited the *Blockburger* case. *Id*. Ms. Edwards' reasoning, although wide of the mark, did touch upon the identity and character of the victim. App. 51-54.

The panel concluded, without any discussion, that the argument was waived, stating only that "we agree these issues were not preserved." Slip Op. at 5. In so doing, the panel erroneously accepted the Commonwealth's argument regarding preservation. The panel then followed *Lowe* and *Fontaine*, but found the Commonwealth's argument as to waiver to be "persuasive." Slip Op. at 6.

The Statute of Jeofails for criminal cases in Virginia provides:

> Judgment in any criminal case shall not be arrested or reversed upon any exception or objection made after a verdict to the indictment or other accusation, unless it be so defective as to be in violation of the Constitution.

Va. Code § 19.2-227.

In this case, the statute was complied with by objection before verdict. Alternately, the facts do not meet the appropriate standard of waiver.

1. The issue was preserved.

Ms. Edwards promptly made her objection to the Commonwealth's motion. App. 51. After the defense rested, the trial court ruled: "I'm going to overrule your motions. I'll be glad to hear your arguments." App. 71.

"[I]t shall be sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court … his objections to the action of the court and his grounds therefore." Va. Code § 8.01-384. Here, Ms. Edwards was resisting the Commonwealth's motion to convict her of assault and battery of a police officer. She objected on the ground that it was not a lesser-included offense. This is sufficient to preserve the issue for appeal.

The Commonwealth nevertheless contends that the issue was not stated with sufficient precision to satisfy the requirements of Va. Sup. Ct. R. 5A:18. As

authority for its proposition, it must resort to an appeal from a decree sustaining a demurrer to an amended bill in chancery to enforce a mechanic's lien. The case is *West Alexandria Properties, Inc. v. First Va. Mortgage and Real Estate Inv. Trust,* 221 Va. 134, 267 S.E.2d 149 (1980). The case is cited for the quotation, "On appeal, though taking the same general position as in the trial court, an appellant may not rely on reasons which could have been but were not raised for the benefit of the lower court." *Id*. at 138; 267 S.E.2d 151.

The quote indicated that the court would not consider plaintiff's additional reasons why it was not a joint venturer. However, the Court then held that the point was not germane to the appeal because "[t]he reason underlying its ruling was that [plaintiff] was not a general contractor and, therefore, had no standing to assert a lien. Under that rationale, the identity of the landowner [as a joint venturer] was inconsequential." *Id*. at 137; 267 S.E.2d 151.

The Court then reversed the trial court, reinstating the plaintiff's bill, because "[a]ssuming that [plaintiff and defendant's predecessor] were joint venturers," plaintiff was nevertheless a general contractor. *Id*. Thus, while the Court refused to entertain plaintiff's new grounds for why it was not a joint venturer, it ruled that the question of whether plaintiff was a joint venturer was immaterial to the issue on appeal.

If the point was immaterial, it is doubtful the case stands for the proposition asserted. In any event, the case at bar is not a bill in chancery to enforce a mechanic's lien. It does not involve a demurrer that was argued orally to the trial court upon notice and after briefs had been filed. Whatever may be the fairness

of making such fine distinctions under those circumstances, such splitting of hairs has no place at all in a criminal proceeding. It certainly has no place upon the issue of whether the written charge embraces the offense at conviction. The criminal case cited in the opinion illustrates the point. The defendant may not "abandon[] the contention made in the trial court and [rely] on entirely new grounds, raised here for the first time." *Miller v. Commonwealth,* 185 Va. 17, 21, 37 S.E.2d 864 (1946). The key is that defendant's position is "new," and "inconsistent" with his position in the trial court. *Upshur v. Commonwealth,* 170 Va. 649, 649, 197 S.E. 435, 437 (1938). The basis of the objection in this case is not only consistent with, but is, in fact, the same as that asserted in the trial court.

The contemporaneous objection rule does not require that an issue be stated with absolute certainty, but only with reasonable certainty. *Darnell v. Commonwealth,* 12 Va. App. 948, 952, 408 S.E.2d 540, 542 (1991). The Commonwealth's proposed standard for preservation undermines the very basis of the contemporaneous objection rule. The primary reason for the rule is to allow the trial court to rule intelligently. If by making a specific objection, a party is penalized for making an argument that correctly captures the objection but is wrong in its details, it will encourage more general objections rather than more specific ones. This will not aid the court in making an intelligent decision, but will hinder it from doing so.

