ORRICK

ORRICK, HERRINGTON & SUTCLIFFE LLP
51 WEST 52ND STREET
NEW YORK, NEW YORK 10019-6142

tel +1-212-506-5000
fax +1-212-506-5151

WWW.ORRICK.COM

E. Joshua Rosenkranz
(212) 506-5380
jrosenkranz@orrick.com

March 11, 2011

VIA HAND DELIVERY

The Honorable William K. Suter
Clerk of the Court
One First Street, N.E.
Washington, DC 20543

Re: Ricky D. Fox v. Billy Ray Vice, Chief of Police for the Town of Vinton; and Town of Vinton, No 10-114

Dear General Suter:

Petitioner Ricky D. Fox, by and through his attorneys, respectfully responds to the Court's Order of March 4, 2011, requesting supplemental letter briefing.

I. SUMMARY

The Court has directed all parties to address "the effect on this proceeding of the death of Respondent Billy Ray Vice, and the failure to substitute an authorized representative of Vice as a party, under this Court's Rule 35.1. To the extent there are claims against Vice in his official capacity, the parties are further directed to address the effect of Rule 35.3 on this proceeding." Order of March 4, 2011.

Chief Vice's death has no effect on the continuing dispute between Petitioner Ricky D. Fox and the remaining co-Respondent, the Town of Vinton ("Vinton"), or on the merits of the question presented for review. This proceeding should, thus, undoubtedly continue with respect to them.

With respect to Chief Vice, Rule 35.1 provides that an authorized representative can appear and substitute himself within six months of a

party's death. Although that deadline has passed, this Court has discretion to entertain requests filed later. Mr. Fox does not object to the substitution of the Estate of Billy Ray Vice ("the Estate") under Rule 35.1. Rule 35.3 does not apply where, as here, the deceased party was sued in both his personal and official capacity.

If this Court declines to permit substitution of the Estate under Rule 35.1, the case should abate as to Chief Vice. In that circumstance, the Court should vacate that portion of the order awarding fees in the amount of $15,813.00 to Chief Vice and dismiss the case as to him. The Court should then hear the merits of the case as to Vinton, the remaining Respondent.

II. BACKGROUND

This case is about who has to pay Respondents' attorneys' fees for legal work billed during a lawsuit in which Mr. Fox sued Chief Vice and Vinton in Louisiana state court for violating his rights under federal and state law. All of Mr. Fox's claims arose out of the same set of facts and unlawful behavior of Chief Vice—behavior for which he ultimately was convicted. Mr. Fox withdrew his federal claim during the litigation, and it was dismissed by the magistrate overseeing the case. Mr. Fox's remaining state law claims survived a motion to dismiss and were remanded to state court where they will be tried less than a month from now. Following remand, a second magistrate concluded that the withdrawn claim was frivolous. The magistrate then ordered Petitioner Fox to pay both Vice and Vinton *all* of the attorneys' fees billed by their respective attorneys—roughly $16,000 to Chief Vice for the work of his attorney and $30,000 to Vinton. The magistrate's fee order was based on 42 U.S.C. § 1988, which permits a court to award attorneys' fees to prevailing defendants in frivolous § 1983 actions.

Mr. Fox timely appealed that order to the Fifth Circuit. A divided panel upheld the order and the Fifth Circuit denied Mr. Fox's petition for en banc review. Mr. Fox then timely filed a petition for certiorari on July 15, 2010, seeking this Court's review of the fee order as to both Respondents Vice and Vinton. On August 26, 2010, weeks after Mr. Fox filed his petition before

this Court, Respondent Billy Ray Vice passed away. The following day, on August 27, 2010, the attorneys for Respondent Vice and the attorneys for Respondent Vinton filed a joint brief in opposition on behalf of their clients. This Court granted certiorari on November 1, 2010.

Just over a week after certiorari was granted, counsel for Mr. Fox, aware of Chief Vice's death, conferred with Chief Vice's attorneys, Vinton's attorneys, and appellate counsel regarding the proper course of action for informing this Court about the death of a party and whether a substitution should be requested. On November 12, 2010, we wrote to attorneys for Vinton and also attorneys for Vice: "[W]e regret to learn of the passing of Mr. Vice, former co-defendant in this matter. Will counsel for Mr. Vice submit a suggestion of death to the Court and make clear its intentions with regard to any proposed substitutions?" Attachment A at 3. The attorney for Vinton responded to that letter to say, "We are evaluating with our respective clients. We will get back to you soon." Attachment B.

