RECENT CASES

CRIMINAL LAW — DUE PROCESS — SECOND CIRCUIT DECISION ILLUSTRATES HARMS OF ABATEMENT DOCTRINE. — *United States v. Brooks*, 872 F.3d 78 (2d Cir. 2017).

When former NFL player Aaron Hernandez committed suicide, news reporters picked up on a curious doctrine: abatement ab initio. Courts use this common law doctrine, meaning abatement "[f]rom the beginning,"[1] to vacate the conviction of a defendant who dies while that conviction is pending appeal.[2] Hernandez had been convicted of murder and committed suicide while his appeal was pending, leading the court to abate his conviction.[3] Reporters speculated that this erasure would weaken civil claims against his estate.[4] Recently, in *United States v. Brooks*,[5] the Second Circuit abated another high-profile conviction: that of businessman David H. Brooks. Brooks died while his convictions were still pending appeal. The court abated both his convictions and other penalties he had received at sentencing, including orders directing him to pay money to the victims of his fraud.[6] Federal courts frequently abate criminal fines — orders to pay money to the government as punishment for a crime. But whether to abate restitution — orders to pay money to victims, often through a government-administered account — is a more controversial question. The answer depends on how courts justify abatement: the traditional "punishment" rationale does not support abating restitution, but the modern "finality" rationale does. The *Brooks* court invoked the finality rationale, holding that restitution ordered (but not yet paid) should abate.[7] Recognizing that victims may suffer as a result, the Second Circuit has invited Congress to amend the abatement doctrine.[8] It is time that Congress accept that invitation. The legislature should scrap abatement and instead allow an appeal to survive the defendant.

Brooks found tremendous commercial success as founder and CEO of DHB Industries, Inc., a publicly traded producer and vendor of body

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[1] *Ab initio*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[2] *See* Commonwealth v. Hernandez, No. BRCR2013-00983, slip op. at 1 (Mass. Super. Ct. May 9, 2017).

[3] *Id.*

[4] *See, e.g.*, Des Bieler, *"You're Rich": Aaron Hernandez Suicide Note Points to Effort to Provide for His Family*, WASH. POST (May 5, 2017), http://wapo.st/2qN12kO [https://perma.cc/N8LK-27BU]; *Ex-NFL Star Hernandez's Fiancee Says She Does Not Know What Motivated Suicide*, REUTERS (May 16, 2017, 9:23 AM), www.reut.rs/2qrShgZ [https://perma.cc/Y52T-9M9P].

[5] United States v. Brooks, 872 F.3d 78 (2d Cir. 2017).

[6] *Id.* at 82.

[7] *Id.* at 87–91.

[8] United States v. Libous, 858 F.3d 64, 68–69 (2d Cir. 2017).

armor.[9] Brooks openly celebrated that success: so extravagant were his expenditures that in 2005 he attracted media attention for hiring popular musicians Aerosmith, the Eagles, Fleetwood Mac, Tom Petty, Kenny G, and 50 Cent to perform at his daughter's bat mitzvah.[10] Brooks resurfaced in the media a few years later, this time in stories of a more serious tenor, when he was indicted on criminal charges.[11] Brooks had allegedly "participat[ed] in several schemes to defraud shareholders," including manipulating his company's books to inflate its profitability, using company assets for personal expenditures, obstructing a Securities and Exchange Commission investigation, and failing to pay income taxes.[12] Brooks was arrested in October 2007, but released on $400 million bail,[13] "the largest ever imposed on an individual defendant."[14] In January 2010, Brooks was found to have violated the terms of his bail by failing to disclose his holdings and concealing assets abroad.[15] The district court ordered Brooks's detention and forfeiture of $48 million, the cash security on the bond.[16]

On September 14, 2010, Brooks was found guilty and sentenced to seventeen years in prison.[17] At sentencing, Judge Seybert of the United States District Court for the Eastern District of New York scolded Brooks for showing "not a glimmer, not a whisper, not a moment of regret."[18] The sentence was applauded by government officials, including then–U.S. Attorney Loretta Lynch, who lambasted Brooks for using shareholder money as "a vehicle for plunder and a means to feed his own greed."[19] In addition to imprisonment, restitution to the Internal Revenue Service for tax evasion, a criminal fine, a special assessment,

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9 *Brooks*, 872 F.3d at 82–83.