This is particularly so where the appellant is *resisting* his adversary's motion at trial. If the appellant is the proponent or movant, then there is reason in requiring him to state the grounds upon which he offers the evidence or asks for

an order more particularly. However, the opponent of a motion cannot know what complexity his adversary might spring on him. This case is a prime example. *Blockburger* analysis has been referred to as "a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator." *Albernaz v. United States,* 450 U.S. 333, 343 (1981) (Rhenquist, J.).

In addition, after Ms. Edwards rested her case and before she could make her motions, the trial court ruled: "I'm going to overrule your motions. I'll be glad to hear your arguments." App. 71.

"[I]f a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection shall not thereafter prejudice him on motion for a new trial or on appeal." Va. Code § 8.01-384. Rule 5A:18 also provides that the Court may hear an issue good cause shown. Good cause exists when the trial court rules peremptorily. *See White v. Commonwealth,* 21 Va. App. 710, 720, 467 S.E.2d 297, 302 (1996).

The trial judge indicated at the conclusion of all of the evidence that he didn't want to hear any more motions and wanted to hear closing arguments. App. 71. Ms. Edwards should thus not be prejudiced on appeal for not having more fully developed the issue.

The objection was preserved in this case.

2. The facts do not meet the appropriate standard of waiver.

The Commonwealth admits that the charge of which Ms. Edwards was convicted was not embraced within the indictment. Brief of Appellee on Rehearing at 3. Beyond the timely objection interposed as required by the Statute of

Jeofails, is the fact that there is really no defect in the indictment in this case. The problem is that the judgment exceeds the scope of the indictment. While some Virginia cases seem to have treated situations similar to this as being defects in the charge, they have uniformly required more for a waiver than mere silence. *See infra.* at pp. 10-12.

The Commonwealth begins its argument with the quotation from *Morrison v. Bestler,* 239 Va. 166, 169-170, 387 S.E.2d 753, 755 (1990): "Subject matter jurisdiction alone cannot be waived." Brief of Appellee on Rehearing at 4.

While perhaps valid as hornbook law, a statement such as this purporting to govern all situations is almost always dictum since a particular case involves only one situation. In fact, *Morrison* did not even involve a question of waiver. That a right is procedural does not answer the question whether it may be waived or the action necessary to effect a waiver. One has to look no further than the rules of court for procedural requirements that are not subject to waiver. "The times prescribed for filing the notice of appeal (Rules 5:9(a), 5:14(a) and 5:21(c)), the transcript or written statement (Rule 5:11), a petition for appeal (Rules 5:17(a) and 5:21(g)) and a petition for rehearing (Rules 5:20 and 5:39), are mandatory." Va. Sup. Ct. R. 5:5 (a). These rules are not subject to waiver. *School Board of Lynchburg v. Scott,* 237 Va. 550, 556, 379 S.E.2d 319, 323 (1989); *Coleman v. Thompson,* 501 U.S. 722, 740 (1991).

The *Morrison* court did allude to the problem of parties characterizing important procedural irregularities as jurisdictional in order to gain an opportunity for review of matters otherwise not preserved. *Id*. Here, the Commonwealth argues

the equally erroneous converse of problem noted in *Morrison*: if the right is "non-jurisdictional," it is therefore subject to waiver by mere silence. This has never been the law and thus there are no cases to support the proposition.

It is plain that the nature of the right affects the stringency of the requirements for finding a waiver. It may be by constitution, statute, rule of court, common law or some combination thereof, but the requirements for waiver vary widely with the nature of the right being waived. No one would for a second contend that a waiver of the right to counsel might be found from the mere failure of the uncounseled defendant to request a lawyer. On the other hand, the right to exclude irrelevant evidence will be waived by the mere failure of the counseled or uncounseled party to interpose an objection to its admission. The reason, of course, is that some rights are more important than others and the right to counsel is more fundamental than the right to exclude irrelevant testimony.

There are myriad sources of law indicating the fundamental nature of the right to a written statement of the charge specific enough allow defenses, including former jeopardy, to be made. There are state and federal constitutional provisions governing notice of the nature of the offense. There are statutes governing waiver and amendment of indictments. There is a specific rule of court equating jurisdiction over the person with jurisdiction over the offense. There are rules of decision, both in Virginia and in the federal and other state courts, which signify the importance of the written charge. All of these combine to impose stringent standards upon a waiver of the right to a written statement of the offense.