Two days later, Chief Vice's attorney informed us that Mark Stancil would be representing both Respondents as counsel of record in this Court. We wrote Mr. Stancil: "I ... wanted to ask whether you will be representing both defendants in the *Fox v. Vice* case before the Supreme Court. I have previously reached out to and been in conversation with Messrs. Miller and Ieyoub to discuss whether a suggestion of death will be filed at the court and how the case ought to be styled following Mr. Vice's unfortunate passing. I ... wanted to confirm that you are in a position to speak for both defendant parties ...." Attachment C at 1. Mr. Stancil replied: "I can speak for both defendants with respect to these issues." *Id.* But he did not indicate at that time whether he would file a suggestion of death. Several weeks later, Mr. Stancil wrote to us, "As you may be aware, I'm told that Billy Ray Vice passed away a couple of months ago. Have you guys given any thought as to how to proceed under S.Ct. Rule 35 in light of this?" Attachment D.

On December 17, 2010, we e-mailed Mr. Stancil a draft Suggestion of Death Upon the Record for his review and consent. It read:

> With the consent of all parties, Petitioner Ricky D. Fox, by and through his attorneys, respectfully suggests upon the record, pursuant to Supreme Court Rule 35, the death of Respondent Billy Ray Vice on August 26, 2010 during the pendency of this action.
>
> No representative of the deceased Respondent has come forward for substitution as a party. But the case is still alive because Petitioner remains burdened by the order requiring him to pay attorneys' fees, and at least one Respondent, the Town of Vinton, seeks to collect those fees.
>
> Accordingly, the parties agree that the Court need not substitute any party for the time being.

Attachment E at 3 and 1 ("[P]lease let me know your thoughts on the attached.").[1] Mr. Stancil responded the same day: "I'll take a look at the [Suggestion of Death] and pass it along to the Louisiana lawyers too." Attachment F.

On December 20, three days before our Opening Brief was due, we asked Mr. Stancil if he had any response to the draft Suggestion of Death. Mr. Stancil responded that he was "[w]aiting to hear from Louisiana. Sorry." Attachment G. Later that same day, Mr. Stancil wrote again that he was "working on getting you a response on the suggestion of death." Attachment H. One day before Mr. Fox's opening brief was due, Mr. Stancil sent us a revised draft Suggestion of Death, noting "I do not yet have sign-off from my co-counsel on the attached, but in the interests of keeping the ball rolling I wanted to send it to you for your review. Let me know your thoughts, and I'll let you know if/when I get comments from this end." Attachment I at 1. The draft read as follows (with minimal edits indicated in redline):

> With the consent of all *remaining* parties, Petitioner Ricky D. Fox, by and through his attorneys, respectfully suggests upon the record, pursuant to Supreme Court Rule 35, the death

[1] The initial drafts of this document were styled after an existing Suggestion of Death on the Record that also included a motion for substitution of parties. The draft was therefore mistakenly styled as a motion. The content of the draft makes it clear that we did not intend to move for substitution.

> of Respondent Billy Ray Vice on August 26, 2010 during the pendency of this action.
>
> No representative of the deceased Respondent has come forward for substitution as a party. But the case is still alive because Petitioner remains burdened by the order requiring him to pay attorneys' fees, and ~~at least one Respondent, the Town of Vinton~~, *one or more Respondents* seek~~s~~ to collect those fees.
>
> Accordingly, the *remaining* parties agree that the Court need not substitute any party for the time being.

Attachment I at 2.

On December 23, 2010, having heard nothing further from Mr. Stancil or his co-counsel, we filed along with our Opening Brief a letter suggesting upon the record the death of Respondent Billy Ray Vice. Attachment J. We sent a copy of the letter to Mr. Stancil. Mr. Fox's Opening Brief also noted that "Respondent Billy Ray Vice, who was sued in both his official and his individual capacities, passed away on August 26, 2010, during the pendency of this action. His name remains in the caption because no representative has come forward as yet to substitute as a party in either capacity. Whether or not a party enters the case to substitute, this case remains alive because Petitioner still owes fees to the Town of Vinton." OB ii. Respondents did not dispute that conclusion and noted in their Response Brief that "Vice died on August 26, 2010." Resp. Br. 5 n.4.

