

ABATEMENT AB INITIO IN NEW JERSEY AND THE EVOLVING LEGAL LANDSCAPE

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I. INTRODUCTION

What is the effect of a criminal defendant’s death while an appeal challenging a conviction is pending? At one point, both federal and state courts provided a fairly uniform answer: death pending appeal required that the judgment of conviction be vacated and the indictment dismissed.¹ In other words, courts generally treated the defendant “as if he or she had never been charged.”² Because the defendant’s death discontinued all proceedings ab initio (from the beginning), this common law doctrine came to be known as abatement ab initio.³

Several criminal cases involving high profile defendants, such as former NFL football player Aaron Hernandez, who died while their appeals were pending, have brought this once-obsolete doctrine to the forefront.⁴ Recently, courts have begun to reexamine abatement ab initio, and in the past year, at least three state courts of last resort have moved away from automatically vacating a defendant’s conviction.⁵ Although many jurisdictions continue to apply the abatement ab initio

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1. See Alexander F. Mindlin, Note, “*Abatement Means What It Says*”: The Quiet Recasting of Abatement, 67 N.Y.U. ANN. SURV. AM. L. 195, 204–05 (2011).

2. Timothy A. Razel, *Dying to Get Away With It: How the Abatement Doctrine Thwarts Justice—And What Should Be Done Instead*, 75 FORDHAM L. REV. 2193, 2196 (2007).

3. See *id.*

4. See Patrick H. Gallagher, *The Aaron Hernandez Case: The Inconsistencies Plaguing the Application of the Abatement Doctrine*, 53 GONZ. L. REV. 263, 266 (2018).

5. See, e.g., State v. Al Mutory, 581 S.W.3d 741 (Tenn. 2019); Payton v. State, 266 So. 3d 630 (Miss. 2019); Commonwealth v. Hernandez, 118 N.E.3d 107, 120 (Mass. 2019).

doctrine, a majority of states now utilize one of several other approaches upon the death of a criminal appellant.⁶ For example, some states consider an appeal to be moot after a defendant's death and automatically dismiss the appeal, leaving the underlying conviction intact.⁷ Conversely, other states allow the defendant's estate to substitute for the deceased appellant so that the merits of the appeal can be considered.⁸

Unlike many other states, New Jersey has never adopted abatement ab initio. Instead, New Jersey has followed "a middle course" by allowing appellate courts to review a criminal appeal of a deceased defendant in narrow circumstances.⁹ In reconsidering abatement ab initio and the continuing viability of this "hotly debated" doctrine, many courts have turned to precedent from other states for guidance.¹⁰ In light of this recent debate, an analysis of how New Jersey has addressed appeals from dead criminal defendants is especially timely.

II. ABATEMENT AB INITIO OVERVIEW

The origins of abatement ab initio are somewhat opaque and the doctrine "is something of a legal curiosity."¹¹ Nonetheless, abatement ab initio was the most common approach employed by courts throughout the twentieth century.¹² Indeed, the U.S. Supreme Court called the unanimity of federal courts applying abatement ab initio "impressive."¹³ The "vast majority" of state courts also applied the doctrine.¹⁴ Two

6. See Gallagher, *supra* note 4, at 283-89.

7. See *id.* at 283.

8. See *id.* at 285.

9. See *State v. Gartland*, 694 A.2d 564, 568-69 (N.J. 1997).

10. See, e.g., *Al Mutory*, 581 S.W.3d at 744-45.

11. *Id.* at 744; see *Bevel v. Commonwealth*, 717 S.E.2d 789, 792 (Va. 2011) ("The origin of the abatement doctrine as applied to criminal appellate cases is unclear, with little or no evidence of its application prior to the late nineteenth century."). See generally Mindlin, *supra* note 1, at 226 (noting "the refusal of courts to examine abatement's history"); Razel, *supra* note 2, at 2198 ("The origins of the abatement doctrine are unclear. There is little historical writing about the doctrine before the nineteenth century.").

