

10-0611-pr
Matthews v. USA

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

3 -----

4 August Term, 2011

5 (Argued: January 25, 2012

Decided: June 14, 2012)

6 Docket No. 10-0611-pr

7
8 MICHAEL MATTHEWS,

9 Petitioner-Appellant,

10 - v. -

11 UNITED STATES OF AMERICA,

12 Respondent-Appellee.
13

14 Before: KEARSE, CABRANES, and STRAUB, Circuit Judges.

15 Appeal from orders of the United States District Court for the Northern District of New
16 York, David N. Hurd, Judge, denying motion under 28 U.S.C. § 2255 to vacate petitioner's conviction
17 or correct his sentence of life imprisonment under the three-strikes provision of 18 U.S.C. § 3559(c).

18 Vacated in part, and remanded.

19 JESSE M. SIEGEL, New York, New York, for Petitioner-Appellant.

20 MICHAEL MATTHEWS, Petitioner-Appellant pro se, Pine Knot,
21 Kentucky, filed a supplemental brief.

22 BRENDA K. SANNES, Assistant United States Attorney, Syracuse,
23 New York (Richard S. Hartunian, United States Attorney for
24 the Northern District of New York, Edward R. Broton, Rajit S.
25 Dosanjh, Assistant United States Attorneys, Syracuse, New
26 York, on the brief), for Respondent-Appellee.

1 KEARSE, Circuit Judge:

2 Petitioner Michael Matthews, who received a sentence of life imprisonment as a career
3 offender pursuant to 18 U.S.C. § 3559(c) following his conviction in 2007 of federal bank robbery
4 and conspiracy offenses, appeals (1) from an order of the United States District Court for the Northern
5 District of New York, David N. Hurd, Judge, denying his motion under 28 U.S.C. § 2255 to vacate
6 his conviction or correct his sentence on the principal grounds that he was denied effective assistance
7 of trial counsel and appellate counsel, and (2) from the denial of his motion for reconsideration.
8 Matthews contends that the district court erred in denying his § 2255 motion without conducting a
9 hearing and without giving a meaningful explanation for its decision. For the reasons that follow, we
10 conclude that the matter must be remanded to the district court for further proceedings on at least one
11 of Matthews's claims and for specification by the district court of the issue or issues as to which it
12 granted Matthews, without explanation, a certificate of appealability (or "COA") to seek review of
13 its denial of his § 2255 motion.

14 I. BACKGROUND

15 Matthews has a history of convictions for robbery and burglary offenses dating back
16 at least to 1971, when he was convicted of first-degree robbery in violation of N.Y. Penal Law
17 § 160.15 and two counts of second-degree burglary in violation of N.Y. Penal Law § 140.25, resulting
18 in a state-court youthful offender adjudication. His § 2255 motion focuses principally on his most
19 recent convictions and their relationship to his past troubles with the law.

1 A. Matthews's Most Recent Convictions

2 In 2006, in a superseding federal indictment, Matthews was charged with one count
3 of bank robbery, in violation of 18 U.S.C. § 2113(a), and one count of conspiracy to commit bank
4 robbery, in violation of 18 U.S.C. § 371 ("the 2006 charges"). The government filed an "Enhanced
5 Penalty Information" alleging that Matthews had previously been convicted of several serious violent
6 felonies; that his record included convictions in 1983 on two counts of first-degree robbery in
7 violation of N.Y. Penal Law § 160.15, and convictions in 1996 of bank robbery in violation of 18
8 U.S.C. §§ 2113(a) and (b), and conspiracy to commit bank robbery in violation of 18 U.S.C. § 371;
9 and that, on the 2006 charges, the government would therefore seek enhanced punishment for
10 Matthews under the three-strikes provision of 18 U.S.C. § 3559(c).

