IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-10563-A

KINGY OSSARIUS HOLDEN,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Alabama

Before: MARTIN and ROSENBAUM, Circuit Judges.

BY THE COURT:

Kingy Ossarious Holden has filed a "Petition for Panel Rehearing Pursuant to FRAP 40," which this Court has construed as a motion for reconsideration of this Court's order dated September 19, 2018, denying his motion for a certificate of appealability, in the appeal from the denial of his 28 U.S.C. § 2255 motion. Because Mr. Holden has not alleged any points of law or fact that this Court overlooked or misapprehended in denying his motions, his motion for reconsideration is DENIED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-10563-A

KINGY OSSARIUS HOLDEN,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Alabama

ORDER:

Kingy Ossarius Holden, a federal prisoner, moves for a certificate of appealability ("COA") to appeal the District Court's denial of his motion to vacate or set aside his sentence under 28 U.S.C. § 2255.

I.

In 2012, a jury convicted Mr. Holden of conspiracy to distribute marijuana, four counts of distributing marijuana, and possession of a firearm by a convicted felon. The District Court sentenced him to 365-months imprisonment.

On direct appeal, Mr. Holden argued the evidence against him should have been suppressed because the government relied on wiretap applications that failed to identify the authorizing official the basis for that official's ability to authorize a wiretap. This Court affirmed his conviction. See United States v. Holden, 603 F. App'x 744, 756 (11th Cir. 2015) (per curiam) (unpublished).

On March 7, 2016, Mr. Holden filed his pro se § 2255 motion, raising three grounds for relief:

(1) his conviction was based on evidence obtained through an unconstitutional search and seizure ("Claim 1");

(2) his trial counsel was ineffective for failing to file a motion for a new trial based on newly discovered evidence the government withheld ("Claim 2"); and

(3) his appellate counsel was ineffective for failing to present issues on appeal ("Claim 3").

The District Court denied the § 2255 motion. It found Claim 1 was procedurally barred because he failed to raise the issue on direct appeal, and denied Claims 2 and 3 on the merits. The District Court denied Mr. Holden's motion for a COA, but granted him leave to appeal in forma pauperis.

Mr. Holden now seeks a COA from this Court.

II.

In order to obtain a COA, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where a § 2255

motion was denied on the merits, the petitioner must demonstrate that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong" or that the issues "deserve encouragement to proceed further." Slack v. McDaniel, 529 U.S. 473, 483–84, 120 S. Ct. 1595, 1603–04 (2000) (quotation marks omitted). Where a § 2255 motion was denied on procedural grounds, the movant must show a valid constitutional claim and that "jurists of reason would find it debatable whether the District Court was correct in its procedural ruling." Id. at 484–85, 120 S. Ct. at 1604. In reviewing a § 2255 proceeding, we review legal issues de novo and factual findings for clear error. Lynn v. United States, 365 F.3d 1225, 1232 (11th Cir. 2004) (per curiam). Pro se § 2255 motions and filings are entitled to a liberal construction. Mederos v. United States, 218 F.3d 1252, 1254 (11th Cir. 2000).

III.

A. CLAIM 1

In his first claim, Mr. Holden argued the wiretap of his phone was unlawfully obtained because it relied in part on information from a confidential informant who later admitted at trial to being "a liar and double dealer." He also argued that the case agent who obtained the wiretaps testified at trial that he "never used normal investigative techniques before, during or even after the wiretaps."

"Under the procedural default rule, a defendant generally must advance an available challenge to a criminal conviction or sentence on direct appeal or else the defendant is barred from presenting that claim in a § 2255 proceeding." McKay v. United States, 657 F.3d 1190, 1196 (11th Cir. 2011) (quotation marks omitted). Although Mr. Holden argued on appeal that the evidence obtained from the wiretaps should have been suppressed, he did not raise any of the grounds he now asserts in his § 2255 motion.

