**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

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|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Plaintiff – Appellee, | ) | |
| | ) | Case No. 13-8058 |
| v. | ) | (D.C. Nos. 2:11-CV-00303- CAB & |
| | ) | 2:07-CR-00032-CAB-1) (D. Wyo.) |
| NATHANIEL SOLON, | ) | |
| | ) | |
| Defendant – Appellant. | ) | |

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**PETITION FOR PANEL REHEARING**

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I, Nathaniel Solon, respectfully petition this court for a panel rehearing pursuant to Federal Rule of Appellate Procedure 40. In support of this petition, I state the following:

**STATEMENT PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 40(a)(2)**

The court rejected my claim that I was prejudiced by my appellate counsel's failure to assert an insufficient evidence claim. In denying my claim, the court concluded:

> "In Solon's direct appeal, both opinions commented upon the strength of the government's case against Solon. See Solon, 596 F.3d at 1213 ("[T]he government's case was strong."); id. at 1216 (Lucero, J., concurring in part and dissenting in part) ("There is no denying that the government's case was

> strong."). The majority, moreover, concluded that Solon did not establish "a reasonable probability that . . . the jury would not have convicted him" but for an error that is not presently at issue. Id. at 1213. Solon has not overcome the strength of the government's case to demonstrate a reasonable probability that, had his counsel argued there was insufficient evidence to prove his guilt, the result of his appeal would have been different." (*United States v. Solon*, 10th Cir. Appellate Case: 13-8058, Order Denying Certificate of Appealability, 12/03/13, p. 3)

In order to reach a determination that the "government's case was strong," the circumstances supporting that determination must be segregated from the totality of the circumstances because an assessment of the totality of the circumstances in this case more strongly supports a correlation between Trojans[1] attacking my computer and child pornography, rather than a conclusion of guilt. Therefore, I respectfully petition this court to review the totality of those

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[1] A Trojan horse, or Trojan, in computing is a non-self-replicating type of malware program containing malicious code that, when executed, carries out actions determined by the nature of the Trojan, typically causing loss or theft of data, and possible system harm. A Trojan often acts as a backdoor, contacting a controller which can then have unauthorized access to the affected computer. Operations that could be performed by a hacker, or be caused unintentionally by program operation, on a targeted computer system include:

- Use of the machine as part of a botnet (e.g. to perform automated spamming or to distribute Denial-of-service attacks)
- Electronic money theft
- Data theft, including confidential files, sometimes for industrial espionage, and information with financial implications such as passwords and payment card information
- Modification or deletion of files
- **Downloading or uploading of files for various purposes**
- Downloading and installing software, including third-party malware and ransomware
- Keystroke logging
- Watching the user's screen
- Viewing the user's webcam
- Controlling the computer system remotely

(http://en.wikipedia.org/wiki/Trojan_Virus)

circumstances and grant a rehearing because the undisputed evidence shows that I was deprived of due process of law and effective assistance of counsel.

## ARGUMENT

"[S]ufficiency of the evidence determinations are made by assessing the totality of the circumstances in the individual case." *Torres v. Mullin,* 317 F.3d 1145, 1164 (10th Cir. 2003). In assessing my case, a reasonable jurist could find that the totality of the circumstances cannot sustain beyond a reasonable doubt the conclusion that I knowingly received and possessed child pornography. Those circumstances are as follows:

1) On the evening of September 20, 2006, I was home alone trying to download some computer games using LimeWire. The games I attempted to download contained Trojans that direct evidence shows were introduced to my computer through the games I attempted to download. (*United States v. Solon*, District of Wyoming, Case 2:07-CR-00032-CAB, Trial Transcript, Vol. V, 11/07/08, pp. 44, 100).

2) Despite the government's claim to the contrary, the direct evidence from my computer clearly proves that the anti-virus software installed on my computer was not working properly in that it was not running continuously as it is designed to do (*Id.*, pp. 95, 116-118). Furthermore, the direct evidence establishes that the anti-virus

program was most likely not running at all the evening of September 20, 2006, which is when I used LimeWire in an attempt to download computer games that unfortunately contained Trojans (*Id.*, pp. 122-123).