11 Section 3559(c) provides, in pertinent part, that if a person "convicted in a court of the
12 United States of a serious violent felony" has previously "been convicted (and those convictions have
13 become final) on separate prior occasions in a court of the United States or of a State of . . . 2 or more
14 serious violent felonies," that person, "[n]otwithstanding any other provision of law, . . . shall be
15 sentenced to life imprisonment." 18 U.S.C. § 3559(c)(1)(A)(i). For purposes of this section, "serious
16 violent felony" is defined to include "robbery (as described in section 2111, 2113, or 2118)" and
17 "conspiracy . . . to commit any of the above offenses." Id. § 3559(c)(2)(F)(i). See also United States
18 v. Snype, 441 F.3d 119, 144 (2d Cir. 2006) ("Snype") (because the New York Penal Law "statutory
19 elements" of robbery, including "§ 160.15," "parallel those required to establish robbery under 18
20 U.S.C. §§ 2111, 2113(a), and 2118(a), . . . New York State convictions for first and second degree
21 robbery by definition qualify as serious violent felonies under § 3559(c)(2)(F)(i)").

1 At a jury trial in September 2006, at which Matthews was represented by James F.
2 Greenwald of the Office of the Federal Public Defender, Matthews was found guilty of the 2006
3 charges. In 2007, the district court found, over defense objections, that Matthews had previously been
4 convicted of at least two serious violent felony offenses, and it sentenced him to, inter alia, concurrent
5 terms of life imprisonment. On direct appeal, for which Matthews was represented by new counsel,
6 his conviction and sentence were affirmed. See United States v. Matthews, 545 F.3d 223, 225 (2d Cir.
7 2008) (noting People v. Matthews, 68 N.Y.2d 118, 123, 506 N.Y.S.2d 149 (1986) (which had
8 affirmed Matthews's first set of adult convictions), and United States v. Matthews, 20 F.3d 538,
9 553-55 (2d Cir. 1994) (which had affirmed his second set of adult convictions)).

10 B. Matthews's § 2255 Motion

11 In March 2009, Matthews, proceeding pro se, filed the § 2255 motion that is the
12 subject of the present appeal, asserting four claims. He alleged principally that he was denied
13 effective assistance of counsel ("IAC") at trial because Greenwald had hired, as an investigator to
14 assist in Matthews's defense, a former police officer with whom Greenwald knew Matthews "had a
15 prior negative relationship" (Matthews § 2255 Motion at 5). The motion alleged that the investigator,
16 Richard Haumann, had been a deputy police chief in Syracuse, New York, and that he had "arrested
17 . . . [and] viciously assaulted" Matthews and addressed Matthews "with racial disdain and
18 insensitivity" at a time when Matthews was accused of the attempted murder of a police officer. (Id.)
19 The motion alleged that due to the conflict of interest stemming from this history, Haumann and
20 Greenwald failed to conduct an adequate investigation into possible defenses for Matthews against
21 the 2006 charges.

1 The other claims asserted in Matthews's § 2255 motion were that he was denied
2 effective assistance of counsel on his direct appeal because his new attorney had, inter alia, failed to
3 communicate with him and to raise meritorious issues on appeal, including the IAC allegations against
4 trial counsel, of which she was aware; that the district court lacked jurisdiction to enhance his
5 sentence under § 3559(c) because the court did not ascertain that Matthews's predicate crimes were
6 violent or that the predicate convictions were final; and that his life sentences violated the Eighth
7 Amendment's prohibition against cruel and unusual punishment.

8 The § 2255 motion requested a hearing, a determination of the relief to which
9 Matthews was entitled on these claims, and/or a reduction of his sentence. Matthews also made
10 several requests that the court furnish him with trial and hearing transcripts and/or appoint counsel
11 to represent him in connection with the motion. Those motions were denied. However, the district
12 court instructed the government to file a response to Matthews's § 2255 motion and stated that the
13 matter would be taken on submission.

14 The government, in its opposition to Matthews's § 2255 motion, submitted a
15 memorandum arguing that his claims should be rejected for a variety of reasons. As to the claim of
16 ineffective assistance of trial counsel, the government argued (a) that Matthews failed to prove
17 deficient performance as required by Strickland v. Washington, 466 U.S. 668 (1984), in that his
18 allegations were "general," "cursory," "vague," and lacking in reference to specific incidents that
19 might substantiate his claim of conflict between himself and the investigator hired by trial counsel,
20 and (b) that Matthews failed to prove the prejudice element of the Strickland test because, given the
21 district court's description of the trial evidence as to Matthews's guilt as overwhelming, Matthews
22 could not show a reasonable probability that but for deficient performance on the part of his attorney

1 the outcome of his trial would have been different. (Government Memorandum in Opposition to
2 Petitioner's Motion Pursuant to 28 U.S.C. § 2255 ("Government Memorandum") at 7-9.) As to the
3 claim of ineffective assistance of appellate counsel, the government argued (a) that counsel had
4 simply made a "cho[ice] to advance stronger arguments on appeal and eliminate weaker ones" (id.
5 at 12) and that her choice thus did not amount to constitutionally deficient performance (see id.
6 at 10-12), and (b) that other arguments against application of the career offender statute would not
7 have been proper issues for appeal because they had not been raised in the district court (see id. at 10).

