NOTES

TEXAS ALLOWS SUCCESSIVE PROSECUTIONS OF A DEFENDANT FOR THE SAME STATUTORY VIOLATION OCCURRING IN THE SAME CRIMINAL TRANSACTION: *Ex parte Rathmell*, 717 S.W.2d 33 (Tex. Crim. App. 1986).

While driving intoxicated, James Rathmell struck an automobile carrying Bonnie Watkins and Devary Durrill.[1] Both women died as a result of the collision.[2] Rathmell was separately indicted for the involuntary manslaughter of both women under section 19.05(a)(2) of the Texas Penal Code.[3] He was first convicted of Watkin's death and sentenced to two years' imprisonment.[4] After this first conviction, Rathmell sought to have the second indictment dismissed, alleging that a trial on the merits would expose him to double jeopardy.[5] The district court denied Rathmell's writ of habeas corpus.[6] On appeal, the Corpus Christi Court of Appeals reversed the district court's determination, finding that prosecution of Rathmell for Durrill's death would violate his protection against double jeopardy.[7] The Texas Court of Criminal Appeals reversed the court of appeals, holding that the prosecution of Rathmell for each death would not be a double jeopardy violation.[8]

I. DOUBLE JEOPARDY AND THE "CARVING DOCTRINE"

The United States Constitution provides in the fifth amendment: "nor shall any person be subject for the same offense to be twice

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1. *Ex parte* Rathmell, 664 S.W.2d 386, 387 (Tex. App.—Corpus Christi 1983, pet. granted).

2. *Id.*

3. *Ex parte* Rathmell, 717 S.W.2d 33, 34 (Tex. Crim. App. 1986). Section 19.05 provides: "(a) a person commits an offense if he; . . . (2) by accident or mistake when operating a motor vehicle while intoxicated and, by reason of such intoxication, causes the death of an individual." TEX. PENAL CODE ANN. § 19.05(a)(2) (Vernon 1974).

4. 664 S.W.2d at 387.

5. 717 S.W.2d at 34.

6. *Id.*

7. 664 S.W.2d at 391. "Here, appellant is not being twice punished for multiple distinct acts, but, if convicted, would be again punished for the exact same singular act." *Id.*

8. 717 S.W.2d at 36.

put in jeopardy of life or limb."[9] The protections that flow from the guarantee are against a second prosecution for the same offense after acquittal, against a second prosecution for the same offense after conviction, and against multiple punishments for the same offense.[10] The Supreme Court has held that the fifth amendment and its protections are fully applicable to the states, as the prohibition against double jeopardy is "fundamental to the American scheme of justice."[11]

Texas has long recognized this policy, providing for its own constitutional guarantee against double jeopardy before it was mandated by the Supreme Court.[12] Like the federal guarantee, the Texas prohibition provides that "[n]o person, for the same offense, shall be twice put in jeopardy of life or liberty, nor shall a person be again put upon trial for the same offense."[13]

While the intended result of the double jeopardy provision is clear under both federal and state interpretations, its application has been much less than clear. Each sovereign has had particular difficulties with the meaning of "same offense," the key concept in determining the existence of double jeopardy.[14] To guide courts in their determination of this issue, the Supreme Court has provided a test in *Blockburger v. United States*:[15] "[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 an additional fact which the other does not."[16]

The *Blockburger* holding was reaffirmed by the court in *Brown v. Ohio*.[17] In *Brown*, the defendant stole a car, was found driving

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9. U.S. CONST. amend. V.

10. North Carolina v. Pearce, 395 U.S. 711, 717, 89 S. Ct. 2072, 2076, 23 L. Ed. 2d 656, 664-65 (1969).

11. Benton v. Maryland, 395 U.S. 784, 796, 89 S. Ct. 2056, 2063, 23 L. Ed. 2d 707, 717 (1969).

12. TEX. CONST. art. I, § 14, interp. commentary (Vernon 1984).

13. TEX. CONST. art. I, § 14.

14. The Supreme Court has promulgated many variations on its basic test for determining the existence of "same offense." "Variations of the test speak of the same 'act,' the same 'transactions,' or same 'intent'. . . ." C. WHITEBREAD, CRIMINAL PROCEDURE—AN ANALYSIS OF CONSTITUTIONAL CASES AND CONCEPTS § 30.04, at 743 (2d ed. 1968) [hereinafter WHITEBREAD]. Texas has struggled between application of the same transaction and same evidence tests. *Ex parte* McWilliams, 634 S.W.2d 815, 823 (Tex. Crim. App.), *cert. denied*, 459 U.S. 1036 (1982).

15. 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

16. *Id.* at 304, 52 S. Ct. at 122, 76 L. Ed. at 309.

