

Abatement *Ab Initio* and a Crime Victim's Right to Restitution

On April 19, 2017, former NFL player Aaron Hernandez committed suicide in his jail cell while serving a life sentence imposed after his first-degree murder conviction. Hernandez's counsel filed a motion in the trial court requesting that the court dismiss defendant's notice of appeal, vacate his convictions, and dismiss the underlying indictments. Concluding that it was bound by precedent, the trial court granted Hernandez's motion, vacating his convictions and dismissing the indictment.¹ The effect—the criminal justice processes the victims had endured were erased.

On October 17, 2006, a federal district court abated Kenneth Lay's multiple Enron-related fraud and conspiracy convictions after he died of a heart attack prior to his sentencing.² The effect—44 million dollars that the government had sought to compensate victims defrauded in the stock scandal was lost.³

Both Kenneth Lay and Aaron Hernandez were posthumous beneficiaries of the doctrine of abatement *ab initio*. Abatement *ab initio* (meaning "from the beginning") is a sweeping judicial action that can have a devastating impact on the rights of crime victims. The judicially created common law doctrine applies when a criminal defendant dies pending appeal and operates to extinguish all criminal proceedings initiated against that defendant from indictment through conviction. Courts cite two main policy rationales in support of the doctrine: (1) it is unfair to maintain a conviction against a deceased defendant which is untested by appellate review; and (2) two of the primary justifications for pursuing criminal proceedings—to punish and/or rehabilitate the defendant—no longer apply after the defendant's death. These rationales are flawed because they fail to acknowledge the legal rights and interests of the crime victims, the individuals injured by the deceased defendant's conduct.⁴

Although abatement *ab initio* can have an adverse impact on a broad array of crime victims' rights, this Bulletin focuses on how the doctrine nullifies a victim's interest in restitution to demonstrate its fundamental lack of fairness.

Abatement in the Federal Courts

To date, the United States Supreme Court has issued two opinions addressing the doctrine of abatement *ab initio*; unfortunately, neither offers guidance as to how to consider the interests of crime victims in the abatement context. In 1971, in *Durham v. United States*, the Supreme Court

applied the doctrine where a defendant died after his direct appeal but while his petition for writ of certiorari was pending.⁵ Acknowledging that “[i]t is, of course, true that appeals are a matter of right while decisions on certiorari petitions are wholly discretionary[,]” the Court nonetheless granted the writ and abated all proceedings, holding that “death pending direct review of a criminal conviction abates not only the appeal but also all proceedings had in the prosecution from its inception.”⁶ Five years later, in *Dove v. United States*, the Supreme Court changed course, dismissing the writ of certiorari in a case in which the defendant similarly died while the petition for the writ was pending, and declined to order that the judgment be vacated or that the case be remanded with directions to dismiss the indictment.⁷ Although the Supreme Court did not provide much guidance to lower courts in its short opinion, it did note that to the extent that the Court’s decision in *Durham* might be inconsistent with the opinion, that case was overruled.⁸

In 2017, the Supreme Court decided *Nelson v. Colorado*. While the doctrine of abatement *ab initio* was not at issue in the case, a growing number of federal courts are relying upon this case when deciding the proper course of action when a defendant dies while a direct appeal is pending.⁹ In *Nelson*, after defendant-petitioners’ state convictions were invalidated, they moved for the return of court costs, fees and restitution paid by them to the State of Colorado.¹⁰ The Colorado Supreme Court held that because they did not file a claim under Colorado’s Compensation for Certain Exonerated Persons statute, which requires petitioners to prove their innocence, the trial courts lacked the authority to order a refund.¹¹ Defendant-petitioners appealed to the Supreme Court, arguing that their due process rights were violated by the law requiring them to prove their innocence before funds are returned following the invalidation of their criminal convictions.¹² The Supreme Court agreed with defendant-petitioners, finding that “once those convictions were erased, the presumption of their innocence was restored.”¹³ The Supreme Court further held that “to get their money back, defendants should not be saddled with any proof burden” and for this reason Colorado’s statutory scheme “fails due process measurement.”¹⁴ The Court reversed the district court’s denial of defendant-petitioners’ motions, and remanded for further proceedings.¹⁵

With only these cases from which to draw upon, the lower federal courts that have wrestled with the application of abatement *ab initio* have reached differing conclusions as to the ultimate disposition of a crime victim’s restitution rights when a defendant dies prior to the resolution of their direct appeals.

