

December 12, 2008

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

KEVIN LEROY RICE,

Defendant-Appellant.

No. 07-5149
(D.C. No. 06-CR-063-001-TCK)
(N.D. Okla.)

ORDER AND JUDGMENT*

Before **BRISCOE**, **BRORBY**, and **EBEL**, Circuit Judges.

On appeal, Defendant-Appellant Kevin Leroy Rice contended that there was insufficient evidence to support his conviction for being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). While the appeal was pending and after oral argument, however, the warden of the prison where Mr. Rice was incarcerated informed this court that Mr. Rice has died. “[D]eath pending direct review of a criminal conviction abates not only the appeal but also all proceedings

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

had in the prosecution from its inception.” United States v. Davis, 953 F.2d 1482, 1486 (10th Cir. 1992) (quoting Durham v. United States, 401 U.S. 481, 483 (1971) (per curiam) (footnote omitted) overruled on other grounds, Dove v. United States, 423 U.S. 325 (1976) (per curiam)); see also United States v. Sloan, 26 Fed. Appx. 890 (10th Cir. Feb. 6, 2002) (unpublished) (remanding case, with directions to vacate the judgment and dismiss the underlying indictment, where appellant died pending the direct appeal of his sentence).

Accordingly, this case is REMANDED to the district court with directions to VACATE the judgment of conviction and DISMISS the underlying indictment.¹

ENTERED FOR THE COURT

David M. Ebel
Circuit Judge

¹If counsel for the Appellant wishes to challenge the factual premise that Appellant has died, counsel shall do so by filing a request for reconsideration of this order within ten days from the date of the filing of this Order.