10 *See* Harry Mount, *Tycoon Spends £6m on Daughter's Party*, THE TELEGRAPH (Dec. 1, 2005, 12:03 AM), http://www.telegraph.co.uk/news/worldnews/northamerica/usa/1504471/Tycoon-spends-6m-on-daughters-party.html [https://perma.cc/EU9S-Q6M8]; James Sullivan, *Go Shorty! It's Your Bat Mitzvah*, TODAY (Dec. 2, 2005, 11:06 AM), http://on.today.com/2bADnA5 [https://perma.cc/FFC9-Q4JN].

11 *See, e.g.*, Andrew Cohen, *The Greatest Trial You've Never Heard Of*, THE ATLANTIC (May 25, 2010), https://www.theatlantic.com/national/archive/2010/05/the-greatest-trial-youve-never-heard-of/57018/ [https://perma.cc/MA3V-M7LP].

12 *Brooks*, 872 F.3d at 83.

13 *Id.* at 83–84.

14 *Id.* at 96.

15 *Id.* at 84–85.

16 *Id.* at 84.

17 *Id.* at 81.

18 Associated Press, *Prison for Founder of Body Armor Company*, N.Y. TIMES (Aug. 15, 2013), https://nyti.ms/2lEhOEg [https://perma.cc/4R54-UFUX].

19 Press Release, FBI N.Y. Field Office, David H. Brooks, Founder and Former Chief Executive Officer of DHB Industries Inc., Sentenced to 17 Years in Prison for Insider Trading, Fraud, Lying to Auditors, and Obstruction of Justice (Aug. 15, 2013), https://archives.fbi.gov/archives/newyork/press-releases/2013/david-h.-brooks-founder-and-former-chief-executive-officer-of-dhb-industries-inc.-sentenced-to-17-years-in-prison-for-insider-trading-fraud-lying-to-auditors-and-obstruction-of-justice [https://perma.cc/6HHC-J56L].

and forfeiture of the cash security on his bond, Brooks was ordered to pay over $90 million in restitution to the victims of his fraud.[20]

Brooks never paid that restitution. He filed an appeal of the nontax convictions and moved successfully to stay disbursement of the assets he had previously deposited with the court.[21] On October 27, 2016, while his appeal was still pending, Brooks passed away.[22] Upon Brooks's death, his estate moved to abate his convictions, fines, restitution orders, forfeited bail cash security, and special assessment.[23]

The Second Circuit abated Brooks's convictions that were pending appeal, and some, but not all, of the monetary exactions he owed.[24] Writing for the panel, Judge Droney[25] explained the two justifications for abatement: first, the finality rationale, that "a defendant not stand convicted without resolution of the merits of an appeal," and second, the punishment rationale, that "to the extent that the judgment of conviction orders . . . sanctions that are designed to punish the defendant, that purpose can no longer be served."[26] The court then turned to whether abatement applied to each of Brooks's sentences: the convictions, the restitution orders, and the forfeiture of the cash security. The first answer came easily: the court abated all convictions pending appeal, in conformity with an "almost unanimous[]" consensus among the federal courts of appeals.[27] The court refrained, however, from abating Brooks's unappealed convictions.[28] The court found that, between the rationales for abatement, "finality is . . . paramount"; unappealed convictions, since they are final, do not abate.[29]

The Second Circuit then broke new ground: having previously reserved the question,[30] the court held that "when a criminal conviction abates . . . any restitution ordered as a result of that conviction must also abate."[31] The panel cited the recent Supreme Court decision in

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[20] *Brooks*, 872 F.3d at 85–86.

[21] *Id.* at 86.

[22] *Id.* at 87; *see also* Reed Abelson, *David H. Brooks, 61, Dies Serving Time for Insider Trading*, N.Y. TIMES (Nov. 1, 2016), https://nyti.ms/2k1Z5xD [https://perma.cc/7JJF-GZSE] (noting that "the cause [of death] was being investigated").

[23] *Brooks*, 872 F.3d at 87.

[24] *Id.* at 96.

