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MCDONALD, C. J., with whom SULLIVAN, J., joins, dissenting in part and concurring in part.[1] The defendant, Santos Miranda, had been charged with twenty-five counts of first degree assault and one count of risk of injury to a child. These offenses were all alleged to have been committed against the same infant on diverse dates between October, 1992, and January 27, 1993. The trial court found the defendant guilty of six counts of first degree assault. Of those, counts two, three and five charged that the defendant had caused the victim's skull fractures, under circumstances evincing an extreme indifference to human life, by recklessly: ''allowing'' the victim ''to live in a situation where she was at repeated risk of injury to her person, which created a risk of death''; ''failing to take measures to prevent [the victim] from living in a situation that placed her at risk of repeated injury . . . which created a risk of death''; and engaging in conduct creating a risk of death to the victim. The defendant was also found guilty on counts seven, eight and ten, which repeated the language of counts two, three and five and charged the defendant with causing the victim to suffer a rectal laceration.

The trial court found the defendant not guilty of nineteen counts of first degree assault. Four of those counts accused the defendant of intentionally inflicting a serious injury by use of a dangerous instrument and five of those counts accused him of not preventing his girlfriend, the victim's mother, ''from repeatedly physically injuring'' the victim.

Count twenty-six also charged the defendant with a violation of General Statutes (Rev. to 1991) § 53-21, the risk of injury statute. That count charged that the defendant, ''under circumstances evincing an extreme indifference to human life,'' did wilfully or unlawfully cause the victim, a child under sixteen, to be placed in such a situation that her life or limb was endangered or her health was likely to be injured. The trial court found the defendant guilty on that count.

The trial court sentenced the defendant to a term of fifteen years on count two. On count three, the defendant was sentenced to fifteen years to be served ''consecutive to the sentence on the second count'' and on count five the sentence was fifteen years to be served concurrently to the sentence on count two. The court then stated that the sentences on counts two, three and five were to be concurrent.

The trial court also sentenced the defendant to a term of fifteen years on count seven. A fifteen year term on count eight, to be served concurrently with that imposed on count seven, and a fifteen year term on count ten, to be served concurrently with that on counts seven and eight, were also imposed. The sentences on counts seven, eight and ten were to be served consecu-

tively to the sentences on counts two, three and five. The court also sentenced the defendant on the risk of injury count to ten years to be served consecutively to the first degree assault sentences. This was stated to be an effective sentence of forty years. As noted by the majority, the mother of the victim was sentenced to a seven year term upon her conviction for intentionally assaulting the victim and for risk of injury.

I

While I concur with the opinion of the majority that there is no merit to the defendant's claims as to his conviction for risk of injury, I dissent from the majority's sustaining of the defendant's convictions for first degree assault.

Counts two, three, seven and eight specified that the defendant either allowed the victim to live in a situation of repeated risk of injury or failed to prevent the victim from living or being in a situation that placed her at risk of repeated injury and death, and thereby caused serious physical injury to the victim. The trial court had found the defendant guilty, because he ''failed to act to help or aid [the victim] by promptly notifying authorities of her injuries, taking her for medical care, removing her from her circumstances and *guarding* her from future abuses.'' (Emphasis added; internal quotation marks omitted.) *State* v. *Miranda*, 245 Conn. 209, 214, 715 A.2d 680 (1998) (*Miranda I*). The gist of the trial court's findings supporting the assault convictions was the defendant's failure to guard against future injury, which resulted in subsequent serious injury. Under this theory, the defendant was liable for those injuries he should have known would be inflicted in the future if he continued to allow the victim to be at risk in her ''circumstances.''

The evidence at the trial was that the defendant was living with the victim's mother, who was his girlfriend, and her two children in his girlfriend's apartment. In these circumstances, the victim, an infant under the age of four months, suffered repeatedly inflicted traumatic injuries.

