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Securing One's Fourth Amendment Rights through Issue Preclusion: Assessing Texas's Application of Collateral Estoppel to Multiple Suppression Motions Filed in Separate Courts.

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SECURING ONE'S FOURTH AMENDMENT RIGHTS THROUGH ISSUE PRECLUSION: ASSESSING TEXAS'S APPLICATION OF COLLATERAL ESTOPPEL TO MULTIPLE SUPPRESSION MOTIONS FILED IN SEPARATE COURTS

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I. INTRODUCTION

The United States Constitution guarantees certain rights and protections for citizens of the United States. Texas, like all states, may extend and expand such rights to its populace. Yet, these protections do not encompass the gamut of potential pitfalls an individual might encounter.

Where the United States and Texas Constitutions fall short, an individual will have to look to the law for other sources of protection.

For example, suppose a defendant is simultaneously on trial in a district court for felony possession of drugs and in a county court for misdemeanor possession of drugs.[1] Defense counsel has filed motions in both courts to suppress the evidence. Based on these facts alone, nothing stands out as unusual or peculiar. However, presume the evidence being used by the prosecution in district court was seized at the same time, by the same police officer, and in the exact same manner as the evidence in the county court. While the evidence stems from the same search and seizure, two charges have been brought against the defendant in compliance with jurisdictional requirements.[2]

Before the district court can hold a suppression hearing, suppose the county court judge holds a pretrial suppression hearing. After a full evidentiary hearing has been conducted, the county judge determines that the drugs were seized in violation of the defendant's Fourth Amendment rights. Because the State's evidence has been suppressed, the prosecution drops its case against the defendant. However, soon after the misdemeanor charges are dropped, suppose the district court holds its own

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1. This hypothetical is based on Texas case law. *See generally* Guajardo v. State, 24 S.W.3d 423 (Tex. App.—Corpus Christi 2000) (involving the defendant being charged with unlawful possession of marijuana in county court and unlawful possession of cocaine in district court), *rev'd*, 109 S.W.3d 456 (Tex. Crim. App. 2003) (en banc); State v. Henry, 25 S.W.3d 260 (Tex. App.—San Antonio 2000, no pet.) (involving a similar factual scenario in which the defendant was charged with the misdemeanor offense of possession of marijuana in county court and charged with the felony offense of possession of cocaine in district court); State v. Rodriguez, 11 S.W.3d 314 (Tex. App.—Eastland 1999, no pet.) (involving charges against the defendant for misdemeanor marijuana possession in a county court and felony cocaine possession in a district court). These three cases comprise a split of authority over the issue of whether collateral estoppel applies to two different suppression hearings for the same defendant. *See* Hewitt v. State, No. 05-01-01258-CR, 2002 Tex. App. LEXIS 4934 (Tex. App.—Dallas July 9, 2002, no pet.) (not designated for publication) (identifying the split of authority at the appellate level, and giving a brief explanation of the split between the Corpus Christi, Eastland, and San Antonio appellate courts). Each of the three mentioned appellate cases that caused the split are discussed in further detail in Part III of this Comment.

2. The Texas Code of Criminal Procedure contains instructions on which court shall hear felony and misdemeanor criminal matters. *See* TEX. CODE CRIM. PROC. ANN. art. 4.05 (Vernon 2004) (establishing original jurisdiction in district courts for all felony offenses, as well as certain misdemeanors); *id.* art. 4.07 (Vernon 2004) (limiting the criminal jurisdiction of a county court to misdemeanors that: (1) do not overlap with the justice court's jurisdiction, and (2) exceed five hundred dollars in the potential fine); *see also id.* art. 4.11 (Vernon 2004) (addressing a justice court's jurisdiction for criminal cases); *id.* art. 4.14 (Vernon 2004) (describing the criminal episodes that fall under a municipal court's criminal jurisdiction).

suppression hearing and, contrary to the finding of the county court, overrules the defendant's motion to suppress.

In response, the defense counsel argues that, based on the doctrine of collateral estoppel, the district judge was barred from coming to any conclusion other than one that coincided with that of the county judge. The argument is made in vain, and the trial proceeds. The defendant is convicted and sentenced to prison.

While the above situation may not seem overtly extraordinary, two judges have come to different conclusions based on the exact same set of facts while applying the exact same laws. Does double jeopardy not extend its veil of security around such a defendant in this situation? Why would collateral estoppel not apply to a motion to suppress hearing?

Unfortunately, no easy answer exists to these questions. Initially, it might seem awkward to discuss collateral estoppel in the same context as double jeopardy. However, while collateral estoppel has its roots in civil law and apart from the Fifth Amendment, the Supreme Court has analogized the Double Jeopardy Clause to collateral estoppel in the criminal context.[3] Collateral estoppel's origin in criminal courts also existed at one time apart from the Fifth Amendment.[4]

By placing collateral estoppel within the confines of the Double Jeopardy Clause, federal law essentially extinguished one form of collateral estoppel and invented another form of the doctrine.[5] However, remnants of both forms are still alive.[6] Texas is one state in which both forms of collateral estoppel may be invoked in a criminal proceeding.[7]

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3. *See* Cromwell v. County of Sac, 94 U.S. 351, 353 (1877) (discussing the common law doctrine of estoppel); Rex R. Perschbacher, *Rethinking Collateral Estoppel: Limiting the Preclusive Effect of Administrative Determinations in Judicial Proceedings*, 35 U. FLA. L. REV. 422, 427-29 (1983) (discussing *Cromwell* and labeling it the "leading nineteenth century decision" of collateral estoppel).

4. United States v. Oppenheimer, 242 U.S. 85, 87 (1916). As was later examined in a *Harvard Law Review* article, Justice Holmes argued that "criminal collateral estoppel had its source in fundamental rights other than the guarantee against double jeopardy." Note, *The Due Process Roots of Criminal Collateral Estoppel*, 109 HARV. L. REV. 1729, 1731 (1996).

5. *See* Ashe v. Swenson, 397 U.S. 436, 446 (1970) (citing Green v. United States, 355 U.S. 184, 190 (1957)) (stating that both collateral estoppel and the Double Jeopardy Clause "protect[ ] a man who has been acquitted from having to 'run the ga[u]ntlet' a second time").

6. *Compare Oppenheimer*, 242 U.S. at 87 (introducing collateral estoppel into the criminal context under the Double Jeopardy Clause), *with* United States v. Kramer, 289 F.2d 909, 912 (2d Cir. 1961) (applying common law collateral estoppel in a situation that fell short of double jeopardy).

7. *See, e.g.*, State v. Brabson, 976 S.W.2d 182, 183 n.2 (Tex. Crim. App. 1998) (en banc) (illustrating that two forms of collateral estoppel are alive in Texas criminal jurisprudence).

Texas appellate courts, in applying collateral estoppel, have tried to answer the above questions, and have come to different conclusions.[8] This Comment will assess the split in Texas courts over the issue of collateral estoppel's application in different motion to suppress hearings. Part II will provide a historical analysis of the exclusionary rule, the Double Jeopardy Clause, and collateral estoppel's rise in criminal court.

After discussing the history of collateral estoppel and its related terms, Part III will address Texas's application of collateral estoppel to suppression motions and the split in authority over the issue. Part IV will identify various problems with collateral estoppel's application to suppression hearings in different cases, and will attempt to reconcile the differences between the appellate cases that caused the split. Finally, part V will offer concluding remarks regarding collateral estoppel's future application to multiple suppression motions.

II. BACKGROUND

A. *Introduction to Concepts*

When dealing with a complex issue that invokes numerous constitutional rights, it is proper to present the terminology in an innocuous manner at the beginning. The Double Jeopardy Clause is found in the Fifth Amendment, and it prevents the government from trying the same person twice for the same offense.[9] From the Double Jeopardy Clause, the doctrines of res judicata and collateral estoppel are seemingly interwoven with not only double jeopardy, but also each other. While the doctrines of res judicata and collateral estoppel seem similar, they are in actuality quite different.[10]

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8. *See* discussion *infra* Part III, analyzing Guajardo v. State, 24 S.W.3d 423 (Tex. App.—Corpus Christi 2000), *rev'd* 109 S.W.3d 456 (Tex. Crim. App. 2003) (en banc); State v. Henry, 25 S.W.3d 260 (Tex. App.—San Antonio 2000, no pet.); State v. Rodriguez, 11 S.W.3d 314 (Tex. App.—Eastland 1999, no pet.).

9. U.S. CONST. amend. V; *see also* BLACK'S LAW DICTIONARY 219 (2d pocket ed. 2001) (defining double jeopardy as "being prosecuted twice for substantially the same offense").

10. *See* Walter W. Heiser, *California's Confusing Collateral Estoppel (Issue Preclusion) Doctrine*, 35 SAN DIEGO L. REV. 509, 509-10 (1998) (outlining the difference between the similar doctrines of res judicata and collateral estoppel). Professor Heiser states that collateral estoppel is secondary to res judicata in the sense that res judicata bars relitigation of an entire cause of action, while collateral estoppel only bars the relitigation of an issue. *Id.* However, this statement implies that collateral estoppel is found within res judicata, and is derived from the res judicata doctrine as well. To the contrary, both collateral estoppel and res judicata are separate and stand alone. In fact, collateral estoppel and res judicata have completely different origins. *See* Rex. R. Perschbacher, *Rethinking Collateral Estoppel: Limiting the Preclusive Effect of Administrative Determinations in Judicial Proceedings*, 35 U. FLA. L. REV. 422, 426 (1983) (describing the Anglo-American origin of res

Res judicata means claim preclusion.[11] Once a claim has been litigated, res judicata bars a party from relitigating that same claim.[12] On the other hand, collateral estoppel bars a party from relitigating an issue that has already been decided.[13]

Coupled with the Fifth Amendment, collateral estoppel's application to a suppression motion invokes the Fourth Amendment and the exclusionary rule. The exclusionary rule is a judicially created rule that allows

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judicata as a product from Roman law and collateral estoppel as having its roots in Germanic law). Professor Perschbacher refutes the notion that collateral estoppel is a part of res judicata by explaining that both doctrines come from different sources of law. *Id.* *See generally* Charles William Hendricks, *100 Years of Double Jeopardy Erosion: Criminal Collateral Estoppel Made Extinct*, 48 DRAKE L. REV. 379, 390-91 (2000) (supporting the proposition that it is a mistake to confuse res judicata and collateral estoppel as part of each other, or worse, the same doctrine). Mr. Hendricks also writes that collateral estoppel is founded in Germanic origins. *Id.* at 391.

11. Walter W. Heiser, *California's Confusing Collateral Estoppel (Issue Preclusion) Doctrine*, 35 SAN DIEGO L. REV. 509, 509 (1998); *see also* BLACK'S LAW DICTIONARY 608 (2d pocket ed. 2001) (defining res judicata as "[a]n issue that has been definitively settled by judicial decision").

12. *See* Walter W. Heiser, *California's Confusing Collateral Estoppel (Issue Preclusion) Doctrine*, 35 SAN DIEGO L. REV. 509, 509 (1998) (stating that "a prior judgment bars the parties or their privies from relitigating the 'same cause of action' in a subsequent proceeding"); Rex. R. Perschbacher, *Rethinking Collateral Estoppel: Limiting the Preclusive Effect of Administrative Determinations in Judicial Proceedings*, 35 U. FLA. L. REV. 422, 426 (1983) (indicating that a final judgment in a case was conclusive and would bar a subsequent suit pertaining to the legal basis of the first suit); *see also* BLACK'S LAW DICTIONARY 608 (2d pocket ed. 2001) (listing the elements of res judicata as: (1) an earlier decision on issue; (2) a final judgment on the merits; and (3) involvement of the same parties or persons in privity with the original parties).

13. Ashe v. Swenson, 397 U.S. 436, 442-43 (1970); United States v. Brackett, 113 F.3d 1396, 1398 (5th Cir. 1997); Showery v. Samaniego, 814 F.2d 200, 202 (5th Cir. 1987); United States v. Mock, 604 F.2d 341, 343 (5th Cir. 1979), *aff'd*, 640 F.2d 629 (5th Cir. Unit B Mar. 1981); Headrick v. State, 988 S.W.2d 226, 228 (Tex. Crim. App. 1999) (en banc); Ladner v. State, 780 S.W.2d 247, 250 (Tex. Crim. App. 1989) (en banc); Dedrick v. State, 623 S.W.2d 332, 337 (Tex. Crim. App. [Panel Op.] 1981); *Ex parte* Ueno, 971 S.W.2d 560, 562 (Tex. App.—Dallas 1998, pet. ref'd); *Ex parte* Culver, 932 S.W.2d 207, 212 (Tex. App.—El Paso 1996, pet. ref'd); Walter W. Heiser, *California's Confusing Collateral Estoppel (Issue Preclusion) Doctrine*, 35 SAN DIEGO L. REV. 509, 509-10 (1998); Charles William Hendricks, *100 Years of Double Jeopardy Erosion: Criminal Collateral Estoppel Made Extinct*, 48 DRAKE L. REV. 379, 380 (2000); Richard B. Kennelly, Jr., Note, *Precluding the Accused: Offensive Collateral Estoppel in Criminal Cases*, 80 VA. L. REV. 1379, 1379 (1994); Rex. R. Perschbacher, *Rethinking Collateral Estoppel: Limiting the Preclusive Effect of Administrative Determinations in Judicial Proceedings*, 35 U. FLA. L. REV. 422, 426 (1983); Anne Bowen Poulin, *Prosecutorial Inconsistency, Estoppel, and Due Process: Making the Prosecution Get Its Story Straight*, 89 CAL. L. REV. 1423, 1443 (2001); Joel M. Schumm & James A. Garrard, *Recent Developments in Indiana Criminal Law and Procedure*, 33 IND. L. REV. 1197, 1211 (2000); Note, *The Due Process Roots of Criminal Collateral Estoppel*, 109 HARV. L. REV. 1729, 1730 (1996); BLACK'S LAW DICTIONARY 108 (2d pocket ed. 2001).

courts to control, somewhat, the practices of law enforcement.[14] The exclusionary rule suppresses evidence that is obtained in a manner that violates a defendant's rights.[15] Even though the exclusionary rule is judge-made, it is founded on the Fourth Amendment's guarantee of freedom from unreasonable searches and seizures.[16]

B. *Fourth Amendment and the Exclusionary Rule*

The Fourth Amendment of the United States Constitution grants individuals "[t]he right . . . to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[17] While the Constitution guarantees this right, courts have led the way in enforcing and upholding this provision.[18] The exclusionary rule has been the weapon of

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14. *See* Wolf v. Colorado, 338 U.S. 25, 31 (1949) (recognizing that previous Supreme Court decisions regarding the exclusionary rule were not gleaned from the actual wording of the Fourth Amendment, but were instead judicially-created decisions based on the Fourth Amendment in order to uphold the Fourth Amendment), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961); Weeks v. United States, 232 U.S. 383, 392 (1914) (holding that the Fourth Amendment is a limitation on the police and other authorities), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961); *see also* Nathan L. Mechler, Comment, *Texas's Statutory Exclusionary Rule: Analyzing the Inadequacies of the Current Application of "Other Person(s)" Pursuant to Article 38.23(a) of the Texas Code of Criminal Procedure*, 36 ST. MARY'S L.J. 195, 196 (2004) (opining that the Fourth Amendment is a restraint upon the government and its actions).

15. *See Wolf*, 338 U.S. at 27-28 (identifying one's right to privacy as a core right that should not be subjected to "arbitrary intrusion by the police"); *Weeks*, 232 U.S. at 392 (declaring that it is the courts who are to uphold the United States Constitution, and a violation of the Constitution and its guaranteed rights by an unreasonable search and seizure by law enforcement "should find no sanction in the judgments of the courts"); Nathan L. Mechler, Comment, *Texas's Statutory Exclusionary Rule: Analyzing the Inadequacies of the Current Application of "Other Person(s)" Pursuant to Article 38.23(a) of the Texas Code of Criminal Procedure*, 36 ST. MARY'S L.J. 195, 200 (2004) (commenting on invoking the exclusionary rule when evidence has been obtained in an illegal, unconstitutional manner); BLACK'S LAW DICTIONARY 257 (2d pocket ed. 2001) (defining the exclusionary rule for purposes of criminal procedure as "[a] rule that excludes or suppresses evidence obtained in violation of an accused person's constitutional rights").