17. 432 U.S. 161, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977).

the car in another county nine days later and charged with joyriding—"taking or operating [a] car without the owner's consent."[18] After serving thirty days in jail for this offense, the defendant returned to the county where the car had been initially stolen and was there charged with auto theft and joyriding.[19] The court found that under *Blockburger*, a lesser-included and greater offense are the same for determination of double jeopardy violations for,

> as is invariably true of a greater and lesser included offense, the lesser offense—joyriding—requires no proof beyond that which is required for conviction of the greater—auto theft. The greater offense is therefore by definition the "same" for purposes of double jeopardy as any lesser offense included in it.[20]

The Supreme Court has recognized that *Blockburger* "focuses on the proof necessary to prove the statutory elements of each offense, rather than on the actual evidence to be presented at trial."[21] Subsequent decisions have further modified and explained the test,[22] notably *Illinois v. Vitale*.[23] There, the defendant was convicted of failing to reduce speed to avoid an accident and was subsequently indicted for manslaughter.[24] The former offense required a showing of failing to slow, while the latter required a showing of reckless operation of a vehicle.[25] Indeed, the statutory elements were different under an application of *Blockburger*, though the evidence in each trial may have been the same (defendant failed to slow). Thus, the

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18. *Id.* at 162-63, 97 S. Ct. at 2223, 53 L. Ed. 2d at 192.

19. *Id.* at 162-63, 97 S. Ct. at 2224, 53 L. Ed. 2d at 192.

20. *Id.* at 168, 97 S. Ct. at 2226-27, 53 L. Ed. 2d at 195-96 (emphasis added).

21. Illinois v. Vitale, 447 U.S. 410, 416, 100 S. Ct. 2260, 2265, 65 L. Ed. 2d 228, 235 (1980).

22. *See, e.g.*, Albernaz v. United States, 450 U.S. 333, 339, 101 S. Ct. 1137, 1142, 67 L. Ed. 2d 275, 281 (1981) (*Blockburger* statisfied as conspiracy to distribute marihuana and conspiracy to import marihuana each require proof of a fact which the other does not); Illinois v. Vitale, 447 U.S. at 420-21, 100 S. Ct. at 2267, 65 L. Ed. 2d at 238 (1980) (proof used in one trial to convict cannot be used in subsequent proceeding for violation of a second statute, though the elements in the two are not necessarily the same); Whalen v. United States, 445 U.S. 684, 691, 100 S. Ct. 1432, 1437, 63 L. Ed. 2d 715, 723 (1980) (*Blockburger* utilized to determine whether Congress intended that two statutory offenses may be punished consecutively); Brown v. Ohio, 432 U.S. 161, 164, 97 S. Ct. 2221, 2227, 53 L. Ed. 2d 187, 193 (1977) (separate statutory crimes need not be identical—either in elements or proof—in order to be the same under the Double Jeopardy Clause).

23. 447 U.S. 410, 100 S. Ct. 2260, 65 L. Ed. 2d 228 (1980). One noted commentator has characterized *Blockburger* as simply a variation of the "same evidence" test. WHITEBREAD, *supra* note 14, § 30.04, at 739-40.

24. 447 U.S. at 412-13, 100 S. Ct. at 2263, 65 L. Ed. 2d at 233.

25. *Id.*

state should have been able to proceed, but the Supreme Court modified *Blockburger*, reasoning that "if in the pending manslaughter prosecution Illinois relies on and proves a failure to slow . . . as the reckless act necessary to prove manslaughter, [defendant] would have a substantial claim of double jeopardy."[26] The modification has been characterized as "proof of criminal conduct in one trial and conviction cannot be used again in a prosecution for another crime under a second statute even though the elements in two statutes are not necessarily the same."[27]

In Texas the standard was stricter. Rather than determining if the same evidence was necessary under separate statutes, the "same transaction" standard was utilized in a majority of cases.[28] Under this standard, if several offenses, though distinct as to statutory elements under *Blockburger*, were violated in the course of one criminal episode, only one prosecution against the defendant was allowed.[29] This was the doctrine known as "carving," and it became the rule in Texas.[30]

A. The Old Carving Doctrine

The carving doctrine was unique to Texas for many years. It had been part of a long-standing tradition first applied in 1876.[31] In *Quitzow v. State*,[32] the defendant stole both a horse and its bridle.[33] After his conviction of horse theft, the court held that he could not subsequently be tried for theft of the bridle.[34] "The prosecutor has a right to carve as large an offense out of this transction as he could, yet he must cut only one."[35] The rule was further clarified in *Simco v. State*,[36] explaining that the "defendant cannot now be indicted and put upon trial for the same acts, in the same transaction,