In Virginia, “no person shall be put upon trial for any felony, unless an indictment or presentment shall have first been found or made by a grand jury in a court of competent jurisdiction.” Va. Code § 19.2-217. The statute further provides how the right of indictment by a grand jury may be waived. The waiver must be in a writing and signed in the presence of the judge. *Id*. In that case, the trial is conducted on the warrant or upon an information. *Id*. In this case, there was no written waiver and even if there had been, the charge was not embraced within the warrant any more than it was embraced within the indictment. *See* Addendum hereto.

The Commonwealth had a right to ask for an amendment of the indictment based upon a “variance between the allegations therein and the evidence offered in proof thereof.” Va. Code § 19.2-231. However, such motions must be made “before the jury returns a verdict or the court finds the accused guilty or not guilty.” *Id*. The Commonwealth thus lost the right to ask for an amendment after the motion to strike the evidence was granted and Ms. Edwards was found not guilty of attempted capital murder of a police officer. Even then the Commonwealth could not have obtained an amendment if it changed the nature of the offense. *Id*. The test of “the nature of the offense” is not whether they arise from the same transaction, but whether they require proof of different facts. *See Miles v. Commonwealth,* 205 Va. 462, 138 S.E.2d 22 (1964) (reckless driving different from failing to yield right of way).

It is sometimes said that, "the requirement for indictment is not jurisdictional and constitutionally imposed but is only statutory and procedural." *Triplett*

v. Commonwealth, 212 Va. 649, 650-51, 186 S.E.2d 16, 17 (1972). That was, however, in relation to whether or not an indictment might be amended. Of course, it can be amended so long as the Commonwealth makes the motion in a timely fashion.

The situation in this case must be distinguished from defects in the indictment where courts are much more willing to find a waiver. An example is that the defect is one of mere form. *Stamper v. Commonwealth,* 228 Va. 707, 713, 324 S.E.2d 682, 686 (1985) (error in statute cited). Another is the matter omitted from the indictment, although important, is unnecessary to the charge. *Evans v. Commonwealth,* 226 Va. 292, 298, 308 S.E.2d 126, 130 (1983) (immunity barring prosecution); *Forester v. Commonwealth,* 210 Va. 764, 768, 173 S.E.2d 851, 863-54 (1970) (age at time of offense). This is recognized by Va. Sup. Ct. R. 3A:9(b) which requires "[d]efenses and objections based on defects … in the written charge upon which the accused is to be tried, *other than that it fails to show jurisdiction in the court or to charge an offense*" must be made before trial. (emphasis supplied). Here, there is not merely a defect of form, but a total failure to state the offense.

A most important situation to distinguish is where there is, in fact, a written charge (e.g., a warrant) correctly stating the offense. Where it is only the lack of an indictment, as opposed to the complete lack of a written charge, the court is again much more willing to find a waiver. *McDougal v. Commonwealth,* 212 Va. 547, 548, 186 S.E.2d 18, 20 (1972) (warrant correctly charged offense). In such cases, the question is merely the statutory right to indictment and does not have

constitutional implications. In this case, the warrant also totally fails to charge the offense at conviction. *See* Addendum hereto.

Even where serious defects can be waived, there must be some positive action on the part of the defendant to amount to a waiver. Thus, where the defendant was indicted for attempted robbery and convicted of robbery, the defect was waived because "[t]he court invited Henson's counsel to make a motion to set aside the verdict because of variance from the indictment, but counsel refused to make the motion." *Henson v. Commonwealth,* 208 Va. 120, 125, 155 S.E.2d 346, 349 (1967). Where there is an explicit waiver by counsel, the court may amend an indictment charging no offense to charge the offense of which the defendant is convicted. *Grier v. Commonwealth,* 35 Va. App. 560, 568-569, 546 S.E.2d 743, 747 (2001). However, a court cannot amend an indictment charging no offense to one charging an offense over defendant's objection. *Wilder v. Commonwealth,* 217 Va. 145, 225 S.E.2d 411 (1976). Here, Ms. Edward interposed an objection.