[25] Judge Droney was joined by Senior Judge Winter and District Judge Donnelly, sitting by designation from the Eastern District of New York.

[26] *Id.* at 87 (quoting United States v. Libous, 858 F.3d 64, 66 (2d Cir. 2017)).

[27] *Id.*

[28] *Id.* at 87–88. Brooks had pled guilty to tax evasion; his tax convictions were never appealed. *Id.* at 88.

[29] *Id.* at 88.

[30] *See* United States v. Wright, 160 F.3d 905, 909 (2d Cir. 1998) (abating restitution but refraining from deciding "whether an order of restitution should be abated as a general matter").

[31] *Brooks*, 872 F.3d at 89.

Nelson v. Colorado.[32] There, a living defendant's conviction was invalidated; the Court held that fees and restitution paid by the defendant to the state had to be refunded.[33] *Brooks* acknowledged that *Nelson* was not an abatement case, but maintained that it "[n]evertheless . . . compels abating monetary penalties where a defendant dies."[34] The court also reasoned from its own precedent, citing *United States v. Libous*,[35] an abatement case decided just months before *Brooks*. *Libous* had abated criminal fines already paid by a defendant before he died.[36] The *Brooks* court argued that the rationale underlying the abatement of *fines* applied just as well to *restitution*: "[S]ince Brooks's convictions have abated and will therefore never be final, the Government lacks the authority to keep the funds related to those abated convictions."[37] The court limited its holding, however, to restitution funds still within state control, reserving the question of whether restitution already disbursed to victims should also abate.[38]

The *Brooks* court acknowledged that abating restitution could frustrate Congress's purpose in passing the Mandatory Victims Restitution Act of 1996[39] (MVRA), "which *requires* restitution to be ordered for victims of certain crimes who have suffered as a result of a defendant's conduct."[40] Nevertheless, the court said, that requirement holds only "where a defendant has been 'convicted of an offense,'" whereas upon abatement, Brooks was no longer convicted.[41] The court insisted that whether the restitution was compensatory or punitive was "irrelevant."[42]

Finally, the court refused to abate the forfeiture of the cash security and upheld the forfeiture order.[43] The court noted that unlike fines and restitution orders, both criminal sanctions, bail is a species of "suretyship and contract law."[44] Moreover, the court said, "bond forfeiture also does

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[32] 137 S. Ct. 1249 (2017).

[33] *Id.* at 1252.

[34] *Brooks*, 872 F.3d at 89.

[35] 858 F.3d 64 (2d Cir. 2017).

[36] *Id.* at 69.

[37] *Brooks*, 872 F.3d at 90–91.

[38] *Id.*; *see also id.* at 91 n.18 ("We also need not decide . . . whether a defendant's estate is entitled to recover restitution that has already been disbursed . . . .").

[39] Pub. L. No. 104-132, 110 Stat. 1227 (codified as amended at 18 U.S.C. §§ 3613A, 3663A (2012)).

[40] *Brooks*, 872 F.3d at 89 (citing 18 U.S.C. § 3663A(a)(1)). The MVRA's legislative history evinces concern for victims. H.R. REP. NO. 104-16, at 5 (1995) (stating that the MVRA "strives to provide [victims] with some means of recouping the personal and financial losses resulting from crime"); S. REP. NO. 104-179, at 12 (1995) (stating that the MVRA is "needed to ensure that the loss to crime victims is recognized").

[41] *Brooks*, 872 F.3d at 90 (quoting 18 U.S.C. § 3663A(a)(1)).

[42] *Id.* at 91.

[43] *Id.* at 93–96.

[44] *Id.* at 93 (quoting United States v. Martinez, 151 F.3d 68, 73 (2d Cir. 1998)).

not implicate the two principles underlying . . . abatement."[45] Regarding finality, the court found no "non-final matter to abate," and regarding punishment, the court noted that "a forfeited bail bond is not a punishment . . . but instead is a remedy" for breach of a bail release agreement.[46]

By focusing on the finality rationale and abating a restitution order, *Brooks* faithfully applied the reasoning of *Nelson*. But the finality rationale constitutes a departure from the traditional justification for abatement, and that departure has concerning implications for victims. In light of those concerns, Congress should dispose of the abatement doctrine, even for convictions. Instead, a deceased defendant's estate should have the option of continuing to litigate the appeal.