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26. *Id.* at 421, 100 S. Ct. at 2267, 65 L. Ed. 2d at 238.
27. Steele, *A Review of the Double Jeopardy Defense in Texas*, 12 TEX. TECH L. REV. 393, 412 (1981).
28. Note, *The Double Jeopardy Carving Doctrine Is Abandoned in Texas*, 14 TEX. TECH L. REV. 495, 499 (1983).
29. *See* Quitzow v. State, 1 Tex. Ct. App. 47, 53-54 (1876).
30. *See id.*
31. *Id.*
32. *Id.*
33. *Id.* at 49.
34. *Id.* at 53-54.
35. *Id.*
36. 9 Tex. Ct. App. 338 (1880).

identical with the first case as to property, ownership, party, time, venue, witnesses and evidence."[37] In *Simco* the court noted that "[a]lthough the two indictments were nominally and mechanically for different offenses, punished under different sections of the Penal Code, and although the evidence required to convict . . . was different," the first indictment barred the second.[38] Thus, the carving doctrine, with its necessary determination of the "same transaction," became a fundamental part of Texas criminal jurisprudence.[39]

The doctrine, however, had a troubled history. Indeed, its application has been characterized as "unsound" and "erratic."[40] Initially, Texas courts came to rely on the same transaction test, whereby subsequent prosecutions were barred if the multiple offenses took place during the same transaction.[41] Inconsistencies began to arise when some result-oriented courts chose to apply the "same evidence" test[42] to circumvent the strict dictates of the carving doctrine.[43]

Under the same evidence test, a court looked to elements of proof within the violated statutes, disregarding the fact that the offenses may have occurred during the same criminal episode or transaction.[44] In *Herera v. State*, the appellant had been previously convicted of assault with intent to murder and had served seven years.[45] Subsequently, he was convicted of robbery and given a

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37. *Id.* at 340.

38. *Id.* at 341 (citing Vestal v. State, 3 Tex. Ct. App. 648 (1878)).

39. Note, *The Double Jeopardy Carving Doctrine Is Abandoned in Texas*: Ex parte McWilliams, 14 TEX. TECH L. REV. 495, 496-98 (1983).

40. *Ex parte* McWilliams, 634 S.W.2d 815, 824 (Tex. Crim. App.), *cert. denied*, 459 U.S. 1036 (1982). ("The doctrine of carving is unsound and its application has been erratic.").

41. *See Ex parte* Curry, 590 S.W.2d 712, 713 (Tex. Crim. App. 1982) (convictions of aggravated rape and aggravated robbery arose out of one single assaultive transaction; thus the second conviction is violative of double jeopardy provisions); Tatum v. State, 534 S.W.2d 592, 593 (Tex. Crim. App. 1976) (two of three convictions for aggravated sexual abuse, aggravated rape and aggravated robbery committed against same individual during same transaction must be overturned as prosecutor may carve only one offense); Robinson v. State, 530 S.W.2d 592, 593 (Tex. Crim. App. 1975) (criminal trespass and subsequent bicycle theft are separate transactions, thus carving doctrine will not apply); Paschal v. State, 49 Tex. Crim. 111, 114, 90 S.W. 878, 880 (1905) (conviction for aggravated assault was a bar to a subsequent prosecution for assault with intent to murder, based on the same acts).

42. *E.g.*, Herera v. State, 35 Tex. Crim. 607, 611, 34 S.W. 943, 944 (1896) (conviction of assault with intent to murder bars prosecution of robbery committed at same time since evidence presented would not differ as to statutory elements).

43. Note, *The Double Jeopardy Carving Doctrine Is Abandoned in Texas*: Ex parte McWilliams, 14 TEX. TECH L. REV. 495, 498-502 (1983).

44. 35 Tex. Crim. at 611, 34 S.W. at 944.

45. *Id.* at 607, 34 S.W. at 943.

sentence of twenty years.[46] The court determined that the robbery and assault were within the same transaction, yet the second conviction was barred because proof of the assault was necessary to the robbery prosecution and proof of the robbery was necessary to the assault prosecution.[47] This result satisfied the rule the court had earlier approved: "when one offense is a necessary element in, and constitutes an essential part of, another offense, and both are in fact but one transaction, a conviction or acquittal of one is a bar to the prosecution for the other."[48] If the elements were different, the prosecutor was permitted to prosecute for more than one offense.

Thus, in *Duckett v. State*,[49] the same evidence test was used to overturn a defendant's robbery conviction in light of like evidence presented at his earlier prosecution for assault with attempt to murder the same robbed individual.[50] The court of criminal appeals recognized the carving doctrine, finding that "when one has been convicted, the State cannot, upon the same evidence, again convict him of the same act."[51] Yet, in *Douthit v. State*, the same transaction test was used to uphold a defendant's successive convictions for assault with attempt to rape and rape upon the same victim.[52] The court avoided application of the carving doctrine, finding each act was sufficiently separated by time and place: "[I]n the present case we have a continuous assaultive action. . . ."[53] Clearly, under a same evidence test the multiple convictions would have been overturned.