In affirming the defendant's convictions for first degree assault on counts five and ten, the majority relies upon the evidence that the victim was living in a household with her mother and was being battered. It also relies on evidence that the mother did not seek medical aid for her child despite the defendant's urging that she do so. The majority concludes, because the defendant himself did not seek medical care or report the victim's abuse, that the victim subsequently suffered additional violent injury. Since the trial court found that the defendant did not himself inflict those injuries, the defendant's guilt for first degree assault rests upon his failure to guard the victim from another person's repeated assaults.

In *Miranda I* this court looked to the mother as the person from whose abuse the defendant was required to guard the victim. Id., 218. This court held in *Miranda I* that the defendant owed a duty "to protect the victim from her mother's abuse . . . ." Id.

Under all the first degree assault counts, the state was required to produce evidence to establish that the defendant allowed repeated physical violence to be inflicted on the victim, which caused her injuries. The defendant did not himself batter the victim, and the evidence revealed the victim's mother as the only other person with the opportunity repeatedly to assault the four month old infant.

As the court pointed out in *Miranda I*, the defendant's guilt for reckless assault because of omission depended upon whether he effectively could prevent future abuse. In *Miranda I*, supra, 245 Conn. 227, we stated that the defendant could have sought medical care for the victim "throughout the four month period during which she was abused by her mother . . . ." In this case the state could point only to the victim's mother as the one battering the victim, and the defendant could be guilty of reckless assault only if he did not prevent his girlfriend, the mother, from abusing the victim. The trial court, however, found the defendant not guilty of counts one and six of the information charging the defendant with reckless conduct in not preventing the victim's mother from repeatedly assaulting the victim, which resulted in serious injury. Once the trial court acquitted the defendant of that specification, the double jeopardy clause prohibited the affirmance of his conviction for first degree assault on those grounds. See *Sanabria* v. *United States*, 437 U.S. 54, 69, 72–73, 98 S. Ct. 2170, 57 L. Ed. 2d 43 (1978); *Benton* v. *Maryland*, 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969); *United States* v. *Ball*, 163 U.S. 662, 670, 16 S. Ct. 1192, 41 L. Ed. 300 (1896).

I also dissent on due process grounds. In applying this new rule after the fact, this court "ex post facto" now extends the scope of criminal liability for third party Penal Code crimes beyond the Penal Code provisions and our previous case law. General Statutes § 53a-59 (a) (3), the first degree assault statute under which the defendant was charged, is part of the Connecticut Penal Code, and the Penal Code itself in General Statutes § 53a-8 provides for "[c]riminal liability for [the] acts of another." Section 53a-8 (a) makes one liable for the crimes of another if one "solicits, requests, commands, importunes or intentionally aids another person" in the commission of an offense. Our cases have long and uniformly held that mere presence as an inactive companion, or "passive acquiescence," does not establish criminal liability for the acts of a third party. *State* v. *Hicks*, 169 Conn. 581, 584–85, 363 A.2d 1081 (1975); *State* v. *Laffin*, 155 Conn. 531, 536, 235 A.2d

650 (1967); *State* v. *Purdy*, 147 Conn. 7, 11, 156 A.2d 193 (1959). In this case, the theory of liability was that the defendant failed to act. The essence of the defendant's criminal conduct was inaction or passive acquiescence. Counts two, three, seven and eight specified that the defendant allowed the victim to be in a situation of risk or failed to prevent the victim from being in such a situation. We have held that such specifications encompass one's ''acquiescence'' in a situation of risk. See *State* v. *Jason B.*, 248 Conn. 543, 567, 729 A.2d 760, cert. denied, 528 U.S. 967, 120 S. Ct. 406, 145 L. Ed. 2d 316 (1999). Before today this would not support criminal liability for the criminal acts of a third party.

This case now extends criminal liability beyond the traditional boundaries. It creates criminal liability for allowing a ''situation'' or conditions to exist where some other person may independently decide to cause, and does cause, serious physical injury. That person decided to and did harm the victim, and that decision was the cause in fact of her injuries. Without that person's actions, no such injury would have been inflicted. Section 53a-59 (a) (3) was modeled after § 120.10 (3) of the New York Penal Code. None of the examples of the application of the New York Penal Code definition of such reckless conduct involves a third party actually inflicting the injury. See *People* v. *Register*, 60 N.Y.2d 270, 277–78, 457 N.E.2d 704, 469 N.Y.S.2d 599 (1983).