The Punitive/Compensatory Distinction vs. the Finality Principle

Three major approaches have emerged in the federal courts in response to the problem of how to address restitution when a defendant’s conviction is abated pending direct review. Two of those approaches involve looking at whether restitution is meant to punish or compensate. The third approach disregards the penal/compensatory inquiry, reasoning that because convictions and their attendant restitution orders are not final if they are untested by appellate review, they are subject to abatement.

Reasoning that it is futile to punish a deceased defendant, the Third and Eleventh Circuit Courts have looked at whether restitution is punitive or compensatory when deciding whether it abates; each has arrived at a different conclusion. The Third Circuit Court has held that the purpose of restitution is to compensate crime victims, not to punish defendants, and has therefore abated the deceased defendant's conviction but not the attendant restitution orders.¹⁶ In contrast, the Eleventh Circuit abates restitution along with the conviction when applying the doctrine because, in the court's opinion "though restitution resembles a judgment for the benefit of a victim, it is penal, rather than compensatory."¹⁷

The Fifth Circuit Court has rejected the punitive/compensatory analysis and adopted "the finality principle."¹⁸ The "finality principle" is based on the idea that a conviction untested by appeal is inherently unreliable, or not yet final.¹⁹ According to the Fifth Circuit, because of this unreliability it is unfair to maintain an un-reviewed conviction against a deceased defendant, and all prior proceedings initiated against that defendant must be erased, including restitution.²⁰ The Seventh and Ninth Circuit Courts, in decisions predating the Supreme Court's decision in *Nelson*, have employed similar reasoning in abating criminal restitution orders.²¹

The Second, Fourth and Tenth Circuit Courts—in opinions issued after the Supreme Court's decision in *Nelson*—have interpreted the case to require abatement of all criminal proceedings and penalties where defendant dies before resolution of the direct appeal, including restitution orders.²² These courts have concluded that even though *Nelson* was decided on due process grounds rather than application of the doctrine of abatement *ab initio*, the reasoning of the case "compels abating monetary penalties where a defendant dies during his direct appeal, as there is no longer a valid conviction to support the government's retention of the [penalty]."²³

The Failure of the Federal Approaches

All of the federal approaches described above are flawed because they continue to subscribe to some form of the abatement doctrine. Even the approach followed by the Third Circuit, which is seemingly beneficial to victims in that it preserves their restitution rights while abating a conviction, is inadequate because it rests on a legal fiction. Pursuant to the Mandatory Victims Restitution Act (MVRA), 18 U.S.C. § 3663A, mandatory restitution is dependent upon conviction.²⁴ The reliance of other Circuit Courts on the "finality" approach is also problematic because its premise—that maintaining a conviction untested by appellate review is inherently unfair—is not grounded in constitutional principles. There is no federal due process right to appeal.²⁵ Instead, a defendant's right to appeal is statutorily based.²⁶ Thus, the Fifth Circuit and other Circuit Courts finding similarly, appear to be adopting a policy choice that elevates a defendant's statutory right to appeal over a victim's statutory right to restitution. That choice is questionable in light of the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771. The CVRA reinforces and expands existing restitution law and grants victims explicit, enforceable rights, including the right to be treated with fairness, dignity and respect.²⁷ The CVRA's legislative

history indicates that its fairness provision “includes the notion of due process.”²⁸ Summarily erasing a crime victim’s statutory right to restitution violates the CVRA’s fairness guarantee.