Inconsistencies not only existed between application of the two tests, but within the interpretation of the favored "same transaction" test. In *Lee v. State*, the defendant, relying on *Duckett*, appealed his three convictions of sodomy upon the same individual.[54] The court found the offenses were "separate and distinct" and "not prove[d] by the same acts or evidence."[55] However, the court in *Ex parte Calderon* reversed a defendant's multiple convictions for indecent

46. *Id.* at 611, 34 S.W. at 944.
47. *Id.*
48. *Id.* (quoting State v. Smith, 43 Vt. 324, 326 (1870)).
49. 454 S.W.2d 755, 757 (Tex. Crim. App. 1972).
50. *Id.* at 757-58.
51. *Id.*
52. Douthit v. State, 482 S.W.2d 155, 161 (Tex. Crim. App. 1971).
53. *Id.*
54. Lee v. State, 505 S.W.2d 816, 818 (Tex. Crim. App. 1974).
55. *Id.*

exposure, fondling and statutory rape upon the same person on the same occasion.[56] The court applied the carving doctrine, holding that "if a continuous assault is made on the same person in the same transaction, the State can carve but one conviction out of the event."[57] The *Calderon* court acknowledged, as the *Lee* court had, that the "three offenses [were] in contemplation of law separate and distinct," yet distinguished the facts of *Calderon* from *Lee* by finding that the offenses were proved by the same evidence.[58]

The record of inconsistencies in applying the carving doctrine led to extensive criticism.[59] Adoption of a new test that would lead to more uniformity within the criminal justice system was urged by dissenters on the court of criminal appeals, who, in *Orosco v. State*,[60] declared their frustration with the carving doctrine and argued that cases applying the doctrine were of little or no consequence.[61] *Orosco* concluded that when offenses are committed against the same person in the same transaction, conviction for more than one of the offenses will violate double jeopardy guarantees.[62] Thus, the court overturned the defendant's conviction for aggravated robbery, as the offense was committed during a "continuous assaultive act" which included his prior conviction of aggravated rape.[63] The dissenters ultimately prevailed and the doctrine was abandoned in 1982.[64]

B. Texas Abandons the Carving Doctrine

Ex parte McWilliams[65] marked the abandonment of the carving doctrine by the court of criminal appeals. In *McWilliams*, the defend-

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56. *Ex parte* Calderon, 508 S.W.2d 360, 362 (Tex. Crim. App. 1974).

57. *Id.* at 361.

58. *Id.* at 362.

59. *See, e.g.*, Orosco v. State, 590 S.W.2d 121, 124-29 (Tex. Crim. App. 1979) (Douglas, J., dissenting). In his dissent, Justice Douglas argued that confusion over the meaning of the "same transaction" has accompanied the carving rule from its inception as well as vacillation between that standard and the same evidence test. He noted that any analysis of the carving doctrine is frustrated by its confused application, concluding that because of the use of more than one test, there is little precedential value in any case determining the existence of the same offense. *Id.*

60. 590 S.W.2d 121 (Tex. Crim. App. 1979).

61. *Id.* at 124-29 (Douglas, J., dissenting).

62. *Id.* at 124.

63. *Id.*

64. *See Ex parte* McWilliams, 634 S.W.2d 815, 822 (Tex. Crim. App.) (carving doctrine abandoned for reasons set forth in *Orosco*), *cert. denied*, 459 U.S. 1036 (1982).

65. *Id.*

ant pled guilty to aggravated robbery, aggravated rape and aggravated kidnapping.[66] Punishment was assessed at thirty years' imprisonment for each offense.[67] On the State's motion for rehearing, each of defendant's convictions was overturned.[68] The court declared: "[w]e now abandon the carving doctrine. . . . Justice and reason demand prosecution for each of the separate offenses. . . ."[69] The rationale that a prosecutor should only be allowed to put forth his "best shot" was renounced in favor of policy considerations, notably the belief that the carving doctrine promoted criminal activity and allowed "bargain" crime.[70] The doctrine was abandoned in favor of the test set out by the United States Supreme Court in *Blockburger v. United States*.[71] That test mandates that separate, successive convictions may be sought if, after examination of both violated statutes, elements are found in each that are not contained in the other.[72] Thus, after *McWilliams*, a Texas prosecutor would not be compelled to try a defendant for only one of many offenses that may have occurred within the same criminal episode; the prosecutor could apply the *Blockburger* test and perhaps gain multiple convictions.