16. *See Wolf*, 338 U.S. at 28 (according the creation of the exclusionary rule to judges while asserting the rule was deduced from the rights explicitly stated in the Fourth Amendment); *Weeks*, 232 U.S. at 391-92 (interpreting the Fourth Amendment to require protection for instances when an unlawful search and seizure has occurred); Nathan L. Mechler, Comment, *Texas's Statutory Exclusionary Rule: Analyzing the Inadequacies of the Current Application of "Other Person(s)" Pursuant to Article 38.23(a) of the Texas Code of Criminal Procedure*, 36 ST. MARY'S L.J. 195, 195-96 (2004) (acknowledging that "[t]he Fourth Amendment to the United States Constitution is the backbone of the exclusionary rule").

17. U.S. CONST. amend. IV.

18. Maryland v. Pringle, 540 U.S. 366, 369 (2003); James v. Louisiana, 382 U.S. 36, 37 (1965); United States v. Goldstein, 456 F.2d 1006, 1011 (8th Cir. 1972); United States v. Criminal, No. CRIM. 00-88, 2002 U.S. Dist. LEXIS 16687, at *7-8 (E.D. Pa. Sept. 4, 2002)

choice by courts to strike down the illegal acts of law enforcement by excluding evidence seized as a result of those acts.[19]

In 1914, the Supreme Court provided one of the first and in-depth examinations of the exclusionary rule. The landmark case of *Weeks v. United States*[20] involved a defendant suspected of sending lottery tickets and coupons through the mail in Kansas City, Missouri.[21] Local law enforcement acted upon this suspicion and arrested Mr. Weeks without a

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(mem.); United States v. Collis, 528 F. Supp. 1023, 1028 (E.D. Mich. 1981), *rev'd*, 699 F.2d 832 (6th Cir. 1983); United States v. Article of Food Consisting of 12 Barrels, More or Less, Labeled in Part: (Barrel) Lumpfish Roe 100 Kg Net Colored Black, 477 F. Supp. 1185, 1190-92 (S.D.N.Y. 1979); Nelson v. Hancock, 239 F. Supp. 857, 865-66 (D.N.H. 1965), *rev'd*, 363 F.2d 249 (1st Cir. 1966); People v. Dilworth, 640 N.E.2d 1009, 1012 (Ill. App. Ct. 1994), *rev'd*, 661 N.E.2d 310 (Ill. 1996); Burkett v. State, 736 N.E.2d 304, 305-06 (Ind. Ct. App. 2000); State v. Nieves, 861 A.2d 62, 63 (Md. 2004); Hernandez v. State, 13 S.W.3d 492, 504 (Tex. App.—Amarillo 2000), *rev'd*, 60 S.W.3d 106 (Tex. Crim. App. 2001); State v. Deherrera, 965 P.2d 501, 501 (Utah Ct. App. 1998); Commonwealth v. Coleman, No. 1672-03-2, 2004 Va. App. LEXIS 6, at *11-12 (Va. Ct. App. Jan. 6, 2004); State v. Stevens, 570 N.W.2d 593, 597 (Wis. Ct. App. 1997), *aff'd*, 577 N.W.2d 335 (Wis. 1998), *and aff'd*, 580 N.W.2d 688 (Wis. 1998).

19. It should be noted that in order for this protective courtroom weapon to be used, a defendant on trial must invoke or seek this type of relief. *See* YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE: CASES-COMMENTS-QUESTIONS 749-58 (10th ed. 2002) (discussing the requirement of standing at the federal level in order to properly move for the court to suppress the evidence); GERALD S. REAMEY & CHARLES P. BUBANY, TEXAS CRIMINAL PROCEDURE 47 (7th ed. 2004) (detailing the three requirements one must meet in order to successfully invoke the exclusionary rule). The three requirements an individual must meet are: (1) standing; (2) violation of an expectation of privacy that society is prepared to recognize; (3) the violation was the result of the actions of the State. *Id.* The third requirement seems to apply only to the federal level, when compared to Texas statutes. *Id.* The Texas Code of Criminal Procedure allows for a private individual's actions to fall victim to the exclusionary rule. *See* TEX. CODE CRIM. PROC. ANN. art. 38.23 (Vernon 2004) (stating that evidence will not be admitted if it is obtained illegally by "an officer or other person"); *see also* GERALD S. REAMEY & CHARLES P. BUBANY, TEXAS CRIMINAL PROCEDURE 47 (7th ed. 2004) (explaining that the Texas exclusionary rule applies not only to law enforcement and government agents, but also individual citizens as well); Nathan L. Mechler, Comment, *Texas's Statutory Exclusionary Rule: Analyzing the Inadequacies of the Current Application of "Other Person(s)" Pursuant to Article 38.23(a) of the Texas Code of Criminal Procedure*, 36 ST. MARY'S L.J. 195, 202-04 (2004) (identifying and detailing the difference between the federal and Texas exclusionary rules). It is also important to note that the federal government has refused to apply the exclusionary rule to the actions of non-government actors. *See, e.g.*, Burdeau v. McDowell, 256 U.S. 465, 475 (1921) (declaring that the Fourth Amendment protects citizens from government action only); Weeks v. United States, 232 U.S. 383, 398 (1914) (holding that the exclusionary rule is applicable only to the "[f]ederal government and its agencies"), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961).

20. 232 U.S. 383 (1914).

21. Weeks v. United States, 232 U.S. 383, 386 (1914), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961).

warrant.[22] Subsequently, Mr. Weeks's house was searched and the papers sought were discovered.[23] After the evidence was turned over to U.S. Marshals, Mr. Weeks was convicted.[24]

When the case reached the Supreme Court, Justice Day wrote that the purpose of the Fourth Amendment was to protect against the tyranny and unreasonableness that the British crown had imposed upon American colonies.[25] In practice, this right must be cared for by those in law enforcement. Yet, if law enforcement fails, it is the courts that must carry the burden of securing the constitutional rights of individuals.[26] The Court's opinion stated very directly:

> The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.[27]

As a result, the lower court's decision was reversed and the exclusionary rule began to take its modern form.[28] However, this newly formed constitutional safeguard was limited in application to federal jurisdic-

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22. *Id.* The defendant, Mr. Weeks, was arrested at his work in Kansas City, Missouri. *Id.*

23. *Id.* Police entered and searched Mr. Weeks's house using a house key that a neighbor had disclosed to the authorities. *Id.* Police and U.S. Marshals returned after the initial search to investigate once more. *Id.* Neither search was made pursuant to a search warrant. *Id.*

24. *Id.*

25. *Id.* at 389-90 (expounding upon the history of the Fourth Amendment and the framers' desire to avoid what took place in the American colonies while under Great Britain's control).

26. Weeks v. United States, 232 U.S. 383, 392 (1914), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961). The Court's opinion then stated:

> The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, . . . should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.

Id.

27. *Id.* at 393.

28. *Id.* at 398-99. The defendant petitioned for the return of his papers at the trial level, but was denied relief. *Id.* at 398; *see also* Nathan L. Mechler, Comment, *Texas's Statutory Exclusionary Rule: Analyzing the Inadequacies of the Current Application of "Other Person(s)" Pursuant to Article 38.23(a) of the Texas Code of Criminal Procedure*, 36 ST. MARY'S L.J. 195, 205 (2004) (providing a concise summary of the landmark case that established the exclusionary rule).

tions.[29] The majority of States did not employ the exclusionary rule. Additionally, the limited application of the exclusionary rule was further embedded by the Supreme Court's decision in *Wolf v. Colorado*.[30] The *Wolf* Court noted that thirty states rejected the rule articulated in *Weeks*, while only seventeen accepted it.[31] The Court followed the general consensus and held that the exclusionary rule did not apply to the States through the Fourteenth Amendment.[32]

It would take twelve years before *Wolf* was reversed in *Mapp v. Ohio*.[33] The Court reasoned in *Mapp* that if the exclusionary rule did not apply to the States, citizens would be subjected to a severe invasion of privacy by law enforcement.[34] The right to be free from unreasonable searches and seizures needed a prophylactic to protect individuals from unrestrained police discretion and abuse.[35] *Mapp* implanted the exclusionary rule in courtrooms throughout the country, and in the minds of law enforcement everywhere.[36]

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29. *See Weeks*, 232 U.S. at 398 (stressing, once again, that the exclusionary rule is limited to the "[f]ederal government and its agencies").

30. 338 U.S. 25 (1949).

31. Wolf v. Colorado, 338 U.S. 25, 29 (1949), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961). In the *Wolf* opinion, the Supreme Court included numerous tables representing the States' opinions toward the exclusionary rule, and the cases from which the opinions were derived. *Id.* at 33-39. The Court was so adamant about not extending the federal exclusionary rule to the States that it included tables of Britain and the Commonwealth of Nations detailing which countries had accepted or denied a similar exclusionary rule. *Id.* at 39. The Court further supported its position by stating, "most of the English-speaking world does not regard as vital to such protection the exclusion of evidence thus obtained [in violation of constitutional rights]." *Id.* at 29.

32. *Id.* at 33. Since the data represented that most states did not want the federal exclusionary rule, the court did not feel it was necessary to force the rule upon the States when state agents enforce state law. *See id.* at 31 (explaining that the Supreme Court should not condemn the States if they choose to use other methods, beside the federally-created methods, to uphold state laws).

33. 367 U.S. 643 (1961).

34. Mapp v. Ohio, 367 U.S. 643, 655 (1961). In reaching its conclusion, the Court looked to data to analyze which States at that time had accepted the exclusionary rule. *Id.* at 652. The Court found that more than half of the States that had once rejected the exclusionary rule now had one created either by the judiciary or the legislature. *Id.*

35. *Id.* at 656. The court stated that absent an exclusionary rule,

> the assurance against unreasonable searches and seizures would be, "a form of words," valueless and undeserving of mention in a perpetual charter of inestimable human liberties, so too, without that rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom "implicit in 'the concept of ordered liberty.'"

Id. at 655.

36. *See, e.g.*, TEX. CODE CRIM. PROC. ANN. art. 38.23 (Vernon 2004) (recodifying the previous exclusionary rule). The former exclusionary rule was enacted in 1929. *See* Acts

Yet, the exclusionary rule must be invoked by an aggrieved party for evidence to be excluded.[37] The proper method by which to seek relief through the exclusionary rule is a motion to suppress the evidence.[38] Nevertheless, filing a motion to suppress does not mean automatic exclusion of the evidence. Instead, the motion puts the trial court on notice of the defendant's grievance, and the trial court will likely hold a hearing to decide the admissibility of the evidence.[39]

Basically, a suppression hearing is a mini-trial, wherein evidence is introduced and witnesses testify, enabling the judge to make a determination of whether the evidence has been obtained in violation of the defendant's right to be free from unreasonable searches and seizures.[40] At the conclusion of the hearing, the judge makes a ruling either denying

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1929, 41st Leg., 2d C.S., ch. 45, § 1, *amended by* Acts 1953, 53d Leg., ch. 253, § 1 (current version at TEX. CODE CRIM. PROC. ANN. art. 38.23 (Vernon 2004) (amended 1965, 1987)).

37. *See* WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 11.2, at 35 (4th ed. 2004) (expressing that evidence will not be excluded *sua sponte*, but rather a motion to suppress must be made); GERALD S. REAMEY & CHARLES P. BUBANY, TEXAS CRIMINAL PROCEDURE 151-54 (7th ed. 2004) (asserting that, after an accused has overcome the three requirements for a successful application of the exclusionary rule, the defendant needs to object pretrial and attack the admissibility of the evidence). The Supreme Court noted in *Weeks* that the defendant's application for the return of his property was seasonable. Weeks v. United States, 232 U.S. 383, 398 (1914), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961).

38. *See* WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 11.2, at 34 (4th ed. 2004) (stating that a "motion to suppress is the device by which the issue of whether evidence should be excluded" from admission at trial is decided). A motion to suppress the evidence should be in writing, identify the items sought to be excluded, and contain at least a generalized statement as to why the evidence ought to be excluded. *Id.* § 11.2(a), at 35. As LaFave suggests, a motion to suppress is a pleading that "frames the issues to be determined in a pretrial hearing on the motion." *Id.*

39. *See id.* § 11.2(a), at 35 (illustrating that filing a motion to suppress will likely get a pretrial suppression hearing). *But see* TEX. CODE CRIM. PROC. ANN. art. 28.01 (Vernon 2004) (authorizing a trial judge to either grant or deny a hearing on a suppression motion); GERALD S. REAMEY & CHARLES P. BUBANY, TEXAS CRIMINAL PROCEDURE 155 (7th ed. 2004) (noting that a trial judge is not required to hold a pretrial evidentiary hearing).

40. *See* GERALD S. REAMEY & CHARLES P. BUBANY, TEXAS CRIMINAL PROCEDURE 154 (7th ed. 2004) (detailing that a "suppression hearing is a full-blown evidentiary hearing at which all witnesses with knowledge relating to the search, arrest, or confession in issue are subject to direct and cross-examination"). The defendant in a suppression hearing bears the initial burden to show that the police obtained the evidence pursuant to a violation of the Fourth Amendment. *Id.*; *see also* WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 11.2(a), at 35 (4th ed. 2004) (commenting that a pretrial suppression hearing is for the benefit of the defendant, and it is the defense's responsibility to show the illegality of the evidence in the government's possession).

the motion to suppress, thereby allowing the evidence in, or granting the suppression motion and excluding the evidence.[41]

It should be noted that this overview of the exclusionary rule is brief in comparison to its vast history. However, for purposes of this Comment, one need only know of its general background, definition, and application. The following section shifts focus from the Fourth Amendment to the Fifth Amendment, and discusses collateral estoppel's relation to double jeopardy.

C. *Fifth Amendment and Double Jeopardy*

The Fifth Amendment provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb."[42] Unlike the Fourth Amendment's ban on unreasonable searches and seizures, the origin of the Double Jeopardy Clause is not based on the oppressive governance of the English crown over the American colonies. Rather, the Double Jeopardy Clause stems from ancient laws and civilization's innate desire to protect individuals from this sort of prosecution.[43] However, the roots of the Clause are not nearly as important as the interpretation and application of double jeopardy.

The simplest explanation of double jeopardy is found in the Amendment itself. One would think that application of such a principle should be simple for courts: the same person cannot be charged for the same offense twice.[44] However, one who seeks to invoke the protection of the

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41. *See* WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 11.2(e), at 83 (4th ed. 2004) (commenting that during a pretrial suppression hearing, the trial judge decides both the "factual and legal issues presented"); *see also* GERALD S. REAMEY & CHARLES P. BUBANY, TEXAS CRIMINAL PROCEDURE 155 (7th ed. 2004) (emphasizing that if a suppression hearing is granted, the defense and prosecution are left with the judge as the only judicial entity to decide issues of fact).

42. U.S. CONST. amend. V.

43. *See* Charles William Hendricks, Note, *100 Years of Double Jeopardy Erosion: Criminal Collateral Estoppel Made Extinct*, 48 DRAKE L. REV. 379, 380-81 (2000) (proposing that double jeopardy potentially originated from English or Roman law, but more than likely has always existed and does not have a particular origin); *see also* Green v. United States, 355 U.S. 184, 187-88 (1957) (recognizing that double jeopardy is deeply ingrained in the law to protect an individual from being subject to "embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty").

44. U.S. CONST. amend. V. Though the Double Jeopardy Clause might seem simple, its application has been complex and rife with various opinions on the intricacies of double jeopardy. *See* Illinois v. Vitale, 447 U.S. 410, 415 (1980) (declaring that double jeopardy provides three guarantees: (1) protection against a second prosecution, after acquittal, of the same offense; (2) protection, after conviction, of a second prosecution for the same offense; (3) protection against multiple punishments for the same crime). *But see* Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 YALE L.J. 1807, 1807-09 (1997)

Double Jeopardy Clause must overcome two obstacles.[45] The first of those obstacles involves the attachment of jeopardy.[46] The attachment of jeopardy essentially serves as a limitation on what cases will be reviewed under Fifth Amendment scrutiny.[47] The point at which jeopardy attaches differs depending on whether the trial is a jury trial or a bench trial. For a jury trial, the general rule is that jeopardy attaches when the jury is empanelled and sworn in.[48] For a bench trial, Texas courts hold that jeopardy attaches when the defendant pleads to the indictment.[49]

The second obstacle that must be overcome once jeopardy has attached is to determine whether the offenses constitute the "same offense."

