

1 view of the fact that such information indicated petitioner no longer was incarcerated as a
2 result of the underlying three-year probation revocation term he challenged in the petition,
3 the Court, by order filed June 8, 2009, directed petitioner to show cause why the petition
4 should not be dismissed as moot. Specifically, the Court informed petitioner that in order to
5 avoid dismissal he must show that he continued to suffer collateral consequences from the
6 expired three-year probation revocation term. (See Order filed June 8, 2009 at 2:3-3:3); see
7 also Spencer v. Kemna, 523 U.S. 1, 7 (1998) (holding that once prisoner’s sentence expires,
8 some concrete and continuing injury other than now completed incarceration or parole, i.e.,
9 some “collateral consequence” of the conviction, must exist if habeas petition is not to be
10 considered moot); see also United States v. Tapia-Marquez, 361 F.3d 535, 537 (9th Cir.
11 2004) (holding petitioner’s release from custody moots pending challenge to sentence
12 imposed upon revocation of supervised release); United States v. Palomba, 182 F.3d 1121,
13 1123 (9th Cir. 1999) (holding rationale of Spencer applies where petitioner seeks to
14 challenge expired sentence rather than underlying criminal conviction).

15 Petitioner filed a timely response to the order to show cause, in which he argued that
16 the petition should not be dismissed as moot because his constitutional rights were violated
17 by the wrongful revocation of his probation. Thereafter, respondent filed a reply to
18 petitioner’s response, arguing that petitioner had not established the petition was not moot, in
19 that petitioner had simply reasserted his claims challenging the validity of his probation
20 revocation and had not demonstrated continuing collateral consequences from such
21 revocation now that his sentence had expired. By order filed August 3, 2009, the Court
22 concluded petitioner had failed to show the instant petition, which, as noted, challenges a
23 three-year probation revocation term that is now expired, has not been rendered moot.
24 Accordingly, as there remained no ongoing case or controversy in the instant action, the
25 Court dismissed the petition as moot. (See Order filed Aug. 3, 2009 at 2:28-3:3.)

26 Thereafter, petitioner filed a notice of appeal in this court and, shortly thereafter, also
27 filed a notice of appeal in the Ninth Circuit. The Ninth Circuit has remanded the notice of
28 appeal, which has been construed as a request for a certificate of appealability, to be decided

1 by this Court in the first instance.¹

2 Petitioner’s notice of appeal, titled Request for Appeal Order, consists of the
3 following statement:

4 Petitioner request for appeal order, due to United States constitutional issues in
5 this case action alone moot is not the case, this case action is not moot,
6 Respondent failed and avoiding the constitutional issues that in this case action
7 alone. This matter need to be review and examine by a high court that will deal
with the issues of the United States Constitution and law, Petitioner suffer
from, illegal and unlawfully imprisonment. Request an appeal to have issue
review and examine.

8 (See Docket No. 49 at 1.)

9 The Court reads petitioner’s Request for Appeal as a contention that he should be
10 authorized to proceed on appeal because the petition should not have been dismissed as moot
11 in view of petitioner’s constitutional rights having been violated by the wrongful revocation
12 of his probation. This is the same argument petitioner made in his response to the Court’s
13 order to show cause why the petition should not be dismissed as moot, which argument the
14 Court rejected, as noted above.

15 Based on the foregoing, the Court concludes the petition was properly dismissed as
16 moot and petitioner has not shown “that jurists of reason would find it debatable whether the
17 petition states a valid claim of the denial of a constitutional right and that jurists of reason
18 would find it debatable whether the district court was correct in its procedural ruling.” Slack
19 v. McDaniel, 529 U.S. 473, 484 (2000). Accordingly, the request for a certificate of
20 appealability is hereby DENIED.²

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26 ¹ A notice of appeal from the denial of a habeas petition must be construed as
27 including a request for a certificate of appealability pursuant to 28 U.S.C. § 2253(c) and
Federal Rule of Appellate Procedure 22(b). See United States v. Asrar, 116 F.3d 1268, 1270
(9th Cir. 1997).

28 ²Petitioner has not filed a request to proceed in forma pauperis on appeal and the
Court makes no determination as to whether such status should be granted.


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The Clerk shall forward this order, along with the case file, to the Ninth Circuit in accordance with the Ninth Circuit's Order of January 7, 2010.

This order terminates Docket No. 49.

IT IS SO ORDERED.

DATED: January 15, 2010


MAKINE M. CHESNEY
United States District Judge