12. See *State v. Carlin*, 249 P.3d 752, 759 (Alaska 2011) ("[T]he doctrine of abatement ab initio was the majority rule in federal and state courts when *Hartwell v. State*, 423 P.2d 282 (Alaska 1967) was decided."); *Surland v. State*, 895 A.2d 1034, 1043 (Md. 2006) ("When *Jones v. State*, 486 A.2d 184, 187 (Md. 1985)] was decided, the clear majority rule, in both the Federal and State courts, was that, when death occurs during the pendency of an appeal of right, the entire criminal proceeding should be abated."); see also Rosanna Cavallaro, *Better Off Dead: Abatement, Innocence, and the Evolving Right of Appeal*, 73 U. COLO. L. REV. 943, 947 (2002) (characterizing abatement ab initio as the "majority approach").

13. *Durham v. United States*, 401 U.S. 481, 483 (1971).

14. See *United States v. Pauline*, 625 F.2d 684, 684 (5th Cir. 1980).

primary justifications have been advanced in support of abatement: (1) a criminal conviction is not final until resolution of the defendant's appeal, and (2) the state cannot punish a dead person.¹⁵

The first rationale is "grounded in procedural due process concerns"¹⁶ and rests on the notion that a defendant should "not stand convicted without resolution of the merits of his appeal."¹⁷ Under this so-called "finality rationale,"¹⁸ "a conviction that cannot be tested by appellate review is . . . unreliable."¹⁹ The second consideration, the "punishment rationale," derives from "the precept that the criminal justice system exists primarily to punish and cannot effectively punish one who has died."²⁰ Most courts have identified the finality rationale to be the more compelling of the two justifications.²¹

15. See *United States v. Brooks*, 872 F.3d 78, 87 (2d Cir. 2017); *State v. Burrell*, 837 N.W.2d 459, 468 (Minn. 2013).

16. *United States v. DeMichael*, 461 F.3d 414, 416 (3d Cir. 2006).

17. *Pauline*, 625 F.2d at 685 (explaining that an appeal "is an integral part of (our) system for finally adjudicating [the] guilt or innocence" of a defendant) (internal citations and quotation marks omitted); *see United States v. Volpendesto*, 755 F.3d 448, 453 (7th Cir. 2014) ("[T]he state should not label one as guilty until he has exhausted his opportunity to appeal.") (internal citations and quotation marks omitted); *United States v. Logal*, 106 F.3d 1547, 1552 (11th Cir. 1997) ("[A] fundamental principle of our jurisprudence from which the abatement principle is derived is that a criminal conviction is not final until resolution of the defendant's appeal as a matter of right."); *see also Commonwealth v. Hernandez*, 118 N.E.3d 107, 117 (Mass. 2019) (describing the finality rationale as resting on "the premise that a trial and appeal are essential parts of our system of justice and that a conviction should not stand until a defendant has had the opportunity to pursue both").

18. See *United States v. Libous*, 858 F.3d 64, 66 (2d Cir. 2017); *United States v. Estate of Parsons*, 367 F.3d 409, 413 (5th Cir. 2004) (en banc). The finality rationale has also been referred to as the "appellate rationale." *See Mindlin*, *supra* note 1, at 199; *Gallagher*, *supra* note 4, at 276.

19. *Cavallaro*, *supra* note 12, at 954 (2002); *see Estate of Parsons*, 367 F.3d at 413–14 ("The finality principle reasons that the state should not label one as guilty until he has exhausted his opportunity to appeal [N]either the state nor affected parties should enjoy the fruits of an untested conviction.").

20. *Estate of Parsons*, 367 F.3d at 414; *see United States v. Wright*, 160 F.3d 905, 908 (2d Cir. 1998) ("[T]o the extent that the judgment of conviction orders incarceration or other sanctions that are designed to punish the defendant, that purpose can no longer be served."); *Carver v. State*, 398 S.W.2d 719, 720 (Tenn. 1966) ("One of the cardinal principles and reasons for the existence of criminal law is to punish the guilty The defendant in this case having died is relieved of all punishment by human hands and the determination of his guilt or innocence is now assumed by the ultimate arbiter of all human affairs."), *overruled by State v. Al Mutory*, 581 S.W.3d 741, 750 (Tenn. 2019); *see also Mindlin*, *supra* note 1, at 205 (The punishment rationale reflects "the principle that death end[s] any possibility of punishing the accused, rendering further action on the court's part superfluous.").

