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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID ARZATE,

Petitioner - Appellant,

v.

F. A. GONZALES,

Respondent - Appellee.

No. 12-17618

D.C. No. 1:09-cv-02156-MJS

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Michael J. Seng, Magistrate Judge, Presiding**

Submitted November 18, 2015***

Before: TASHIMA, OWENS, and FRIEDLAND, Circuit Judges.

California state prisoner David Arzate appeals from the district court's judgment denying his 28 U.S.C. § 2254 habeas petition. We dismiss.

Arzate raises two challenges to his convictions for attempted murder and

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The parties consented to magistrate judge jurisdiction.

*** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

related offenses. The district court granted a certificate of appealability only as to Arzate's claim that there was insufficient evidence to support his conviction for active participation in a criminal street gang. While this appeal was pending, the state court dismissed that count.¹ As Arzate concedes, because he is no longer in custody for the criminal street gang offense, the certified claim is moot. *See Calderon v. Moore*, 518 U.S. 149, 150 (1996) (per curiam).

Arzate's unopposed motion to construe the opening brief as a request for a certificate of appealability as to his additional claim is granted. The request for a certificate of appealability is denied. *See* 9th Cir. R. 22-1(e); *Hiivala v. Wood*, 195 F.3d 1098, 1104-05 (9th Cir. 1999) (per curiam).

DISMISSED.

¹ We treat Arzate's notice regarding the status of the case as a request for judicial notice of the state court order and abstract of judgment dated May 6, 2014. So treated, the request is granted.