After *McWilliams*, Texas courts relied on the *Blockburger* test to determine if a double jeopardy violation had occurred,[73] resulting in much needed uniformity. The new approach was characterized in *Dunn v. State*:[74] "Since the carving doctrine has been abandoned, then double jeopardy only applies to a second trial based on the same offense."[75] Thus, in *Dunn*, no double jeopardy violation was found when defendant was convicted for possession of marihuana following his acquittal for possession of amphetimines.[76]

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66. *Id.* at 817.
67. *Id.*
68. *Id.* at 824.
69. *Id.* at 822.
70. *Id.*
71. *Id.* at 824; *see Blockburger*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932); *see also Ex parte* Mike, 632 S.W.2d 594, 595 (Tex. Crim. App. 1982) ("[w]e will determine the double jeopardy implication of successive prosecution by applying the offense defining test set forth by the Supreme Court in *Blockburger*").
72. *Blockburger*, 284 U.S. at 304, 52 S. Ct. at 182, 79 L. Ed. at 309.
73. *See Ex parte* Trout, 715 S.W.2d 426, 428 (Tex. App.—Waco 1986, pet. ref'd); Johnson v. State, 693 S.W.2d 707, 710 (Tex. App.—San Antonio 1985, pet. ref'd); Fox v. State, 693 S.W.2d 593, 596 (Tex. App.—San Antonio 1985, no pet.).
74. 647 S.W.2d 3 (Tex. App.—Houston [14th Dist.] 1982, pet. ref'd), *cert. denied*, 461 U.S. 926 (1983).
75. *Id.* at 4.
76. *Id.* at 5.

There were limitations, however. *Blockburger* and *McWilliams* applied to those instances where separate and distinct statutory violations were involved.[77] Indeed, the Supreme Court had mandated in *Brown v. Ohio*[78] that if proof of statutory elements of one crime were also included in the other charged offense, only one conviction could be had, as they are deemed the same.[79] The *McWilliams* court recognized *Brown* and its rule[80] but had not contemplated the dilemma of allowing successive convictions of a defendant for twice violating the same statute during the same transaction. Texas courts handled this dilemma by following the dictates of *McWilliams* and applying *Blockburger* to such situations.

Thus, in *Harrison v. State*,[81] the Houston Court of Appeals applied *Blockburger* when the defendant was charged with two counts of manslaughter for deaths that occurred while he was driving while intoxicated.[82] This court found two separate offenses had occurred because "two different people were killed in violation of one statute" and conviction for each violation required proof of an additional fact—the identity of the deceased—which the other did not.[83] The Waco Court of Appeals also found, in *Ex parte Trout*,[84] that *Blockburger* was applicable to the same facts, holding "[t]here may be successive prosecutions against a defendant, without violating the rule against double jeopardy, for as many persons as are affected by [the defendant's] unlawful act."[85] The court concluded, by applying *Blockburger*, that the separate identities of the victims are the "additional facts" necessary for a determination of separate offenses.[86]

The courts' application of *Blockburger* helped to achieve the eradication of carving in a uniform and precise way. However,

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77. *See supra* note 16 and accompanying text.

78. 432 U.S. 161, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977).

79. *Id.* at 168, 97 S. Ct. at 2226, 53 L. Ed. 2d at 196.

80. 634 S.W.2d at 824.

81. 713 S.W.2d 760 (Tex. App.—Houston [14th Dist.] 1986, no pet.). The *Harrison* court analyzed the Corpus Christi Court of Appeals' decision in *Rathmell* (the subject case) and pointedly declined to follow its reasoning. *Id.* at 763.

82. *Id.* at 762.

83. *Id.* at 762-63. The court concluded that the reasoning of *Blockburger* was applicable but also explored legislative intent, citing Sanabria v. United States, 437 U.S. 54, 97 S. Ct. 2170, 57 L. Ed. 2d 43 (1978). *Id.*

84. 715 S.W.2d 426, 428 (Tex. App.—Waco 1986, pet. ref'd).

85. *Id.*

86. *Id.*

Blockburger speaks of a violation of "two distinct statutory provisions."[87] The remaining question facing the courts was whether double jeopardy guarantees are violated upon multiple prosecutions for violations of one statutory provision.

II. Ex Parte Rathmell

Ex Parte Rathmell[88] presented to the Texas Court of Criminal Appeals its first occasion to decide if multiple violations of one statute during the same transaction barred successive prosecutions of a defendant under the double jeopardy clauses of the United States and Texas constitutions.[89] James Rathmell, while driving intoxicated, struck a vehicle, killing its two occupants.[90] He was separately indicted for involuntary manslaughter for each death.[91] His first trial resulted in conviction and a sentence of two years' imprisonment.[92] The State attempted to prosecute under the second indictment for the other death, but the Corpus Christi Court of Appeals reversed the trial court and ruled that a second prosecution of Rathmell under the same statute was double jeopardy.[93]