8 The government opposed Matthews's claim that the district court lacked jurisdiction
9 to impose a life sentence under § 3559(c)(1)(A)(i) on the grounds (a) that that claim was procedurally
10 barred because Matthews had not raised it on direct appeal from his conviction, and (b) that the claim
11 lacked merit because the district court had properly determined, based on adequately supported
12 findings, that § 3559(c) was applicable based on Matthews's prior commission of at least two serious
13 violent felonies. (See id. at 12-15.)

14 As to Matthews's Eighth Amendment claim, the government argued (a) that the claim
15 was procedurally barred because Matthews failed to raise it on direct appeal, and (b) that it lacked
16 merit in light of this Court's decision in Snype, 441 F.3d at 152 (holding that a life sentence pursuant
17 to § 3559(c) does not constitute cruel and unusual punishment). (See Government Memorandum
18 at 15-16.)

19 After the government filed its memorandum, Matthews requested and received leave
20 to amend his motion. However, the May 13, 2009 order granting that permission instructed that any
21 amendment be filed on or before July 17; no amendment was filed.

1 By Order dated July 22, 2009 ("July 2009 Order"), the district court denied Matthews's
2 § 2255 motion, stating as follows:

3 On March 23, 2009, the petitioner/defendant filed a motion pursuant
4 to 28 U.S.C. § 2255 to vacate, set aside, or correct his conviction of September
5 11, 2006, and judgment of February 22, 2007. (Docket No. 95)[.] The
6 Government filed a memorandum in opposition. (Docket No. 100). The
7 petitioner/defendant's request for permission to amend the original petition
8 (Docket No. 101) was granted on May 13, 2009. (Docket No. 102). The
9 petitioner/defendant failed to file an amendment by the due date of July 17,
10 2009.

11 Upon a review of the submissions and for all of the reasons set forth in
12 the Government's memorandum, it is

13 ORDERED, that the petitioner/defendant's motion pursuant to 28
14 U.S.C. § 2255 is DENIED.

15 July 2009 Order at 1-2.

16 Matthews moved for reconsideration of the July 2009 Order, stating that he had
17 informed the court that he would be unable to comply with the July 17 deadline for amendment and
18 that the clerk of the court had indicated to him that the transcripts he had requested would be
19 forthcoming. Matthews contended that his § 2255 motion should not have been denied without giving
20 him additional time. The motion for reconsideration was summarily denied. See District Court Order
21 dated September 11, 2009.

22 Matthews thereafter applied to the district court for a certificate of appealability to
23 challenge the denials of his § 2255 motion and his motion for reconsideration. In an order dated
24 December 17, 2009 ("December 2009 Order"), the court granted the COA, stating only as follows:

25 On September 21, 2009, the petitioner filed an Application for
26 Certificate of Appealability (Docket No. 107) for the denial of his motion
27 pursuant to 28 U.S.C. [§] 2255 to vacate his conviction (Docket No. 103), and
28 for reconsideration (Docket No. 106). The Government has not opposed.

1 Therefore, it is

2 ORDERED that a Certificate of Appealability is GRANTED.

3 IT IS SO ORDERED.

4 December 2009 Order at 1-2.

5 II. DISCUSSION

6 On this appeal, represented by new counsel appointed by this Court in June 2010,
7 Matthews argues principally that the district court abused its discretion in denying his § 2255 motion
8 without an evidentiary hearing and "without any findings or conclusions other than the statement that
9 [the denial] was 'for all of the reasons set forth in the Government's memorandum'" (Matthews brief on
10 appeal at 5 (quoting July 2009 Order)). He asks that we remand to the district court with
11 instructions (a) to appoint counsel to assist him, (b) to allow him to amend his § 2255 motion and
12 respond to the Government Memorandum, and (c) "once the record is fully and fairly developed," to
13 make "findings and conclusions consistent with the requirements of" § 2255. (Matthews brief on
14 appeal at 15.) For the reasons that follow, we vacate the July 2009 Order to the extent that it
15 summarily rejected Matthews's claim of ineffective assistance of trial counsel due to the alleged
16 conflict of interest of the investigator hired by counsel. We remand for further proceedings on that
17 claim, as well as for identification by the district court of any other issues as to which its December
18 2009 Order was meant to grant a certificate of appealability.