Unfortunately, one federal case that has addressed directly the argument that the CVRA’s fairness guarantee precluded abatement has rejected that argument. In the *Lay* case, a crime victim who was defrauded opposed the Estate of Kenneth Lay’s motion to vacate his conviction. The trial court vacated Lay’s convictions without addressing the victim’s argument that the CVRA’s fairness guarantee precluded abatement.²⁹ The victim sought mandamus review of that decision, which the Fifth Circuit denied after concluding that, because a victim’s right to restitution under the CVRA accrues at conviction, that right abates with conviction.³⁰ In short, despite the victims’ rights conferred by the CVRA, abatement continues to be the rule in the federal courts. The states, on the other hand, are leading the way in acknowledging the rights of crime victims and rejecting abatement *ab initio*.

How States are Leading the Way

Among the states, there is a growing trend towards abrogating the abatement doctrine in its entirety. Following this trend, in a 2019 decision, the Supreme Judicial Court of Massachusetts reversed the trial court’s decision in the Aaron Hernandez case, abrogated its earlier holdings adopting the doctrine, and ruled that the doctrine was “no longer consonant with the circumstances of contemporary life” as, *inter alia*, “the justice system acknowledges the rights and interests of the victims of crime.”³¹ The court also acknowledged as part of that decision that crime victims have the right to “request that restitution be an element of the final disposition of a case.”³² The decision effectively overruled the court’s earlier precedent and restored Hernandez’s murder conviction. Courts in a number of other jurisdictions have similarly followed this trend, abrogating the doctrine of abatement *ab initio*,³³ although at least two of these jurisdictions have agreed it is appropriate to leave intact the conviction and any restitution awards to victims but have left open the question of abating “financial penalties” to be paid to the state in form of fines and fees.³⁴ There are other courts that have adopted one of a number of intermediate approaches, including the so-called “moderation approach,” by which they refuse to automatically abate a defendant’s conviction but may permit a third party to elect to continue an already filed direct appeal on a deceased defendant’s behalf.³⁵ Another category of states automatically abate a defendant’s conviction if the defendant dies before the resolution of the direct appeal, but do not automatically abate a restitution order.³⁶

Most of the state courts rejecting abatement have cited the interests of crime victims as the reason for doing so, even extending their discussion of victims’ rights beyond the realm of restitution. For instance, the Idaho Supreme Court observed that, considering the state’s constitutional and statutory victims’ rights, the “abatement of the conviction would deny the victim of the fairness, respect and dignity guaranteed by these laws by preventing the finality and closure they are designed to provide.”³⁷

Conclusion

The doctrine of abatement *ab initio* dates back to the 19th Century, leading one state court to refer to the rule as “one of antiquity.”³⁸ Over recent decades the landscape of the criminal justice system has fundamentally changed in regards to the rights of crime victims. Currently, every state in the union guarantees crime victims’ rights in the criminal justice system, with 36 states enshrining these in their state constitutions.³⁹ At the federal level, through the CVRA, Congress has firmly established rights that guarantee a participatory role for victims within criminal proceedings. Considering the legislative protections gained by crime victims in recent years, the doctrine of abatement is outmoded and unjust. The death of a defendant, found guilty in a court of law, should not erase the rights of the victims left behind, particularly not the right to restitution.



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¹ See Sharon Lynn Pruitt, *Why Was Convicted Killer Aaron Hernandez Considered Innocent After Suicide? Abatement, Explained*, Oxygen.com (Jan. 15, 2020, 3:27 PM), <https://www.oxygen.com/true-crime-buzz/aaron-hernandez-innocent-what-is-abatement-how-does-it-work>.

² See *United States v. Lay*, 456 F. Supp. 2d 869 (S.D. Tex. 2006).

³ See Kris Axtman, *An Enron Twist: Convicted But Not Guilty?*, The Christian Science Monitor (Aug. 28, 2006), <https://www.csmonitor.com/2006/0828/p03s02-usju.html>.

