IN THE SUPREME COURT OF THE UNITED STATES

No. 06-5618

MARIO CLAIBORNE, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RESPONSE OF THE UNITED STATES TO PETITIONER'S MOTION FOR DISPOSITION OF CASE AS PRESENTED

The United States respectfully submits that, in light of petitioner's death, the Court should vacate the grant of certiorari and dismiss the petition.

Petitioner's counsel suggests (Mot. 2-8) that this Court could decline to treat petitioner's case as moot and could resolve it on the merits notwithstanding petitioner's death. As petitioner acknowledges, however, in past cases when a criminal defendant has died after briefing and argument on the merits, this Court has vacated the order granting certiorari and dismissed the petition. See Mosley v. United States, 525 U.S. 120 (1998) (per curiam); United States v. Green, 507 U.S. 545 (1993) (per curiam); see also

United States v. John, 437 U.S. 634, 635 n.1 (1978) (when defendant died during the pendency of an appeal to this Court pursuant to 28 U.S.C. 1257(2) (1976 ed.), the Court agreed that the case was "moot" as to that defendant and resolved the merits only as to a co-defendant); Dove v. United States, 423 U.S. 325 (1976) (per curiam) (dismissing certiorari petition in light of the defendant's death); Gersewitz v. New York, 326 U.S. 687 (1945) (per curiam) (same). The identical course is appropriate here.

This Court has treated mootness doctrine as an aspect of the Article III requirement of a "[c]ase" or "[c]ontroversy." U.S. Const. Art. III, § 2. See Friends of the Earth, Inc., v. Laidlaw Environmental Serv., 528 U.S. 167, 180 (2000) ("The Constitution's case-or-controversy limitation on federal judicial authority, Art. III, § 2, underpins both our standing and our mootness jurisprudence."); Spencer v. Kemna, 523 U.S. 1, 7 (1998) (inquiring whether a prisoner's release from custody "caused his [habeas] petition to be moot because it no longer presented a case or controversy under Article III, § 2, of the Constitution"). The controversy in this case that the Court granted certiorari to decide was whether petitioner should be resentenced, as the court of appeals had ordered. Petitioner's death clearly renders his effort to avoid that resentencing moot.

Petitioner's counsel suggests (Mot. 6) that the Court should apply "pragmatic, prudential" considerations and conclude that, in

light of the investment of judicial resources in resolving the "urgent issues that will continue to bedevil the federal criminal justice system if they remain unresolved," the Court should go on to decide the merits of the issues it framed for resolution in this case. While the government agrees that the federal criminal justice system would greatly benefit from the prompt resolution of those issues, this case cannot serve as the vehicle. A bedrock principle of Article III is that the litigants must have a concrete, personal stake in the proceedings "throughout the litigation." Spencer v. Kemna, 523 U.S. at 7. In light of petitioner's death, he of course cannot serve any additional prison time if this Court were to affirm the judgment of the court of appeals remanding for resentencing. He similarly cannot benefit from reversal of the decision of the court of appeals. Petitioner's counsel asserts (Mot. 6) that "the government cannot in any sense be prejudiced if the Court intended to reverse the Eighth Circuit's decision in Claiborne with directions to affirm the district court's sentence." But mootness doctrine does not depend on the way in which the Court would have resolved the case; it depends on a litigant's stake in the decision. Here, unfortunate events have supervened and eliminated that stake.

Nor can the asserted "stigma" (Mot. 7-8) to petitioner from the court of appeals' opinion constitute the concrete interest that Article III requires. In Spencer v. Kemna, a defendant who had

completed service of a term of imprisonment upon revocation of parole asserted that his parole revocation would have a variety of possible criminal justice consequences that saved the case from mootness. Although all of those consequences were far more concrete than mere "stigma," this Court held them inadequate to rescue the defendant's challenge to his parole revocation from mootness. 523 U.S. at 14-16. Still less can the effect of the court of appeals' opinion on any "wrongful death action that Claiborne's family might pursue" (Mot. 8) save the case from mootness; it is petitioner, not his family, who must demonstrate collateral consequences.

While petitioner relies on Chief Justice Rehnquist's concurring opinion in Honig v. Doe, 484 U.S. 305, 330 (1988), in urging a pragmatic relaxation of mootness doctrine where the Court has already invested resources in deciding a case in which it has granted review, the Court has ruled to the contrary. Friends of the Earth, Inc., 528 U.S. at 192 ("This argument from sunk [judicial] costs does not license courts to retain jurisdiction over cases in which one or both of the parties plainly lack a continuing interest, as when the parties have settled or a plaintiff pursuing a nonsurviving claim has died.") (footnote omitted). Notably, Chief Justice Rehnquist himself joined this Court's per curiam dismissals of the petitions in Mosely and Green after the defendants' deaths.

Accordingly, the order granting certiorari in this case should be vacated and the petition dismissed.*

Respectfully submitted.

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Counsel of Record

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* Petitioner's counsel has also requested, in the alternative, that the Court grant certiorari in Beal v. United States, No. 06-8498, to address the second question on which the Court granted certiorari in Claiborne. The government will respond to that request in a separate filing.