A case illustrating several of these themes is *Cunningham v. Hayes,* 204 Va. 851, 134 S.E.2d 271 (1964). The case holds that one indicted that he did "kill and slay" instead of "kill and murder" could waive indictment and be convicted of murder. It is implicit in the case that there was a warrant containing the correct charge because the court reasoned that the indictment could be waived noting that the statute allows trial on a warrant when indictment is waived. *Id*. at 854-55, 134 S.E.2d at 274. Thus, only the statutory right to indictment was at issue and not the constitutional right to a definite statement of the offense. A waiver was

found since the entire trial proceeded upon the basis that the defendant had been charged with murder, no objection was interposed and his petition for appeal even recited that he had been indicted for murder. *Id*. at 857, 134 S.E.2d at 275. Moreover, the case, holds that the defendant could have been raised the issue on direct appeal, but did not. *Id*. at 854-55, 134 S.E.2d at 277.

In this case, there was a complete failure to charge the offense at conviction, both in the indictment and in the warrant. This involves questions of notice and the ability to defend, as well as the extent of the court's jurisdiction over the defendant.

The circuit courts "have original jurisdiction of all indictments for felonies." Va. Code § 17.1-513. The circuit court has jurisdiction of the indictment returned by the grand jury. Unless properly amended in accordance with the statute, the jurisdiction of the court is limited to the crime charged in the indictment and any lesser-included offense thereof. The circuit court does not have jurisdiction over a defendant for all purposes, but only for those purposes set forth by the grand jury. The power of the court is coextensive with the charge in the particular case. The Commonwealth asserts that once the state has jurisdiction over the person, it may secure a conviction for any offense known to Virginia law so long as he does not object. However, the constitutional provisions, statutes and rules at issue were designed to protect the private individual against the grasping power of the state. They are to be interpreted to further that intent.

The Commonwealth relies upon the case of *People v. Ford*, 62 N.Y.2d 275, 465 N.E.2d 322, 476 N.Y.S.2d 783 (1984). Brief of Appellee on Rehearing

at 8. That case turns upon the interpretation of a New York statute specifically requiring that an objection to the consideration of a lesser-included offense be made before the case is submitted for decision. We have no such statute. In fact, our statutes are markedly different. Moreover, New York procedure is contained in a comprehensive code that bears little resemblance to the common law or to the federal rules, both of which are significant sources of Virginia's procedures in this area.

Indeed, one of the cases quoted by the Commonwealth, Brief of Appellee on Rehearing at 6-7, correctly points out that in Virginia subject-matter jurisdiction and jurisdiction over the person are both fundamental to the validity of the judgment:

> If the court had jurisdiction of the person and of the subject matter of the prosecution, and if the punishment imposed is of the character prescribed by law, a writ of *habeas corpus* does not lie to release the prisoner from custody merely because of irregularities or defects in the sentence.

Cunningham v. Hayes, 204 Va. 851, 854, 134 S.E.2d 271, 273 (1964) (internal quotations and citations omitted).

The concept that jurisdiction over the person and the crime charged are both of such importance that they should be exempted from ordinary standards of waiver is carried forward in the rules of court:

> Lack of jurisdiction or the *failure of the written charge upon which the accused is to be tried to state an offense* shall be noticed by the court at any time during the pendency of the proceeding.

Va. Sup. Ct. R. 3A:9(b)(1) (emphasis supplied). This rule is patterned after Fed. R. Crim. P. 12(b).

The rule explicitly states that such fundamental questions "shall be noticed by the court at any time during the pendency of the proceeding." Of course, Part 3A of the rules applies to proceedings in the circuit courts. Va. Sup. Ct. R. 3A:1. There are no Virginia cases deciding if the language of Rule 3A:9 allows the question of failure of the indictment to state an offense to be raised for the first time on appeal.

The federal rules are likewise applicable by their terms to the district courts. Fed. R. Crim. P. 1. There are, however, numerous federal cases holding that the question may be raised for the first time on appeal. *United States v. Hernandez*, 330 F.3d 964, 978 (7th Cir. 2003); *United States v. Velasco-Medina*, 305 F.3d 839, 846 (9th Cir. 2002); *United States v. Wilson*, 884 F.2d 174, 179 (5th Cir. 1989); *Government v. Greenidge*, 600 F.2d 437 (3d Cir. 1979); *United States v. Fistel*, 460 F.2d 157 (2d Cir. 1972); *United States v. Thomas*, 444 F.2d 919, 920 (D.C. Cir. 1971).