Traditionally, abatement was justified on the basis of the punishment rationale — that the purpose of criminal sentences and fines is to punish the defendant, an objective rendered moot once the defendant dies.[47] On the punishment rationale, abatement applies to fines, which have a punitive purpose, but not to restitution orders, which have a compensatory purpose.[48] In the 1980s, however, many federal courts began adopting the finality rationale[49] — "that the state should not label [a defendant] as guilty until he has exhausted his opportunity to appeal."[50] On the finality rationale, the abatement for a conviction leaves "no legal basis"[51] for *any* sentence imposed — whether punitive or compensatory in nature.[52] This difference in rationales has given rise to a circuit split as to whether restitution orders should abate.[53]

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[45] *Id.* at 94.

[46] *Id.*

[47] *See* Alexander F. Mindlin, *"Abatement Means What It Says": The Quiet Recasting of Abatement*, 67 N.Y.U. ANN. SURV. AM. L. 195, 205 (2011) ("[T]raditional abatement reflected the principle that death ended any possibility of punishing the accused, rendering further action on the court's part superfluous.").

[48] *See* United States v. Christopher, 273 F.3d 294, 298 (3d Cir. 2001) ("A penal provision, such as a fine or criminal forfeiture, abates with the conviction. If viewed as compensatory, a restitution order survives."); *see also* United States v. Dudley, 739 F.2d 175, 176–78 (4th Cir. 1984) (abating conviction but not restitution order because the latter was compensatory); United States v. DiBruno, 438 F. App'x 198 (4th Cir. 2011) (per curiam) (applying *Dudley*).

[49] Mindlin, *supra* note 47, at 225 n.126. Mindlin argues that this shift — from the punishment rationale to what he calls the "appellate" rationale, *id.* at 221 — was instigated by the Seventh Circuit case *United States v. Moehlenkamp*, 557 F.2d 126 (7th Cir. 1977). Mindlin, *supra* note 47, at 221–28.

[50] United States v. Libous, 858 F.3d 64, 66 (2d Cir. 2017) (quoting United States v. Volpendesto, 755 F.3d 448, 453 (7th Cir. 2014)).

[51] *Brooks*, 872 F.3d at 90 (quoting *Libous*, 858 F.3d at 67).

[52] *See* Mindlin, *supra* note 47, at 228–30 (describing the finality rationale as an "uncompromising defense," *id.* at 228, that "turned abatement into a right, rather than a . . . practice," *id.* at 230).

[53] *See* United States v. Rich, 603 F.3d 722, 728 (9th Cir. 2010) (collecting cases illustrating the circuit split); United States v. Koblan, 478 F.3d 1324, 1325–26 (11th Cir. 2007) (per curiam) (same).

By the time *Brooks* was on the docket, the Second Circuit was already partial to the finality rationale.[54] The court has continued a trend among federal courts of "refus[ing] . . . to examine abatement's history."[55] Instead, *Brooks* reasoned that the finality rationale was mandated by *Nelson*.[56] There, the Court held that when a conviction is invalidated, due process requires the state to "refund fees, court costs, and restitution exacted from the defendant upon, and as a consequence of, the conviction."[57] In the *Brooks* court's view, *Nelson* "compels" abatement of restitution — in part because of *Nelson*'s "specific inclusion . . . of restitution."[58]

Widespread reliance on the finality rationale may have negative consequences for victims. Restitution is often critical to compensating victims for their harms.[59] Brooks was not the first defendant whose abated conviction left victims unable to recoup tremendous financial losses.[60] Perhaps anticipating this criticism, the *Brooks* court tried to soften the blow of abating restitution by noting that "[v]ictims of criminal offenses may also be compensated through a civil action against the estate of the defendant."[61] True, a victim could theoretically recover his or her losses in civil court.[62] But whereas receiving criminal restitution requires no action on the part of the plaintiff, pursuing civil restitution costs time and money. That price may be prohibitive — for example, if a plaintiff cannot afford representation, or if each of several plaintiffs suffers harm

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[54] *See Libous*, 858 F.3d at 69 (abating previously paid fine on finality rationale); United States v. Wright, 160 F.3d 905, 909 (2d Cir. 1998) (abating unpaid restitution on finality rationale).