The procedural default can be excused if a defendant demonstrates either: (1) cause and prejudice, or (2) a miscarriage of justice, meaning actual innocence. Id. Mr. Holden did not explicitly argue his default should be excused, but instead asserted that the facts he alleged in "Ground 3 will support Ground One." Liberally construed, Mr. Holden appears to assert that ineffective assistance of appellate counsel was the cause of his failure to raise the claim on direct appeal.

Ineffective assistance of counsel may satisfy the cause exception to a procedural bar if the claim of ineffective assistance has merit. See United States v. Nyhuis, 211 F.3d 1340, 1344 (11th Cir. 2000). A claim of ineffective assistance of counsel requires the defendant to show his "counsel's performance was deficient," and "the deficient performance prejudiced the defense." Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). There is a strong presumption that counsel rendered competent assistance, meaning a defendant must demonstrate

that "no competent counsel would have taken the action that his counsel did take." United States v. Freixas, 332 F.3d 1314, 1319–20 (11th Cir. 2003) (quotation marks omitted). As to the prejudice prong, the petitioner must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. Appellate counsel is not ineffective for failing to raise meritless issues. Nyhuis, 211 F.3d at 1344.

Mr. Holden cannot demonstrate ineffective assistance of appellate counsel on this issue. In analyzing Mr. Holden's claims and those raised by his co-defendants on direct appeal, this Court determined the affidavit in support of the wiretap applications "sufficiently explained why 'investigative techniques that reasonably suggest themselves' were insufficient in this case" and "outlined in detail the traditional investigative techniques that either had been employed or had not been attempted based on dangerousness or a lack of probability of success." Holden, 603 F. App'x at 750. It is unlikely our conclusions would have differed if Mr. Holden's appellate counsel had also raised these arguments, so he cannot show prejudice.

Further, Mr. Holden points to the fact that on cross-examination, the confidential informant admitted that when he was informing the government about Mr. Holden's drug dealings he concealed the fact that he was also continuing to

buy drugs from others. He agreed with counsel's characterization that this was "double dealing." However, this admission does not provide much probative value for undercutting the sufficiency of the wiretap application, such that it would be a viable appellate claim. Mr. Holden does not indicate he instructed his appellate counsel to raise this claim. His counsel's decision to highlight other, more meritorious issues, is generally the type of strategic decision that Courts do not question. See Strickland, 466 U.S. at 690–91, 104 S. Ct. at 2066. In short, Mr. Holden has not shown appellate counsel was deficient for failing to raise this issue. See Freixas, 332 F.3d at 1319–20.

Mr. Holden cannot demonstrate cause to excuse the procedural bar.

B. CLAIM 2

In his second claim, Mr. Holden asserted trial counsel was ineffective because he failed to file a motion for new trial based on "newly discovered evidence." The evidence concerned the testimony of one of Mr. Holden's co-defendants, who testified at trial that he had not been a "snitch" before. Mr. Holden alleges this was a lie, and the government knew it was a lie but took no steps to correct the record.

In Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963), the Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon his request violates due process where the evidence is material either

to guilt or punishment." Id. at 87, 83 S. Ct. at 1196–97. To show a Brady violation, a defendant must prove: "(1) the government possessed favorable evidence to the defense; (2) the defendant does not possess the evidence and could not obtain the evidence with any reasonable diligence; (3) the prosecution suppressed the favorable evidence; and (4) had the evidence been disclosed to the defendant, there is a reasonable probability that the outcome would have been different." United States v. Vallejo, 297 F.3d 1154, 1164 (11th Cir. 2002).

Here, although the witness denied having been a "snitch" in the past, he acknowledged, upon further questioning, that he acted as a confidential informant for the government in previous cases that occurred in 2008 and 2009. Because of this admission in open court, Mr. Holden has not shown the government withheld any information that wasn't available to the defense. This means there was no Brady violation. See Vallejo, 297 F.3d at 1164. For this same reason, Mr. Holden cannot show he was prejudiced by his counsel's failure to move for a new trial on this ground. See Strickland, 466 U.S. at 687, 104 S. Ct. at 2064.