21. *United States v. Brooks*, 872 F.3d 78, 88 (2d Cir. 2017) (explaining why "finality is the paramount consideration"); *United States v. Bourgeois*, No. 10-207, 2019 WL 2524601,

Unlike its genesis, the parameters of abatement ab initio are fairly well defined. Courts have typically held that in addition to the conviction, criminal penalties and fines are subject to abatement and need not be paid after a defendant's death.²² Courts embracing abatement ab initio also agree that the doctrine does not apply when a defendant dies during the pendency of a discretionary appeal.²³ Similarly, courts will not apply the doctrine when a defendant challenges only his or her sentence rather than the underlying conviction.²⁴

The exact bounds of abatement ab initio, however, are not precisely delineated. For example, although penalties and fines are generally subject to abatement, courts disagree as to whether abatement ab initio requires the return of money paid for fines before the defendant's death.²⁵

at *2 (E.D. La. June 19, 2019) ("Whatever the merits of the punishment rationale, the Fifth Circuit has explicitly rejected it in favor of the finality appellate rationale, stating 'we adopt the finality rationale,' and '[t]he primary justification for the abatement doctrine arguably is that it prevents a wrongly-accused defendant from standing convicted.'") (quoting *Estate of Parsons*, 367 F.3d at 415). *See generally* Mindlin, *supra* note 1, at 198 (tracing the emergence of the finality rationale, but recommending that courts return to the punishment rationale).

22. *See, e.g.*, United States v. Rich, 603 F.3d 722, 724 (9th Cir. 2010) ("[T]here is no doubt that Rich's conviction and any outstanding fines must be abated, and that his indictment must be dismissed."); United States v. Christopher, 273 F.3d 294, 297 (3d Cir. 2001) ("Criminal forfeitures and fines are subject to abatement.").

23. *See, e.g.*, Dove v. United States, 423 U.S. 325 (1976) (dismissing petition for certiorari of deceased appellant); People v. Griffin, 328 P.3d 91, 92–93 (Colo. 2014) (holding abatement ab initio applies only to "direct appeal [as of right]" and declining to apply doctrine to matter pending certiorari review).

24. *See* United States v. DeMichael, 461 F.3d 414, 417 (3d Cir. 2006) (holding the "narrow scope" of defendant's appeal did not warrant abatement of conviction where defendant only contested his sentence); *see also* United States v. Williams, No. 5:03cr59, 2006 WL 2588743, at *2 n.4 (N.D. Fla. Sept. 7, 2006) ("All persuasive, recorded cases the court could find that dealt with abatement conditioned it solely on an appeal of right of a defendant's conviction, not his sentence.").

25. *Compare Rich*, 603 F.3d 724 n.3 (noting "only outstanding fines must be abated," and "fines already paid need not be refunded"), United States v. Zizzo, 120 F.3d 1338, 1347 (7th Cir. 1997) (holding defendant who died during a pending appeal—but after paying a fine and various other assessments—was not entitled to return of money because the payments "are analogous to time served and are not refundable"), and United States v. Schumann, 861 F.2d 1234, 1236 (11th Cir. 1988) (holding the \$1,000 fine the defendant paid before his death did not abate because "the penalty operated as a punishment to [the defendant] rather than to his estate."), *with* United States v. Ajrawat, 738 F. App'x 136, 140 (4th Cir. 2018) (relying on *Nelson v. Colorado*, 137 S. Ct. 1249 (2017), and holding death of defendant while appeal was pending warranted abatement of already-paid portion of fine and special assessment); United States v. Libous, 858 F.3d 64, 66–69 (2d Cir. 2017) (explaining that "the logic of *Nelson* strongly supports abating" and returning \$50,000 criminal fine already paid by a defendant), and United States v. Sheehan, 874 F. Supp. 31, 34 (D. Mass. 1994) (ordering the government to return fine to the estate of a defendant who