This extension of liability is therefore ''a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope . . . .'' *United States* v. *Lanier*, 520 U.S. 259, 266, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997).

II

I disagree as well with the majority's upholding of multiple sentences for violations of the assault statute and the risk of injury statute that arose out of the defendant's failure to guard the same victim from abuse.

The majority, in sustaining the conviction for risk of injury, finds that the state proved that the defendant acted wilfully, that is, had an intent to cause the victim to be in a situation of risk. See *State* v. *Payne*, 240 Conn. 766, 774, 695 A.2d 525 (1997). The trial court had found the defendant guilty on counts two, three, five, seven, eight and ten of the information, which alleged that the defendant recklessly allowed the victim to be, or failed to prevent the victim from living, ''in a situation'' where she was at risk of repeated injury and death and thereby caused serious physical injury. In sustaining the defendant's convictions on counts five and ten for assault in the first degree, the majority finds that the defendant recklessly had engaged in conduct that created a risk of death because he failed to guard the victim from repeated abuse and thereby caused the

victim subsequently to sustain serious physical injuries. The same conduct, or failure, was the basis of the risk of injury convictions. Given those bases of multiple criminal liability, I would conclude that the defendant may not be punished under the first degree assault statute for having recklessly, and thus unintentionally, failed to act and punished as well under the risk of injury statute for having wilfully, and thus intentionally, failed to act. By no rational theory could the defendant have been found guilty of both crimes.

In *State* v. *King*, 216 Conn. 585, 583 A.2d 896 (1990), the defendant had been convicted of the crimes of both attempted murder and reckless assault in the first degree under § 53a-59 (a) (3). Following such cases as *People* v. *Gallagher*, 69 N.Y.2d 525, 529, 508 N.E.2d 909, 516 N.Y.S.2d 174 (1987), this court reversed those ''mutually exclusive and inconsistent'' convictions. *State* v. *King*, supra, 593–94, 603. We recognized in *King* that ''[r]eckless conduct [as for assault under § 53a-59 (a) (3)] is not intentional conduct [as for attempted murder] because one who acts recklessly does not have a conscious objective to cause a particular result.'' (Internal quotation marks omitted.) Id., 594, quoting *State* v. *Beccia*, 199 Conn. 1, 4, 505 A.2d 683 (1986). In the present case the court also would have had to find that the defendant simultaneously acted intentionally as to § 53-21 and recklessly as to § 53a-59 (a) (3) with respect to the victim's situation. We followed *King* in *State* v. *Hinton*, 227 Conn. 301, 630 A.2d 593 (1993), explaining that such mutually exclusive mental states could not exist as to the same act against a single victim. Accordingly, I believe that this court should reverse the defendant's convictions for both of the alternative and mutually exclusive crimes, in accordance with *King* and *Hinton*, and remand the case for a new trial as to all charges where the charges properly would be considered in the alternative.[2] As stated in *King* and reiterated in *Hinton*, we do not have jurisdiction to determine as to which count the defendant should be found guilty. ''[I]t is not for this court, on appeal, to make a factual determination as to the defendant's mental state at the time the alleged crime was committed.'' *State* v. *King*, supra, 595; *State* v. *Hinton*, supra, 321.

The state concedes that the defendant's six assault convictions were based upon two criminal acts, and, accordingly, that the defendant should have been convicted of two rather than six counts of first degree assault. See *State* v. *Miranda*, 56 Conn. App. 298, 301 n.5, 742 A.2d 1276 (2000). The state now requests this court to affirm the convictions with respect to counts five and ten, charging unspecified reckless conduct, and to vacate the convictions with respect to counts two, three, seven and eight specifying the reckless conduct.