The Texas Court of Criminal Appeals disagreed, holding that the specific language of the manslaughter statute conveyed a legislative intent to permit prosecution for *each* death resulting from the defendant's act.[94] The court eschewed the constitutional test for double jeopardy violations,[95] relying instead on judicial interpretation of the statute to find that "two distinct and separate offenses [had] been committed."[96] Thus, successive prosecution of Rathmell for manslaughter was not barred.[97]

A. *The Existence of Constitutional Issues*

In allowing the defendant to be prosecuted twice for violations of one criminal statute, the *Rathmell* court relied upon legislative

87. 284 U.S. at 304, 52 S. Ct. at 182, 76 L. Ed. at 309.
88. 717 S.W.2d 33 (Tex. Crim. App. 1986).
89. *Id.* at 35.
90. *Id.* at 34.
91. *Id.* Rathmell was indicted under Tex. Penal Code Ann. § 19.05(a)(2) (Vernon 1974). *Id.*
92. 717 S.W.2d at 34.
93. *Id.*
94. *Id.* at 35; *see also infra* note 100 and accompanying text.
95. 717 S.W.2d at 36.
96. *Id.*
97. *Id.* at 35.

intent.[98] Rather than applying the *Blockburger* test, which goes to instances where the criminal conduct has violated two separate and distinct statutory provisions, the court simply interpreted a statute.[99] At issue was section 19.05 of the Texas Penal Code: "(a) A person commits an offense if he: . . . (2) by accident or mistake when operating a motor vehicle while intoxicated and, by reason of such intoxication, causes the death of an individual."[100]

The court found that the legislature, by use of the term "an individual," contemplated separate offenses for each death that might occur, thus avoiding application of constitutional tests.[101] By causing the death of two women, the defendant committed separate offenses and did not have a valid double jeopardy claim since double jeopardy protection speaks in terms of the same offense rather than the same transaction.[102]

The United States Supreme Court noted in *Ladner v. United States*,[103] that where the defendant's firing of one shotgun shell injured two federal officers, the determination of whether one or two statutory violations occurred was a matter of statutory interpretation and that "no constitutional issue [was] presented."[104] The Court noted in *Sanabria v. United States*[105] that "[f]ew, if any, limitations are imposed by the Double Jeopardy Clause on the legislative power to define offenses. . . . But once Congress has defined a statutory offense by its prescription of the 'allowable unit of prosecution,' . . . that prescription determines the scope of protection afforded by a prior conviction or acquittal."[106]

Though, according to *Ladner*,[107] no constitutional issue may have been presented,[108] application of constitutional tests to determine

98. *Id.* at 35. "It is clear from the language of these statutes that the Legislature has determined and intends that the offense of involuntary manslaughter . . . is completed with the death of a single individual." *Id.*

99. *Id.*

100. TEX. PENAL CODE ANN. § 19.05(a)(2) (Vernon 1974).

101. 717 S.W.2d at 35. "The *Blockburger/McWilliams*' rationale applies to situations in which the criminal conduct violates two separate distinct statutory provisons." *Id.* The court also noted that an "individual," as defined in section 1.07(a)(17) of the Texas Penal Code, means "a human being who has been born and is alive." *Id.*

102. *Id.* (citing *McWilliams*, 634 S.W.2d at 823).

103. 358 U.S. 169, 79 S. Ct. 209, 3 L. Ed. 2d 199 (1958).

104. *Id.* at 173, 79 S. Ct. at 211, 3 L. Ed. 2d at 203.

105. 437 U.S. 54, 98 S. Ct. 2170, 57 L. Ed. 2d 43 (1978).

106. *Id.* at 69-70, 98 S. Ct. at 2181-82, 57 L. Ed. 2d at 57 (citations omitted).

107. 358 U.S. 169, 79 S. Ct. 209, 3 L. Ed. 2d 199 (1958).

108. *Id.* at 173, 79 S. Ct. at 211, 3 L. Ed. 2d at 203.

if distinct or same offenses have occurred regarding double jeopardy claims have been utilized in lower courts upon facts similar to *Rathmell*.[109] *Blockburger* was one of the tests promulgated by the Supreme Court to aid state courts in disposition of double jeopardy claims. As previously noted, *Rathmell* approves the result in those cases but does not agree with the lower courts' application of the *Blockburger* test.[110] The court's reasoning in *Rathmell* that allowed it to sidestep constitutional issues does not eradicate the possibility of the appearance of constitutional considerations that do indeed underlie the ruling. The result is especially troublesome in light of the Supreme Court's decision in *Brown v. Ohio*.[111] In *Brown*, the Court pointedly refused to address the question of whether the repetition of proof required by successive prosecutions would provide a defendant additional protection under *Ashe v. Swenson*.[112] In *Ashe*, the Supreme Court determined that the fifth amendment's guarantee against double jeopardy embodied the federal rule of collateral estoppel in criminal cases.[113] The doctrine of collateral estoppel will not apply unless issues in the first trial were resolved in *favor* of the defendant (there is an acquittal).[114] Yet, the rule of *Rathmell* directly conflicts with this principle. After this holding, Rathmell could have been prosecuted subsequent to acquittal since, according to the court, the legislature intended prosecution for each death[115] irrespective of the positive resolution of the ultimate issue—the defendant's guilt or innocence. However, *Ashe* holds that prior acquittal bars subsequent attempts at prosecuting a defendant for the same offense.[116] Under *Rathmell*'s determination of "same offense," the prosecutor may