(bemoaning the "double jeopardy double talk" and the various approaches and tests courts have taken to uphold this constitutional right).

45. *See* United States v. Martin Linen Supply Co., 430 U.S. 564, 569 (1977) (stating that double jeopardy "rests upon two threshold conditions"); GERALD S. REAMEY & CHARLES P. BUBANY, TEXAS CRIMINAL PROCEDURE 429 (7th ed. 2004) (suggesting it is best to examine double jeopardy in two separate parts).

46. *See* Serfass v. United States, 420 U.S. 377, 388 (1975) (defining jeopardy as the point in which the constitutional safeguards are implicated during criminal proceedings); *see also* Crist v. Bretz, 437 U.S. 28, 33 (1978) (requiring jeopardy allows for the finality of judgments to be preserved); GERALD S. REAMEY & CHARLES P. BUBANY, TEXAS CRIMINAL PROCEDURE 429 (7th ed. 2004) (noting that until jeopardy attaches the first time, there can be no thought of double jeopardy); Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 YALE L.J. 1807, 1838-48 (1997) (examining the issue of when jeopardy attaches and ends, and various scenarios which might affect the attachment of jeopardy).

47. *See generally* Illinois v. Vitale, 447 U.S. 410 (1980) (declaring double jeopardy requires jeopardy to attach first before the Fifth Amendment can be invoked); Crist v. Bretz, 437 U.S. 28 (1978) (reiterating that the requirement for jeopardy is a limitation on the application of the Double Jeopardy Clause); *Martin Linen Supply Co.*, 430 U.S. 564 (holding that jeopardy must attach during the first prosecution for there to be a bar against the second prosecution); Green v. United States, 355 U.S. 184 (1957) (stating that double jeopardy exists only when jeopardy previously existed in the first prosecution); Ortiz v. State, 933 S.W.2d 102 (Tex. Crim. App. 1996) (en banc) (supporting the requirement of jeopardy in order for double jeopardy to bar a second prosecution); State v. Torres, 805 S.W.2d 418 (Tex. Crim. App. 1991) (en banc) (expressing that without jeopardy, there can be no double jeopardy).

48. *Crist*, 437 U.S. at 35; *Martin Linen Supply Co.*, 430 U.S. at 569; *Serfass*, 420 U.S. at 388; *Ortiz*, 933 S.W.2d at 105; *Torres*, 805 S.W.2d at 420; GERALD S. REAMEY & CHARLES P. BUBANY, TEXAS CRIMINAL PROCEDURE 429 (7th ed. 2004).

49. *See Torres*, 805 S.W.2d at 420-21 (adopting in Texas the more traditional rule that jeopardy attaches when the defendant pleads to the indictment during a bench trial); *Ortiz*, 933 S.W.2d at 105 (recognizing that Texas attaches jeopardy when the defendant pleads during a bench trial); GERALD S. REAMEY & CHARLES P. BUBANY, TEXAS CRIMINAL PROCEDURE 429 (7th ed. 2004) (emphasizing that "jeopardy attaches when the accused pleads to the charging instrument" during a bench trial). However, the federal courts apply jeopardy to bench trials in a different way. *See Martin Linen Supply Co.*, 430 U.S. at 569 (recognizing the federal rule that jeopardy attaches during a bench trial upon the introduction of evidence); *Serfass*, 420 U.S. at 388 (holding that jeopardy attaches during a bench trial when the court begins to receive evidence).

While some commentators have questioned and discussed what is meant by "life or limb,"[50] the phrase that receives the majority of judicial and academic scrutiny is what is meant by the same offense.[51]

The Double Jeopardy Clause has been applied in varying ways.[52] Initially, the "same elements" test was determinative.[53] In *Blockburger v. United States,*[54] the key was whether overlap existed in the statutorily defined elements of criminal offenses.[55] The Court determined that two separate chargeable offenses existed if proof of a fact was needed for one offense that another offense did not need.[56] Under this approach, few

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50. *See, e.g.,* Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 YALE L.J. 1807, 1810-12 (1997) (pointing out that the phrase "life or limb" represents the scope of the Fifth Amendment, and examining the history of what this phrase has been interpreted to mean).

51. *See id. at* 1813-14 (arguing that "same offence" [sic] should be interpreted much more simply than it is, but that the Supreme Court has relied upon tests which are "a mess, legally and logically"); Charles William Hendricks, *100 Years of Double Jeopardy Erosion: Criminal Collateral Estoppel Made Extinct*, 48 DRAKE L. REV. 379, 382-83 (2000) (noting that the Supreme Court has rejected test after test when determining what is a same offense).

52. *See* Charles William Hendricks, *100 Years of Double Jeopardy Erosion: Criminal Collateral Estoppel Made Extinct*, 48 DRAKE L. REV. 379, 383 (2000) (identifying two tests, the "identical statutory offense" test and "same evidence" test, rejected by the Supreme Court prior to adopting the same elements test in *Blockburger v. United States*, 284 U.S. 299, 304 (1932)).

53. *See* Blockburger v. United States, 284 U.S. 299, 304 (1932) (holding, "[t]he applicable rule is that, where 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"); *see also* Brown v. Ohio, 432 U.S. 161, 166 (1977) (upholding the same elements test as the determinative standard for double jeopardy application); United States v. Kramer, 289 F.2d 909, 913 (2d Cir. 1961) (favoring the same elements test over the same transaction test for double jeopardy purposes); Morey v. Commonwealth, 108 Mass. 433, 434 (1871) (declaring, "[a] single act may be an offence [sic] against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other"). The Supreme Court relied upon the Massachusetts Supreme Court case in reaching its decision. *Blockburger*, 284 U.S. at 304.

54. 284 U.S. 299 (1932).

55. Blockburger v. United States, 284 U.S. 299, 304 (1932). The case involved a charge against the defendant whereby he was indicted for three violations of a narcotics act. *Id.* at 300. The charges against the defendant were: (1) sale of morphine hydrochloride; (2) sale of ten grains of morphine hydrochloride; (3) sale of eight grains of morphine hydrochloride. *Id.* The defense argued that the purported offense of selling the morphine hydrochloride was one single act since it was sold to the same individual. *Id.* at 301.

56. *Id.* at 304. The Supreme Court determined that two charges for the sale of morphine hydrochloride, though made to the same individual, did not constitute the same offense. *Id.* at 301-03. The Supreme Court noted that "[t]he next sale was not the result of the original impulse, but of a fresh one—that is to say, of a new bargain." *Id.* at 303.

offenses would constitute the same offense, thereby negating the Double Jeopardy Clause.[57]

A different approach from *Blockburger* is the "same conduct" or "same transaction" test.[58] This test takes into account what an individual did during a single criminal transaction. The thinking behind this approach is that an individual defendant should be charged at one time for every offense spawned from that defendant's criminal episode.[59] This ne-

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57. *See* Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 YALE L.J. 1807, 1818-19 (1997) (noting that any positives that stem from the same elements test are achieved "in a crude and imprecise manner that is both over- and under[-]inclusive"); *see also* Charles William Hendricks, *100 Years of Double Jeopardy Erosion: Criminal Collateral Estoppel Made Extinct*, 48 DRAKE L. REV. 379, 384 (2000) (arguing that two offenses will almost never have the same elements, therefore they will not be subject to the Double Jeopardy Clause of the Fifth Amendment). Mr. Hendricks gives a stirring illustration of how the same elements test falls short:

> Imagine if the legislature passed two statutes, identical except for one element. Statute A required that the crime be committed while the perpetrator was wearing a 'right' shoe. Statute B required that the crime be committed while the perpetrator was wearing a 'left' shoe. Under current double jeopardy analysis, these statutes would not contain the same elements and neither would be the lesser or greater included offense of the other. Therefore, acquittal of one charge would not bar a subsequent prosecution for the other.

Id. at 384 n.40. *But see* Brown v. Ohio, 432 U.S. 161, 167 (1977) (finding that the crimes of joyriding and automobile theft constituted the same offense because the elements in the statutes require the same proof for each).

58. The same transaction test was not followed, but began its ascent to a majority view in 1970. Ashe v. Swenson, 397 U.S. 436, 448 (1970) (Brennan, J., concurring). In this case, three justices—Justice Black, Justice Harlan, and Justice Brennan—wrote concurring opinions, but only Justice Brennan favored applying a same transaction test for the Double Jeopardy Clause. *Id.* Justice Brennan reiterated his views on the same transaction test in later cases. *See Brown*, 432 U.S. at 170 (Brennan, J., concurring) (stating that the same transaction test should be employed for double jeopardy purposes); *see also* Charles William Hendricks, *100 Years of Double Jeopardy Erosion: Criminal Collateral Estoppel Made Extinct*, 48 DRAKE L. REV. 379, 385 (2000) (expounding upon Justice Brennan's views in favor of applying a same transaction test). *See generally* Illinois v. Vitale, 447 U.S. 410 (1980) (expressing that a test might exist beyond the same elements test when the subsequent prosecutions require the re-litigation of a defendant's conduct or criminal episode).

59. Basically, the same transaction test serves as a form of joinder for all offenses that one individual engaged in during one criminal episode. *See Brown*, 432 U.S. at 170 (Brennan, J., concurring) (reaffirming his views in favor of the same transaction test); *Ashe*, 397 U.S. at 453-54 (Brennan, J., concurring) (stating "the Double Jeopardy Clause requires the prosecution, . . . to join at one trial all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction"); Charles William Hendricks, *100 Years of Double Jeopardy Erosion: Criminal Collateral Estoppel Made Extinct*, 48 DRAKE L. REV. 379, 384-86 (2000) (discussing the same transaction test as Justice Brennan believed it should be).

gates the need for multiple trials and helps reduce waste of judicial resources.[60]

Realizing the limitations of *Blockburger*, the Supreme Court briefly adopted the same transaction test as an additional safeguard to the same elements test.[61] In *Grady v. Corbin*,[62] the Court held that the prosecution cannot bring separate trials against a defendant.[63] If the defendant allegedly committed several crimes at one time, those charges must all be brought together.[64]

However, the same transaction test was short-lived. The Court reverted back to the same elements test in *United States v. Dixon*,[65] and eliminated the same transaction approach only three years after *Grady*.[66] With the *Blockburger* test put back into place, the Double Jeopardy Clause has been limited. The same elements test does not cover the gamut of potential scenarios that should be protected by the Double Jeopardy Clause, meaning double jeopardy is limited to situations in

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60. *See Brown*, 432 U.S. at 170 (Brennan, J., concurring) (urging adoption of the same transaction test because of its benefits to the legal system); *Ashe*, 397 U.S. at 454 (Brennan, J., concurring) (encouraging the use of the same transaction test because it furthers judicial economy and convenience, along with promoting justice); Charles William Hendricks, *100 Years of Double Jeopardy Erosion: Criminal Collateral Estoppel Made Extinct*, 48 DRAKE L. REV. 379, 385 (2000) (commenting on Justice Brennan's belief in the benefits of the same transaction test). *See generally* Grady v. Corbin, 495 U.S. 508, 518 (1990) (noting that another benefit of the same transaction test is that it prevents the prosecution from perfecting its case against a defendant because it disallows multiple prosecutions arising from one criminal occurrence).

61. *See* Grady v. Corbin, 495 U.S. 508, 520 (1990) (identifying that "strict application of the *Blockburger* test is not the exclusive means of determining whether a subsequent prosecution violates the Double Jeopardy Clause").

62. 495 U.S. 508 (1990).

63. Grady v. Corbin, 495 U.S. 508, 521-23 (1990). *Grady* involved a traffic accident in which the defendant was charged initially with the misdemeanor of driving while intoxicated and other traffic violations. *Id.* at 511. After the defendant plead guilty, a grand jury convened and returned an indictment against the defendant charging him with reckless manslaughter, criminally negligent homicide, and second-degree vehicular manslaughter—among other charges—because a person involved in the accident had died. *Id.* at 513. The defendant attempted to invoke double jeopardy protection because he already plead guilty to the misdemeanor offenses the prosecution had charged him with. *Id.* at 514.

64. The same transaction test did not supplant the same elements standard, but rather was a safeguard if a particular case did not meet the requirements for double jeopardy protection under the same elements test. *Id.* at 519-22. Today, the prosecution would have to do more than meet the same elements test; it would also have to establish that the offense being charged against the defendant did not arise out of a criminal occurrence in which the defendant had already been tried. *Id.* at 522. The Supreme Court referenced the fact that the same elements test did not provide adequate protection for defendants against the burden of multiple trials. *Id.* at 520.

65. 509 U.S. 688 (1993).

66. United States v. Dixon, 509 U.S. 688, 711 (1993).

which the technical statutory elements match up with each other.[67] A defendant must show that jeopardy has attached, and that the same offense has occurred because two statutes involve the same elements of a crime.[68] Accordingly, under this approach to double jeopardy, collateral estoppel arose in the criminal context.

D. *Collateral Estoppel in Criminal Court*

Though often confused with res judicata, and now with double jeopardy, collateral estoppel is a separate doctrine with its own function.[69]

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67. *See id.* at 701-04 (analyzing the facts of the case, the Supreme Court stated that under the same transaction test, contrary to the same elements test, the offenses would be barred by double jeopardy). In this case, the defendant was charged with multiple offenses, such as kidnapping, assault, assault with intent to kill, and others. *Id.* at 700. Under the same transaction test, all these offenses would be barred, but the Supreme Court called this test a mistake. *Id.* at 711. The Court reasoned that the same elements test had historical roots, unlike the same transaction test, and that the same transaction test was "wholly inconsistent with earlier Supreme Court precedent and with the clear common-law understanding of double jeopardy." *Id.* at 704.

68. *See* Brown v. Ohio, 432 U.S. 161, 166 (1977) (upholding the same elements test as the determinative standard for double jeopardy application); Blockburger v. United States, 284 U.S. 299, 304 (1932) (holding, "[t]he applicable rule is that, where 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"); United States v. Kramer, 289 F.2d 909, 913 (2d Cir. 1961) (favoring the same elements test over the same transaction test); Morey v. Commonwealth, 108 Mass. 433, 434 (1871) (declaring, "[a] single act may be an offence against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other"). *See generally* Illinois v. Vitale, 447 U.S. 410 (1980) (declaring double jeopardy requires jeopardy to attach first before the Fifth Amendment can be invoked); Crist v. Bretz, 437 U.S. 28 (1978) (reiterating that the requirement for jeopardy is a limitation on the application of the Double Jeopardy Clause); United States v. Martin Linen Supply Co., 430 U.S. 564 (1977) (holding that jeopardy must attach during the first prosecution for there to be a bar against the second prosecution); Green v. United States, 355 U.S. 184 (1957) (stating that double jeopardy exists only once former jeopardy previously existed in the first prosecution); Ortiz v. State, 933 S.W.2d 102 (Tex. Crim. App. 1996) (en banc) (reaffirming that jeopardy must exist in order for double jeopardy to bar a second prosecution); State v. Torres, 805 S.W.2d 418 (Tex. Crim. App. 1991) (en banc) (expressing that, without jeopardy, there can be no double jeopardy).

69. The landmark case for collateral estoppel is also the case that initially distinguished collateral estoppel from res judicata. *See* Cromwell v. County of Sac, 94 U.S. 351, 353-55 (1877) (defining res judicata as a preclusion to claims and collateral estoppel as a bar against issues already decided upon); *see also* Mayes v. Stewart, 11 S.W.3d 440, 450 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (pointing out that, while res judicata and collateral estoppel are related, they are nevertheless different doctrines of law and cannot be interchangeable); Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 YALE L.J. 1807, 1828 (1997) (writing that the notion that double jeopardy and collateral estoppel are the same "cannot . . . be taken seriously"); Walter W. Heiser, *California's*

Collateral estoppel bars the relitigation of previously decided issues.[70] After a long history in civil court,[71] collateral estoppel arose in the criminal context in the 1916 case of *United States v. Oppenheimer*.[72] The *Oppenheimer* Court affirmed a dismissal of an indictment because the lower court had previously dismissed an indictment for the same offense as violative of the statute of limitations.[73]

Confusing Collateral Estoppel (Issue Preclusion) Doctrine, 35 SAN DIEGO L. REV. 509, 509-10 (1998) (distinguishing collateral estoppel from res judicata); Charles William Hendricks, *100 Years of Double Jeopardy Erosion: Criminal Collateral Estoppel Made Extinct*, 48 DRAKE L. REV. 379, 390-91 (2000) (stating that, although res judicata and collateral estoppel are similar and often confused, they are quite different); Rex. R. Perschbacher, *Rethinking Collateral Estoppel: Limiting the Preclusive Effect of Administrative Determinations in Judicial Proceedings*, 35 U. FLA. L. REV. 422, 426 (1983) (detailing res judicata's Roman origin, collateral estoppel's German origins, and the different purposes and functions of both doctrines).