1 A. The Specificity Requirement for an Order Granting a COA

2 The federal habeas appeals statute, as amended by the Antiterrorism and Effective
 3 Death Penalty Act of 1996 ("AEDPA"), provides that "[u]nless a circuit justice or judge issues a
 4 certificate of appealability, an appeal may not be taken to the court of appeals from . . . the final order
 5 in a proceeding under section 2255." 28 U.S.C. § 2253(c)(1)(B). Notwithstanding § 2253(c)'s
 6 reference to a "circuit justice or judge" as the potential issuer of a COA, a district judge too has
 7 authority to grant a COA. See, e.g., Soto v. United States, 185 F.3d 48, 51 n.3 (2d Cir. 1999)
 8 ("Soto"); Lozada v. United States, 107 F.3d 1011, 1014-16 (2d Cir. 1997), abrogated on other grounds
 9 by United States v. Perez, 129 F.3d 255, 260 (2d Cir. 1997), cert. denied, 525 U.S. 953 (1998).

10 AEDPA provides that the COA may be granted "only if the applicant has made a
 11 substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). It requires the
 12 judge, in granting a COA, "to indicate the 'specific issue or issues' that satisfy the 'substantial showing
 13 of the denial of a constitutional right' standard." Blackman v. Ercole, 661 F.3d 161, 164 (2d Cir.
 14 2011) ("Blackman") (quoting 28 U.S.C. §§ 2253(c)(2) and (3)).

15 Our decision in Blackman (which was issued more than a year after the district court's
 16 grant of the COA in the present case) noted that the specificity requirement is "a threshold procedural
 17 requirement designed to 'avoid[] the waste of judicial energy on the consideration of clearly meritless
 18 claims,'" Blackman, 661 F.3d at 164 (quoting Grotto v. Herbert, 316 F.3d 198, 209 (2d Cir. 2003));
 19 see, e.g., Blackman, 661 F.3d at 164 ("Appellate courts cannot waste scarce judicial resources by
 20 wading through trial records in an effort to guess which issues a district judge may have deemed
 21 worthy of appellate review."). In Blackman, in which the district court had granted a COA without
 22 identifying the issue or issues on which it was granted, we remanded for the required specification.

1 In the present case, the problem discussed in Blackman is exacerbated by the fact that
 2 the district court, in denying Matthews's § 2255 motion, did not provide any explanation for its denial
 3 except to state that it adopted "all of the reasons set forth in the Government's memorandum" in
 4 opposition to the motion, July 2009 Order at 2--and the fact that the reasons advanced by the
 5 government for the rejection of one of Matthews's complaints about trial counsel were plainly flawed
 6 (see Part II.B. below).

7 Nonetheless, because we do not view the district court's failure to comply with the
 8 specificity requirement as a flaw that is jurisdictional, given (a) that we have ruled that a "certificate
 9 of appealability issued without meeting the 'substantial showing of the denial of a constitutional right'
 10 requirement nonetheless suffices to confer appellate jurisdiction," Soto, 185 F.3d at 52 (quoting
 11 § 2253(c)(2)), and (b) that this Court itself is authorized to grant a certificate of appealability, we
 12 proceed to address the issue that this Court would have viewed as facially appropriate for the issuance
 13 of a COA. If the district court in fact viewed Matthews as having met the substantial-showing-of-the-
 14 denial-of-a-constitutional-right standard with respect to any other issue, that court will be free on
 15 remand to identify such issue or issues and to grant a new COA following the proceedings on remand.

16 B. The Biased-Investigator IAC Claim

17 Section 2255 provides, inter alia, that a federal prisoner claiming that he was
 18 imprisoned in violation of federal law "may move the court which imposed . . . sentence [on him] to
 19 vacate, set aside or correct the sentence." 28 U.S.C. § 2255(a). It also provides that

20 [u]nless the motion and the files and records of the case **conclusively**
 21 show that the prisoner **is entitled to no relief**, the court shall cause notice

1 thereof to be served upon the United States attorney, grant a prompt hearing
2 thereon, determine the issues and make findings of fact and conclusions of law
3 with respect thereto.

