

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

February 11, 2015

Elisabeth A. Shumaker
Clerk of Court

JAMES J. FITZGERALD,

Petitioner - Appellee /
Cross-Appellant,

v.

ANITA TRAMMELL, Warden,
Oklahoma State Penitentiary,

Respondent - Appellant /
Cross-Appellee.

Nos. 13-5131 & 13-5133
(D.C. No. 4:03-CV-00531-GKF-TLW)

ORDER

Before **LUCERO, BACHARACH, and MCHUGH** Circuit Judges.

These cross appeals are before the Court for consideration of Petitioner’s Suggestion of Death and Petitioner’s Motion to Dismiss Appeal and Cross-Appeal or in the Alternative to Allow Substitution of Parties (“Motion”), and Respondent’s response thereto. The Motion is granted in part and denied in part as follows.

As the result of petitioner’s death, these appeals became moot due to circumstances unattributable to any of the parties. “A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness to be forced to acquiesce in the judgment.” *U.S. Bancorp Mortg. Co. v. Bonner Mall P’ship*, 513 U.S. 18, 25, 115 S. Ct. 386, 391-92 (1994) (mootness by happenstance

provides sufficient reason to vacate the unreviewable district court judgment). In this instance, both parties seek review of merits of a partially-adverse district court judgment, which has been rendered unreviewable by happenstance.

In light of the foregoing, we dismiss these appeals as moot, vacate the judgment of the district court, and remand with instructions to dismiss the underlying case as moot. *See Claiborne v. United States*, 127 S. Ct. 2245 (2007) (vacating criminal judgment as moot due to defendant's death during pendency of appeal); *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950) (outlining general procedure to be followed when federal case becomes moot during pendency of appeal); *Portalatin v. Graham*, 624 F.3d 69, 78 n.3 (2d Cir. 2010) (reversing district court's judgment and remanding case with instructions to dismiss as moot due to federal habeas petitioner's death during pendency of appeal). All pending motions are denied as moot.

A copy of this order shall stand as and for the mandate of the Court.

The oral argument set for March 19, 2015 is vacated, and all counsel are excused from attendance in Denver, Colorado.

Entered for the Court,

ELISABETH A. SHUMAKER, Clerk

A handwritten signature in black ink, appearing to read "Chris Wolpert", written over a horizontal line.

by: Chris Wolpert
Chief Deputy Clerk