[55] Mindlin, *supra* note 47, at 226.

[56] *Brooks*, 872 F.3d at 89–90.

[57] Nelson v. Colorado, 137 S. Ct. 1249, 1252 (2017).

[58] *Brooks*, 872 F.3d at 90 (citing *Nelson*, 137 S. Ct. at 1256).

[59] *See* Sabrina Margret Bierer, Note, *The Importance of Being Earned: How Abatement After Death Collaterally Harms Insurers, Families, and Society at Large*, 78 BROOK. L. REV. 1699, 1699 (2013) (arguing that abatement of restitution denies the victim compensation and "create[s] unpredictable results for insurance settlements"); *see also* Douglas E. Beloof, *Weighing Crime Victims' Interests in Judicially Crafted Criminal Procedure*, 56 CATH. U. L. REV. 1135, 1159 (2007) ("[W]ith abatement ab initio[,] victims are denied justice . . . ."); Mary Margaret Giannini, *The Procreative Power of Dignity: Dignity's Evolution in the Victims' Rights Movement*, 9 DREXEL L. REV. 43, 91–92 (2016) (arguing that abatement undermines victims' dignitary rights).

[60] Take the example of Kenneth Lay, the founder and CEO of Enron, who was found guilty of crimes contributing to Enron's collapse and losses of over $2 billion in pension plans. Juan A. Lozano, *Judge Vacates Conviction of Ken Lay*, WASH. POST (Oct. 18, 2006, 2:25 AM), http://www.washingtonpost.com/wp-dyn/content/article/2006/10/17/AR2006101700827.html [https://perma.cc/77PL-TNB3]. Lay died before sentencing, leading the court to abate his convictions and, critically, to deny a motion for restitution by the alleged victims of his fraud. United States v. Lay, 456 F. Supp. 2d 869, 870 (S.D. Tex. 2006).

[61] *Brooks*, 872 F.3d at 90 n.16.

[62] *See Restitution*, NAT'L CTR. FOR VICTIMS OF CRIME, http://victimsofcrime.org/help-for-crime-victims/get-help-bulletins-for-crime-victims/restitution [https://perma.cc/7L4E-WK6J] ("Usually a civil judgment is decreased by the amount of restitution that the victim has already received for a loss.").

too minor to litigate independently. Abatement also weakens the plaintiff's civil case: without an admissible conviction, a plaintiff must prove every element of the alleged tort, including elements that would have been necessarily decided as part of the conviction.[63] Worse yet, abatement of restitution creates perverse incentives for defendants: the Second Circuit has yet to abate restitution *already* disbursed to victims,[64] so a defendant anticipating the possibility of abatement may be motivated to delay payments.[65]

Brooks thus presents a problem: the finality rationale has reshaped the abatement doctrine, and *Nelson*'s reinforcement of that rationale has "unsettling" consequences for victims.[66] But *Libous* hinted at a solution: "Abatement *ab initio* is a common law doctrine: If Congress deems it an undesirable one, it can act accordingly."[67] It can, and it should. The Second Circuit cases illustrate how courts reach abatement's unpleasant consequences in two steps: First, when a defendant dies while his or her conviction is pending appeal, the court's "precedents require" abatement of that conviction.[68] Second, once a court abates the conviction, due process requires the "refund [of related] fees, court costs, and restitution."[69] The second step involves due process,[70] a constitutional principle beyond Congress's power of modification by statute. But abatement is required by nothing but the common law.[71] The first step, therefore, *is* within Congress's power to change. Congress should use this power to abolish abatement and instead permit a defendant's estate to litigate

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[63] *See* Bierer, *supra* note 59, at 1699 (noting that "when a conviction abates, all proof of the conviction and its consequences legally disappear, which affects the victim in subsequent civil suits" (footnote omitted)).

[64] *Brooks* explicitly reserved the question of whether such restitution should abate. *Brooks*, 872 F.3d at 90. The district court had stayed disbursement because "it would be difficult to recover that money from the victims if Brooks was ultimately successful on appeal." *Id.* at 86.

