FOR PUBLICATION

IN THE SUPERIOR COURT OF THE

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, **Plaintiff,** **vs.** **CHUPWEI TOIER WILLY,** **Defendant.**	**CRIMINAL CASE NO. 09-0089D** **ORDER DENYING DEFENDANT'S MOTION TO DISMISS ASSAULT AND BATTERY COUNT**

THIS MATTER came before the Court for a hearing on Defendant's motion to dismiss the assault and battery count in the Information. The CNMI ("Government") was represented by Assistant Attorney General Elchonon Golob. Defendant Chupwei Toier Willy ("Defendant") appeared with Assistant Public Defender Richard Miller. Based on the pleadings, papers on file and arguments of counsel, the Court denied Defendant's motion from the bench and now issues this written order.

I. FACTS

Defendant was arrested and charged by Information with one count of Assault and Battery in violation of 6 CMC § 1202(a) and one count of Child Abuse in violation of 6 CMC § 5312(a)(1). (Information at 1-2.) The victim, also the daughter of the Defendant, was a ten-year-old female who had gone to school with extensive bruising along her back and legs. The school promptly contacted the Division of Youth Services and an investigation ensued. Photographs were taken of the victim's injuries and she was also brought to the Commonwealth Health Center for a medical examination.

On October 13, 2010, Defendant submitted a Motion to Dismiss Assault and Battery Count. Defendant asserts that assault and battery is a lesser included offense of child abuse and it therefore merges with the child abuse count.

II. MOTION TO DISMISS DUE TO MERGER OF COUNTS

A. Legal Standard

Our constitution's Double Jeopardy Clause provides: "[n]o person shall be put twice in jeopardy for the same offense regardless of the governmental entity that first institutes prosecution." NMI Const. art. I, § 4(e). Our Supreme Court has explained that "[o]ur double jeopardy clause is patterned after the Double Jeopardy Clause of the U.S. Constitution." *Commonwealth v. Oden*, 3 NMI 186, 206 (1992). The Double Jeopardy Clause of the U.S. Constitution is made applicable to the Commonwealth through the Covenant. *Id.*

Since the Double Jeopardy Clause forbids multiple punishment of the "the same" offense,[1] the definition of "the same" is critical. To determine what makes two offenses the same, the Supreme Court uses the *Blockburger* test.[2] *Blockburger v. United States*, 284 U.S. 299 (1932). Under *Blockburger*, the offenses are different if each "requires proof of a fact which the other does not." *Id.* at 304.

The CNMI has adopted the "lesser included offense" analysis enunciated by the Supreme Court in *Brown v. Ohio*.[3] *See Commonwealth v. Manila*, 2005 MP 17 ¶ 40 (stating that "[a]n offense is a lesser included offense if its elements 'are a subset of the charged offense.' This determination is accomplished by a textual comparison of the pertinent statutes.") (quoting *Commonwealth v. Kaipat*, 4 NMI 300, 303 (1995)). Offenses "merge" when a court determines that the legislature did not intend

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[1]The Supreme Court has interpreted the Double Jeopardy Clause to allow multiple punishment for the same offense if expressly authorized by the legislature. *Missouri v. Hunter*, 459 U.S. 359, 366 (1983).

[2]In *United States v. Dixon*, 509 U.S. 688, 704 (1993), the Supreme Court overruled *Grady v. Corbin*, 495 U.S. 508, 521-22 (1990), expressly rejecting the conduct based test in favor of the *Blockburger* same-elements test.

[3]*Brown v. Ohio*, 432 U.S. 161, 166-67 n.6 (1977) (explaining that "we conclude today that a lesser included and a greater offense are the same under *Blockburger*.").

to allow for separate convictions and punishment. *See United States v. Mourad*, 729 F.2d 195, 202 (2d Cir. 1984). Accordingly, the Court must conduct a textual analysis comparing the assault and battery and child abuse statutes.

B. Discussion

The text of the relevant statutes read as follows:

> **Assault and Battery**.
> (a) A person commits the offense of assault and battery if the person unlawfully strikes, beats, wounds, or otherwise does bodily harm to another, or has sexual contact with another without the other persons consent.[4]

> **Child Abuse or Neglect: Offense Defined.**
> (a) A person commits the offense of child abuse if the person:
> (1) Willfully and intentionally strikes, beats or by any other act or omission inflicts physical pain, injury or mental distress upon a child under the age of 18 who is in the persons custody, such pain or injury being clearly beyond the scope of reasonable corporal punishment, with the result that the child's physical or mental health and well-being are harmed or threatened.[5]

The elements of assault and battery are not subsets of child abuse. The *actus reus* for each crime are not the same. The *actus reus* of child abuse (when a defendant "strikes, beats or by any other act or omission inflicts physical pain, injury or mental distress upon a child under the age of 18 who is in the person's custody . . .")[6] differs from that of assault and battery (when a defendant "unlawfully strikes, beats, wounds, or otherwise does bodily harm to another, or has sexual contact with another without the other persons consent.").[7] Assault and battery requires touching, while child abuse does not.

Moreover, the *mens rea* is different for each of these crimes. Child abuse requires an act that is "willful[] and intentional[],"[8] which makes child abuse a specific intent crime, whereas assault and

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[4] 6 CMC § 1202.

[5] 6 CMC § 5312(a)(1).

[6] *Id.*

[7] 6 CMC § 1202.

[8] 6 CMC § 5312(a)(1).

battery is a general intent crime with no requirement of willful and intentional conduct.[9] Thus, both the *mens rea* as well as the *actus reus* for assault and battery are different from those of child abuse.

Defendant, recognizing that the statutes have different elements, argues that "proving up" the elements of child abuse, demands that the Government have already "proved up" the elements for assault and battery. (Reply to Government's Opposition to Defendant's Motion to Dismiss Assault and Battery Count at 1-2.) This argument echoes the rule established in *Grady v. Corbin* which prohibits "a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted." *Grady*, 495 U.S. at 510.

In *United States v. Dixon*, the Supreme Court overruled *Grady's* "same-conduct" test finding it to be "wholly inconsistent with earlier Supreme Court precedent." *Dixon*, 509 U.S. at 704. The Court reinstated *Blockburger's* same-element test which does not consider the conduct of the defendant. *Id.*

Child abuse and assault and battery statutes exist to hold parents accountable for abuses against their children, but it is possible to violate one without violating the other.[10] There is no inherent incompatibility between these crimes. The Court will not judicially impute legislative intent to limit punishments over crimes against children.

III. CONCLUSION

For the forgoing reasons, the Court hereby DENIES Defendant's Motion to Dismiss Assault and Battery Count.

SO ORDERED this 29th day of October, 2010.

/s/
PERRY B. INOS, Associate Judge

[9] 6 CMC § 1202.

[10] One offense is necessarily included in another if it is impossible to commit the greater without also having committed the lesser. *Commonwealth v. Mitchell*, 1997 MP 4. Assault and battery requires a touching, whereas child abuse may come about through an omission. Therefore, it is possible to commit child abuse without also having committed assault and battery.