Owing to the pervasive adoption of rules patterned on the federal model, there are also numerous state cases so holding. *Semancik v. State*, 57 P.3d 682, 683 (Alas. 2002); *State v. Reed*, 55 Conn. App. 170, 176, 740 A.2d 383 (1999). The reasoning may be couched in terms of jurisdiction:

> Consequently, the failure to state an offense in an accusation that, nonetheless, results in a conviction, constitutes a defect that, in itself, requires reversal. This is because the defect, . . . is not one of mere form, which is waive-able, not simply one of notice, which may be deemed harmless if a defendant was actually aware of the nature of the accusation against him or her, but, rather, is one of substantive subject matter jurisdiction, 'which may not be waived or dispensed with,' and that is per se prejudicial.

State v. Sprattling, 99 Haw. 312, 292, 55 P.3d 276 (2002) (internal citation omitted).

Even states which hold that the language of the rule does not extend to proceedings in the appellate court, nevertheless hold that the question presented here may be presented for the first time on appeal because a waiver of the indictment was not had in accordance with constitutional or statute law. *Ford v. State*, 612 So. 2d 1317, 1327 (Ala. Crim. App. 1992).

Some states hold that in challenging the indictment, a challenge may be raised for the first time on appeal if there is prejudice. *State v. Baker*, 103 S.W.3d 711 (Mo. 2003) (finding no prejudice where elements alleged accurately, but in disjunctive, and correct statute cited).

In evaluating the question of prejudice, a critical factor is whether the statement of the charge enables the defendant to raise defenses, including double jeopardy. Thus, the crime must be charged with sufficient specificity to identify the offense. The concept of former jeopardy requires the comparison of the current charge to the former charge. Thus, the requirement of specificity applies so that a defendant might plead a former jeopardy as a defense to the case *sub judice*. *Hagner v. United States*, 285 U.S.427, 431(1931). It also applies so that the accused might plead a judgment in the case *sub judice* as a bar to any subsequent prosecution for the same offense. *Russell v. United States*, 369 U.S. 749, 763-64 (1962).

The Commonwealth's position would wreak havoc with these concepts. Under the Commonwealth's theory anyone charged with a crime is in jeopardy of

being convicted of any offense. This is not the law. The law makes provisions for amendments that were not complied with. The law makes provisions for waivers that were not complied with. Absent an amendment or waiver, any possible conviction offense must be embraced within the indictment.

The Commonwealth seems to suggest that as long as Ms. Edwards' conduct was the same, then she could be convicted of any crime arising out of the same transaction. Brief of Appellee on Rehearing at 7. The Commonwealth cites no authority for this proposition because there is none.

The Supreme Court tried the approach of identifying offenses on the basis of the conduct of the accused. *See Grady v. Corbin,* 495 U.S. 508 (1990). After only a short time, the Court reversed itself because there is no way to define conduct in any predictable way. It found the conduct-based approach both "wrong in principle" and "unstable in application." *United States v. Dixon,* 509 U.S. 688, 709 (1993). Thus, the *Blockburger* rule is the test.

The Court should refuse to recognize a waiver under the facts of this case.

B. The Offense At Conviction Is Not A Lesser-Included Offense Of The Offense Charged.

In order to determine if one offense is included within another, the test in *Blockburger v. United States*, 284 U.S. 299 (1932) is employed. "[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Id.* at 304.

In applying the *Blockburger* test, it is the elements of the offenses charged in the abstract, without reference to the particular facts of the case, which control. *Blythe v. Commonwealth*, 222 Va. 722, 726-27, 284 S.E.2d 796, 798-99 (1981), *citing*, *Whalen v. United States*, 445 U.S. 684, 694, n.8 (1980).

A second offense containing elements not contained in the first offense is not a lesser-included offense of the first offense. *Jones v. Commonwealth*, 218 Va. 757, 759, 240 S.E.2d 658, 660, *cert. denied*, 435 U.S. 909 (1978).

Under this test, there are three reasons why assault and battery of a law enforcement officer is not a lesser-included offense of attempted capital murder of a law enforcement officer. First, the identity of the potential victims of the two crimes is different. Second, battery is not a lesser-included offense of attempted murder. Third, assault is not a lesser-included offense of attempted murder.