I agree with the state's concession that the defendant

may not be punished more than once for the same criminal act of violating a criminal statute. I submit, however, that this defect requires a remand for a new trial as to all six first degree assault counts. It is not the function of this court, an appellate court, to find facts after hearing evidence and determine in what manner and as to which count the defendant violated the first degree assault statute. That function is properly performed in the trial court. In *Dexter Yarn Co.* v. *American Fabrics Co.*, 102 Conn. 529, 538, 129 A. 527 (1925), we quoted *Styles* v. *Tyler*, 64 Conn. 432, 450, 30 A. 165 (1894): " 'Two courts are established and the character of their jurisdiction described by the Constitution itself; one [Superior Court] with a supreme jurisdiction in the trial of causes, and one [Supreme Court] with a supreme and final jurisdiction in determining in the last resort the principles of law involved in the trial of causes.' "

The court in *Dexter Yarn Co.* went on to state: "We further held, as to the Supreme Court, that the jurisdiction of this court as fixed by the Constitution relates to the correction of errors in law and not to the retrial of questions of fact. *Styles* v. *Tyler*, supra [64 Conn. 450]; *Atwater* v. *Morning News Co.*, 67 Conn. 504, 525, 34 Atl. 865 [1896]." *Dexter Yarn Co.* v. *American Fabrics Co.*, supra, 102 Conn. 538. "Our jurisdiction cannot be enlarged, to permit the retrial of facts by us, by legislative enactment or rules of court; *Atwater* v. *Morning News Co.*, supra [525]; *Hoadley* v. *Savings Bank of Danbury*, 71 Conn. 599, 613, 42 Atl. 667 [1899]; and obviously not by the consent or acquiescence of the parties." *Dexter Yarn Co.* v. *American Fabrics Co.*, supra, 538.

In *State* v. *Wilson*, 199 Conn. 417, 438, 513 A.2d 620 (1986), we simply stated: "This court has no constitutional jurisdiction to decide disputed issues of fact," and we have applied this principle in refusing to decide the counts of an information as to which a defendant should be found guilty. See *State* v. *Hinton*, supra, 227 Conn. 321; *State* v. *King*, supra, 216 Conn. 595.

In counts two, three, seven and eight the state specified the reckless conduct it was charging in order to give the defendant the notice of the nature of the charges against him required under the sixth amendment of the United States constitution. It would be pointless to give such notice without also informing the defendant of the specification on which he was convicted.

The defendant was a live-in boyfriend in his girlfriend's apartment. Because the defendant had undertaken "unofficially" a caretaker role in his "familial relationship" with his girlfriend and her children, he owed a duty of care to the victim. The fact remains, however, that the defendant had no right to take the infant victim away from her mother or to direct the child's upbringing or circumstances. All he could do

was call an ambulance, which would put the authorities on notice. Because he failed to do this earlier, he was sentenced to forty years, while the girlfriend serves seven years for beating the infant victim.

In sentencing the defendant, the trial court imposed consecutive sentences on counts two, seven and twenty-six, with concurrent sentences on counts three and five as to count two, and on counts eight and ten as to count seven. I agree with the majority in rejecting the state's request that the sentences imposed under counts five and ten remain. However, I would remand the six assault counts and the risk of injury count for a new trial where a finding could be properly made as to issues in those counts.

I therefore respectfully dissent.

[1] This is one case where "because of various legitimate factors, decisions of this court have not been rendered until many months after their oral argument, sometimes not until the following court year." *Doyle* v. *Metropolitan Property & Casualty Ins. Co.*, 252 Conn. 912, 914B, 746 A.2d 1257 (1999). Because, as appears at the beginning of this opinion, I participated in this case after reaching mandatory retirement age, it should be noted that this dissent was prepared within 150 days of the opinion it addressed. See id.

[2] Although the defendant briefed the issue of double jeopardy arising from multiple sentences for one offense, he did not bring to our attention the doctrine of *State* v. *King*, supra, 216 Conn. 593–94. However, we have recognized that imposing multiple sentences for mutually exclusive offenses deprives a defendant of his right to have an essential element of the offense, his mental state, be proven. *State* v. *Hinton*, supra, 227 Conn. 313–14. Accordingly, I would apply *King* to this case.