[65] *See* United States v. Sheehan, 874 F. Supp. 31, 35 (D. Mass. 1994) (arguing that the abatement of criminal fines "certainly discourages making prompt payments of such financial obligations"). A defendant might anticipate abatement if, for example, he or she is elderly or has a terminal illness. *See, e.g.*, Sentencing Transcript at 50, United States v. Libous, No. 14 Cr. 440 (S.D.N.Y. Nov. 24, 2015) (noting that Libous had terminal prostate cancer). True, abatement may seem like an obscure doctrine to the lay person, but postconviction defendants arguably have strong incentives to explore the law surrounding their rights of appeal. This trend is reflected in the prevalence of habeas cases in the courts of appeals. *See* Admin. Office of the U.S. Courts, *Federal Judicial Caseload Statistics 2014*, U.S. COURTS, http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2014 [https://perma.cc/3TGR-P5FV] ("[F]or the year ending March 31, 2014 . . . [s]ixty-four percent of original and other proceedings involved second or successive motions for writs of habeas corpus . . . ."). In addition, wealthy defendants like Brooks can afford sophisticated lawyers familiar with the doctrine.

[66] *Brooks*, 872 F.3d at 89 (quoting United States v. Libous, 858 F.3d 64, 68 (2d Cir. 2017)).

[67] *Libous*, 858 F.3d at 69.

[68] *Id.*

[69] Nelson v. Colorado, 137 S. Ct. 1249, 1252 (2017).

[70] *Id.* at 1255.

[71] *See Brooks*, 872 F.3d at 87; *Libous*, 858 F.3d at 69.

unexhausted appeals. Such legislation would preserve the primary benefit of abatement: that "a defendant not stand convicted without resolution of the merits of an appeal."[72] It would also provide benefits that abatement does not: Allowing the appeal to be decided on the merits would prevent the undue erasure of restitution orders. And encouraging more merits decisions would promote a central objective of appellate review: to clarify the law.[73] No wonder, then, that more than a dozen states have already adopted this approach.[74]

Critics might argue that litigating the appeal of a deceased defendant would constitute a drain on judicial time and resources. They might further stress that not every defendant is a Brooks — unjustly enriched by fraudulent schemes and wealthy enough to pay victims. If the defendant is indigent, the court's failure to abate a restitution order may saddle the defendant's relatives with debt that they cannot pay and do not deserve. But these issues can be remedied by sound prosecutorial discretion: prosecutors should continue to litigate cases like *Brooks*, in which victims are significantly harmed and defendants are able to pay restitution. Such cases have high stakes from a societal perspective. And allowing them to continue would hardly burden judicial dockets, given that parties would pursue only a subset of the already rare cases in which abatement is relevant. Even in light of such reasoning, however, courts may be reluctant to abandon a doctrine with widespread acceptance and long history. Until Congress explicitly abolishes abatement, federal courts may remain bound to the far-reaching doctrine and disinclined to address its ugly consequences.

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[72] *Brooks*, 872 F.3d at 87 (quoting *Libous*, 858 F.3d at 66). In other words, the finality rationale would still be satisfied. The same is likely true of the punishment rationale. A conviction's purpose is not limited to punishment; it also allows for the compensation of victims through restitution. Even now, finalized convictions are not erased when a defendant dies, suggesting that such convictions serve purposes beyond the defendant's punishment. Such a conviction might promote general deterrence, for example, from reputational effects that persist after the defendant's death.

[73] *See* Henderson v. United States, 568 U.S. 266, 278 (2013) ("[C]ourts of appeals . . . clarify the law through their opinions.").

[74] State v. Burrell, 837 N.W.2d 459, 465 (Minn. 2013) ("Currently, fourteen states do not preclude appellate courts from considering the merits of a deceased criminal defendant's appeal."). While these states eschew automatic abatement, some abate the conviction if the appellate court orders a new trial. *See id.* at 465–66 (citing Washington, New Jersey, and Utah state cases and noting that "[i]f . . . a new trial is required, the defendant's conviction then abates due to the court's inability to retry [the] defendant").