C. CLAIM 3

Finally, in his third claim Mr. Holden argued his appellate counsel was ineffective for failing to raise certain issues, including "numerous constitutional violations." However, Mr. Holden failed to specify what those issues were or give any indication as to when or how the alleged constitutional violations occurred.

Instead, he claimed he "cannot state the violations because he [does] not have his trial transcript of [the] proceedings."

General, unsupported allegations are insufficient to show ineffective assistance of counsel. See Tejada v. Dugger, 941 F.2d 1551, 1559 (11th Cir. 1991) (holding petitioner cannot make a claim of ineffective assistance based on "conclusory allegations unsupported by specifics" (quotation marks omitted)). The District Court did not err in dismissing Mr. Holden's unspecified claims of ineffective assistance.

Further, to the extent Mr. Holden argues his appellate counsel was ineffective for failing to raise the issues identified in his first two claims, his argument is unpersuasive. As previously discussed, Mr. Holden's counsel was not ineffective for failing to raise the issues identified in Claim 1, and because Claim 2 lacked merit, his counsel was not deficient for failing to raise it. See Nyhuis, 211 F.3d at 1344.

IV.

Because reasonable jurists would not find debatable or wrong the District Court's denial of Mr. Holden's § 2255 motion, his motion for a COA is DENIED..

Beverly B. Martin
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA NORTHEASTERN DIVISION

KINGY OSSARIUS HOLDEN,	)	
	)	
Petitioner,	)	
	)	**Case Nos. 5:16-CV-8010-KOB**
v.	)	**5:11-cr-399-KOB-JHE**
	)	
	)	
UNITED STATES OF AMERICA,	)	

MEMORANDUM OPINION

This case is before the court on Kingy Ossarius Holden's motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255.[1] (Civ. Doc. 1).[2] A jury found Mr. Holden guilty of conspiracy to possess with the intent to distribute 1000 kilograms or more of marijuana, four counts of distributing marijuana, and one count of being a felon in possession of a firearm. In his motion to vacate, he alleges three grounds: (1) his conviction was based on evidence obtained through an unconstitutional search and seizure; (2) his trial counsel was ineffective for failing to file a motion for a new trial based on newly discovered evidence; and (3) his appellate counsel was

---

[1] A prisoner "claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . . may move the court . . . to vacate, set aside or correct the sentence." 28 U.S.C. § 2255.

[2] The court will designate documents from Mr. Holden's civil and criminal cases as follows: "Civ. Doc. ___" for documents from 5:16-cv-8010-KOB and "Cr. Doc. ___" for documents in 5:11-cr-399-KOB-JHE.

ineffective for failing to present issues on appeal.

The court has interpreted Mr. Holden's claims liberally because he is not represented by counsel in this action. *See Mederos v. United States*, 218 F.3d 1252, 1254 (11th Cir. 2000) ("Pro se filings, including those submitted by [the petitioner] in the present case, are entitled to liberal construction."). After reviewing Mr. Holden's motion to vacate, the Government's response, Mr. Holden' replies, and the court record including the trial transcript, and for the following reasons, the court finds that his motion to vacate is due to be DENIED on all grounds.

I. BACKGROUND

The Government filed a twenty-six count Superseding Indictment on December 29, 2011against Mr. Holden and fourteen other defendants, charging crimes related to a drug distribution ring, money laundering, and firearm offenses. Specifically, the Superseding Indictment charged Mr. Holden with conspiracy to possess with intent to distribute 5 kilograms or more of cocaine hydrochloride and 280 grams or more of "crack" cocaine (Count One); conspiracy to possess with intent to distribute 1,000 kilograms or more of marijuana (Count Two); distribution of marijuana (Counts Three through Six); felon in possession of a firearm (Count Eleven); and money laundering (Counts Twenty-Three through Twenty-Six). (Crim. Doc. 53).