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109. *See Ex parte* Trout, 715 S.W.2d 426, 428 (Tex. App.—Waco 1986, pet. ref'd); Harrison v. State, 713 S.W.2d 760, 762-63 (Tex. App.—Houston [14th Dist.] 1986, no pet.); Johnson v. State, 693 S.W.2d 707, 710 (Tex. App.—San Antonio 1985, no pet.).

110. 717 S.W.2d at 35.

111. 432 U.S. 161, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977).

112. *Id.* at 165, 97 S. Ct. at 2225, 53 L. Ed. 2d at 194.

113. *See* 397 U.S. 436, 445, 90 S. Ct. 1189, 1195, 25 L. Ed. 2d 469, 476 (1970) (where defendant was convicted of robbery of one of several individuals present at poker game, court found that principles of collateral estoppel embodied in Double Jeopardy Clause barred successive prosecutions for the other robberies).

114. *Id.* at 444, 90 S. Ct. at 1195, 25 L. Ed. 2d at 476. The doctrine of collateral estoppel mandates that when an issue of ultimate fact has been once determined in a final judgment, that issue cannot be relitigated between the same parties in another lawsuit. *Id.* at 443, 90 S. Ct. at 1195, 25 L. Ed. 2d at 475.

115. 717 S.W.2d at 35.

116. 397 U.S. at 444, 90 S. Ct. at 1194, 25 L. Ed. 2d at 476.

have a second (or third or fourth) chance at gaining a conviction. Of course, any direct conflict between state and federal determinations of the same offense within the double jeopardy clause will result in a federal victory under the supremacy clause of the United States Constitution.[117]

Further, compared to the policy concerns that framed the *Brown* rule—to restrain courts and prosecutors in their pursuit of convictions[118]—*Rathmell* seems especially dogmatic in obtaining its result.[119] The *Brown* test has been characterized as follows: "If proof of the statutory elements of a crime necessarily includes proof of all statutory elements of another crime, then only one conviction can be had. . . ."[120] The court did indeed find that two crimes (or offenses) had been committed since statutory elements differed as to the victim's identity.[121] Thus, while *Rathmell* does not promote the policies set forth in *Brown*, it technically falls under its rule.[122]

B. Return to the Same Evidence Test

Like the same transaction test, the same evidence test was promulgated to help courts determine if successive trials dealt with the same offense in violation of the fifth amendment's double jeopardy clause.[123] When *Blockburger* was adopted in Texas, the *McWilliams* court noted the modifications made to the test by the Supreme Court, including the *Vitale* variation, though examination of separate statutory elements was emphasized.[124]

Upon determining that *Blockburger*, in its pure form, would not apply to the facts of *Rathmell* as no separate statutory elements can exist when the same statute is at issue, the court turned to proof.[125] Though never directly addressing the question as to what evidence would be presented at the defendant's two trials, *Rathmell* does focus

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117. U.S. CONST. art. VI, § 2.

118. 432 U.S. at 165, 97 S. Ct. at 2225, 53 L. Ed. 2d at 193.

119. 717 S.W.2d at 36. The court does not address the impact on prosecutors and courts of allowing successive prosecutions for the same offense.

120. Steele, *A Review of the Double Jeopardy Defense in Texas*, 12 TEX. TECH L. REV. 393, 411-12 (1981).

121. 717 S.W.2d at 35.

122. *Id.*

123. Steele, *supra* note 120, at 426.

124. 634 S.W.2d at 824.

125. 717 S.W.2d at 35.

on the existence of the victims' separate identities to find distinct offenses.[126] The court couches its apparent return to the same evidence test in legislative intent—of which it presents none.[127] Further, though the court seemingly engaged in basic statutory interpretation, it implicitly based its conclusion on the fact that at each trial, presentation of different evidence—the separate identities of each woman—will be proved against the defendant.[128] "It is clear from the language of [the statute] that the Legislature has determined and intends that the offense of involuntary manslaughter . . . is *completed with the death of a single individual.*"[129] Surely, the offense is not "completed" until there has been an adjudication of the defendant's guilt or innocence at trial, which would necessarily include proof of the victims' identities.