4 Id. § 2255(b) (emphases added).

5 "We review the district court's denial of a hearing under 28 U.S.C. § 2255 for abuse
6 of discretion." Chang v. United States, 250 F.3d 79, 82 (2d Cir. 2001). "A district court abuses its
7 discretion when its decision rests on an error of law or a clearly erroneous factual finding, or when
8 its decision, though not necessarily the product of legal error or a clearly erroneous finding of fact,
9 cannot be located within the range of permissible decisions." United States v. Gonzalez, 647 F.3d 41,
10 57 (2d Cir. 2011). And "[w]hile the district court has wide discretion in developing the record it will
11 use to determine a habeas petition, that discretion does not extend to summary dismissals of petitions
12 presenting facially valid claims and off-the-record interactions with trial counsel." Pham v. United
13 States, 317 F.3d 178, 185 (2d Cir. 2003).

14 In assessing a claim that the habeas petitioner has been denied the effective assistance
15 of counsel to which he is entitled under the Sixth Amendment, the court applies the standard
16 established by Strickland v. Washington, 466 U.S. 668. Under that standard, the petitioner

17 must meet a two-pronged test: (1) he "must show that counsel's performance
18 was deficient," 466 U.S. at 687, so deficient that, "in light of all the
19 circumstances, the identified acts or omissions were outside the wide range of
20 professionally competent assistance," id. at 690; and (2) he must show "that the
21 deficient performance prejudiced the defense," id. at 687, in the sense that
22 "there is a reasonable probability that, but for counsel's unprofessional errors,
23 the result of the proceeding would have been different," id. at 694.

24 Bennett v. United States, 663 F.3d 71, 84 (2d Cir. 2011). With respect to the performance prong, the
25 Strickland Court noted that

26 counsel has a duty to make reasonable investigations or to make a reasonable
27 decision that makes particular investigations unnecessary. In any

1 ineffectiveness case, a particular decision not to investigate must be directly
2 assessed for reasonableness in all the circumstances, applying a heavy measure
3 of deference to counsel's judgments.

4 466 U.S. at 691; see id. at 688 ("the performance inquiry must be whether counsel's assistance was
5 reasonable considering all the circumstances").

6 Matthews's principal claim--which we refer to as the biased-investigator IAC claim--
7 was that his trial counsel rendered ineffective assistance by insisting on using Haumann as the
8 investigator to assist in the preparation of Matthews's defense against the 2006 charges despite
9 knowing that Haumann and Matthews had had a relationship that was surely adversarial. The
10 government opposed this claim on the grounds (a) that Matthews could not satisfy the performance
11 prong of Strickland because his allegations as to the conflict between himself and the investigator--
12 based on the fact that "the investigator . . . arrested Matthews 27 years ago when the investigator was
13 a Syracuse police officer" (Government Memorandum at 6)--were "general," "cursory," "vague," and
14 "unsubstantiated" (id. at 8), and "ma[de] no specific allegation evidencing a conflict" (id. at 6); and
15 (b) that Matthews could not satisfy Strickland's requirement that he show that use of the allegedly
16 biased investigator caused him prejudice because

17 [i]n an order issued after trial denying Matthews' first request to have his
18 attorney replaced due to ineffective assistance, the Court stated:

19 [T]he evidence of defendant's guilt was overwhelming. Even if
20 defendant's present complaints about his attorney are true, it would
21 have made no difference in the outcome of the trial.

22 Doc. Number 58.

23 (Government Memorandum at 9.)

24 These arguments by the government did not warrant the denial of Matthews's biased-
25 investigator IAC claim without a hearing. Looking first at the basis for the government's argument

1 for lack of prejudice, we note that the government acknowledges in its brief on this appeal that the
2 district court's statement that the evidence was overwhelming was made in the context of a motion
3 seeking new counsel but "not in response to a motion alleging ineffective assistance of counsel"
4 (Government brief on appeal at 21 n.13). Further, "Doc. Number 58," in which the district court
5 described the evidence against Matthews as overwhelming, was an order entered by the district court
6 on October 3, 2006. So far as the record before us reveals, Matthews did not introduce his biased-
7 investigator IAC claim until November 22, 2006. In sum, the court's statement that the evidence
8 against Matthews was overwhelming does not appear to have been part of a Strickland analysis, much
9 less one undertaken in the context of the claim that is at issue here.