Prior to his trial, Mr. Holden's trial attorney, Bruce Harvey, along with several co-defendants, moved to suppress recordings of calls, and any evidence derived from those calls, that the Government intercepted via wiretaps on Mr. Holden's telephone. After a hearing on the

Habeas Case

Mr. Holden filed the current habeas motion asking this court to vacate, set aside, or correct his sentence on March 7, 2016. (Civ. Doc. 1). The court ordered the Government to show cause in writing why it should not grant the motion (civ. doc. 3), and the Government filed its response on June 6, 2016 (civ. doc. 7). Mr. Holden filed his reply to the Government's response on June 15, 2016. After the court gave him additional time to file any additional evidentiary materials, he filed exhibits on November 28, 2016. (Civ. Docs. 8 & 14).

Mr. Holden is currently incarcerated at Atlanta USP.

II. DISCUSSION

Mr. Holden's three grounds for his motion to vacate involve either a claim that is procedurally defaulted or an ineffective assistance counsel claim that has no merit. After a discussion of the applicable law regarding procedural default and ineffective assistance of counsel, the court will address each ground separately.

Applicable Law:

Procedural Default

The procedural default doctrine reflects the general rule that claims not raised on direct appeal may not be raised on collateral review. *See Massaro v. United States*, 538 U.S. 500, 504 (2003). Federal courts will not review a procedurally-defaulted claim unless the defendant can show either (1) cause for the default *and* actual prejudice from the error; *or* (2) that the court's failure to consider the claim will cause a miscarriage of justice because the defendant is actually

A petitioner's counsel generally—not always—is presumed to have acted reasonably. *Strickland*, 466 U.S. at 690; *Williams v. Head*, 185 F.3d 1223, 1228 (11th Cir. 1999) ("[W]here the record is incomplete or unclear about [counsel]'s actions, we will presume that he did what he should have done, and that he exercised reasonable professional judgment."). To overcome that presumption, a petitioner "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Strickland*, 466 U.S. at 690. Conclusory or unsupported allegations cannot support an ineffective assistance of counsel claim. *See Tejada v. Dugger*, 941 F.2d 1551, 1559 (11th Cir. 1991) (finding "unsupported allegations, conclusory in nature and lacking factual substantiation" to be an insufficient basis for relief); *see also Chandler v. United States*, 218 F.3d 1305, 1314 n.15 (11th Cir. 2000) ("An ambiguous or silent record is not sufficient to disprove the strong and continuing [*Strickland*] presumption.").

Moreover, if a petitioner can show his counsel's performance was deficient, he must also show that deficient performance prejudiced his case. *Eagle v. Linahan*, 279 F.3d 926, 943 (11th Cir. 2001); *see also Strickland*, 466 U.S. at 697 (finding that the court is not obligated to "address both components of the inquiry if the defendant makes an insufficient showing on one"). Prejudice exists if "a reasonable probability [exists] that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A "reasonable probability" is one "sufficient to undermine confidence in the outcome" of the case.

Id. Merely showing that counsel's error had "some conceivable effect on the outcome of the proceeding" cannot establish prejudice. *Id.* at 693.

Ground 1: Evidence for Probable Cause for the Search Warrant Obtained by Unconstitutional Search and Seizure

Mr. Holden argues that the evidence used to obtain the search warrant for the wiretaps was obtained by an unconstitutional search and seizure. He claims that the "Government's factual basis for probable cause for the wiretaps was relied upon by (CI) Ivan Fletcher whom at trial admitted to being a liar and double dealer"; that Agent Boyd testified during cross examination that he "never used normal investigative techniques before, during or even after the wiretaps"; and that Agent Boyd admitted that he did not determine "pertinent and non pertinent calls until a week before trail." In his reply to the Government's response, Mr. Holden further explains his reasons behind Ground 1, and specifically asserts that the wiretap applications lack the "necessity" and "minimization" requirements. However, Mr. Holden is procedurally barred from raising this issue regarding the wiretaps and has failed to show cause and actual prejudice to overcome this bar.[3]