⁴ “For crime victims, validation that they were wronged comes from the conviction and sentencing of the criminal defendant. Furthermore, some financial redress for the wrong may come in the form of restitution. Abatement ab

initio eliminates both the conviction and the opportunity for restitution. Thus, abatement ab initio denies the importance of victim vindication and removes from victims the opportunity for financial compensation. In the language of victims' interests, with abatement ab initio victims are denied justice and a secondary harm is inflicted upon them." Douglas E. Beloof, *Weighing Crime Victims' Interests in Judicially Crafted Criminal Procedure*, 56 Cath. U. L. Rev. 1135, 1159 (2007).

⁵ 401 U.S. 481, 483 (1971) (per curiam).

⁶ *Id.*

⁷ 423 U.S. 325, 325 (1976) (per curiam).

⁸ *Id.*

⁹ --- U.S. ---, 137 S. Ct. 1249, 197 L. Ed. 2d 611 (2017).

¹⁰ *Id.* at 1253.

¹¹ *Id.* at 1254.

¹² *Id.* at 1254-55.

¹³ *Id.* at 1255-56.

¹⁴ *Id.* at 1256-58.

¹⁵ *Id.* at 1258. In a concurring opinion, Justice Alito emphasized that the majority's decision "overlooks important differences between restitution, which is paid to the victims of an offense, and fines and other payments that are kept by the State." *Id.* at 1261-62. Justice Alito criticized the Court's reasoning, although agreeing with the judgment, noting that "[t]he Court's disregard of historical practice is particularly damaging when it comes to the question of restitution[.]" and that the Court's declaration that "the State is 'obliged to refund ... restitution' in just the same way as fees and court costs . . . is not supported by historical practice, and it overlooks important differences between restitution, which is paid to the victims of an offense, and fines and other payments that are kept by the State." *Id.* at 1261. Justice Alito also criticized the Court's failure to "consider how restitution's unique characteristics might affect the balance that it strikes under *Mathews*["] as well as questions its rejection of "the proposition that 'equitable considerations' might militate against a blanket rule requiring the refund of money paid as restitution." *Id.* at 1262. His concurrence concludes by explaining that: "It was unnecessary for the Court to issue a sweeping pronouncement on restitution. But if the Court had to address this subject to dispose of these cases, it should have acknowledged that—at least in some circumstances—refunds of restitution payments made under later reversed judgments are not constitutionally required." *Id.* at 1263.

¹⁶ See *United States v. Christopher*, 273 F.3d 294, 298 (3d Cir. 2001) (holding that restitution was "an equitable remedy . . . intended to reimburse a person wronged by the actions of another" and that abating restitution would grant defendant's estate "an undeserved windfall"); see also *United States v. Johnson*, Nos. 91-3287, 91-3382, 1991 WL 131892, at *1 (6th Cir. 1991) (unpublished) (holding that defendant's death pending direct appellate review required abating the appeal, conviction and any accompanying fine, but that "[t]o the extent that the deceased appellant has been ordered to make restitution as a consequence of his conviction, such restitution is not affected hereby").

¹⁷ *United States v. Logal*, 106 F.3d 1547, 1552 (11th Cir. 1997).

¹⁸ *United States v. Estate of Parsons*, 367 F.3d 409, 415 (5th Cir. 2004) (en banc).

¹⁹ *Id.*

²⁰ *Id.*

²¹ See *United States v. Volpendesto*, 755 F.3d 448, 454 (7th Cir. 2014) (holding that defendant's death before resolution of his direct appeal required the court to abate all proceedings including the restitution order as "[t]he fact that criminal restitution serves a compensatory purpose does not enable it to be imposed in the absence of a final conviction"); *United States v. Rich*, 603 F.3d 722, 729-30 (9th Cir. 2010) (holding that defendant's death while his direct appeal was pending required the court to abate his conviction, sentence and all other proceedings, including restitution; further recognizing restitution as neither "obviously penal or compensatory" and therefore "declin[ing] to apply the distinction between the penal and the compensatory to restitution abatement").