70. BLACK'S LAW DICTIONARY 108 (2d pocket ed. 2001).

71. Collateral estoppel has a long history in the civil law of America. The Supreme Court officially adopted collateral estoppel into American jurisprudence in 1877. *See Cromwell*, 94 U.S. at 353-58 (developing the use of collateral estoppel in the civil context); *see also* Rex. R. Perschbacher, *Rethinking Collateral Estoppel: Limiting the Preclusive Effect of Administrative Determinations in Judicial Proceedings*, 35 U. FLA. L. REV. 422, 427-29 (1983) (exploring the history of collateral estoppel and the Supreme Court's decision in *Cromwell*). With *Cromwell* as the father of collateral estoppel in America, the doctrine spread and States began to employ the doctrine of collateral estoppel. *See id.* at 429 (expressing that *Cromwell* became "the standard American statement of collateral estoppel"). Eventually, Texas incorporated collateral estoppel into its jurisprudence. Bonniwell v. Beech Aircraft Corp., 663 S.W.2d 816, 820-21 (Tex. 1984) (laying out the elements necessary for collateral estoppel). The Supreme Court of Texas determined the elements of collateral estoppel to include: (1) the facts at issue in a subsequent action were previously fairly and fully litigated; (2) the facts at issue were essential in the first cause of action; and (3) "the parties were cast as adversaries in the first action." *Id.* The last element is not a limit as to only the plaintiff and the defendant, but collateral estoppel is available to all parties to a claim as well as secondary parties in privity. *Id.* at 821. The Supreme Court of Texas also provided guidance on who could invoke collateral estoppel. *See* Quinney Elec., Inc. v. Kondos Entm't, Inc., 988 S.W.2d 212, 213-14 (Tex. 1999) (holding that collateral estoppel is to prevent a party from re-litigating an issue that that party had lost).

72. 242 U.S. 85 (1916).

73. United States v. Oppenheimer, 242 U.S. 85, 85-86 (1916). In *Oppenheimer*, the defendant was charged with conspiracy to conceal assets. *Id.* The defendant had previously been charged with the same offense, but the original offense had been thrown out due to the passage of the statute of limitations. *Id.* The defendant plead that the second indictment should also be dismissed because of the previous adjudication. *Id.; see also* Charles William Hendricks, *100 Years of Double Jeopardy Erosion: Criminal Collateral Estoppel Made Extinct*, 48 DRAKE L. REV. 379, 392 (2000) (providing a detailed description of the landmark case); Note, *The Due Process Roots of Criminal Collateral Estoppel*, 109 HARV. L. REV. 1729, 1730-31 (1996) (detailing the facts of the landmark *Oppenheimer* decision).

Application of the collateral estoppel doctrine in the criminal context actually protected the individual where double jeopardy fell short. In *Oppenheimer*, for example, jeopardy did not attach to the defendant due to the dismissal on statute of limitations grounds.[74] Collateral estoppel still applied, however, under due process principles.[75] *United States v. Kramer*[76] is another case exemplifying this form of common law collateral estoppel.[77] The Second Circuit applied common law collateral estoppel, and both acquitted the defendant on some charges and reversed other convictions with instructions to remand without the evidence barred by collateral estoppel.[78] Thus, in *Kramer,* common law collateral estoppel provided protection where double jeopardy could not.[79]

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74. Introducing collateral estoppel into the criminal field, the Supreme Court's opinion stated:

> It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt. . . .
>
> The safeguard provided by the Constitution against the gravest abuses has tended to give the impression that when it did not apply in terms, there was no other principle that could. But the [Fifth] Amendment was not intended to do away with what in civil law is a fundamental principle of justice . . . .

Oppenheimer, 242 U.S. at 87-88.

75. *See* Charles William Hendricks, *100 Years of Double Jeopardy Erosion: Criminal Collateral Estoppel Made Extinct*, 48 DRAKE L. REV. 379, 392-94 (2000) (developing the idea that collateral estoppel's introduction into criminal law was based on principles of the Due Process Clause, even though the Supreme Court never explicitly mentioned this term in its opinion in *Oppenheimer*); Note, *The Due Process Roots of Criminal Collateral Estoppel*, 109 HARV. L. REV. 1729, 1740-45 (1996) (supporting the proposition that collateral estoppel was initially brought into criminal law on the shoulders of due process).

76. 289 F.2d 909 (2d Cir. 1961).

77. United States v. Kramer, 289 F.2d 909, 913 (2d Cir. 1961).

78. In *Kramer,* the defendant was indicted on multiple counts, and the Supreme Court, after applying collateral estoppel, reversed and remanded certain charges while acquitting the defendant on other charges. *Id.* at 921 (holding, "conviction is reversed with directions to enter a judgment of acquittal on Counts I and II, and to order a new trial on Counts III and IV").

79. Collateral estoppel was applied on grounds that the various charges against the defendant arose from the same criminal episode or transaction. *Kramer*, 289 F.2d at 917. Under the Double Jeopardy Clause, the defendant had to have shown that each crime met the same elements standard. Blockburger v. United States, 284 U.S. 299, 304 (1932). However, the accused would not have been able to successfully invoke double jeopardy because the defendant previously had been acquitted for the crime of burglary, and was now being charged with conspiracy. *Kramer*, 289 F.2d at 912. The Second Circuit Court of Appeals initially stated that double jeopardy will not protect the defendant in this situation. *See id.* at 913 (restating that the test for double jeopardy is not based on a defendant's criminal episode, but whether the proof required for one offense is the same as that required for the other offenses).

Later, however, this type of protection was limited when the doctrine of collateral estoppel became constitutionalized. In *Ashe v. Swenson*,[80] the Court determined that the collateral estoppel doctrine was instilled within the Double Jeopardy Clause.[81] In other words, while double jeopardy and collateral estoppel were not the same, collateral estoppel was now a relative of double jeopardy and stemmed from the same basic parameters.[82] While the two concepts are similar, collateral estoppel became intermingled with double jeopardy, and once found constitutional, became significantly limited in application.[83]

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80. 397 U.S. 436 (1970).

81. Ashe v. Swenson, 397 U.S. 436, 445 (1970). The Supreme Court held that "[t]he ultimate question to be determined, . . . is whether this established rule of [collateral estoppel in] federal law is embodied in the Fifth Amendment guarantee against double jeopardy." *Id.* The Supreme Court answered that collateral estoppel was definitely a part of the Fifth Amendment's Double Jeopardy Clause. *Id.* The Court determined that there was no other source for collateral estoppel but the Double Jeopardy Clause. *See id.* at 442-43 (holding that collateral estoppel, now embodied in the Fifth Amendment, was no longer available for courts to apply fundamental fairness or other due process concerns); *see also* Showery v. Samaniego, 814 F.2d 200, 203 (5th Cir. 1987) (reaffirming that the Fifth Amendment, not the Due Process Clause, is the basis for collateral estoppel).

82. *See Ashe*, 397 U.S. at 443 (finding that collateral estoppel bars re-litigation of an ultimate issue between the same parties after the issue has been decided by a final, valid judgment); United States v. Brackett, 113 F.3d 1396, 1398 (5th Cir. 1997) (stressing that an ultimate issue must be "necessarily decided" previously for an individual to successfully invoke the bar of collateral estoppel); *see also* Dowling v. United States, 493 U.S. 342, 348 (1990) (indicating that collateral estoppel is merely a component of double jeopardy); Nichols v. Scott, 69 F.3d 1255, 1270 (5th Cir. 1995) (asserting that jeopardy must attach in order for collateral estoppel to bar a subsequent litigation of an issue already decided); *Samaniego*, 814 F.2d at 202 (claiming collateral estoppel is an ingredient of double jeopardy); United States v. Mock, 604 F.2d 341, 343 (5th Cir. 1979) (identifying double jeopardy as the "parent doctrine" of collateral estoppel), *aff'd*, 640 F.2d 629 (5th Cir. Unit B Mar. 1981). *But see* Charles William Hendricks, *100 Years of Double Jeopardy Erosion: Criminal Collateral Estoppel Made Extinct*, 48 DRAKE L. REV. 379, 394 (2000) (expressing that "collateral estoppel was constitutionalized under an amendment that it cannot coexist with"); Note, *The Due Process Roots of Criminal Collateral Estoppel*, 109 HARV. L. REV. 1729, 1735-36 (1996) (declaring that collateral estoppel was not solely limited to double jeopardy initially, but subsequent decisions limited and caged collateral estoppel within the Double Jeopardy Clause).

83. At one time, collateral estoppel would protect where double jeopardy would not. *See* United States v. Oppenheimer, 242 U.S. 85, 87 (1916) (applying collateral estoppel where jeopardy had not attached); *Kramer*, 289 F.2d at 915-16 (recognizing that the offense at hand would not fall under Fifth Amendment protection, and looking to collateral estoppel for potential relief). Collateral estoppel no longer provides security to individuals apart from double jeopardy, but is a part of double jeopardy. *See Dowling*, 493 U.S. at 347 (reiterating that double jeopardy umbrellas the doctrine of collateral estoppel in criminal court); *Ashe*, 397 U.S. at 445 (holding that collateral estoppel is based on the constitutional principle of double jeopardy); *Mock*, 604 F.2d at 343 (asserting that collateral estoppel no longer stands alone, but is constitutionalized in the Fifth Amendment). Consequently, col-

III. The Texas Approach to Collateral Estoppel's Application to Suppression Hearings: A Split in Authority

Numerous Texas courts have rendered opinions on the general topic of criminal collateral estoppel.[84] In general, these decisions have followed the precedent set by the United States Supreme Court.[85] Specifically, Texas case law discusses whether collateral estoppel applies to different motion to suppress hearings.[86] While it would be improper to state that Texas courts have been uniform in their decisions of collateral estoppel's applicability, a general consensus holds that collateral estoppel does not apply to different motions to suppress.[87] The reasons for the current split

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lateral estoppel needs the attachment of jeopardy. *See Nichols*, 69 F.3d at 1270 (stating that jeopardy must attach for collateral estoppel to bar subsequent litigation of an issue already decided).

84. *See generally* Reynolds v. State, 4 S.W.3d 13 (Tex. Crim. App. 1999) (en banc); Headrick v. State, 988 S.W.2d 226 (Tex. Crim. App. 1999) (en banc); State v. Brabson, 976 S.W.2d 182 (Tex. Crim. App. 1998) (en banc); State v. Aguilar, 947 S.W.2d 257 (Tex. Crim. App. 1997) (en banc); Ladner v. State, 780 S.W.2d 247 (Tex. Crim. App. 1989) (en banc); Neaves v. State, 767 S.W.2d 784 (Tex. Crim. App. 1989) (en banc); Ware v. State, 736 S.W.2d 700 (Tex. Crim. App. 1987) (en banc); Dedrick v. State, 623 S.W.2d 332 (Tex. Crim. App. [Panel Op.] 1981); *Ex parte* King, 134 S.W.3d 500 (Tex. App.—Austin 2004, pet. ref'd); Robertson v. State, No. 05-99-00138-CR, 2001 WL 243661 (Tex. App.—Dallas Mar. 13, 2001, pet. ref'd) (not designated for publication); Thomas v. State, 990 S.W.2d 858 (Tex. App.—Dallas 1999, no pet.); Salinas v. State, 1 S.W.3d 700 (Tex. App.—Amarillo 1999, pet. ref'd); *Ex parte* Gregerman, 974 S.W.2d 800 (Tex. App.—Houston [14th Dist.] 1998, no pet.); State v. Ayala, 981 S.W.2d 474 (Tex. App.—El Paso 1998, pet. ref'd); *Ex parte* Ueno, 971 S.W.2d 560 (Tex. App.—Dallas 1998, pet. ref'd); *Ex parte* Serna, 957 S.W.2d 598 (Tex. App.—Fort Worth 1997, pet. ref'd); *Ex parte* Pipkin, 935 S.W.2d 213 (Tex. App.—Amarillo 1996, pet. ref'd); Holmberg v. State, 931 S.W.2d 3 (Tex. App.—Houston [1st Dist.] 1996, pet. ref'd); *Ex parte* Culver, 932 S.W.2d 207 (Tex. App.—El Paso 1996, pet. ref'd); Manning v. State, 870 S.W.2d 200 (Tex. App.—Eastland 1994, pet. ref'd); McConnell v. Attorney Gen. of Tex., 878 S.W.2d 281 (Tex. App.—Corpus Christi 1994, no pet.).

85. *See* Warren v. State, 514 S.W.2d 458, 462 (Tex. Crim. App. 1974) (adopting the federal approach to collateral estoppel by incorporating the doctrine into the Double Jeopardy Clause, and declaring the federal approach is applicable to the States through the Fourteenth Amendment), *overruled on other grounds by* Reed v. State, 744 S.W.2d 112 (Tex. Crim. App. 1988) (en banc).

86. *See, e.g.*, State v. Henry, 25 S.W.3d 260, 262 (Tex. App.—San Antonio 2000, no pet.) (discussing whether collateral estoppel applies to motion to suppress hearings).

87. *See Reynolds*, 4 S.W.3d at 13 (holding that collateral estoppel does not apply to prevent issues decided in an administrative license revocation hearing from being relitigated again in a criminal trial for DWI). *See generally* Neaves v. State, 767 S.W.2d 784 (Tex. Crim. App. 1989) (en banc) (asserting that a license revocation hearing does not an issue of ultimate fact in common with a criminal trial for DWI, and collateral estoppel does not apply); *Henry*, 25 S.W.3d 260 (stating that collateral estoppel does not apply to suppression motions because a ruling on a suppression motion is not a final ruling); State v. Rodriguez, 11 S.W.3d 314 (Tex. App.—Eastland 1999, no pet.) (holding that jeopardy must

in the appellate courts regarding collateral estoppel are discussed below. Fortunately, an analysis of Texas law and recent court decisions clarifies these differing approaches.

The split in Texas can be attributed to three cases that were decided within a span of two years.[88] In each case, the defendant was charged in county court for one offense and in district court for another offense after searches produced drugs.[89] The charges were based on the same transaction.[90] Moreover, in each case, the county court granted the defendant's motion to suppress the evidence,[91] and the defendant subsequently argued that (1) collateral estoppel applied to the district court, and (2) the district court was bound by the factual determinations of the county court.[92] Two Texas Courts of Appeals rejected the defendants' arguments regarding the application of collateral estoppel to the felony charge in district court, while the remaining appellate court held that collateral estoppel did apply, and that the evidence should be suppressed.

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attach for collateral estoppel to bar the relitigation of certain issues, and that jeopardy does not attach during a suppression hearing); *Ex parte* Ueno, 971 S.W.2d 560 (Tex. App.—Dallas 1998, pet. ref'd) (declaring that jeopardy must attach before collateral estoppel will bar a subsequent litigation of issues already decided).

88. Guajardo v. State, 24 S.W.3d 423 (Tex. App.—Corpus Christi 2000), *rev'd*, 109 S.W.3d 456 (Tex. Crim. App. 2003) (en banc); *Henry*, 25 S.W.3d 260; *Rodriguez*, 11 S.W.3d 314.

89. *See Guajardo*, 24 S.W.3d at 425 (charging the accused with "Unlawful [misdemeanor] Possession of Marijuana in the County Court" and with "Unlawful [felony] Possession of Cocaine" in the district court); *Henry*, 25 S.W.3d at 261 (charging the accused with the misdemeanor of marijuana possession in county court and the felony of cocaine possession in district court); *Rodriguez*, 11 S.W.3d at 315 (charging the defendant with felony possession of cocaine in district court and misdemeanor possession in county court).