3) The version of LimeWire installed on my computer was an older version that has an opening in the software that allows people to get into your computer, which results in the computer being vulnerable to attack (*Id.*, p. 24). In addition, the settings in the LimeWire properties file on my computer showed a "forced" port and a "forced" IP address, both of which were peculiar and have yet to be explained, but look suspicious in light of the fact my computer was being attacked (*Id.*, Vol. III, 11/05/08, pp. 183-184, and Vol. V, 11/07/08, pp. 21-24).

4) On June 23, 2006, prior to the search and seizure of my computer on September 21, 2006, law enforcement observed my computer offering to share child pornography (*Id.*, Vol. II, 11/04/08, pp. 18-35). Direct evidence from my computer's anti-virus program shows virus activity occurring on June 22 and 23, 2006 (*Id.*, Vol. V, 11/07/08, p. 96).

5) From the end of June until the end of July 2006, direct evidence shows that there was no virus activity occurring on my computer during that time (*Id.*). During this time when there was no virus

activity on my computer, law enforcement did not observe my computer offering to share child pornography.

6) On July 29 and 30, 2006 virus activity once again occurred on my computer (*Id.*), and on August 4, 2006 my anti-virus program found and deleted a Zlob Trojan (*Id.*, p. 95).

7) Virus activity started up again on my computer on August 7, 2006 and continued through August 11, 2006 (*Id.*, p. 96). On August 7, 2006, my anti-virus program detected another Zlob Trojan, but there is no indication from the anti-virus program that that particular Trojan had been deleted (*Id.*, p. 96). During this time of virus activity, law enforcement once again observed my computer offering to share child pornography, specifically on August 9, 10 and 11, 2006 (*Id.*, Vol. II, 11/04/08, pp. 46-50).

8) Direct evidence reveals that the same Trojan that appeared on August 4th and August 7th, also appeared on August 9th, 2006, which was an indication that these Trojans were resident on the system, that they were continuing to try to work themselves, and that the anti-virus program was sometimes seeing them and sometimes not (*Id.*, Vol. V, 11/07/08, p. 116).

9) Then from August 11th until September 10, 2006, which is when a virus warning appeared, there was no virus activity occurring on my computer (*Id.*, Vol. V, 11/07/08, p. 43). During this time when there was no virus activity on my computer, law enforcement did not observe my computer offering to share child pornography.

10) Again on September 17, 2006, more virus warnings show up (*Id.*). At some point from September 18th to the 21st, the anti-virus program on my computer turned off. On the evening of September 20th, child pornography downloaded to my computer. At 5:44 a.m., the morning of the seizure, September 21, 2006, the anti-virus program turned on again. It turned off again at 2:17 p.m., which was most likely at some point during the seizure (*Id.*, pp. 122, 123).

11) The government's report from the anti-virus program installed on my computer indicated that it would shut itself off and start up again on numerous occasions when the virus activity was happening (*Id.*, p. 95). The anti-virus program continually starting and stopping is indicative of something attacking the virus protection program (*Id.*, pp. 116-118).

12) The government's expert, Agent Huff, testified that on the day of the search, he found nothing in my house suggesting an interest in child

pornography (*Id.*, Vol. IV, 11/06/08, p. 9). In addition to my hard drive, three VHS tapes and a Sony Video 8 tape were seized. None of these tapes had anything to do with child pornography (*Id.*, Vol. II, 11/04/08, pp. 74-75). Furthermore, other than what was located in the unallocated space of my hard drive[2], there was no child pornography found saved on my computer or copied to CDs or DVDs.

13) Agent Huff further testified that there was no indication that I or anyone else viewed the images that were on my computer (*Id.*, Vol. III, 11/05/08, p. 112; *Id.*, Vol. IV, 11/06/08, pp. 14, 55, 57). He testified that he found no email communication regarding child pornography, and no indication that I was participating in chat rooms related to child pornography (*Id.*, Vol. III, 11/05/08, p. 165).