Applying *Blockburger* as modified by *Vitale*, the *Rathmell* court could have allowed successive prosecutions alternatively to its legislative intent rationale, for proof would differ between the trials though the statutory elements are the same. This approach would have followed the basic policy of *McWilliams* in adopting the *Blockburger* test and the subsequent Supreme Court cases construing the basic standard for double jeopardy determinations.[130] Further, use of *Blockburger* and its progeny would have buttressed lower courts' applications of the test to facts similar to *Rathmell.*[131]

The chaos and controversy surrounding statutory interpretation of this sort would be alleviated if the court had clearly enunciated what it really did instead of rationalizing what is probably a correct result under the guise of legislative intent. Though *Rathmell* focuses on the language of the violated statute, the court actually relied on

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126. *Id.* "Each individual death constitutes a complete and distinct offense (albeit under the terms of the one statute) and as such each death constituted a separable 'allowable writ of prosecution.' " *Id.*

127. *Id.* In his dissent, Justice Clinton focused on the majority's method and engaged in a discussion on exactly what was intended by the legislature in their use of the term "individual" in the manslaughter statute. *Id.* at 52-53 (Clinton, J., dissenting). Finding the weakness in the majority opinion, he asked: "Where is there any evidence that the legislative choice was to divide that particular course of conduct into more than one distinct offense under the statute?" *Id.* at 54 (Clinton, J., dissenting). Indeed, the majority presents no evidence.

128. *Id.* at 35.

129. *Id.* (emphasis added).

130. 634 S.W.2d at 824.

131. *See supra* note 109.

the same evidence test, now a variation of *Blockburger*,[132] that was occasionally applied during the days when the carving doctrine was still mandated. Unless the court makes a definitive statement as to the viability of *Blockburger*, the confusion that surrounded the carving doctrine may reappear in a new context.

C. *Practical Implications of* Rathmell

Ex parte Rathmell has opened the door even wider to procurement of multiple convictions for offenses committed during the same criminal transaction. *Rathmell* impacts most drastically on prosecutorial plea bargaining leverage.[133]

A prosecutor's bargaining position is greatly enhanced after *Rathmell*. Indeed, "bargain" becomes a complete misnomer in cases where multiple victims result from one criminal episode. The prosecutor is free to obtain as many indictments as victims and compel the accused to defend at successive trials. Since the fifth amendment and the Texas constitution speak in terms of the same offense, theoretically, there may be as many prosecutions against a defendant as there are separate offenses without the double jeopardy guarantee ever attaching.

Of course, principles of collateral estoppel apply to bar subsequent prosecution after acquittal as mandated by the Supreme Court in *Ashe*.[134] Clever use of legislative intent and the court's traditional deference to the legislature's function, however, may preclude the application of collateral estoppel.[135] The court of criminal appeals did not address the question of a prior acquittal for Rathmell, which, according to its rationale, would not preclude the prosecutor from seeking a subsequent prosecution for the second death.[136] Under that hypothesis, barring application of *Ashe* through the supremacy clause, Texas prosecutors have no boundaries as to the number of indictments they may bring or prosecutions they may seek against a

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132. *See* Illinois v. Vitale, 447 U.S. 410, 416, 100 S. Ct. 2260, 2265, 65 L. Ed. 2d 228, 235 (1980).

133. *See* Note, *The Double Jeopardy Carving Doctrine Is Abandoned in Texas*, 14 TEX. TECH L. REV. 495, 506-07 (1983).

134. 397 U.S. 436, 445, 90 S. Ct. 1189, 1195, 25 L. Ed. 2d 469, 476 (1970).

135. Sanabria v. United States, 437 U.S. 54, 70, 98 S. Ct. 2170, 2182, 57 L. Ed. 2d 43, 57 (1978). ("Whether a particular course of conduct involves one or more distinct offenses under the statute depends on the congressional choice.").

136. 717 S.W.2d at 35.

defendant who has committed an offense resulting in multiple victims.

CONCLUSION

Ex parte Rathmell[137] allows a defendant to be prosecuted successively for multiple violations of the same statute during the same transaction.[138] Its decision is consistent with the policy rationale of *McWilliams*[139] and, more importantly, with the language of the statute.[140] What is unexpected is the court's repudiation of the *Blockburger* test that it had approved and adopted in *McWilliams*.[141] By not permitting lower courts to apply this standard and mandating statutory interpretation, the court of criminal appeals has effectively destroyed the uniformity that *McWilliams* had produced and perhaps returned to the infamous same evidence test.

by Catherine L. Bennett

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137. 717 S.W.2d 33 (Tex. Crim. App. 1986).
138. *Id.* at 35.
139. 634 S.W.2d 815 (Tex. Crim. App. 1982).
140. TEX. PENAL CODE ANN. § 19.05(a)(2) (Vernon 1974).
141. 717 S.W.2d at 35.