90. *See Guajardo*, 24 S.W.3d at 425 (during a traffic stop, the defendant threw two objects, one being marijuana and the other being cocaine, out of the vehicle's window into a field); *Henry*, 25 S.W.3d at 261 (involving a traffic stop for speeding whereupon the marijuana and cocaine were discovered); *Rodriguez*, 11 S.W.3d at 315 (involving the discovery of both marijuana and cocaine as a result of a single search warrant).

91. *See Guajardo*, 24 S.W.3d at 425 (stating that the county court granted the motion to suppress the marijuana found); *Henry*, 25 S.W.3d at 261 (noting that the county court granted the suppression motion); *Rodriguez*, 11 S.W.3d at 316 (reiterating that the county court found the search warrant lacked probable cause and granted the motion to suppress).

92. *See Guajardo*, 24 S.W.3d at 425 (stating that the district court denied the application of collateral estoppel and denied the motion to suppress the evidence); *Henry*, 25 S.W.3d at 261 (detailing that the district court granted the motion to suppress the cocaine based on collateral estoppel); *Rodriguez*, 11 S.W.3d at 316 (noting that the district court applied collateral estoppel and dismissed the felony indictment).

A. *Collateral Estoppel Does Not Apply*

In *State v. Rodriguez*,[93] the Eastland Court of Appeals rejected the application of collateral estoppel to different motion to suppress hearings.[94] The court reasoned that while collateral estoppel applies in civil proceedings, it does not carry the same weight in criminal trials.[95] As the court noted, public policy favors efficiency and other economic ends in civil court, yet in the criminal context the public's desire for accurate justice and finality prevail.[96] The court also considered collateral estoppel in light of the Supreme Court's conclusion in *Ashe v. Swenson*. As the Supreme Court limited collateral estoppel by finding it constitutional under the Fifth Amendment, the Texas court also stated that before collateral estoppel may apply, jeopardy must first attach.[97] For jeopardy to attach, however, there must be a valid and final judgment.[98]

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93. 11 S.W.3d 314 (Tex. App.—Eastland 1999, no pet.).

94. *See* State v. Rodriguez, 11 S.W.3d 314, 324 (Tex. App.—Eastland 1999, no pet.) (finding that "the district court erred in applying collateral estoppel and in dismissing the indictment").

95. *See id.* (asserting that the form of collateral estoppel applied in civil law is different than the form found in criminal law under double jeopardy, and that the two forms are not based on identical principles).

96. *See id.* at 322. (pointing out that civil trials do not carry with them the burden of the public's interest in justice and accuracy, and that, in criminal trials, such concerns outweigh other policy reasons behind the doctrine of collateral estoppel); *cf.* Rex. R. Perschbacher, *Rethinking Collateral Estoppel: Limiting the Preclusive Effect of Administrative Determinations in Judicial Proceedings*, 35 U. FLA. L. REV. 422, 446-51 (1983) (illustrating four policy reasons that support collateral estoppel's general application in law). The four policy reasons behind collateral estoppel are: (1) the finality of decisions and issues when a second suit could reopen the issue again; (2) "[p]rotection of [l]itigants [f]rom the '[e]xpense and [v]exation' of [m]ultiple [s]uits"; (3) the potential to conserve and efficiently use scarce judicial resources; and (4) the avoidance of inconsistency in court decisions. *Id.*

97. *See Rodriguez*, 11 S.W.3d at 317 (interpreting the Supreme Court's requirement of a "valid and final judgment" as intent that jeopardy must attach, just as is required for double jeopardy); *Ex parte* Ueno, 971 S.W.2d 560, 562 (Tex. App.—Dallas 1998, pet. ref'd) (stating that collateral estoppel requires an individual to be placed in jeopardy). The Eastland court declared that the attachment of jeopardy is well established, and that jeopardy never attached at the county level because the misdemeanor charge was dismissed. *See Rodriguez*, 11 S.W.3d at 319 (noting that Pennsylvania, Massachusetts, Florida, and Louisiana all require jeopardy to attach); *cf. Ueno*, 971 S.W.2d at 562-63 (stating that a pretrial suppression hearing is based on the admissibility of evidence, and does not place an individual in jeopardy); Ortiz v. State, 933 S.W.2d 102, 105 (Tex. Crim. App. 1996) (en banc) (holding that an individual is placed in jeopardy when the jury is sworn in and empaneled); State v. Torres, 805 S.W.2d 418, 420-21 (Tex. Crim. App. 1991) (establishing that jeopardy attaches during a bench trial when the accused pleads to the charge).

98. *See Rodriguez*, 11 S.W.3d at 317 (adopting the notion that jeopardy equates to a valid and final judgment for collateral estoppel purposes). Does this mean that jeopardy has been limited, for criminal collateral estoppel, to only a verdict? Texas law does not

Rodriguez further stated that a ruling on a motion to suppress, though valid, is not a final judgment.[99] A motion to suppress hearing is simply a pretrial motion. Similarly, the court in *State v. Henry*[100] held that a ruling on a motion to suppress is interlocutory and allows a trial judge to reconsider it later.[101] The *Henry* court held that a ruling is not final until it can no longer be reconsidered; until then it can definitely not be classified as final.[102] The *Rodriguez* court further denigrated the motion to suppress by calling it a "specialized objection."[103] Thus, both the Eastland and San Antonio courts determined that if the doctrine of collateral estoppel is to apply in criminal litigation, it should apply only when a final decision is reached in the first proceeding.[104]

Although the reasoning of the two courts differed slightly, the rulings were ultimately the same. In *Rodriguez*, for example, the appellate court focused on whether jeopardy attached.[105] The court concluded that col-

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require a judgment for jeopardy to attach, but rather the seating of the jury or the plea of a defendant will suffice for one to be placed in jeopardy. *See Ortiz*, 933 S.W.2d at 105 (holding that jeopardy attaches once the jury is empaneled and sworn); *Torres*, 805 S.W.2d at 420-21 (holding that jeopardy attaches once an accused pleads to the charge during a bench trial).

99. *See Rodriguez*, 11 S.W.3d at 322 (expressing that a pretrial ruling on a suppression motion is not final and, therefore, collateral estoppel could not apply since there was not final judgment); *see also* McKown v. State, 915 S.W.2d 160, 160 (Tex. App.—Fort Worth 1996, no pet.) (describing a pretrial ruling as non-final).

100. 25 S.W.3d 260 (Tex. App.—San Antonio 2000, no pet.).

101. State v. Henry, 25 S.W.3d 260, 262 (Tex. App.—San Antonio 2000, no pet.) (stating that a pretrial ruling is interlocutory and not final); *see also Rodriguez*, 11 S.W.3d at 322 (expressing that a pretrial ruling on a suppression motion is not final); *McKown*, 915 S.W.2d at 160 (describing a pretrial ruling as non-final); Montalvo v. State, 846 S.W.2d 133, 136 (Tex. App.—Austin 1993, no pet.) (recognizing that pretrial suppression rulings can be reconsidered by a trial judge).

102. *See Henry*, 25 S.W.3d at 262 (stating that "[a] ruling is not final for purposes of collateral estoppel if it is subject to reconsideration"); *see also Montalvo*, 846 S.W.2d at 136 (allowing for a pretrial suppression ruling to be reconsidered by the trial judge who made the initial ruling).

103. *See Rodriguez*, 11 S.W.3d at 322 (demeaning the importance of a motion to suppress by calling it a "specialized objection to the admissibility of evidence"); *see also* Galitz v. State, 617 S.W.2d 949, 952 n.10 (Tex. Crim. App. 1981) (en banc) (discounting the suppression motion as a specialized objection); Holmberg v. State, 931 S.W.2d 3, 5 (Tex. App.—Houston [1st Dist.] 1996, pet. ref'd) (supporting the idea that a motion to suppress is nothing more than a specialized objection); *Montalvo*, 846 S.W.2d at 137 (agreeing with other Texas courts on the status of a suppression motion).

104. *See Henry*, 25 S.W.3d at 262 (stating that a pretrial ruling is interlocutory and not final); *Rodriguez*, 11 S.W.3d at 317 (indicating that a pretrial ruling on a suppression motion is not final).

105. *See Rodriguez*, 11 S.W.3d at 317 (interpreting the Supreme Court's requirement of a "valid and final judgment" as intent that jeopardy must attach, just as is required for double jeopardy); *Ex parte* Ueno, 971 S.W.2d 560, 562 (Tex. App.—Dallas 1998, pet. ref'd)

lateral estoppel would apply to a second proceeding only when jeopardy has attached in a prior proceeding. Thus, in a suppression hearing where jeopardy did not attach, collateral estoppel did not apply.[106] In *Henry*, the San Antonio court found collateral estoppel inapplicable because the earlier suppression hearing decision was not final.[107] As previously noted, the court reasoned that the ruling on the suppression motion was not final if it could have been reconsidered.[108] Because both jeopardy and finality are interwoven in double jeopardy and collateral estoppel analysis,[109] jeopardy attaches for collateral estoppel when a final judg-

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(stating that collateral estoppel requires an individual to be placed in jeopardy). The Eastland court declared that the attachment of jeopardy is well established, and jeopardy never attached at the county level because the misdemeanor charge was dismissed. *See Rodriguez*, 11 S.W.3d at 319 (noting that Pennsylvania, Massachusetts, Florida and Louisiana all require jeopardy to attach); *Ueno*, 971 S.W.2d at 562-63 (stating that a pretrial suppression hearing is based on the admissibility of evidence, and does not place an individual in jeopardy); *cf.* Ortiz v. State, 933 S.W.2d 102, 105 (Tex. Crim. App. 1999) (en banc) (holding that an individual is placed in jeopardy when the jury is sworn in and empaneled); State v. Torres, 805 S.W.2d 418, 420-21 (Tex. Crim. App. 1991) (establishing that jeopardy attaches during a bench trial when the accused pleads to the charge).

106. *Rodriguez*, 11 S.W.3d at 317; *Ueno*, 971 S.W.2d at 562. The Eastland court declared that the attachment of jeopardy is well established, and jeopardy never attached at the county level because the misdemeanor charge was dismissed. *Rodriguez*, 11 S.W.3d at 319; *Ueno*, 971 S.W.2d at 562-63.

107. *See Henry*, 25 S.W.3d at 262 (holding that a ruling on a suppression motion is not final); *Rodriguez*, 11 S.W.3d at 322 (advancing the idea that a ruling on a suppression motion is a non-final ruling); McKown v. State, 915 S.W.2d 160, 161 (Tex. App.—Fort Worth 1996, no pet.) (identifying a pretrial ruling as a "non-final ruling by [a] trial court"); *Montalvo*, 846 S.W.2d at 136 (noting that a pretrial suppression ruling can be reconsidered and, therefore, would not be a final ruling); *see also Ex parte* Williams, 379 S.W.2d 911, 912 (Tex. Crim. App. 1964) (furthering the idea that a ruling on a motion to suppress is not final in that if the motion is granted and the charges are dismissed, the dismissal does not make the ruling any more final because one can always be re-indicted or re-charged); Holmberg v. State, 931 S.W.2d 3, 5 (Tex. App.—Houston [1st Dist.] 1996, pet. ref'd) (supporting the non-finality of a suppression ruling by stating that neither double jeopardy nor collateral estoppel apply to the mere admissibility of evidence); McConnell v. Attorney Gen. of Tex., 878 S.W.2d 281, 283 (Tex. App.—Corpus Christi 1994, no pet.) (stating that a dismissal without prejudice does not have a collateral estoppel effect on a subsequent case).

108. *See Henry*, 25 S.W.3d at 262 (stating that "[a] ruling is not final for purposes of collateral estoppel if it is subject to reconsideration"); *see also Montalvo*, 846 S.W.2d at 136 (allowing for a pretrial suppression ruling to be reconsidered by the trial judge who made the initial ruling).

109. *See* Ashe v. Swenson, 397 U.S. 436, 443 (1970) (defining constitutionalized collateral estoppel as "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit"); Nichols v. Scott, 69 F.3d 1255, 1270 (5th Cir. 1995) (asserting that jeopardy must attach in order for collateral estoppel to bar subsequent litigation of an issue already decided); *Rodriguez*, 11 S.W.3d at 317 (interpreting the Supreme Court's requirement of a

ment is rendered.[110] Hence, the Eastland and San Antonio decisions help to further the body of law concerning collateral estoppel as a component of the Fifth Amendment Double Jeopardy Clause.

B. *Collateral Estoppel Does Apply*

In *Guajardo v. State*,[111] the Corpus Christi Court of Appeals disagreed with the San Antonio and Eastland courts just eight days after *Henry* was issued.[112] The *Guajardo* court relied on three elements articulated by the Texas Court of Criminal Appeals in *State v. Aguilar*.[113] The *Aguilar* ele-

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"valid and final judgment" as intent that jeopardy must attach, just as is required for double jeopardy).

110. *See* State v. Rodriguez, 11 S.W.3d 314, 317 (Tex. App.—Eastland 1999, no pet.) (holding that jeopardy equates to a valid and final judgment for collateral estoppel purposes); *Ex parte* Ueno, 971 S.W.2d 560, 562 (Tex. App.—Dallas 1998, pet. ref'd) (stating that collateral estoppel requires an individual to be placed in jeopardy).

111. 24 S.W.3d 423 (Tex. App.—Corpus Christi 2000), *rev'd*, 109 S.W.3d 456 (Tex. Crim. App. 2003) (en banc).

112. *See* Guajardo v. State, 24 S.W.3d 423, 426 (Tex. App.—Corpus Christi 2000) (holding that the defendant established the requisite elements of collateral estoppel, and that the district court was barred from ruling on the suppression motion in any manner other than granting the motion and excluding the evidence), *rev'd*, 109 S.W.3d 456 (Tex. Crim. App. 2003) (en banc).

113. 947 S.W.2d 257, 259-60 (Tex. Crim. App. 1997) (en banc). The Texas Court of Criminal Appeals adopted the three elements test from the Supreme Court of the United States. *See* United States v. Utah Constr. & Mining Co., 384 U.S. 394, 422 (1966) (announcing that collateral estoppel can apply to two different hearings, even if one is an administrative hearing and the other is a hearing before a court of law). The Texas court also noted that collateral estoppel can have a preclusive effect "even if one of the proceedings under analysis is labeled 'civil' or 'administrative.'" *See* State v. Aguilar, 947 S.W.2d 257, 259 (Tex. Crim. App. 1997) (en banc) (stating that this is the result of collateral estoppel being constitutionalized under double jeopardy); *cf.* United States v. Halper, 490 U.S. 435, 447-49 (1989) (proclaiming that double jeopardy protections may apply to a civil trial if the purpose of the punishment is grounded on the ideas of retribution, deterrence or punitive purposes). The Texas Court of Criminal Appeals further embedded this form of collateral estoppel into Texas law in 1998 by stating that this form of collateral estoppel is not based on the form found under the Double Jeopardy Clause. *See* State v. Brabson, 976 S.W.2d 182, 183 n.2 (Tex. Crim. App. 1998) (en banc) (noting that the form of collateral estoppel used in *Utah Construction* "does not implicate the rule of collateral estoppel as 'embodied in the Fifth Amendment guarantee against double jeopardy'"). The Corpus Christi court cited various Texas cases that have adopted the version of collateral estoppel as applied in *State v. Aguilar*. *Guajardo*, 24 S.W.3d at 426 n.3; *see also* State v. Ayala, 981 S.W.2d 474, 477 (Tex. App.—El Paso 1998, pet. ref'd) (recognizing the existence of the common law form of collateral estoppel in Texas criminal law); *Ex parte* Gregerman, 974 S.W.2d 800, 803 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (noting that the "federal common law doctrine of administrative collateral estoppel for criminal cases" has been adopted in Texas); *Ex parte* Serna, 957 S.W.2d 598, 601 (Tex. App.—Fort Worth 1997, pet. ref'd) (asserting that administrative collateral estoppel, apart from the Fifth Amendment, is applicable in Texas); *Ex parte* Pipkin, 935 S.W.2d 213, 215 (Tex. App.—Amarillo 1996,

ments are: (1) a full hearing must have been afforded to both parties, so that each party has the opportunity to litigate the issue at hand; (2) the fact issue involved in both proceedings must be the same; and (3) "the fact finder must have acted in a judicial capacity in each proceeding."[114] By using these elements, the *Guajardo* court decided—unlike the county court—that collateral estoppel barred the district court from ruling on the motion to suppress.[115]

One should note that in all three cases, the State brought the charges in county court and district court based on the same search of the defendant and seizure by law enforcement.[116] The issue in each suppression hearing, at both the county and district level, was the validity of the search and/or seizure, and whether the court should suppress the evidence.[117]

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pet. ref'd) (acknowledging the potential existence of another form of collateral estoppel, even though not supporting its application); Manning v. State, 870 S.W.2d 200, 203 (Tex. App.—Eastland 1994, pet. ref'd) (citing *Ex parte* Tarver, 725 S.W.2d 195 (Tex. Crim. App. 1986) (en banc)) (noting the application of collateral estoppel beyond that of double jeopardy).