Based on the language of this ground in his habeas motion, Mr. Holden is procedurally barred from raising this ground because he did not raise it in his direct appeal. Mr. Holden does not mention ineffective assistance of counsel or any other purported "cause" for his procedural

[3] Because Mr. Holden has not raised actual innocence, the court will not address whether the alleged error in Ground 1 constitutes a miscarriage of justice to overcome procedural default.

default for this ground in his habeas motion; but in his reply to the Government's response, he asserts that the facts he alleges in "Ground 3 will support Ground One." The court is unsure of the exact meaning of this statement, but Ground 3 alleges ineffective assistance of appellate counsel for failing to raise issues on appeal. The court surmises that Mr. Holden may be asserting ineffective assistance of appellate counsel as cause for his default in failing to raise this issue on direct appeal. As the court will discuss in more detail below under Ground 3, Mr. Holden's conclusory statements in Ground 3 are insufficient to show ineffective assistance of counsel as cause for his procedural default.

Moreover, assuming arguendo that somehow Mr. Holden could show that his appellate counsel's performance was deficient on this ground, he fails to show how an appeal on this issue would have changed the results of his case. To determine whether the failure of appellate counsel to raise a claim resulted in prejudice, the court must look to the merits of that claim on appeal. *See Eagle*, 279 F.3d at 943.

On direct appeal, Mr. Holden's counsel challenged this court's ruling regarding the validity of the wiretap applications; specifically, he argued that this court should have suppressed the evidence from the wiretaps because the applications did not include DOJ authorization memos and because one of the applications misidentified the authorizing official. *Holden*, 603 F. App'x at 748-50. The Eleventh Circuit discussed the validity of the wiretap applications at length, including co-defendant Myron Tibbs' argument that the applications failed to show necessity, and affirmed this court's denial of the motions to suppress evidence

those wiretaps was obtained unconstitutionally; the jury simply found that the Government did not meet its high burden of proving that count beyond a reasonable doubt—a burden much higher than the probable cause necessary for the initial wiretap applications. Likewise, Mr. Holden's burden to show cause and actual prejudice to overcome procedural default on this ground is a high one, and Mr. Holden has failed to cross that hurdle..

Ground 2: Ineffective Assistance of Trial Counsel for Failure to File a Motion for New Trial Based on New Evidence

Mr. Holden claims that his trial counsel was ineffective because he failed to file a motion for a new trial based on the "newly discovered evidence" that Cedric Carroll, a co-defendant, lied under oath when Mr. Holden's "trial counsel asked [Mr. Carroll] had he cooperated before and he replied 'no.'" (Doc. 1 at 6). On cross examination at trial, Mr. Holden's trial counsel said to Mr. Carroll: "You have been a snitch before," and Mr. Carroll replied "No, sir, I haven't." "You haven't?" asked trial counsel, and Mr. Carroll responded: "This is my first case ever, sir." Mr. Holden's trial counsel then asked Mr. Carroll about incidents in 2008 and 2009 in which he acted as a confidential informant for a state agent, and Mr. Carroll admitted that he was a confidential informant in 2008 and 2009, but did not equate a "snitch" with a "confidential informant." (Crim. Doc. 371 at 106-09).

Mr. Holden alleges that the Government withheld *Brady* material because it did not disclose that Mr. Carroll had previously cooperated with the Government and that the Government knowingly used or failed to correct perjured testimony of Mr. Carroll. (Doc. 8 at 5,

7). Mr. Holden's trial counsel was not ineffective for failing to file a motion for a new trial that had no grounds for success. Even assuming arguendo that his trial counsel was ineffective for failing to file a motion for a new trial, Mr. Holden cannot show a reasonable probability that this court would have granted a motion for a new trial on this issue had his trial counsel filed one.