14) The defense forensic computer expert, Ms. Loehrs, did a thorough examination of my computer, including locating search terms that had been used to browse the internet and search terms that had been used in LimeWire, and she too found nothing related to child pornography or nothing out of the ordinary (*Id.*, p. 10).

[2] Unallocated space is the place on the hard drive where deleted files can be overwritten and are no longer viewable without forensic software (*United States v. Solon*, District of Wyoming, Case 2:07-CR-00032-CAB, Trial Transcript, Vol. III, 11/5/08, pp. 99-101). For this reason, files cannot be stored in unallocated space.

This court noted that "[t]o sustain a criminal conviction [based on circumstantial evidence], the Government's evidence must be 'substantial' or raise more than a 'mere suspicion of guilt' . . ." *United States v. Caraway*, 534 F.3d 1290, 1293 (10th Cir.2008).

A determination that the Government's evidence is "substantial" appears to be difficult to make in my case because circumstantial evidence results from reasonable inferences that are drawn from a series of facts. An assessment of the totality of the facts in this case makes it difficult to support a reasonable inference that I am guilty just because I was home alone using LimeWire the evening of September 20, 2006. *United States v. Solon*, 596 F.3d at 1213, 1216 (10th Cir. 2010).

In order for the Government's inference to be considered "substantial" or reasonable, there should be other circumstances to support that conclusion, and there are none. In order for that inference to be considered "substantial" or reasonable, the totality of the circumstances and evidence in this case appear to be ignored because rather than supporting an inference of guilt, the totality of the circumstances in this case supports a reasonable inference of a correlation between Trojans attacking my computer and child pornography.

The reasonable inferences that can be drawn from an assessment of the totality of the facts and circumstances in this case are as follows:

A Trojan often acts as a backdoor, which allows a hacker to have unauthorized access to the affected computer. In the summer of 2006, Trojans were being introduced to my computer through the games I was attempting to download using LimeWire. These Trojans were periodically attacking my computer.

Also in the summer of 2006, law enforcement observed my computer offering to share child pornography, specifically on June 23rd, and then again on August 9th through August 11th, which happened to be at the exact same times that Trojans were attacking my computer. Trojans were again attacking my computer at the time of the seizure, and during the time of that attack, child pornography once again appeared on my computer.

When Trojans were not attacking my computer, there was no observation of my computer offering to share child pornography. During the summer of 2006, the times when there was no virus activity on my computer were substantial. From the end of June until the end of July, a one-month period, there was no virus activity, and during that time, law enforcement did not observe my computer offering child pornography. From August 11th until September 10th, again a one-month period, there was no virus activity, and again during that timeframe, law enforcement did not observe my computer sharing child pornography.

The reasonable inferences that can be drawn from these facts are that every time I attempted to download computer games, I was instead getting Trojans which were attacking my computer and causing child pornography to be downloaded. A reasonable jurist could reasonably infer that if I were knowingly receiving and possessing child pornography, then law enforcement would have observed that activity during the long periods of time when there wasn't any virus activity on my computer. The fact that law enforcement only observed my computer offering to share child pornography at the exact same times that Trojans were attacking my computer reasonably infers a connection between the Trojans and the child pornography.

In addition, the night before the search when Trojans were attacking my computer and my anti-virus program was not running, 46 files with names consistent with child pornography were downloaded to my computer. At 5:44 a.m. the day of the search, my anti-virus program started up again. By that afternoon when the computer was seized, there were only seven files that contained child pornography left in unallocated space. In addition, none of the files that law enforcement observed in June or August were on my computer.

In light of that evidence, a reasonable jurist must ask why the rest of those 46 files were not found in unallocated space. There was no evidence that a disk

cleaner[3] was or had been on my computer, and no evidence that I had used a disk cleaner to erase those files from unallocated space. From these facts, a reasonable jurist could infer that once my anti-virus program was running again, it would work to remove the damage caused by Trojan activity and was near the end of its process at the time the computer was seized.