114. *Aguilar*, 947 S.W.2d at 259-60 (adopting the requisite elements for collateral estoppel in this form); *see Utah Constr. & Mining Co.*, 384 U.S. at 422 (creating the elements required for administrative collateral estoppel); *Brabson*, 976 S.W.2d at 183-84 (recognizing Texas's adoption of the *Utah Construction* elements); *Guajardo*, 24 S.W.3d at 426 (applying the three elements to find that collateral estoppel applies to suppression motions in both county and district courts); *see also Ex parte* Tarver, 725 S.W.2d 195, 199 (Tex. Crim. App. 1986) (en banc) (acknowledging the elements in *Utah Construction*, but not officially adopting these three elements in its application).

115. *Guajardo,* 24 S.W.3d at 426. The Corpus Christi court looked to the second element first, and determined that the ultimate issue to be decided in both suppression hearings was the validity of the search and seizure. *See id.* (evaluating that, because both substances were recovered during the same traffic stop, "[i]t stands to reason that the fact issues surrounding the lawfulness of the search in one case will be the same in the other"). The next issue was whether there had been a full hearing. *Id.* The court noted that the record indicated each side was afforded an opportunity to litigate the constitutionality of the traffic stop and seizure of evidence. *See id.* (noting that nothing in the trial record signifies that the "suppression hearing was truncated in any way"). Lastly, the court concluded that the trial judge had acted in her judicial capacity. *See id.* (concluding, "Judge Saldana, acting in her capacity as a trial court judge, made fact findings necessary to support the suppression of the marijuana").

116. *See* Guajardo v. State, 24 S.W.3d 423, 425 (Tex. App.—Corpus Christi 2000) (identifying that both the marijuana and cocaine, and consequently both charges, stemmed from the same police encounter), *rev'd*, 109 S.W.3d 456 (Tex. Crim. App. 2003) (en banc); State v. Henry, 25 S.W.3d 260, 261 (Tex. App.—San Antonio 2000, no pet.) (describing the discovery of marijuana and cocaine as the result of a single search after a traffic stop); State v. Rodriguez, 11 S.W.3d 314, 315 (Tex. App.—Eastland 1999, no pet.) (detailing that both the misdemeanor and felony charges were based on the same search warrant and subsequent search).

117. *See Guajardo*, 24 S.W.3d at 424-25 (identifying that the prior court granted a suppression motion on grounds that the evidence obtained was tainted by an illegal search and seizure); *Henry*, 25 S.W.3d at 261 (noting that the defendant argued that the search

However, a lack of consensus exists over collateral estoppel's application to suppression motions and hearings.[118] The split begs the question of how the split arose, and which appellate court is wrong. The Texas Court of Criminal Appeals had the chance to resolve the split, but did not.[119] With a split of authority still in existence, there must be some resolution of the issue. But first, some problems associated with collateral estoppel's application to suppression motions must be identified.

IV. ANALYSIS

A. *Problems with Constitutional Collateral Estoppel's Application to Suppression Motions*

To properly identify and analyze the various problems confronting collateral estoppel in the criminal context, one must go to the original source. The best place to begin is by once again looking at the definition of criminal collateral estoppel. The Supreme Court described the form of collateral estoppel found under the Fifth Amendment: "[W]hen an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any fu-

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after the traffic stop was the product of an illegal and unconstitutional search); *Rodriguez*, 11 S.W.3d at 316 (indicating that the county court of law granted the defendant's suppression motion on the grounds that law enforcement lacked probable cause and ultimately violated the defendant's Fourth Amendment rights).

118. Though each search occurred for a different reason, the findings of the searches were the same, the charges brought were the same, the defense tactics of utilizing suppression motions were the same, and the collateral estoppel arguments were the same. *See Guajardo*, 24 S.W.3d at 425 (noting that the initial reason for the traffic stop was because a license plate light "might" have been out); *Henry*, 25 S.W.3d at 261 (noting that the stop was premised on a speeding violation); *Rodriguez*, 11 S.W.3d at 315 (noting that the search was based on an officially procured search warrant). The extraordinary aspect of these three cases is that the same scenario produced different holdings.

119. *See generally* Guajardo v. State, 109 S.W.3d 456 (Tex. Crim. App. 2003) (en banc). The Texas Court of Criminal Appeals was poised to relieve the burden of this split in authority on the Texas legal community. However, the court dispelled this notion by declaring that the trial record to be reviewed was incomplete, and the court could not resolve the issue. *See id.* at 462 (finding that, without the proper record to be reviewed, the defendant "cannot even reach first base"). The court held:

> Because the [district] court denied appellant's claim of collateral estoppel, and neither the court of appeals nor this [c]ourt has a transcript of the first suppression hearing, we hold that appellant failed to provide a sufficient appellate record to review the trial court's ruling. Any further discussion concerning this case would be an advisory opinion.

Id. (footnote omitted). While the appellate decision that caused the split was ultimately overruled, the Texas Court of Criminal Appeals did not, and could not, settle the dispute over collateral estoppel's application to separate suppression motions. *See id.* (failing to provide a definitive answer, to avoid an advisory opinion, concerning collateral estoppel).

ture lawsuit."[120] This description spawns four notable obstacles that collateral estoppel seemingly cannot overcome in order to apply to suppression motions.

1. Lack of Jeopardy

The Supreme Court has made collateral estoppel constitutional under the Double Jeopardy Clause, and as a result, has placed certain conditions upon collateral estoppel's application.[121] The attachment of jeopardy is one such prerequisite.[122] Jeopardy attaches in either of the following instances: (1) the empaneling and swearing in of the jury;[123] or

120. Ashe v. Swenson, 397 U.S. 436, 443 (1970). Other courts and cases since 1970 have continued applying this definition of collateral estoppel in the criminal context. *See* Dowling v. United States, 493 U.S. 342, 347 (1990) (upholding the definition given to criminal collateral estoppel twenty years earlier); Nichols v. Scott, 69 F.3d 1255, 1269 (5th Cir. 1995) (quoting the Supreme Court and its definition of collateral estoppel); Showery v. Samaniego, 814 F.2d 200, 202 (5th Cir. 1987) (reiterating the definition of collateral estoppel as promulgated by the Supreme Court); Reynolds v. State, 4 S.W.3d 13, 17-18 (Tex. Crim. App. 1999) (en banc) (recognizing the federal definition); *Rodriguez*, 11 S.W.3d at 316 (agreeing, implicitly, with the State's application of the federal definition as the standard for criminal collateral estoppel).

121. *See Dowling*, 493 U.S. at 348 (indicating that collateral estoppel is merely a component of double jeopardy); *see also Samaniego*, 814 F.2d at 202 (claiming collateral estoppel is an ingredient of double jeopardy); United States v. Mock, 604 F.2d 341, 343 (5th Cir. 1979) (identifying double jeopardy as the "parent doctrine" while collateral estoppel is its "progeny"), *aff'd*, 640 F.2d 629 (5th Cir. Unit B Mar. 1981); Headrick v. State, 988 S.W.2d 226, 228 (Tex. Crim. App. 1999) (en banc) (accepting collateral estoppel as "closely related to the Fifth Amendment guarantee against double jeopardy"); Neaves v. State, 767 S.W.2d 784, 786 (Tex. Crim. App. 1989) (en banc) (supporting the Fifth Amendment-included doctrine of collateral estoppel); Warren v. State, 514 S.W.2d 458, 462 (Tex. Crim. App. 1974), *overruled on other grounds by* Reed v. State, 744 S.W.2d 112 (Tex. Crim. App. 1988) (en banc) (adopting the federal approach that "double jeopardy . . . encompasses collateral estoppel"); Thomas v. State, 990 S.W.2d 858, 862 (Tex. App.—Dallas 1999, no pet.) (proclaiming that collateral estoppel is not available to a defendant unless the "complaint implicates the protections of the Double Jeopardy Clause").

122. *See Nichols*, 69 F.3d at 1269-70 (describing the lack of jeopardy as fatal to the application of collateral estoppel); *Reynolds*, 4 S.W.3d at 19-21 (discussing the applicability of jeopardy for collateral estoppel); Ladner v. State, 780 S.W.2d 247, 250 (Tex. Crim. App. 1989) (en banc) (implying that jeopardy must attach because collateral estoppel is embodied within the Fifth Amendment); Dedrick v. State, 623 S.W.2d 332, 339 (Tex. Crim. App. [Panel Op.] 1981) (indicating that it is the defendant who has the burden of establishing the attachment of jeopardy); *see also Samaniego*, 814 F.2d at 201-02 (noting the connection between collateral estoppel and double jeopardy).

123. *See* United States v. Martin Linen Supply Co., 430 U.S. 564, 569 (1977) (finding that attachment of jeopardy during a jury trial occurs when the jury is empaneled and sworn); Serfass v. United States, 420 U.S. 377, 388 (1975) (holding that jeopardy occurs once the jury is empaneled and sworn in); Ortiz v. State, 933 S.W.2d 102, 105 (Tex. Crim. App. 1996) (en banc) (expressing when jeopardy attaches during a jury trial).

(2) a pleading to the charge during a bench trial.[124] Hence, jeopardy never attaches to a suppression motion, or even a suppression hearing.

A party submits a motion to suppress the evidence during the pretrial stage before empanelling a jury or a plea to an indictment occurs.[125] If the court grants a hearing on the motion, that hearing still occurs before jeopardy attaches because it occurs pretrial.[126] Because precedent requires the attachment of jeopardy, the accused will not be protected by constitutional criminal collateral estoppel when facing multiple prosecutions, arising from the same episode, in different courts.

2. Lack of Finality

Along with the prerequisite of jeopardy, constitutional criminal collateral estoppel also requires a final judgment.[127] The Supreme Court ex-

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124. *See* State v. Torres, 805 S.W.2d 418, 420-21 (Tex. Crim. App. 1991) (en banc) (adopting the more traditional rule in Texas that jeopardy attaches when the defendant pleads to the indictment during a bench trial); *Ortiz*, 933 S.W.2d at 105 (recognizing that Texas attaches jeopardy when then defendant pleads during a bench trial). *But see Martin Linen Supply Co.*, 430 U.S. at 569 (supporting the federal rule that jeopardy attaches during a bench trial upon the introduction of evidence); *Serfass*, 420 U.S. at 388 (holding that jeopardy attaches during a bench trial when the court begins to receive evidence).

125. *See* WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 11.2(a), at 35 (4th ed. 2004) (stating that a suppression motion must be filed pretrial in order to receive a pretrial hearing); GERALD S. REAMEY & CHARLES P. BUBANY, TEXAS CRIMINAL PROCEDURE 151 (7th ed. 2004) (noting that a motion to suppress is generally filed with a court pretrial).

126. *See* WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 11.2(a), at 35 (4th ed. 2004) (commenting that a hearing on a motion to suppress will occur pretrial); GERALD S. REAMEY & CHARLES P. BUBANY, TEXAS CRIMINAL PROCEDURE 154 (7th ed. 2004) (discussing suppression motions and a court's tendency to hear them pretrial). However, since the federal courts apply jeopardy during a bench trial upon the introduction of evidence, and a suppression hearing is basically a mini-trial with evidence introduced, why would jeopardy not be considered to have attached, thereby enabling collateral estoppel to apply in different prosecutions? *See Martin Linen Supply Co.*, 430 U.S. at 569 (supporting the federal rule that jeopardy attaches during a bench trial upon the introduction of evidence); *Serfass*, 420 U.S. at 388 (holding that jeopardy attaches during a bench trial when the court begins to receive evidence); *cf.* GERALD S. REAMEY & CHARLES P. BUBANY, TEXAS CRIMINAL PROCEDURE 154 (7th ed. 2004) (detailing that a "suppression hearing is a full-blown evidentiary hearing at which all witnesses with knowledge relating to the search, arrest, or confession in issue are subject to direct and cross-examination").

127. *See Ex parte* King, 134 S.W.3d 500, 503-04 (Tex. App.—Austin 2004, pet. ref'd) (stating that a final judgment is needed for collateral estoppel to apply); State v. Henry, 25 S.W.3d 260, 260 (Tex. App.—San Antonio 2000, no pet.) (prohibiting the use of collateral estoppel without a final judgment); State v. Rodriguez, 11 S.W.3d 314, 316-19 (Tex. App.—Eastland 1999, no pet.) (echoing that collateral estoppel requires a final judgment); Salinas v. State, 1 S.W.3d 700, 703 (Tex. App.—Amarillo 1999, pet. ref'd) (urging the need for a final judgment).

plicitly stated that "a valid and final judgment" is necessary for collateral estoppel.[128] Though not necessarily needed for double jeopardy, the doctrine of collateral estoppel requires that, in addition to jeopardy attaching, a court must render a valid judgment.[129] While finality and jeopardy may appear to be the same, the distinction, if one exists, merits discussion because courts have negated collateral estoppel's application on the ground that a ruling on a suppression motion is not final.[130]

In Texas, a trial judge can reconsider a pretrial suppression ruling or the adversely affected party may appeal it.[131] Thus, the ability of a judge to reconsider a pretrial suppression ruling hardly fits the definition of "final." Defendants who wish to avail themselves of collateral estoppel's protection in multiple suppression hearings face the daunting task of maneuvering through the pitfalls of a lack of jeopardy and a lack of finality.

3. Different Parties Are Not Allowed

Another obstacle one must overcome is the inherent need for the same parties to be present in both prosecutions.[132] Logically, collateral estop-

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128. Ashe v. Swenson, 397 U.S. 436, 443 (1970).

129. Jeopardy has clearly been defined in Texas. *See Ortiz*, 933 S.W.2d at 105 (stating that jeopardy attaches when a jury is empaneled and sworn, or when a plea occurs during a bench trial). The rule of when jeopardy attaches does not incorporate or insinuate the requirement of a final judgment. *See id.* (failing to discuss a requirement of finality for jeopardy to attach). Though, logically, jeopardy can exist without finality, the question is whether finality can exist without jeopardy. Nevertheless, jeopardy and finality are two distinct hurdles, even if almost the same, that one must overcome for successful application of collateral estoppel.

130. *See Henry*, 25 S.W.3d at 262 (stating that a pretrial ruling is interlocutory and not final); *Rodriguez*, 11 S.W.3d at 322 (expressing that a pretrial ruling on a suppression motion is not final); McKown v. State, 915 S.W.2d 160, 160 (Tex. App.—Fort Worth 1996, no pet.) (describing a pretrial ruling as non-final); Montalvo v. State, 846 S.W.2d 133, 136 (Tex. App.—Austin 1993, no pet.) (proclaiming that a pretrial suppression ruling can be reconsidered by a trial judge).

131. *See* TEX. CODE CRIM. PROC. ANN. art. 44.01(a)(5) (Vernon 2004) (authorizing an appeal by the State after an order granting a suppression ruling); Guajardo v. State, 24 S.W.3d 423, 426 (Tex. App.—Corpus Christi 2000) (citing the provision under the previous Texas Code of Criminal Procedure), *rev'd*, 109 S.W.3d 456 (Tex. Crim. App. 2003) (en banc); *see also* State v. Henry, 25 S.W.3d 260, 262 (Tex. App.—San Antonio 2000, no pet.) (stating that "[a] ruling is not final for purposes of collateral estoppel if it is subject to reconsideration"); *Montalvo*, 846 S.W.2d at 136 (allowing a pretrial suppression ruling to be reconsidered by the trial judge who made the initial ruling).