Mr. Holden claims that "[a]fter trial, but before sentencing, [he] discovered that the Government withheld *Brady* material on Cedric Carroll that proved he lied under oath." Mr. Holden asserts that the "Government knew this testimony was false, but failed to correct it as the document clearly proves." (Doc. 1 at 6). However, Mr. Holden failed to attach the referenced "document" to his habeas motion. And in his response to the Government's filing, Mr. Holden explained that he repeatedly asked "his attorney" for the document, but "counsel has not sent it." (Doc. 8 at 5). However, in his later evidentiary submission, Mr. Holden attaches a document entitled "Narrative" that sets out Mr. Carroll's involvement as a confidential information in 2008 and 2009 involving Tryrome Terrell Bynum as support for this ground in his habeas motion. (Doc. 14 at 14-16). Unfortunately for Mr. Holden, this document does not support that his trial counsel was ineffective for failing to file a motion for a new trial and does not show a reasonable probability that this court would have granted that motion.

To succeed on a motion for new trial alleging a *Brady* violation, Mr. Holden would have to show that

> (1) the government possessed favorable evidence to the defendant;
> (2) the defendant does not possess the evidence and could not

> obtain the evidence with any reasonable diligence; (3) the prosecution suppressed the favorable evidence; *and* (4) had the evidence been disclosed to the defendant, there is a reasonable probability that the outcome would have been different.

See United States v. Vallejo, 297 F.3d 1154, 1164 (11th Cir. 2002) (emphasis added); *see also United States v. Caro*, 589 F. App'x 449, 455 (11th Cir. 2014).[4] Had Mr. Holden's trial counsel filed a motion for new trial based on this alleged *Brady* violation, that motion would have failed on several grounds.

Mr. Holden's trial counsel obviously knew at trial about Mr. Carroll's past as a confidential information from December 2008 through June 2009 because counsel cross-examined Mr. Carroll extensively about it, including references to the specific months and dates contained in the "Narrative" document Mr. Holden claims the Government failed to disclose. (Crim. Doc. 371 at 106-115). Therefore, this evidence could not be "newly discovered" after trial; Mr. Holden's counsel must have possessed such information *prior* to trial to cross examine Mr. Carroll about it *during* trial. Moreover, because Mr. Holden's trial counsel cross-examined Mr. Carroll about his past as a confidential information, the jury was free to consider his past cooperation as impeachment of Mr. Carroll's testimony at trial.

---

[4] When a motion for a new trial alleges *Brady* violations, the district court does not use the standard for a motion for new trial under Fed. R. Crim. P. 33. *See United States v. Takhalov*, 2013 WL 2146996 (S.D. Fla. May 15, 2013). This court finds that, even if the Rule 33 standard applied, Mr. Holden's claim on this ground still fails because the evidence was not discovered after trial; the evidence was merely cumulative or impeaching; and the evidence is not of "such a nature that a new trial would probably produce a new result." *See United States v. Hall*, 854 F.2d 1269, 1271 (11th Cir. 1988).

So, Mr. Holden cannot show that his counsel was ineffective for failure to file a frivolous motion or a reasonable probability that the outcome of the case would have been different if counsel filed the motion.

Also, Mr. Holden has no basis for his *Giglio* claim that the Government knowingly used Mr. Carroll's false testimony and failed to correct his false statements. *See Giglio v. United States*, 405 U.S. 150 (1972). To succeed on a motion for a new trial alleging this ground, Mr. Holden would have to show that the Government "used or failed to correct" Mr. Carroll's false testimony; that the Government knew or should have know Mr. Carroll's testimony was false; and that a "reasonable likelihood" exists the "false testimony could have affected the judgment." *See Rodriguez v. Sec'y, Fla. Dep't of Corr.*, 756 F.3d 1277, 1302 (11th Cir. 2014).

