

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 92-1916  
Summary Calendar

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JORGE SERRATO SOLIS,

Petitioner-Appellant,

versus

JAMES A. COLLINS, Director,  
Texas Department of Criminal  
Justice, Institutional Division,

Respondent-Appellee.

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Appeal from the United States District Court  
For the Northern District of Texas  
(5:91-CV-331-C)

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(June 17, 1993)

Before POLITZ, Chief Judge, JOLLY and EMILIO M. GARZA, Circuit  
Judges.

POLITZ, Chief Judge:\*

Jorge Serrato Solis appeals the denial of his application for  
federal habeas relief from an aggravated robbery conviction in  
state court. For the reasons assigned we affirm.

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\*Local Rule 47.5 provides: "The publication of opinions that  
have no precedential value and merely decide particular cases on  
the basis of well-settled principles of law imposes needless  
expense on the public and burdens on the legal profession."  
Pursuant to that Rule, the Court has determined that this opinion  
should not be published.

### Background

Solis was charged in a two-count indictment with attempted capital murder and aggravated robbery. He submitted a guilty plea to the attempted capital murder count. Before accepting that plea the state trial court held a bench trial. At the conclusion thereof the court stated it maintained reasonable doubt about Solis's guilt on the attempted capital murder count but found him guilty of aggravated robbery. A life sentence was imposed. On direct appeal, on reconsideration, the conviction was affirmed;<sup>1</sup> the Texas appellate court held that the trial court could find Solis guilty on the lesser included offense pursuant to his plea of guilty to the greater offense.

After exhausting state collateral relief in which he challenged his conviction on double jeopardy and collateral estoppel grounds, Solis filed the instant federal application. The magistrate judge recommended dismissal of his petition; the district court agreed. This appeal followed.

### Analysis

Solis maintains that the state trial court erred by finding him guilty of aggravated robbery after acquitting him of attempted capital murder, to which he had pleaded guilty. He contends that aggravated robbery is not a lesser included offense of attempted capital murder.

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<sup>1</sup> **Solis v. State**, 798 S.W.2d 620 (Tex.App. 1990).

The double jeopardy clause protects against: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense.<sup>2</sup> In this instance, the trial court found Solis guilty of one offense as opposed to another in the same proceeding. Double jeopardy concerns are therefore implicated only if Solis was subjected to multiple punishments for the same offense.<sup>3</sup>

From the case cited in the opinion affirming on Solis's direct appeal, we learn that the Texas courts have determined that robbery can be a lesser included offense of capital murder, but such a determination must be made on a case-by-case basis. "[A] person commits the offense of capital murder if that person intentionally commits the murder in the course of committing or attempting to commit the offense of robbery."<sup>4</sup> If the defendant is not found guilty of capital murder, he may be found guilty of murder or any other lesser included offense.<sup>5</sup> The same rationale applies to attempted capital murder.

Solis cites four cases in support of his position. All are

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<sup>2</sup> **Grady v. Corbin**, 495 U.S. 508 (1990).

<sup>3</sup> **Cervantes v. Texas**, 815 S.W.2d 569 (Tex.Crim.App. 1991) (*en banc*).

<sup>4</sup> **Broussard v. State**, 642 S.W.2d 171, 173 (Tex.Crim.App. 1982) (*en banc*).

<sup>5</sup> **Id.**

inapposite. **Brown v. Ohio**<sup>6</sup> involved a defendant indicted on two separate occasions for different offenses arising out of the same incident. The purportedly separate offenses failed the **Blockburger**<sup>7</sup> test. **Jones v. Thomas**<sup>8</sup> involved Missouri law which did not allow conviction and punishment for both felony murder and the underlying felony. **Grady v. Corbin**, cited supra, likewise addressed the prohibition against successive and multiple prosecutions for the same offense. And **Woodkins v. State**<sup>9</sup> involved a dispute over a jury charge; the defendant there, in fact, wanted an instruction on the lesser included offense of robbery to a capital murder charge.

Solis was convicted of a lesser included offense to a crime to which he pleaded guilty but for which he was acquitted in the same proceeding. His constitutional protection against double jeopardy was not violated.

AFFIRMED.

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<sup>6</sup> 432 U.S. 161 (1977).

<sup>7</sup> **Blockburger v. United States**, 284 U.S. 299 (1932).

<sup>8</sup> 491 U.S. 376 (1989).

<sup>9</sup> 542 S.W.2d 855 (Tex.Crim.App. 1976).