III. Substitution By The Estate Is Permissible Under Rule 35.1, And Mr. Fox Does Not Object To It.

We understand from Respondents' counsel that the Estate will now move for substitution as a party. We will not oppose the motion.

This Court's Rule 35.1 permits "the authorized representative of [a] deceased party [to] appear and, on motion, be substituted as a party." Although the Rule also requires that the substitution be made prior to six

months after the death, "[t]he procedural rules adopted by the Court for the orderly transaction of its business are not jurisdictional and can be relaxed by the Court in the exercise of its discretion." *Schacht v. United States,* 398 U.S. 58, 64 (1970); *see, e.g., Riegel v. Medtronic, Inc.*, 552 U.S. 804, 804-05 (2007) ("The exercise of this Court's power to grant an untimely motion to substitute a party is not unprecedented." (citing *State Farm Mutual Auto. Ins. Co. v. Campbell,* 537 U.S. 1042 (2002) and R. STERN, E. GRESSMAN, ET AL., SUPREME COURT PRACTICE 414 (8th ed. 2002)); *see also Taglianetti v. United States*, 394 U.S. 316, 316 n.1 (1969) (waiving time limitation under Supreme Court Rule 22(2)); *Heflin v. United States*, 358 U.S. 415, 418 n.7 (1959) (same, because "no jurisdictional statute is involved").

Applying those principles, substitution by the Estate would be appropriate. First, the tardiness here is minimal—less than two weeks have passed since the deadline to move for substitution—and no party is prejudiced by the delay. This Court has exercised its discretion to waive the requirements of Rule 35.1 and allow untimely substitutions under far more egregious circumstances. *See, e.g., Riegel*, 552 U.S. 804 (waiving deadline where petitioner had died two years before motion for substitution was filed and a full year before petition itself was filed). Second, substitution will allow the Court to resolve all controversies as to all parties without further collateral litigation as to the effects of abatement on the judgment. *Cf. Heflin*, 358 U.S. at 418 (stating that it is proper to "dispense with the requirements of our Rule [22(2)] in order to avoid wasteful circuity"). For all of these reasons, Mr. Fox will not oppose substitution.

IV. Rule 35.3 Does Not Apply In This Case.

Supreme Court Rule 35.3 provides for the "automatic" substitution of any successor in office where a public officer is a party to a proceeding solely in an official capacity.

> When a public officer who is a party to a proceeding in this Court in an official capacity dies, resigns, or otherwise ceases to hold office, the action does not abate and any successor in office is

> automatically substituted as a party. The parties shall notify the Clerk in writing of any such successions. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting substantial rights of the parties will be disregarded.

"Rule 35.3 has no pertinence when a public officer is a party in a private capacity (either in addition to or instead of the official capacity)." E. GRESSMAN, ET AL., SUPREME COURT PRACTICE 944 (9th ed. 2007). Instead, that Rule "is concerned only with those cases in which the substantial rights of the parties are in no way dependent upon naming the particular occupant of a public office." *Id.* Where, as here, "the cause of action is based upon alleged unlawful acts of the public officer, for which he or she is chargeable personally as well as officially, a successor *may not* automatically be substituted in the absence of allegations or facts of record showing an intent to continue the predecessor's conduct." *Id.* (emphasis added).

In light of these principles, Rule 35.3 does not apply here. The order under review has nothing to do with Chief Vice's official capacity. Mr. Fox's petition is about attorneys' fees, not the unlawful acts of Respondents. Because of that, the Court is not reviewing the alleged violations of state and federal law that were the focus of the first magistrate in this case. It is reviewing a different judge's award of fees based on Mr. Fox's withdrawal and the district court's dismissal of his federal claim. That award requires Mr. Fox to pay Chief Vice—*not* the Office of the Chief of Police for the Town of Vinton—approximately $17,000 in costs and fees that Chief Vice personally paid or owes his attorney (or the insurance company paid the attorney). Mr. Fox remains subject to that fee order, the merits of which under 42 U.S.C. § 1988 do not turn in any way on Chief Vice's unlawful behavior while in office. This case, thus, simply does not concern itself with whether Chief Vice's unlawful behavior will be continued by his successor.