10 Further, as to the performance prong of the Strickland standard, Matthews's stated basis
11 for his claim that Haumann would have a negative interest in assisting Matthews's defense was
12 anything but vague, unsubstantiated, or unspecific. His § 2255 motion alleged that Haumann, when
13 he was deputy chief of police in Syracuse, had, inter alia, arrested, assaulted, and racially demeaned
14 Matthews, when Matthews was charged with the attempted murder of a police officer. That arrest was
15 a subject of Matthews's November 2006 IAC motion, and his supporting affirmation, made under
16 penalty of perjury (see Matthews November 7, 2006 Affirmation)--which the government has
17 reproduced in its appendix on this appeal--appended as Exhibit B a photocopy of a December 1982
18 newspaper article headlined "Released Shooting Suspect Nabbed in Early Morning Stakeout." The
19 article reported, inter alia, that Matthews had been arrested some three months earlier on charges of
20 armed robbery and the attempted murder of a police officer who tried to stop him after the robbery,
21 that Matthews had then been released from custody inadvertently and become a fugitive, and that he
22 had just been recaptured. Three months of Syracuse police stakeouts--and a manhunt joined by "[t]he

1 FBI, state police, and several out-of-state metropolitan police departments"--had followed Matthews's
2 inadvertent release. Just after 1 a.m. in the final stakeout, Matthews ("disguised in a wig and granny
3 glasses") was "tackled," "pull[ed] . . . to the ground," and "taken into custody" by two policemen,
4 including "Deputy Police Chief Richard L. Haumann." The article stated that "[t]he arrest capped
5 what Police Chief Thomas J. Sardino called 'one of the most extensive manhunts in the City's
6 history.'"

7 Although a conflict of interest or an inferable bias on the part of a person on whom the
8 attorney relies for information in formulating a defense does not mean that the attorney himself has
9 a conflict of interest, the record plainly reveals a plausible basis for an inference that Haumann could
10 reasonably be expected to bear animus against Matthews. Matthews's attorney's reliance on such a
11 person while knowing of that person's presumable bias would call into question whether counsel had
12 performed his "duty to make reasonable investigations," Strickland, 466 U.S. at 691 (emphasis added).

13 The government argues that "Matthews fails to present any evidence that, if a conflict
14 existed between himself and the investigator, that his counsel was aware of it." (Government brief
15 on appeal at 21.) A handwritten note at the bottom of the Matthews Affirmation's Exhibit B included
16 the statement that "Counsel was advised that there would be a conflict of interest in having this
17 investigator (Richard L. Haumman [sic]) work on my case, racial remarks during the arrest by this
18 investigator who was a deputy police chief during this arrest of defendant." Although the court has
19 discretion as to the methods it will use to develop the record needed to rule on a habeas petition, we
20 do not see that it could properly summarily resolve against Matthews the matter of whether his
21 off-the-record communications with Greenwald had made Greenwald aware of the potential bias of
22 Haumann.

1 In sum, the government's responses to Matthews's § 2255 motion were inadequate to
2 show that his biased-investigator IAC claim could not meet the Strickland standard, and the district
3 court's rejection of this claim by adopting the government's arguments was likewise inadequate.

4 We conclude that Matthews should have an opportunity to show what an unbiased
5 investigator could have unearthed in order to create a reasonable probability that the result of the trial
6 would have been different.

7 CONCLUSION

8 For the above reasons, we vacate so much of the July 2009 Order as summarily
9 rejected Matthews's biased-investigator IAC claim and we remand to the district court for further
10 proceedings on this claim, including such proceedings as may be necessary for the court to determine
11 whether to appoint counsel to represent Matthews in connection with this claim.

12 Matthews has filed a pro se supplemental brief on appeal, arguing the merits of other
13 issues as well. We decline to address issues other than the biased-investigator IAC claim at this time.
14 If the district court intended its December 2009 Order to grant a COA with respect to any other issue,
15 the court should, following the proceedings on remand, grant a new COA identifying such issue or
16 issues.