Additionally, there is a split among courts as to whether a criminal restitution order abates upon a defendant's death.²⁶ Some courts, including the U.S. Court of Appeals for the Third Circuit,²⁷ have held that the estate of a criminal defendant who dies pending appeal must continue to pay restitution to victims;²⁸ whereas other courts have required abatement of restitution orders.²⁹ While there may be some divergence regarding the exact contours of abatement ab initio, courts generally agree that the doctrine was at one point the majority approach.³⁰

III. ABATEMENT IN NEW JERSEY

Although abatement ab initio previously "flourished in the United States,"³¹ courts in New Jersey have never endorsed the doctrine. In *State v. Stevens*, which appears to be the earliest case in which a New Jersey court confronted the issue, the Supreme Court of New Jersey (then an intermediate appellate court) found the questions raised in a deceased defendant's appeal from a conviction for driving while intoxicated to be moot and ordered that the appeal be dismissed.³² Likewise, in *State v. Levin*, the intermediate appellate court held that the "principles laid down" in *Stevens* compelled dismissal of a deceased defendant's appeal from a conviction for breaking and entering.³³ Notably, in dismissing the appeal, the *Levin* court rejected the defendant's reliance on *Bower v.*

died pending appeal because, while "[t]ime served pursuant to a judgment later voided cannot be recovered[,] . . . this unhappy circumstance does not mean that the defendant (or his estate) should also be deprived of fine monies taken by a judgment determined to be without any legal force".

26. See *United States v. Coddington*, No. 18-1470, 2020 WL 582581, at *2 (10th Cir. Feb. 6, 2020) (describing circuit split and holding restitution order must be vacated); see also Joseph Sauder, Comment, *How a Criminal Defendant's Death Pending Direct Appeal Affects the Victim's Right to Restitution Under the Abatement Ab Initio Doctrine*, 71 TEMP. L. REV. 347, 349 (1998) (analyzing the issue and contending that "restitution should abate . . . except where [the] defendant commits suicide").

27. *United States v. Christopher*, 273 F.3d 294, 299 (3d Cir. 2001).

28. See, e.g., *United States v. Johnson*, 937 F.2d 609 (6th Cir. 1991) (unpublished opinion).

29. See, e.g., *United States v. Ajrawat*, 738 F. App'x 136, 139–40 (4th Cir. 2018); *United States v. Brooks*, 872 F.3d 78, 89 (2d Cir. 2017); *United States v. Volpendesto*, 755 F.3d 448, 454 (7th Cir. 2014); *United States v. Rich*, 603 F.3d 722, 729 (9th Cir. 2010); *United States v. Estate of Parsons*, 367 F.3d 409, 415 (5th Cir. 2004); *United States v. Legal*, 106 F.3d 1547, 1552 (11th Cir. 1997).

30. See *supra* text accompanying notes 12–14.

31. *State v. Al Mutory*, 581 S.W.3d 741, 747 (Tenn. 2019).

32. 44 A.2d 713, 714 (N.J. Sup. Ct. 1945).

33. 58 A.2d 231, 232–33 (N.J. Sup. Ct. 1948).

State,³⁴ which held that a completed custodial sentence did not moot appellate review because the stigma of a criminal conviction remained.³⁵

After the Supreme Court of New Jersey replaced the Court of Errors and Appeals as New Jersey's court of last resort, New Jersey's "middle course" began to take root. In *City of Newark v. Pulverman*, the defendant was convicted of violating a "quasi-criminal" zoning ordinance in municipal court and appealed his conviction to the county court.³⁶ After a trial de novo, the county court found the defendant not guilty of violating the Newark zoning ordinance.³⁷ The City appealed and the intermediate appellate court, the Appellate Division, reversed the judgment of the county court.³⁸ The defendant subsequently filed a petition for rehearing "on the ground that the judgment of the [c]ounty [c]ourt constituted an acquittal on a criminal charge and was not appealable."³⁹ The Appellate Division denied the defendant's petition and the defendant died the next day.⁴⁰ The defendant's wife, and executrix of his estate, then appealed to the Supreme Court of New Jersey.⁴¹