Even if it did, Rule 35.3 still would not apply. No one has ever suggested that Chief Vice's successor in office—who happens to be Mr. Fox—would continue the criminally extortionate behavior for which Chief Vice was

later convicted and that ultimately led to the lawsuit between Mr. Fox and Chief Vice and Vinton. More fundamentally, the purpose of Rule 35.3 is to ensure that the appropriate government office is represented in suits involving government officials acting in their professional capacity. *Hafer v. Melo*, 502 U.S. 21, 25 (1991) ("Suits against [government] officials in their official capacity therefore should be treated as suits against the [government] ... and the real party in interest in an official-capacity suit is the governmental entity and not the named official." (citing *Kentucky v. Graham*, 473 U.S. 159, 166 (1985)). But the governmental entity—Vinton—is already a named Respondent in this case. Even if Respondent Vice had been a party to this petition in his official capacity alone, then, it would not have been proper, much less necessary for Chief Vice's successor (Mr. Fox) to succeed him in this appeal.

V. If This Court Denies Substitution, It Should Hear The Case On The Merits Between Mr. Fox and Vinton As Scheduled And Dismiss And Remand The Case Against Chief Vice With Directions To Vacate The Fee Order As To Him.

Should this Court deny the Estate's motion for substitution or should the Estate otherwise fail to appear, this Court should continue to hear the merits of the case as scheduled with respect to Mr. Fox and Vinton. The Court should dismiss the case as to Chief Vice and remand the case with directions to vacate the lower court's fee order as to him. The caption of the case should also be amended to reflect Vinton as the sole Respondent before this Court.

A. Respondent Vice's Death Has No Effect On The Dispute Between Mr. Fox And The Remaining Co-Respondent Vinton, Or On The Merits Or Suitability Of The Question Presented For Review.

Respondent Vice's death has no effect on the dispute between Mr. Fox and Vinton, the merits of the question presented, or its suitability for review in this case. That question—whether attorneys' fees may be awarded under

§ 1988 to a defendant who partially prevails on interrelated frivolous and non-frivolous claims—is no less in dispute between Mr. Fox and Vinton than it was prior to Vice's death. The magistrate's order requiring Mr. Fox to pay two distinct, specified awards of attorneys' fees to Chief Vice *and* Vinton continues to bind Mr. Fox; Vinton still vigorously defends that fee order before this Court. In the course of doing so, Vinton filed with Chief Vice a joint brief on the merits in this Court that focuses entirely on the risk that 42 U.S.C. § 1983 will be abused as a vehicle for forcing municipalities into court where they should not appear. *See generally* Resp. Br. 32-40. Those arguments are not in any way affected by the death of Chief Vice. The dispute in this case, which has now been fully briefed by the parties and more than 35 amici curiae, is just as well-positioned for resolution by this Court as it was before Chief Vice's death. Thus, even if it denies substitution to the Estate, the Court should hear the merits of the case between Mr. Fox and Vinton as scheduled.

B. Abatement Of The Case Against Chief Vice Requires Dismissal And Remand With Directions To Vacate The Fee Order As To Him.

This Court's Rule 35.1 provides that in the event no substitution is made of a representative of a deceased party, the "case shall abate" as to that party. Should the Estate not be substituted for any reason, then, this case will abate as to Chief Vice. In that event, this Court should dismiss the case as to Chief Vice's fee award and remand that portion of the case with instructions to vacate the fee order as to him. Any other resolution would be deeply unfair in that it would leave the disputed order intact and binding in favor of Chief Vice's Estate and would deprive Mr. Fox of judicial review on the merits.

Even where a court may not properly proceed with an appeal as to a particular party, "it may nevertheless, in the exercise of its supervisory appellate power ... vacate the judgment." *Walling v. James V. Reuter, Inc.*, 321 U.S. 671, 676 (1944); *see, e.g., United States v. Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft*, 239 U.S. 466, 478 (1916) ("[T]he ends of

justice exact that the judgment below should not be permitted to stand when without any fault of the Government there is no power to review it upon the merits ...."). When a matter becomes unreviewable on the merits due to mootness, for example, this Court may "make such disposition of the ... case as justice may require." *Walling*, 321 U.S. at 677. The Court should approach the issue now before it "in the manner 'most consonant to justice' ... in view of the nature and character of the conditions which have caused the [portion of a] case to become [abated]. *The principal condition to which we have looked is whether the party seeking relief from the judgment below caused the [abatement] by voluntary action....* A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment." *U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18, 24-25 (1994) (emphasis added) (citations and internal quotations omitted). For that reason, the "established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." *United States* v. *Munsingwear, Inc.*, 340 U. S. 36, 39 (1950); *see id.* at 39 n.2 (citing more than 30 examples of this "standard disposition in federal civil cases").