²² See *United States v. Brooks*, 872 F.3d 78, 89 (2d Cir. 2017) (interpreting *Nelson* as requiring abatement of restitution following the death of a defendant pending a direct criminal appeal because even though "*Nelson* was resolved on the basis of due process violations rather than the application of the abatement *ab initio* doctrine . . . the

reasoning of *Nelson* also compels abating monetary penalties where a defendant dies during his direct appeal, as “there is no longer a valid conviction to support the government’s retention of the [penalty]” (quoting *United States v. Libous* 858 F.3d 64, 68 (2d Cir. 2017)); *United States v. Ajrawat*, 738 Fed. Appx. 136, 139 (4th Cir. 2018) (per curiam) (unpublished) (agreeing with the Second Circuit’s conclusion in *Brooks* that “the reasoning of *Nelson* also compels abating monetary penalties where a defendant dies during his direct appeal, as there is no longer a valid conviction to support the government’s retention of the [penalty]” and holding that “[w]hen a defendant dies pending the resolution of the direct appeal of his conviction, everything associated with the case is extinguished, leaving the defendant as if he had never been indicted or convicted[,]” and that the question of “[w]hether restitution is compensatory rather than in the nature of punishment is irrelevant to this inquiry when the conviction underlying the order of restitution has abated”); *United States v. Coddington*, No. 18-1470, 2020 WL 582581, at *2-3 (10th Cir. Feb. 6, 2020) (noting the government’s concession that “if [defendant’s] convictions must be vacated, the restitution order must be vacated as well” and agreeing “with this reading and application of *Nelson*” in holding that the abatement doctrine required that defendant’s appeal must be dismissed and the case “remand[ed] to the district court with instructions to vacate the judgment, which includes the convictions and the restitution order”).

²³ *Brooks*, 872 F.3d at 89.

²⁴ See 18 U.S.C. § 3663A(a)(1) (“Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim’s estate.”).

²⁵ See *Herrera v. Collins*, 506 U.S. 390, 399 (1993) (stating that “[o]nce a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears”); *United States v. Burns*, 433 F.3d 442, 445 (5th Cir. 2005) (explaining that a federal criminal defendant’s right to appeal is not constitutional in dimension).

²⁶ See 18 U.S.C. § 3742(a).

²⁷ See 18 U.S.C. § 3771(a)(6), (a)(8) (guaranteeing victims, *inter alia*, the rights “to full and timely restitution as provided in law” and “to be treated with fairness and with respect for the victim’s dignity and privacy”).

²⁸ See 150 Cong. Rec. S10911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

²⁹ See *Lay*, 456 F. Supp. 2d at 875.

³⁰ See *In re: Russell P. Butler*, No. 06-20848, slip op. at 5 (5th Cir. Nov. 1, 2006) (unpublished) (on file with author).

³¹ *Commonwealth v. Hernandez*, 118 N.E.3d 107, 110, 120 (Mass. 2019).

³² *Id.* at 120 (quoting Mass. Gen. Laws ch. 258B, § 3(o)).

³³ See, e.g., *Wheat v. State*, 907 So. 2d 461 (Ala. 2005); *State v. Korsen*, 111 P.3d 130 (Idaho 2005); *People v. Peters*, 537 N.W.2d 160 (Mich. 1995); *State v. Benn*, 274 P.3d 47 (Mont. 2012); *State v. Al Mutory*, 581 S.W.3d 741 (Tenn. 2019); *State v. Devin*, 142 P.3d 599 (Wash. 2006) (en banc).

³⁴ See *Peters*, 537 N.W.2d at 161 (holding that “where a convicted defendant dies pending appeal, the appeal should be dismissed, absent collateral consequences not presented here, and the underlying conviction and accompanying compensatory sentencing sanctions should stand[,]” including the victim’s restitution order, but that “[p]urely penal sanctions . . . should be abated ab initio because they no longer continue to serve a purpose”); *Devin*, 142 P.3d at 606 (overruling precedent “to the extent that it automatically abates convictions as well as victim compensation orders upon the death of a defendant during a pending appeal[,]” but noting that “[i]n so doing, we do not preclude courts from abating financial penalties still owed to the county or State, as opposed to restitution owed to victims, where the death of a defendant pending an appeal creates a risk of unfairly burdening the defendant’s heirs”).