132. *See Ashe*, 397 U.S. at 443 (limiting collateral estoppel's application to only the same parties); State v. Brabson, 976 S.W.2d 182, 184 (Tex. Crim. App. 1998) (en banc) (requiring that the parties be the same in both proceedings); Thomas v. State, 990 S.W.2d 858, 862 (Tex. App.—Dallas 1999, no pet.) (determining that the Texas Department of Public Safety is not the same party as the Dallas County District Attorney, and therefore collateral estoppel does not apply). However, Texas law, at least on the civil side, has held

pel cannot preclude a party from litigating an issue if the party never had the opportunity initially to litigate the issue.[133] The need for the same parties seems elementary; yet, it becomes more complex in criminal litigation due to the fact that the government is always the prosecutor. Accordingly, a question that will be addressed is whether the label of "government" defines every governmental agency and agent as the same party for collateral estoppel purposes.[134]

4. Issue Must Be an Ultimate Issue in Common with Previous Proceeding

Finally, the Supreme Court of the United States expressed that collateral estoppel cannot apply to any issue previously litigated, but it must apply only to "an issue of ultimate fact."[135] This creates two sub-requirements. First, the issue must rise to the level of an ultimate issue.[136] Second, the ultimate issue in each proceeding must be in common.[137] Texas courts have held that suppression rulings satisfy neither requirement: (1) a suppression ruling is not an ultimate issue; and (2) the matter at issue in one suppression ruling is not the same as the matter at issue in another.[138]

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that collateral estoppel is limited to a party or those in privity with that party. *See* Bonniwell v. Beech Aircraft Corp., 663 S.W.2d 816, 821 (Tex. 1984) (defining the requisite element of the same party to include those in privity with an original party).

133. *See* Walter W. Heiser, *California's Confusing Collateral Estoppel (Issue Preclusion) Doctrine*, 35 SAN DIEGO L. REV. 509, 514 (1998) (stating that collateral estoppel is applicable to only the same parties); Rex. R. Perschbacher, *Rethinking Collateral Estoppel: Limiting the Preclusive Effect of Administrative Determinations in Judicial Proceedings*, 35 U. FLA. L. REV. 422, 424 (1983) (noting that the identity of the parties is key to collateral estoppel and res judicata's application, and arguing that administrative proceedings should not preclude subsequent judicial proceedings); BLACK'S LAW DICTIONARY 108 (2d pocket ed. 2001) (defining collateral estoppel as requiring the same parties).

134. *See* discussion *infra* Part IV.C.3.

135. *Ashe*, 397 U.S. at 443; *see also* United States v. Brackett, 113 F.3d 1396, 1398-99 (5th Cir. 1997) (surveying the need for an ultimate issue to have been "necessarily decided" for collateral estoppel to bar subsequent litigation).

136. *See Ashe*, 397 U.S. at 443 (creating the need for an ultimate issue); *Brackett*, 113 F.3d at 1398-99 (detailing that an ultimate issue must be "necessarily decided"); Neaves v. State, 767 S.W.2d 784, 786-87 (Tex. Crim. App. 1989) (en banc) (identifying the requirement for an ultimate issue in collateral estoppel analysis); Salinas v. State, 1 S.W.3d 700, 703 (Tex. App.—Amarillo 1999, pet. ref'd) (rejecting application of collateral estoppel when the issue was not an ultimate issue); *Rodriguez*, 11 S.W.3d at 316 (holding that the ruling on a suppression motion involved an ultimate issue).

137. *See Guajardo*, 109 S.W.3d at 460-61 (noting that the issue involved in separate proceedings must be the same); *Rodriguez*, 11 S.W.3d at 319 (noting the need for a common ultimate issue); *Neaves*, 767 S.W.2d at 787 (noting that an ultimate issue must be a common issue as well).

138. *See Guajardo*, 109 S.W.3d at 461 (noting that, while the two suppression motions might be based on identical facts, it does not mean that the issue is the same); *Rodriguez*,

Therefore, a suppression motion fails to satisfy another element of criminal collateral estoppel.

B. *Source of the Texas Split*

Though the list of hurdles[139] a party must overcome to successfully invoke criminal collateral estoppel is clear, merely identifying the obstacles does not resolve the fact that Texas appellate courts are split over collateral estoppel's application to multiple suppression motions. Of the three appellate courts responsible for the split, only two, the Eastland and San Antonio courts, abided by the requisites of constitutional collateral estoppel.[140] Because Texas has adopted the federal approach, collateral estoppel's application rests upon one meeting the requirements found in the original definition and its subsequent interpretation.[141] Conversely, only the Corpus Christi court applied the elements issued by the Texas Court of Criminal Appeals.[142]

The reasoning and conclusions of the appellate courts differ because the Corpus Christi court utilized a different standard than the one followed by the Eastland and San Antonio courts. This difference arises

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11 S.W.3d at 324 (stating that "[t]he issue determined in the misdemeanor motion to suppress hearing was not an ultimate issue in the felony case"); *Salinas*, 1 S.W.3d at 703 (deciding that a probation revocation hearing does not involve an ultimate issue); *Neaves*, 767 S.W.2d at 787 (holding that a license suspension hearing does not involve an ultimate issue in common with a subsequent DWI charge).

139. The author would like to note that the list of potential problems is in no way a conclusive representation of the *only* problems collateral estoppel might face. Though not an exhaustive list, the four obstacles mentioned are ones that have been identified and expounded upon by various courts in their opinions and are relevant to the issue of whether collateral estoppel applies to two suppression motions filed in two courts based on two charges that stemmed from the same single transaction.

140. *See* State v. Henry, 25 S.W.3d 260, 262 (Tex. App.—San Antonio 2000, no pet.) (holding that the requirement of a final judgment is not met by a ruling on a suppression motion); *Rodriguez*, 11 S.W.3d at 316 (holding that collateral estoppel did not apply because jeopardy did not attach and a common ultimate issue was not determined).

141. *See Ashe*, 397 U.S. at 443 (defining collateral estoppel as "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit"); Warren v. State, 514 S.W.2d 458, 462 (Tex. Crim. App. 1974) (adopting the federal constitutionalized form of collateral estoppel), *overruled on other grounds by* Reed v. State, 744 S.W.2d 112 (Tex. Crim. App. 1988) (en banc).

142. *See Guajardo*, 24 S.W.3d at 426 (applying the elements as listed by the Texas Court of Criminal Appeals); *see also* State v. Aguilar, 947 S.W.2d 257, 259-60 (Tex. Crim. App. 1997) (en banc) (listing the elements as the following: (1) "there must be a 'full hearing' at which the parties had an opportunity to thoroughly and fairly litigate the relevant fact issue"; (2) "the fact issue must be the same in both proceedings"; and (3) "the fact finder must have acted in a judicial capacity").

because Texas employs two forms of collateral estoppel in criminal law.[143]

Multiple courts, including those involved in the split, recognize that two forms of collateral estoppel exist in Texas.[144] In determining whether collateral estoppel applied to suppression motions, both the Eastland and San Antonio courts used an analysis in conjunction with federal law.[145] Meanwhile, the Corpus Christi court looked to a second form of collateral estoppel that had been dormant, but has since seen revival by the Texas Court of Criminal Appeals.[146]

The Texas Court of Criminal Appeals adopted "administrative collateral estoppel"[147] initially for application in administrative hearings and ensuing criminal prosecutions.[148] A more appropriate title for this form of collateral estoppel would be common law collateral estoppel. The

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143. *See* State v. Brabson, 976 S.W.2d 182, 183 n.2 (Tex. Crim. App. 1998) (en banc) (supporting the notion that two forms of collateral estoppel, common law and constitutional, exist in Texas criminal law); *Aguilar*, 947 S.W.2d at 259 (stating that Texas "adopted the functional test propounded by the U.S. Supreme Court in *United States v. Utah Construction & Mining Company*"); *Ex parte* Tarver, 725 S.W.2d 195, 199 (Tex. Crim. App. 1986) (en banc) (introducing administrative collateral estoppel in Texas criminal law).

144. *See Brabson*, 976 S.W.2d at 183 n.2 (supporting that two forms of collateral estoppel, common law and constitutional, exist in Texas criminal law); *Guajardo*, 24 S.W.3d at 425-26 n.3 (identifying a common law and constitutional form of collateral estoppel); *Henry*, 25 S.W.3d at 261 (noting that two forms of collateral estoppel have been adopted by Texas); *Rodriguez*, 11 S.W.3d at 314 (analyzing throughout the opinion the two forms of collateral estoppel); State v. Ayala, 981 S.W.2d 474, 477 (Tex. App.—El Paso 1998, pet. ref'd) (writing that administrative collateral estoppel does not implicate double jeopardy collateral estoppel); *Ex parte* Gregerman, 974 S.W.2d 800, 803 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (identifying a non-double jeopardy form of collateral estoppel that can be invoked by a defendant); *Ex parte* Serna, 957 S.W.2d 598, 601 (Tex. App.—Fort Worth 1997, pet. ref'd) (agreeing that a form of collateral estoppel exists outside the one embodied within the Fifth Amendment); Manning v. State, 870 S.W.2d 200, 203 (Tex. App.—Eastland 1994, pet. ref'd) (discussing that even though double jeopardy does not apply, common law administrative collateral estoppel can apply).

145. *See Henry*, 25 S.W.3d at 262 (holding that the requirement of a final judgment is not met by an appellate ruling on a lower court's suppression ruling); *Rodriguez*, 11 S.W.3d at 316 (holding that collateral estoppel did not apply because jeopardy did not attach and a common ultimate issue was not determined).

146. *See Guajardo*, 24 S.W.3d at 426 (applying the elements as listed by the Texas Court of Criminal Appeals, rather than the constitutional form of collateral estoppel).

147. State v. Ayala, 981 S.W.2d 474, 477 (Tex. App.—El Paso 1998, pet. ref'd).

148. *See Brabson*, 976 S.W.2d at 183 (involving a license revocation hearing and a criminal prosecution for DWI); *Aguilar*, 947 S.W.2d at 258 (recognizing a second form of collateral estoppel for an individual undergoing an administrative license revocation hearing and a criminal prosecution for DWI); *see also Ex parte* Tarver, 725 S.W.2d at 196 (involving a probation revocation hearing and a criminal trial). Notably, Texas's adoption of common law collateral estoppel was never limited to administrative hearings. Rather, this was the avenue upon which the common law doctrine was inserted into Texas law.

court did not create this approach, but utilized a form from federal law.[149] However, the federal law approach adopted by Texas is the common law version of collateral estoppel.[150]

At the time the Supreme Court created administrative collateral estoppel, it had not yet decided *Ashe*, and collateral estoppel was not constitutionalized within the Fifth Amendment.[151] The Supreme Court basically took the common law form and allowed its application in administrative hearings as well as the more typical scenario of multiple trials.[152] After *Ashe*, the only form of collateral estoppel recognized in federal law was the constitutionalized form.[153] Texas began to revive administrative col-

149. *See Aguilar*, 947 S.W.2d at 259 (stating that Texas adopted the U.S. Supreme Court's application of collateral estoppel to administrative proceedings, as found in *United States v. Utah Construction & Mining Co.*). The facts surrounding the Supreme Court case involved a contractual claim that was required by statute to undergo an administrative hearing first, before allowing the claim to go before the Court of Claims. United States v. Utah Constr. & Mining Co., 384 U.S. 394, 396-401 (1966). The Supreme Court declared that collateral estoppel could apply to administrative hearings as well as the more traditional basis for the doctrine. *Id.* at 422.

150. Though the various elements required for administrative collateral estoppel were not required for pure common law estoppel, the Supreme Court held that the parameters of administrative collateral estoppel were created so that it upholds what collateral estoppel is supposed to protect. *See Utah Constr. & Mining Co.*, 384 U.S. at 421 (stating that the holding "is harmonious with general principles of collateral estoppel").

151. *Ashe* would not be decided until four years after *Utah Construction*. Until *Ashe*, the discussion about the constitutionalization of collateral estoppel was centered on the Due Process Clause—not the Double Jeopardy Clause. *See* Note, *The Due Process Roots of Criminal Collateral Estoppel*, 109 HARV. L. REV. 1729, 1733-34 (1996) (discussing the issue of due process as the constitutional source for the Supreme Court to uphold collateral estoppel, but turning to the selective incorporation of double jeopardy as the primary source instead).

152. In 1966, the only form of collateral estoppel was the common law doctrine. *See* Charles William Hendricks, *100 Years of Double Jeopardy Erosion: Criminal Collateral Estoppel Made Extinct*, 48 DRAKE L. REV. 379, 393 (2000) (noting that the Supreme Court had not constitutionalized collateral estoppel, and only common law collateral estoppel existed); Note, *The Due Process Roots of Criminal Collateral Estoppel*, 109 HARV. L. REV. 1729, 1733-34 (1996) (discussing the ascent of collateral estoppel from a common law foundation to a constitutional right). The Supreme Court "modified" collateral estoppel so that it could apply to administrative proceedings while upholding the traditional doctrine as applied to cases and courts of law. *See Utah Constr. & Mining Co.*, 384 U.S. at 422 (declaring that the administrative form of collateral estoppel has been created in such a manner that it follows the basic precepts of collateral estoppel). In conclusion, the Supreme Court took the common law form of collateral estoppel and allowed for it to protect parties involved in administrative proceedings, as well as trials. *Id.*

153. *See* Nichols v. Scott, 69 F.3d 1255, 1272 (5th Cir. 1995) (detailing that even though two forms of collateral estoppel have been mentioned, the only one present in federal law is the one found under the Double Jeopardy Clause).

lateral estoppel in 1986, and officially adopted it in 1997.[154] By adopting administrative collateral estoppel, the Texas Court of Criminal Appeals effectively allowed common law collateral estoppel back into Texas jurisprudence. As stated earlier, common law collateral estoppel and constitutional collateral estoppel are not the same.[155]

Though initially limited to instances when one proceeding was "administrative" and the other was "criminal," it was only a matter of time before one court applied the common law form to a situation where both proceedings were "criminal" in nature. The Corpus Christi court simply applied the common law form of collateral estoppel, which the Texas Court of Criminal Appeals had previously accepted in Texas.[156] Although the Texas Court of Criminal Appeals has accepted both forms of collateral estoppel, uncertainty exists as to how the two can coexist.

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154. *See Brabson*, 976 S.W.2d at 183 n.2 (identifying that administrative collateral estoppel and constitutional collateral estoppel were not the same); *Aguilar*, 947 S.W.2d at 259 (adopting the second manifestation of collateral estoppel); *Tarver*, 725 S.W.2d at 199 (discussing administrative collateral estoppel as a source of application).

155. Constitutional collateral estoppel requires an adjudication of an ultimate issue between the same parties. Ashe v. Swenson, 397 U.S. 436, 443-46 (1970). Since collateral estoppel is a component of double jeopardy, the prerequisites of double jeopardy, such as the attachment of jeopardy, are required for collateral estoppel. *See* State v. Rodriguez, 11 S.W.3d 314, 324 (Tex. App.—Eastland 1999, no pet.) (holding that jeopardy must attach for collateral estoppel to bar the relitigation of certain issues, and that jeopardy does not attach during a suppression hearing). While common law collateral estoppel requires the same issue and same parties, it does not require the attachment of jeopardy. United States v. Oppenheimer, 242 U.S. 85, 87-88 (1916). In fact, the Supreme Court explicitly stated that where the Fifth Amendment might leave off, the doctrine of estoppel will protect an individual. *Id.* Also, common law collateral estoppel looked to the same transaction test in determining when an issue could be precluded. United States v. Kramer, 289 F.2d 909, 917 (2d Cir. 1961). The Double Jeopardy Clause and collateral estoppel employ the much more difficult standard of the same elements test. United States v. Dixon, 509 U.S. 688, 701-02 (1993) (readopting the *Blockburger* same elements test for double jeopardy and, thus, constitutional collateral estoppel).

156. Since Texas adopted the form of collateral estoppel and its elements, as promulgated by the Supreme Court in *Utah Construction*, the Corpus Christi court applied the three elements required for common law collateral estoppel. *See* Guajardo v. State, 24 S.W.3d 423, 426 (Tex. App.—Corpus Christi 2000) (applying the elements as stated by the Texas Court of Criminal Appeals), *rev'd*, 109 S.W.3d 456 (Tex. Crim. App. 2003) (en banc). This is noted because original common law collateral estoppel has been described as lacking elements and purely discretionary. *See Nichols*, 69 F.3d at 1272 (stating that collateral estoppel is "an 'obscure doctrine,' lacking 'defined principles' and . . . 'basically an "ad hoc" decision in each case'" (citations omitted)).