These reasonable inferences constitute circumstantial evidence that Trojans were responsible for child pornography on my computer, and this circumstantial evidence is made exponentially stronger because it is coupled with the fact that absolutely no other evidence exists that links me to child pornography.

The government has inferred that because I was home alone using LimeWire, I not only knew child pornography was on computer, but I actually downloaded it. However, in making that inference, it appears that the rest of the facts and circumstances in this case have been ignored. When the totality of the facts and circumstances are assessed, the government's inference appears to be an unreasonable inference. However, it is the only "evidence" they have, and that "evidence" has the appearance of being neither reasonable, nor substantial, nor strong.

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[3] Disk cleaners are computer programs that find and delete potentially unnecessary or potentially unwanted files from a computer. The purpose of such deletion may be to free up disk space, to eliminate clutter or to protect privacy. (http://en.wikipedia.org/wiki/Disk_cleaner)

This court has stated that "[i]n considering whether the Government's evidence is sufficient to support the jury's verdict, we remain mindful that circumstantial evidence is entitled to the "same weight" as direct evidence. *United States v. Brunson*, 907 F.2d 117, 119 (10th Cir.1990)." *United States v. Winder*, 557 F.3d 1129 (10th Cir. 2009). This statement should also hold true in assessing whether reasonable inferences from the totality of the circumstances are sufficient to negate the jury's verdict.

In *United States v. Rufai*, this court stated:

> "Nevertheless, '[w]e will not uphold a conviction . . .that was obtained by nothing more than piling inference upon inference . . .or where the evidence raises no more than a mere suspicion of guilt.' *United States v. Rahseparian*, 231 F.3d 1257, 1262 (10th Cir. 2000) (citations omitted) (quotations omitted). '[R]easonable inferences supported by other reasonable inferences may warrant a conviction,' but '[a] jury will not be allowed to engage in a degree of speculation and conjecture that renders its finding a guess or mere possibility.' *United States v. Michel*, 446 F.3d 1122, 1127-28 (10th Cir. 2006) (quotations omitted)." *United States v. Rufai*, No. 12-6034, (10th Cir. 2013).

In my case, the Government appears to have no reasonable inferences, let alone "reasonable inferences supported by other reasonable inferences." In my case, the jury was allowed "to engage in a degree of speculation and conjecture that render[ed] its finding a guess or mere possibility," therefore, my conviction cannot and should not be upheld.

The district court, in its denial of my Motion under 28 U.S. C. § 2255, stated:

> "The Tenth Circuit recently held that for possession of child pornography to be "knowing," a defendant must know the charged images exist. *United States v. Haymond,* 672 F.3d 948, 955 (10th Cir. 2012). The Court in *Haymond* stated, "in the analogous context of knowing receipt of child pornography, 'defendants cannot be convicted for having the ability to control something that they do not even know exists.'" *United States v. Haymond,* 672 F.3d at 955, citing *United States v. Dobbs,* 629 F.3d 1199, 1207 (10th Cir. 2011). "In other words, the defendant's control or ability to control 'need[s] to relate to images that the defendant knew existed; otherwise, the defendant's conduct with respect to the images could not be deemed to be *knowing.*' To convict [defendant], the government was required to prove he knew of and also controlled (or at least had the ability to control) the particular images that formed the basis of the conviction." *United States v. Haymond,* 672 F.3d at 955, citing *United States v. Dobbs,* 629 F.3d at 1207 (emphasis in original). "

In light of the fact that the only evidence the Government has in my case is an unreasonable inference that I am guilty, the Government appears unable to fulfill the requirements set forth in *Haymond.*

This court also stated in *United States v. Rufai* that:

> "An appellate court must consider the burden of proof in its sufficiency-of-the-evidence analysis. The test is not whether some evidence could have reasonably supported a guilty verdict, but whether a rational jury could have found each element of a crime beyond a reasonable doubt. See *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). The test is not whether a rational jury could decide that guilt was more likely than not, but beyond a reasonable doubt. The evidence 'must be substantial, raising more than a mere suspicion of guilt.' *United States v. Smith*, 133 F.3d 737, 742 (10th Cir.1997).