First, assault and battery of a law enforcement officer and attempted capital murder of a law enforcement officer are each statutory offenses which include within their respective ambits potential victims not included within the other. Thus, although the purposes of the statutes proscribing assault and battery of a law enforcement officer and attempted capital murder of a law enforcement officer are generally to protect law enforcement officers, this similarity is not enough to render the former a lesser-included offense of the latter.

For example, statutory trespass against the "land, dwelling, outhouse or any other building of another," is not a lesser-included offense of statutory burglary, the possible objects of which may include ships, vessels and river craft. *Crump v. Commonwealth*, 13 Va. App. 286, 291, 411 S.E.2d 238, 241 (1991).

Likewise, another form of statutory trespass against the "premises of another" is not a lesser-included offense of statutory burglary because “premises” do not encompass ships, vessels and river craft. *Lowe v. Commonwealth,* 33 Va. App. 583, 591, 535 S.E.2d 689, 693 (2000).

The statutes defining assault and battery of a law enforcement officer and attempted capital murder of a law enforcement officer each contains its own definition of law enforcement officer. *Compare*, Va. Code § 18.2-57 (E) *with* Va. Code §§ 18.2-31(6) & 9.1-101. While both contain the general definition “any full-time or part-time employee of a police department or sheriff's office which is part of or administered by the Commonwealth or any political subdivision thereof, who is responsible for the prevention or detection of crime and the enforcement of the penal, traffic or highway laws of this Commonwealth,” each goes on to include others.

Included within Va. Code § 9.1-101 and not within Va. Code § 18.2-57 (E) are, for example, “special agent[s] of the Department of Alcoholic Beverage Control," “officer[s] of the Virginia Marine Patrol,” and “investigator[s] who [are] full-time sworn member[s] of the security division of the State Lottery Department.”

The Commonwealth admits the correctness of this analysis as to why assault and battery of a law enforcement officer is not a lesser-included offense of attempted capital murder of a law enforcement officer. Brief of Appellee on Rehearing at 3.

The second reason that the offense at conviction is not a lesser-included offense of the offense charged is that battery is not a lesser-included offense of attempted murder since the latter requires no touching. *Coleman v. Commonwealth,* 261 Va. 196, 201, 539 S.E.2d 732, 735 (2001). The panel pointed out that the conviction offense here is "assault" and not "assault and battery." Slip Op. at 5, n.1. However, the evidence in this case is clear that there was a touching. Therefore, if there was an assault in this case, it is only based on the rule that "[a] battery includes an assault." *Hinkel v. Commonwealth,* 137 Va. 791, 794, 119 S.E. 53, 54 (1923). Thus, the basis of the conviction was a battery, which was not a lesser-included offense of attempted murder.

The third reason that the offense at conviction is not a lesser-included offense of the offense charged is because simple assault is "any attempt or offer with force or violence to do a corporal hurt to another, whether from *malice* or from *wantonness,* as by striking at him, or even holding up one's fist at him in a threatening or insulting manner, or pointing a weapon at him *within reach.*" *Jones v. Commonwealth,* 184 Va. 679, 681, 36 S.E.2d 571, 572 (1946) (internal quotations and citations omitted) (emphasis in original). Thus, simple assault involves both putting in fear and an immediately present ability, neither of which are required for attempted murder.

Conclusion

For the foregoing reasons, it is respectfully submitted that this Honorable Court reverse the judgments of conviction of October 4, 2001 and enter final judgments of acquittal.

Respectfully submitted,

LOLITA EDWARDS

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Certificate

I, Joseph R. Winston, a member of the Bar of this Court, hereby certify:

(a) The appellant is Lolita Edwards, defendant below. Appellee is the Commonwealth of Virginia.

(b) The names, addresses, and telephone numbers of counsel are:

Counsel	***Party Represented***
Joseph R. Winston (VSB # 17746) Special Appellate Counsel Public Defender Commission 701 East Franklin Street, Suite 1416 Richmond, Virginia 23219 *Phone: (804) 225-3297* *Fax: (804) 371-8326* *email: Joe_Winston@pdcmail.state.va.us*	Defendant-Appellant
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(c) that on July 22, 2003, I served three copies of the foregoing document on the foregoing counsel, which include all of the parties required to be served, by depositing three copies of it in a United States mailbox with first class postage prepaid and addressed as listed above.

(d) Appellant desires to state orally and in person the reasons why the judgment below should be reversed.

_____

Joseph R. Winston