Preliminarily, the court rejected the City's contention that, because the defendant failed to raise the issue of double jeopardy prior to the petition for rehearing, the issue could not be considered by the state supreme court.⁴² The court explained that the issue could be considered because it was "an important one of public concern" and pointed to a court rule authorizing review of "plain errors affecting substantial rights of a party" that are "not brought to the attention of the trial court."⁴³ In reversing the Appellate Division and reinstating the county court's acquittal, the court held that the death of an appellant does not render the case moot "insofar as the family of a deceased defendant is concerned and that his legal representative should have the opportunity to establish on appeal that the conviction was wrongful."⁴⁴ The *Pulverman* court relied on *Bower* and pointed to former Rule 1:2-3A, which provided that "[a]ny party, His legal representative, or other person damaged or

34. 53 A.2d 357, 359–60 (N.J. Sup. Ct. 1947).

35. *Levin*, 58 A.2d at 232 (explaining that *Bower* "did not overrule the principles decided . . . in the *Stevens* case").

36. 95 A.2d 889, 890, 893 (N.J. 1953).

37. *Id.* at 890.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *See id.* (citing former N.J. Court Rules, R.R. 1:2-20(c)).

44. *Id.* at 894.

aggrieved by any final judgment rendered in a criminal cause may take an appeal to the appropriate appellate court.”⁴⁵

Over forty years later, in *State v. Gartland*, the Supreme Court of New Jersey revisited the issue and, again, implicitly rejected abatement ab initio.⁴⁶ In that case, the defendant was convicted of reckless manslaughter after killing her abusive husband in the bedroom of their home.⁴⁷ The defendant appealed, arguing that the trial court erred in instructing the jury on self-defense and the duty to retreat.⁴⁸ The Appellate Division affirmed the conviction.⁴⁹ After filing a petition for certification with the state supreme court, the defendant died.⁵⁰ Before reaching the merits, the Supreme Court considered whether it should dismiss the appeal.⁵¹

The court first confirmed that it had the power to decide the appeal notwithstanding the defendant’s death by citing *Pulverman* and noting its tradition of hearing cases that have “become moot when the issue is of significant public importance and is likely to recur.”⁵² The court also emphasized that, “[u]nlike the federal constitution, the New Jersey Constitution does not confine the exercise of the judicial power to actual cases and controversies.”⁵³ Additionally, the court highlighted the current rule governing standing to appeal, which states “that ‘[i]n any criminal action, any defendant, the defendant’s legal representative, or other person aggrieved by the final judgment of conviction entered by the Superior Court . . . may appeal.’”⁵⁴

Although the Supreme Court made clear that courts in New Jersey have the authority to review criminal appeals from deceased defendants, it admonished that “[t]he power to entertain a criminal appeal even after death should be sparingly exercised.”⁵⁵ The court also indicated that a deceased defendant’s conviction should not be overturned absent “a fundamental miscarriage of justice” because the defendant can no longer be retried and the State is “deprived of the opportunity to vindicate the public interest” if the conviction is set aside.⁵⁶ Nonetheless, the court recognized that “important interests of the defendant or society at large

45. *Id.*

46. 694 A.2d 564, 568-69 (N.J. 1997).

47. *Id.* at 566.

48. *Id.*

49. *See id.* at 567.

50. *Id.* at 566.

51. *See id.* at 567-69.

52. *Id.* at 568.

53. *Id.*

54. *Id.* (quoting N.J. Court Rules, R. 2:3-2).

55. *Id.* at 569.

