

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

November 4, 2003

Charles R. Fulbruge III  
Clerk

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No. 02-41730  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RICARDO REYNA-BRECEDA,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Southern District of Texas  
USDC No. L-02-CR-719-ALL  
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Before SMITH, DeMOSS, and STEWART, Circuit Judges.

PER CURIAM:\*

Ricardo Reyna-Breceda ("Reyna") was convicted after a guilty plea for illegal reentry, in violation of 8 U.S.C. § 1326. This court affirmed Reyna's sentence on direct appeal. See United States v. Reyna-Breceda, No. 02-41730 (5th Cir. Aug. 6, 2003) (unpublished). After we issued our opinion affirming the sentence but before we issued our mandate, Reyna died. Reyna's counsel has filed an unopposed suggestion of death and abatement of appeal, and motion to recall the mandate and dismiss the appeal with a remand

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\* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

to the district court to vacate the judgment and dismiss the indictment.

"It is well established in this circuit that the death of a criminal defendant pending an appeal of his or her case abates, ab initio, the entire criminal proceeding." United States v. Asset, 990 F.2d 208, 210 (5th Cir. 1993). Our control over an appeal continues until the mandate is issued, and "'where the mandate has not issued the availability of appeal has not yet been exhausted.'" First Gibraltar Bank, FSB v. Morales, 42 F.3d 895, 897 (5th Cir. 1995)(citation omitted). We may recall our mandate to prevent injustice. 5TH CIR. R. 41.2.

Given Reyna's death under the circumstances, the motion to recall the mandate is GRANTED, the appeal is DISMISSED, and we REMAND to the district court with instructions to vacate the judgment and dismiss the indictment. See United States v. Schuster, 778 F.2d 1132, 1133 (5th Cir. 1985); United States v. Pauline, 625 F.2d 684, 684-85 (5th Cir. 1980).

MOTION GRANTED; APPEAL DISMISSED; REMANDED WITH INSTRUCTIONS.