> . . . The Supreme Court has recognized "the imperative duty of a court to see that all the elements of [a defendant's] crime are proved, or at least that testimony is offered which justifies a jury in finding those elements." *Clyatt v. United States*, 197 U.S. 207, 222, 25 S.Ct. 429, 49 L.Ed. 726 (1905); see also *United States v. Delgado*, 672 F.3d 320, 351 (5th Cir.2012), cert. denied, —— U.S. ——, 133 S.Ct. 525, 184 L.Ed.2d 339 (2012)." *United States v. Rufai*, No. 12-6034, (10th Cir. 2013).

The totality of the circumstances and evidence in my case cannot sustain beyond a reasonable doubt the conclusion that I knowingly received and possessed child pornography; therefore, the Government cannot fulfill the requirements set forth in *Haymond*.

In addition, I have sufficiently shown that I was unquestionably prejudiced by both my trial counsel's and my appellate counsel's failures to assert insufficient evidence claims.

## RELIEF REQUESTED

I respectfully request that this court review the totality of the evidence, grant a rehearing, issue a Certificate of Appealability (COA), and reverse my convictions for knowingly receiving and possessing child pornography.

Respectfully submitted this 12th day of February, 2014.

Nathaniel E. Solon

**CERTIFICATE OF SERVICE**

I hereby certify that on this 12th day of February, 2014, the foregoing Petition for Panel Rehearing was sent via United States mail, postage prepaid, to:

Clerk
U.S. Court of Appeals for the Tenth Circuit
1823 Stout St.
Denver, CO 80257

In addition, I hereby certify that a true and correct copy of the foregoing Petition for Panel Rehearing was sent via United States mail, postage prepaid, to:

James C. Anderson
Assistant United States Attorney
PO Box 668
Cheyenne, WY 82003-0668

Nathaniel E. Solon

FILED
United States Court of Appeals
Tenth Circuit

December 3, 2013

Elisabeth A. Shumaker
Clerk of Court

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

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UNITED STATES OF AMERICA,

Plaintiff–Appellee,

v.

NATHANIEL SOLON,

Defendant–Appellant.

No. 13-8058
(D.C. Nos. 2:11-CV-00303-CAB &
2:07-CR-00032-CAB-1)
(D. Wyo.)

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**ORDER DENYING CERTIFICATE OF APPEALABILITY***

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Before **LUCERO**, Circuit Judge, **BRORBY**, Senior Circuit Judge, and **BACHARACH**, Circuit Judge.

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Nathaniel Solon, appearing pro se, seeks a certificate of appealability ("COA") to appeal the district court's order denying his motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. We deny a COA and dismiss the appeal.

**I**

A jury convicted Solon of possession of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B) and (b)(2) and attempted receipt of child pornography in violation of 18 U.S.C. § 2252A(a)(2)(A) and (b)(1). He was sentenced to

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* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

seventy-two months' imprisonment and five years of supervised release. On direct appeal, this court affirmed Solon's conviction. See United States v. Solon, 596 F.3d 1206 (10th Cir. 2010). The district court denied Solon's post-conviction motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. Solon now seeks a COA to challenge that denial.[1]

**II**

Solon argues that his appellate counsel provided ineffective assistance on direct appeal because she failed to assert claims based on: (1) insufficiency of the evidence; (2) the government's failure to seize his entire computer system instead of only the hard drive; and (3) bias that permeated his jury trial and the other judicial proceedings in the district court. To obtain a COA to pursue these claims, Solon must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 327 (2003).

"The proper standard for assessing a claim of ineffectiveness of appellate counsel is that set forth in Strickland v. Washington, 466 U.S. 668 . . . (1984)."