The equitable principles that this Court has applied in mootness cases apply here as well. And they overwhelmingly favor vacatur of the order below as to Chief Vice.

Mr. Fox should not be held responsible for the Estate's tardiness. Rule 35.1 permits a deceased respondent's authorized representative to appear and move for substitution as a party. If the Estate wished to protect its interest, it should have taken advantage of the opportunity to be heard. Rule 35.1 *does not require* a petitioner to seek an order from the Court forcing a potential substitute to appear and be heard.

Mr. Fox has dutifully complied with the rules and procedures of this Court and, indeed, did more than what was required of him under the circumstances. His counsel raised the issue of Respondent Vice's death first

with Respondent Vice's counsel (who had no response), then with Vinton's counsel (who had no response), and then with appellate counsel of record for both Respondents (who had no response, except that he fared no better than Mr. Fox at exacting a response from his colleagues). Mr. Fox—not counsel for Chief Vice—nonetheless drafted a Suggestion of Death on the Record as was his prerogative, but not necessarily his obligation, and certainly not his obligation *alone*, under Rule 35.1. ("[A]ny ... party *may* suggest the death on the record ...."). He invited Respondents' counsel to consent to the Suggestion. That invitation was declined. Mr. Fox nonetheless shared his draft letter with Respondents' counsel, and Respondents' counsel reviewed it and edited it. Mr. Fox filed that letter with the Court and sent a copy to counsel for Respondents.

Mr. Fox relied on Respondents' representations that Chief Vice was represented in this proceeding: Messrs. Ieyoub and Guidry, Respondent Vice's attorneys, appear on all papers filed in this appeal as "Counsel for Respondent Billy Ray Vice." Mr. Stancil appears on all papers as "Counsel for [both] Respondents" and specifically confirmed that he represented "both defendants." Attachment C. And Respondents' brief was filed "For The Respondents." At no time has any attorney suggested that Respondent Vice's position was unrepresented in this case or that he was represented only in one capacity or the other. If the Court now determines that Respondent Vice's position has not been adequately represented here, the mistake is not Mr. Fox's. He does not bear the responsibility for ensuring that opposing counsel are, in fact, sufficiently representing all parties' interests they claim to represent. And it would be patently unfair to saddle Mr. Fox with the burden of a fee order that he in good faith believed he was challenging in its entirety.

To allow the fee order as to Chief Vice to stand would be to ignore "the emphasis on fault in [this Court's] decisions." *Bonner Mall,* 513 U.S. at 26. It also would create a deeply perverse incentive by allowing parties to avoid review of orders by this Court simply by not showing up. "[T]he demands of orderly procedure [should] ... be honored when they can." *Id.* at 27 (citation and internal quotations omitted). When they cannot, "the public interest is

best served by granting relief." *Id.* This is not a case where, for instance, a petition abates by virtue of some voluntary and informed decision taken by the parties, *see, e.g., id.* at 29 (where mootness resulted from the parties' mutual decision to settle their dispute, abatement was not appropriate because of the "*voluntariness* of the abandonment of review" (emphasis added)). Mr. Fox has neither voluntarily nor passively abandoned his rights to seek relief on the entire order against him. Of course, Chief Vice's death was not any party's fault. But those who have succeeded to Chief Vice's interest in this case have had every opportunity to make a timely appearance, and their failure to do so *is* their fault and theirs alone. If anyone has "slept on its rights," *Munsingwear*, 340 U. S. at 41, it is the Estate. The Estate is the "litigant who has voluntarily abandoned review," *Bonner Mall*, 513 U.S. at 28, and "[i]f there is hardship in this case, it was preventable." *Munsingwear*, 340 U.S. at 39.

* * *

Accordingly, the Court should grant Respondents' unopposed motion for substitution and in the alternative dismiss the case as to Chief Vice and vacate the award as to his attorneys' fees.

Respectfully Submitted,

E. Joshua Rosenkranz /MKG

Attachments.

cc: Mark T. Stancil, Esq.
Counsel of Record for Respondents