The fatal error in Mr. Holden's argument is that Mr. Carroll's testimony on this issue was not false. Mr. Carroll did not deny being a confidential information in 2008 and 2009; he just did not agree that being a confidential information meant he was a "snitch."

Mr. Carroll admitted that he started working as a confidential informant in December 2008 and continued to participate in controlled buys through June 2009, the exact dates and time line contained in the "Narrative." (Crim. Doc. 371 at 109). Mr. Holden's trial counsel asked Mr. Carroll during cross-examination: "You went in to talk to them and you started working with them in December 2008 as a confidential informant, didn't you?" Mr. Carroll responded "Yes, sir." *Id.* When asked "And you did that back in 2008 all the way through June of 2009,

(Doc. 8 at 6). However, his conclusory statement that numerous constitutional violations occurred is insufficient to show ineffective assistance of appellate counsel or prejudice.

Mr. Holden's general, unsupported allegation that his appellate counsel was ineffective for failing to appeal "numerous constitutional violations"does not pass muster. *See Tejada*, 941 F.2d at 1559. The court understands that Mr. Holden may not remember each and every word from the trial; but, even without the trial transcript, he could give the court some indication about the factual support for the alleged constitutional violations to which he refers. However, he gives the court no facts at all to explain the alleged violations his appellate counsel failed to raise. The court cannot find his appellate counsel ineffective on grounds unrevealed by Mr. Holden and unknown to the court.

Moreover, Mr. Holden had access to his trial transcript because he attached several pages from it to his evidentiary submission filing. See (Doc. 14 at 4-20). If Mr. Holden could find these specific pages from the trial transcript to support his claims, he could have pointed the court to facts from the transcript to support his conclusion that alleged constitutional violations occurred. Even if Mr. Holden did not have all of the trial transcripts, he did not ask the court in this proceeding for access to those transcripts or for additional time to obtain them. In any event, he failed to give the court any facts to support his unsubstantiated conclusions. Such conclusions with no factual support cannot show ineffective assistance of appellate counsel.

Interestingly, Mr. Holden actually cites to pages from the transcript of the motion to suppress to support this ground even though he claims he had no transcripts. (Doc. 14 at 18-20). Mr. Holden claims that, because his trial counsel asked the court to certify the denial of the motion to suppress as an interlocutory appeal but the court denied that request, he "is entitled to a [belated] appeal, so that he may address trial and sentencing issues." (Doc. 8 at 6).

But, the court's denial of the interlocutory appeal on the motion to suppress issue has no bearing on this ineffective assistance of appellate counsel claim on this ground. His appellate counsel did file a direct appeal challenging the denial of the motion to suppress—the very issue for which he requested an interlocutory appeal. His counsel's request for an interlocutory appeal that the court denied does not subsequently give Mr. Holden the right to file more issues on direct appeal later.

His appellate counsel raised the strongest argument on direct appeal, and he is not ineffective for failing to raise frivolous issues on appeal. *See Deonarinesingh v. United States*, 542 F. App'x 857, 863 (citing *Payne v. United States*, 566 F.3d 1276, 1277 (11th Cir. 2009) (per curiam)) ("Appellate counsel is not required to raise all nonfrivolous issues on appeal . . . especially where counsel raised other strong issues."). Mr. Holden has produced nothing for this ground other than unsubstantiated conclusory allegations, and this grounds fails to show that his appellate counsel was ineffective, much less that any prejudice occurred as required by *Strickland*.

III. CONCLUSION

For the reasons stated in this opinion, the court finds that Mr. Holden' motion to vacate is due to be DENIED on all grounds.

The court will enter a separate Order.

DONE and ORDERED this 9th day of November, 2017.

Karon O. Bowdre

KARON OWEN BOWDRE
CHIEF UNITED STATES DISTRICT JUDGE