[1] In his opening brief, Solon states that he was released from federal prison in January 2013 and is currently on supervised release. Because he is subject to the restraints of supervised release, Solon remains "in custody" for purposes of 28 U.S.C. § 2255(a). See United States v. Cervini, 379 F.3d 987, 989 n.1 (10th Cir. 2004).

Cargle v. Mullin, 317 F.3d 1196, 1202 (10th Cir. 2003). "[T]he petitioner must show both (1) constitutionally deficient performance, by demonstrating that his appellate counsel's conduct was objectively unreasonable, and (2) resulting prejudice, by demonstrating a reasonable probability that, but for counsel's unprofessional error(s), the result of the [appeal] . . . would have been different." Id. As the Supreme Court explained in Strickland, however, it is not necessary "to address both components of the [ineffectiveness] inquiry if the defendant makes an insufficient showing on one." 466 U.S. at 697.

A

Solon has failed to show that he was prejudiced by his appellate counsel's failure to assert an insufficient evidence claim. In Solon's direct appeal, both opinions commented upon the strength of the government's case against Solon. See Solon, 596 F.3d at 1213 ("[T]he government's case was strong."); id. at 1216 (Lucero, J., concurring in part and dissenting in part) ("There is no denying that the government's case was strong."). The majority, moreover, concluded that Solon did not establish "a reasonable probability that . . . the jury would not have convicted him" but for an error that is not presently at issue. Id. at 1213. Solon has not overcome the strength of the government's case to demonstrate a reasonable probability that, had his counsel argued there was insufficient evidence to prove his guilt, the result of his appeal would have been different.

**B**

Solon also claims that his appellate counsel was ineffective because she failed to challenge the fact that the government seized only the hard drive from his home computer instead of the entire computer system. Solon essentially contends that the government's failure to seize the entire computer system resulted in the loss of evidence that was potentially exculpatory and therefore violated his due process rights as articulated by the Supreme Court in California v. Trombetta, 467 U.S. 479 (1984) and Arizona v. Youngblood, 488 U.S. 51 (1988).

However, Solon has not established a reasonable probability that he would have succeeded on a due process claim under Trombetta or Youngblood if his appellate counsel had asserted such a claim on direct appeal. Solon's trial counsel filed a motion to dismiss the charges against him based on a similar theory. The district court denied the motion, concluding that Solon had "fail[ed] to point to any evidence that the government destroyed." Moreover, during the hearing before the district court, Solon's trial counsel "admitted that he could not actually state that there had been any destruction of evidence." Solon also fails to point to any specific components of his computer system that the government destroyed or lost, or to allege that he was wrongfully denied access to any of the computer components necessary for examinations or testing. Nor does he allege any deficiencies or problems with regard to the protocol that the district court set up for obtaining access

to the computer components. Thus, Solon fails to establish prejudice as a result of the alleged ineffective assistance.

**C**

Finally, Solon claims that his appellate counsel was ineffective because she failed to argue that his trial and the other judicial proceedings before the district court were permeated with bias. He alleges that this bias violated his constitutional rights to due process, an impartial jury, and a fair trial. Solon is apparently complaining that the district judge was biased against him because the judge believed that anything on Solon's computer must have been put there by Solon. He also complains that the court expressed disbelief as to his theory that files could be placed on a computer remotely, without the owner's knowledge. Although Solon has pointed to doubts by the district court judge about the validity of his defense theories in certain pretrial proceedings, he has not pointed to any such statements by the judge during his jury trial. Moreover, Solon abandoned any claims related to the district judge's absence from the courtroom during closing arguments or the judge's treatment of his expert witness. See Solon, 596 F.3d at 1211-13 (describing and ruling upon the relevant events). Accordingly, Solon has not established prejudice.

**III**

Because Solon has not satisfied the Strickland standard on any of the grounds he raises, reasonable jurists would not disagree with the district court's resolution of

his claims. See Miller-El, 537 U.S. at 327. We therefore **DENY** a COA and **DISMISS** the appeal.

Entered for the Court

Carlos F. Lucero
Circuit Judge