56. *Id.*

may be at stake if an erroneous conviction is left standing.”⁵⁷ Applying its middle course approach, the court concluded that it “was worth the judicial effort” to consider the appeal despite the defendant’s death because the case involved issues of “significant public importance” that were likely to recur.⁵⁸ Ultimately, the court reversed the Appellate Division’s decision and vacated the defendant’s manslaughter conviction.⁵⁹

As the Supreme Court in *Gartland* noted, “The power to review a criminal appeal of a dead defendant is rarely exercised.”⁶⁰ However, whether an appellate court will entertain an appeal from a deceased defendant depends on the circumstances of each case. For example, in *State v. Cassidy*, the Supreme Court granted direct certification from a municipal court decision despite the defendant’s passing because the case called into question over 20,000 drunk driving convictions based on improperly calibrated breathalyzer machines.⁶¹ In reversing thousands of convictions, including the deceased defendant’s, the court held that the “far-reaching implications” of the case justified consideration of the matter.⁶² The Supreme Court also agreed to exercise its discretionary power in *State v. Hackett*, to decide the “important public issue[]” of whether the State’s lewdness and endangering the welfare of a child statutes “proscribe independent criminal conduct and require distinct proofs” after the defendant died following oral argument.⁶³

Additionally, some courts have exercised their authority to review an appeal from a deceased defendant even where the issues raised were arguably not of significant public importance. In *State v. Riva*, a probation officer was convicted in municipal court of possessing drug paraphernalia, which required the defendant to forfeit his position as a state employee.⁶⁴ The defendant subsequently appealed his conviction to

57. *Id.*

58. *See id.* at 568.

59. *See id.* at 575.

60. *Id.* at 568; *see, e.g.*, *State v. Fuller*, No. A-2121-17T4, 2019 WL 2450908, at *1 (N.J. Super. Ct. App. Div. June 12, 2019) (dismissing appeal where none of the issues were “novel, present[ed] an important public interest issue, or involve[d] trial errors that cut mortally into defendant’s right to a fair trial”); *State v. Kovats*, No. A-3580-13T1, 2015 WL 9700589, at *1 (N.J. Super. Ct. App. Div. Sept. 24, 2015) (“The arguments raised by defendant do not implicate issues of great public importance, and the record does not reveal a fundamental miscarriage of justice.”).

61. 197 A.3d 86, 91 (N.J. 2018).

62. *Id.* (relying on *Garland*, 694 A.2d at 568, and noting the “admissibility . . . of thousands of breath samples, often used as the sole evidence to support a conviction, is undeniably of significant public importance”).

63. 764 A.2d 421, 422–24 (N.J. 2001) (affirming Appellate Division’s reversal of endangering conviction).

64. No. A-1148-07T4, 2008 WL 4922538, at *1 (N.J. Super. Ct. App. Div. Nov. 19, 2008).

the Superior Court, but died in a shootout with a police officer before oral argument.⁶⁵ The Superior Court refused to apply abatement *ab initio* and adjudicated the defendant's appeal on the merits, upholding the defendant's conviction.⁶⁶ The Appellate Division also agreed to entertain the defendant's appeal "[b]ecause the circumstances suggest[ed] that the [conviction] ha[d] collateral consequences" for the defendant's estate and the public fisc.⁶⁷ Specifically, the panel reasoned that the defendant's estate could be entitled to back pay and a death benefit upon reversal of the conviction.⁶⁸ Accordingly, the court concluded that the "potential financial impact for both defendant's family and the public" warranted review of the merits of the appeal and the court went on to reverse the defendant's conviction.⁶⁹

Although the Supreme Court of New Jersey has addressed the issue of appeals from deceased criminal defendants on a number of occasions,⁷⁰ the court's decision in *Gartland* remains the seminal case in this area. In cautioning that the power to hear such an appeal should be "sparingly exercised," the court reaffirmed New Jersey's departure from the then-dominant abatement *ab initio* approach and provided additional guidance to the Appellate Division.⁷¹ The court's decision in *Gartland* is also significant because it indirectly addressed the finality and punishment rationales underlying abatement *ab initio*. Regarding the punishment rationale, the court explained that, even though a deceased defendant can no longer be punished, the "State and the victims of the crime" still have an interest in preserving a conviction.⁷² Thus, in considering the interests of others, not just those of the deceased defendant, the court obliquely cast doubt on the punishment rationale.⁷³ But the court was not as dismissive of the finality rationale, recognizing that "a fundamental miscarriage of justice" may warrant overturning a deceased appellant's conviction.⁷⁴ In sum, the court's decision in

65. *Id.* at *2.