³⁵ See, e.g., *State v. Carlin*, 249 P.3d 752 (Alaska 2011); *State v. Makaila*, 897 P.2d 967 (Haw. 1995); *Surland v. State*, 895 A.2d 1034 (Md. 2006); *Payton v. State*, 266 So. 3d 630 (Miss. 2019); *Brass v. State*, 325 P.3d 1256 (Nev. 2014) (en banc); but see *State v. Salazar*, 945 P.2d 996, 1004 (N.M. 1997) (holding that when a defendant dies pending direct appeal, “the court, in its sound discretion, may consider two courses of action[,]” which are to “allow or provide for substitution of the decedent and permit continuation of the appeal” or “where no substitution is sought by either the court or the parties, the court shall then abate the entire proceeding *ab initio*”).

³⁶ See, e.g., *People v. Daly*, 313 P.3d 571, 578 (Colo. App. 2011) (concluding that although defendant’s conviction should be abated *ab initio* because he died during the pendency of his direct appeal, “the doctrine does not apply to civil judgments created by restitution orders” but that “in order to vindicate his statutory right to an appeal, defendant’s estate is entitled to challenge the restitution order that forms the basis for the civil judgment”); cf. *State v. Burrell*, 837 N.W.2d 459, 469-70 (Minn. 2013) (abating convictions in a case in which defendant died while his direct appeal was pending while acknowledging, “as other courts have recognized, that when a victim has been awarded restitution, the principles discussed above may not weigh in favor of abatement *ab initio*”).

³⁷ *Korsen*, 111 P.3d at 135.

³⁸ *People v. Ekinici*, 743 N.Y.S.2d 651, 657 (N.Y. Sup. Ct. 2002).

³⁹ Ala. Const. art. 1, § 6.01; Alaska Const. art. 1, § 24; Ariz. Const. art. 2, § 2.1; Cal. Const. art. 1, § 28; Colo. Const. art. 2, § 16a; Conn. Const. art. 1, § 8(b); Fla. Const. art. 1, § 16; Ga. Const. art. I, § 1, ¶ XXX; Idaho Const. art. I, § 22; Ill. Const. art. 1 § 8.1; Ind. Const. art. 1 § 13(b); Kan. Const. art. 15, § 15; La. Const. art. 1 § 25; Mich. Const. art. 1, § 24; Md. Const. Decl. of Rts., art. 47; Mich. Const. art. 1, § 24; Miss. Const. art. 3, § 26A; Mo. Const. art. 1, § 32; Neb. Const. art. 1, § 28; Nev. Const. art. 1, § 8A; N.J. Const. art. 1, ¶ 22; N.M. Const. art. 2, § 24; N.C. Const. art. 1, § 37; N.D. Const. art. 1, § 25; Ohio Const. art. 1, § 10a; Okla. Const. art. 2, § 34; Or. Const. art. 1, §§ 42, 43; R.I. Const. art. 1 § 23; S.C. Const. art. 1, § 24; S.D. Const. art. 6, § 29; Tenn. Const. art. 1, § 35; Tex. Const. art. 1, § 30; Utah Const. art. I, § 28; Va. Const. art. 1, § 8-A; Wash. Const. art. 1, § 35; Wis. Const. art. 1, § 9m. Two additional states—Kentucky and Pennsylvania—have submitted constitutional victims’ rights amendments to voters; however, there are ongoing legal challenges to these amendments that prevented them from becoming operational as of most recent updating of this *Bulletin*. See *Westerfield v. Ward*, --- SW.3d ---, No. 2018-CA-001510, 2019 WL 2463046, at *11 (Ky. June 13, 2019) (holding that the proposed amendment was void because its full text was not published and submitted at least ninety days before the vote); *League of Women Voters of Pa. v. Boockvar*, 219 A.3d 594 (Pa. 2019) (per curiam) (affirming the lower court’s grant of a preliminary injunction preventing votes cast on the proposed victims’ rights amendment from being tabulated and certified pending the outcome of a challenge to the proposed amendment).