C. *Common Law Collateral Estoppel Applied to Constitutional Requirements*

Due to the Corpus Christi court applying common law collateral estoppel, the court did not attempt to overcome the various obstacles necessary for the constitutional form of collateral estoppel to apply. In contrast, the appellate court made sure that it met the requirements of the common law form.[157] Because Texas recognizes two forms of collateral estoppel, measuring the common law version against the aforementioned obstacles of the constitutional form is the most resourceful method to distinguish the two.

1. Jeopardy Not Needed

The most obvious difference between the two forms of collateral estoppel is the varying approaches to the requirement of jeopardy. The constitutional form requires jeopardy to attach because, of course, the concept of double jeopardy requires it.[158] On the other hand, common law collateral estoppel does not require jeopardy to attach.[159] In actuality, courts have interpreted the common law version to protect individuals where double jeopardy would not.[160] Thus, the lack of jeopardy attaching to a

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157. *Compare Aguilar*, 947 S.W.2d at 259-60 (articulating that common law collateral estoppel requires a full hearing involving the same issue, and that the "fact finder must have acted in a judicial capacity"), *with* Neaves v. State, 767 S.W.2d 784, 786 (Tex. Crim. App. 1989) (en banc) (stating that constitutional collateral estoppel requires an issue of ultimate fact to have been determined by a final and valid judgment involving the same parties in both proceedings).

158. *See Nichols*, 69 F.3d at 1269-70 (describing the lack of jeopardy as fatal to the application of collateral estoppel); Hubbard v. Hatrak, 588 F.2d 414, 416 (3d Cir. 1978) (requiring jeopardy to attach for collateral estoppel purposes); Reynolds v. State, 4 S.W.3d 13, 19 (Tex. Crim. App. 1999) (en banc) (stating that constitutional collateral estoppel only applies if the protections of the Double Jeopardy Clause are also implicated); Ladner v. State, 780 S.W.2d 247, 250 (Tex. Crim. App. 1989) (en banc) (implying that jeopardy must attach because constitutional collateral estoppel is embodied within the Fifth Amendment); Dedrick v. State, 623 S.W.2d 332, 339 (Tex. Crim. App. [Panel Op.] 1981) (indicating that it is the defendant who has the burden of establishing the attachment of jeopardy); Thomas v. State, 990 S.W.2d 858, 862 (Tex. App.—Dallas 1999, no pet.) (proclaiming that collateral estoppel is not available to a defendant unless the "complaint implicates the protections of the Double Jeopardy Clause").

159. The United States Supreme Court applied collateral estoppel in a second proceeding after the first proceeding had been dismissed due to the statute of limitations. *Oppenheimer*, 242 U.S. at 87-88. Even though jeopardy never attached in the first proceeding, the Supreme Court still was compelled to apply the doctrine of collateral estoppel. *Id.*

160. *See id.* (holding that collateral estoppel applied even where double jeopardy would not); *Kramer*, 289 F.2d at 913 (looking to collateral estoppel because double jeopardy could not apply to the situation involved).

suppression motion is no longer an obstacle when a court applies the common law doctrine of collateral estoppel.

2. Finality Not Needed

The same outcome is true when comparing the need for finality. The Fifth Amendment, through constitutional collateral estoppel, necessitates a final adjudication,[161] whereas the common law form does not require a final judgment.[162] Texas law has established that a judge's ruling on a suppression motion is a non-final ruling.[163] Nonetheless, this is a problem because fundamental fairness and due process are the foundation of collateral estoppel.[164]

Texas law with regard to suppression motions and collateral estoppel is plainly inequitable. If a motion to suppress is granted, the trial court excludes the evidence and the State more than likely drops the charges. If the State re-indicts a defendant in the same court or even in a separate court, the defendant cannot subsequently and successfully use collateral estoppel as a shield because the defendant has nothing more than a non-final ruling that is without the attachment of jeopardy. However, if the trial court denies the suppression motion and admits the evidence, the accused must stand trial and face jeopardy. This notion has been recog-

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161. *See Ex parte* King, 134 S.W.3d 500, 503-04 (Tex. App.—Austin 2004, pet. ref'd) (stating that a final judgment is needed for collateral estoppel to apply); State v. Henry, 25 S.W.3d 260, 262 (Tex. App.—San Antonio 2000, no pet.) (prohibiting the use of collateral estoppel without a final judgment); State v. Rodriguez, 11 S.W.3d 314, 316 (Tex. App.—Eastland 1999, no pet.) (echoing that collateral estoppel requires a final judgment); Salinas v. State, 1 S.W.3d 700, 703 (Tex. App.—1999 Amarillo, pet. ref'd) (urging the need for a final judgment).

162. *See Oppenheimer*, 242 U.S. at 86 (applying collateral estoppel without a final judgment because the charges had been dismissed based on the affirmative defense of statute of limitations).

163. *See* TEX. CODE CRIM. PROC. ANN. art. 44.01(a)(5) (Vernon 2004) (authorizing an appeal by the State after an order granting a suppression ruling); Guajardo v. State, 24 S.W.3d 423, 425 (Tex. App.—Corpus Christi 2000) (citing the provision under the previous Texas Code of Criminal Procedure), *rev'd*, 109 S.W.3d 456 (Tex. Crim. App. 2003) (en banc); *see also Henry*, 25 S.W.3d at 262 (stating that "[a] ruling is not final for purposes of collateral estoppel if it is subject to reconsideration"); McKown v. State, 915 S.W.2d 160, 160 (Tex. App.—Fort Worth 1996, no pet.) (describing a pretrial ruling as non-appealable and thus non-final); Montalvo v. State, 846 S.W.2d 133, 136 (Tex. App.—Austin 1993, no pet.) (allowing for a pretrial suppression ruling to be reconsidered by the trial judge who made the initial ruling).

164. *See* Charles William Hendricks, *100 Years of Double Jeopardy Erosion: Criminal Collateral Estoppel Made Extinct*, 48 DRAKE L. REV. 379, 393 (2000) (quoting Judge Friendly as stating "overly sensitive ears are not needed to detect due process overtones" in the Supreme Court's opinion in *Oppenheimer*); Note, *The Due Process Roots of Criminal Collateral Estoppel*, 109 HARV. L. REV. 1729, 1732-34 (1996) (discussing the origins of collateral estoppel in criminal law and its relation to due process).

nized as having a detrimental effect on defendants because courts can prevent the "defendant from relitigating unsuccessful motions to suppress."[165] Therefore, the prosecution is the only party that can successfully invoke constitutional collateral estoppel for suppression motions. This discrepancy leads to an offensive use of collateral estoppel in its application to suppression motions.[166]

The one-sided availability of collateral estoppel offends the notions of fundamental fairness. Although a court can theoretically reconsider a suppression ruling, a ruling on a motion to suppress is, arguably, final in practice.[167] The common law version of collateral estoppel does not unfairly benefit the government because a defendant has the chance to successfully invoke the doctrine as well. The practical result of a granted suppression motion equates to suppression of evidence and the State potentially dropping the charges. An individual's defense in subsequent proceedings concerning the same criminal episode should not be negated simply because he is in the "unfortunate" situation of not having stood trial due to a lack of prosecutorial evidence. The fundamental fairness that the common law doctrine is premised upon cannot allow for one-sided, offensive use of collateral estoppel.

3. The Same Parties Are Present

Both forms of collateral estoppel require the parties to be the same for the two proceedings. This issue is most prevalent when dealing with an administrative hearing and a criminal proceeding.[168] However, the circumstances of the three cases that caused the split involved only prose-

165. Richard B. Kennelly, Jr., Note, *Precluding the Accused: Offensive Collateral Estoppel in Criminal Cases*, 80 VA. L. REV. 1379, 1385 & n.33 (1994). The author examines a multitude of cases wherein the defendant was unable to argue a subsequent motion to suppress. *Id.*

166. *See id.* at 1384-86 (discussing the government's ability to use collateral estoppel to its advantage in suppression hearings, whereas a defendant cannot).

167. While an order granting a motion to suppress critical evidence may in theory be subject to reconsideration during further proceedings, few judges are likely to undertake such reconsideration. An order granting a motion to suppress is, for all practical purposes, final. The availability of the right to appeal gives the State a remedy if it finds the outcome in the first proceeding totally unacceptable. Thus, a rule barring relitigation would not leave the State at the mercy of an arbitrary trial judge. 42 GEORGE E. DIX & ROBERT O. DAWSON, TEXAS PRACTICE: TEXAS CRIMINAL PRACTICE AND PROCEDURE § 29.83 (2d ed. Supp. 2004).

168. *See* State v. Brabson, 976 S.W.2d 182, 184 (Tex. Crim. App. 1998) (en banc) (requiring that the parties be the same in both proceedings); Thomas v. State, 990 S.W.2d 858, 862 (Tex. App.—Dallas 1999, no pet.) (determining that the Texas Department of Public Safety is not the same party as the Dallas County District Attorney and, therefore, collateral estoppel does not apply).

cuting attorneys.[169] Although one would not normally consider an administrative board and a district attorney as the same party, the proposition that two prosecutors in the same county are the same party is reasonable. In other words, a prosecutor is the same party as another prosecutor. This notion logically flows from the fact that, for discovery purposes, courts treat the State and its agencies as one and the same.[170] Because courts consider state agencies and their actors as one entity for discovery,[171] why would they be considered differently for other purposes? Of course, consistency might lend credence to the argument that the law should consider an administrative agency and a district attorney as one and the same for collateral estoppel purposes. Nevertheless, that topic is not the focus here. The key here is that a district attorney is the same party as another prosecuting attorney, especially when the different proceedings are in the same county.

4. Constitutional Rights Are an Ultimate Issue

Common law collateral estoppel did not make mention of a requirement for an ultimate issue. Clearly, under both forms of the doctrine, the issue must be common to the different proceedings.[172] Nonetheless, the claim that a suppression motion does not rise to the level of an ultimate issue under any form of collateral estoppel is hard to imagine. Considering that a motion to suppress is the primary avenue upon which to specifically argue one's Fourth Amendment rights,[173] how can the law not

169. *See Guajardo*, 24 S.W.3d at 425 (involving criminal charges in a county court and a district court within the same county); *Henry*, 25 S.W.3d at 261 (involving felony and misdemeanor charges in district and county court, both within the same county); *Rodriguez*, 11 S.W.3d at 315 (pointing out that both the felony and misdemeanor charges were filed by the Taylor County District Attorney).

170. TEX. CODE CRIM. PROC. ANN. art. 39.14(a) (Vernon 2004); *see also* GERALD S. REAMEY & CHARLES P. BUBANY, TEXAS CRIMINAL PROCEDURE 299 (7th ed. 2004) (suggesting that exculpatory evidence in the possession of the government, regardless of whether it is an administrative agency or a district attorney's office, must be disclosed to the defendant).

171. *See* O'Rarden v. State, 777 S.W.2d 455, 458 (Tex. App.—Dallas 1989, pet. ref'd) (citing United States v. Antone, 603 F.2d 566, 569 (5th Cir. 1979)); *Ex parte* Adams, 768 S.W.2d 281, 292 (Tex. Crim. App. 1989) (stating, "[t]he 'prosecution' includes all members of the 'prosecution team'—both investigative and prosecutorial—and no distinction is drawn between different agencies under the same government").

172. *See Guajardo*, 109 S.W.3d at 461 (noting that the issue involved in separate proceedings must be the same); *Rodriguez*, 11 S.W.3d at 319 (noting the need for a common ultimate issue); Neaves v. State, 767 S.W.2d 784, 787 (Tex. Crim. App. 1989) (en banc) (noting that an ultimate issue must also be a common issue as well).

173. *See* WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 11.2(a), at 34-35 (4th ed. 2004) (declaring that a "motion to suppress is the

consider suppression rulings over one's constitutional rights to be an ultimate issue?

Texas courts have belittled a suppression motion as merely a specialized objection based on the admissibility of evidence.[174] Yet, this motion does not determine whether evidence meets the hearsay requirements or whether a party properly authenticates a document. Rather, the law allows a suppression motion and subsequent hearing so that a court can properly determine whether the government has violated one's right to be free from unreasonable searches and seizures. Courts have demeaned the determination of whether Fourth Amendment rights were violated to the status of a "specialized objection." Nevertheless, under both common law and constitutional collateral estoppel, the determination of a suppression ruling should rise to the level of an ultimate issue. Furthermore, the issue is in common because these motions concern the same episode, involving the same police, and the same question of the validity of the search and seizure.[175]

V. CONCLUSION

Collateral estoppel exists in two forms in its application in Texas. Case law differs on collateral estoppel's application to suppression hearings because appellate courts have relied on different forms of the doctrine. Reconciliation of this issue will only occur when the Texas Court of Criminal Appeals gives a definitive answer as to which form applies to suppression hearings when two separate charges and prosecutions are brought in two courts of law. From this author's perspective, the proper course would entail utilizing the common law version of collateral estoppel.

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device by which the issue of whether evidence should be excluded because it was obtained in violation of the Fourth Amendment" is decided).

174. *See* Galitz v. State, 617 S.W.2d 949, 952 n.10 (Tex. Crim. App. 1981) (en banc) (discounting the suppression motion as a specialized objection); *Rodriguez*, 11 S.W.3d at 322 (demeaning the importance of a motion to suppress by calling it a "specialized objection to the admissibility of evidence"); Holmberg v. State, 931 S.W.2d 3, 5 (Tex. App.—Houston [1st Dist.] 1996, pet. ref'd) (supporting the idea that a motion to suppress is nothing more than a specialized objection); Montalvo v. State, 846 S.W.2d 133, 137 (Tex. App.—Austin 1993, no pet.) (agreeing with other Texas courts on the diminished status of a suppression motion).

175. *See* Guajardo v. State, 24 S.W.3d 423, 425 (Tex. App.—Corpus Christi 2000) (involving the issue of the validity of a traffic stop in both a district and county court), *rev'd*, 109 S.W.3d 456 (Tex. Crim. App. 2003) (en banc); State v. Henry, 25 S.W.3d 260, 261 (Tex. App.—San Antonio 2000, no pet.) (involving the same issue of the legality of a traffic stop in both a district and county court); *Rodriguez*, 11 S.W.3d at 315-16 (involving the constitutionality of a search warrant in both district and county court).

Collateral estoppel did not come into existence with the Double Jeopardy Clause. Before constitutionalization, this legal concept had a distinct purpose, and one that stood apart from jeopardy. Initially, collateral estoppel's forced entry into the spirit of the Fifth Amendment might have seemed like a good idea. The doctrine now merits constitutional scrutiny, and individuals have an unwritten right to invoke its protections. Yet, constitutional scrutiny does not occur. Individuals are allowed to cry out for collateral estoppel's protection but to no avail.

Jurists have dubbed collateral estoppel a relative of double jeopardy. In reality, collateral estoppel is embedded deep within double jeopardy, and no longer stands on its own. While the doctrine used to protect individuals where the Fifth Amendment did not, the two are now seemingly interchangeable in the context of criminal law.

However, collateral estoppel is not double jeopardy. So long as Texas accepts the common law form, Texas courts should employ collateral estoppel as an additional protection in different suppression hearings arising out of the same transaction for multiple charges and prosecutions. Common law collateral estoppel is designed to protect a defendant, especially when the defendant's Fourth Amendment rights are in issue. There is no need for two judges, who sit in different courts, to determine the admissibility of the same evidence stemming from the same police encounter.

If one judge determines that an individual's constitutional right to be free from unreasonable searches and seizures has been violated, collateral estoppel should serve to protect that individual's Fourth Amendment rights in other actions arising from the same illegality. As such, Texas courts should no longer belittle a suppression motion. Instead, Texas courts should recognize that this particular motion has been molded so that one may ask a court and judge to guarantee that the Fourth Amendment has not been violated.

Clearly, Texas has allowed a return of collateral estoppel in its original form. The issue of whether the common law or constitutional form of collateral estoppel will apply to suppression hearings involving separate charges in separate courts ultimately resides within the discretion of the Texas Court of Criminal Appeals.