66. *Id.*

67. *Id.*

68. *Id.* at *4.

69. *Id.* at *5, *9.

70. See, e.g., *State v. Cassidy*, 197 A.3d 86, 91 (N.J. 2018); *State v. Hackett*, 764 A.2d 421, 422–24 (N.J. 2001); *City of Newark v. Pulverman*, 95 A.2d 889, 894 (N.J. 1953); *see also State v. Levin*, 58 A.2d 231, 232 (N.J. Sup. Ct. 1948); *Bower v. State*, 53 A.2d 357, 359 (N.J. Sup. Ct. 1947); *State v. Stevens*, 44 A.2d 713, 714 (N.J. Sup. Ct. 1945).

71. *State v. Gartland*, 694 A.2d 564, 569 (N.J. 1997).

72. *Id.* ("If the conviction is set aside, the State is realistically deprived of the opportunity to vindicate the public interest in enforcement of the law.").

73. *Id.* at 571.

74. *Id.* at 569.

Gartland provides the most detailed explanation of New Jersey's flexible approach to reviewing convictions of deceased defendants.

IV. CONCLUSION

Unlike federal courts, which continue to be "essentially unanimous in their application of the doctrine of abatement *ab initio*,"⁷⁵ a majority of state courts no longer apply the doctrine.⁷⁶ In 2019 alone, the courts of last resort of Massachusetts, Mississippi, and Tennessee overruled precedent applying abatement *ab initio*.⁷⁷ Although the Massachusetts Supreme Judicial Court completely jettisoned abatement *ab initio* and made clear that courts in the state do not have authority to review criminal appeals from deceased defendants,⁷⁸ the Mississippi and Tennessee Supreme Courts abandoned abatement *ab initio* but left open the possibility that courts could entertain an appeal from a deceased appellant in certain circumstances.⁷⁹ As more courts reconsider abatement *ab initio* and navigate the shifting legal sands, New Jersey's middle course approach to addressing appeals from deceased defendants may prove influential.

75. *See State v. Carlin*, 249 P.3d 752, 759 n.42 (Alaska 2011).

76. *See Commonwealth v. Hernandez*, 118 N.E.3d 107, 116 (Mass. 2019) ("[A]batement *ab initio* may still qualify as the plurality approach, but a majority of State courts have rejected it and chosen to go in another direction.").

77. *See id.* (overruling *Commonwealth v. Eisen*, 334 N.E.2d 14 (Mass. 1975)); *Payton v. State*, 266 So.3d 630 (Miss. 2019) (overruling *Gollott v. State*, 646 So.2d 1297 (Miss. 1994)); *State v. Al Mutory*, 581 S.W.3d 741 (Tenn. 2019) (overruling *Carver v. State*, 398 S.W.2d 719 (Tenn. 1966)).

78. *See Hernandez*, 118 N.E.3d at 110, 121 ("conclud[ing] that the doctrine of abatement *ab initio* is outdated and no longer consonant with the circumstances of contemporary life, if, in fact, it ever was" and "rejecting the substitution approach").

79. *See Al Mutory*, 581 S.W.3d at 755 ("We do not by this decision foreclose the possibility that a future appeal may present circumstances that would warrant its continuation after a defendant's death. We simply leave those matters to another case in which such circumstances are presented and raised."); *Payton*, 266 So.3d at 640–42 (adopting "Alaska's balanced approach" in *Carlin* allowing for substitution and dismissing deceased appellant's appeal as moot where "no motion was filed for substitution").