

App. No. _____

In The
Supreme Court of the United States

David H. Brooks,

Petitioner,

v.

United States of America,

Respondent.

PETITIONER'S APPLICATION TO EXTEND TIME
TO FILE PETITION FOR A WRIT OF CERTIORARI

To the Honorable Ruth Bader Ginsburg, as Circuit Justice for the United States Court of Appeals for the Second Circuit:

Petitioner David H. Brooks respectfully requests that the time to file a Petition for a Writ of Certiorari in this case be extended for thirty days to May 12, 2018. The court of appeals issued its opinion on September 20, 2017. App. A, *infra*. Petitioner timely filed petition for rehearing on December 4, 2017. App. B, *infra*. The court denied Petitioner's motion for rehearing on January 12, 2018. App. C, *infra*. Absent an extension of time, the petition would be due on April 12, 2018. Petitioner is filing this Application at least ten (10) days before that date. See S.Ct. R. 13-5. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Background

Petitioner seeks review of the decision of the United States Court of Appeals for the Second Circuit based on substantial questions relating to application of the abatement doctrine on direct appeal from criminal convictions and related penalties. The decision below deepens a circuit conflict relating to whether a restitution judgment and other penalties imposed on a criminal defendant who dies during the pendency of an appeal must be vacated and all convictions abated, or whether there are exceptions to the rule of abatement in cases involving a guilty plea. The issues are complex. Briefing in the Second Circuit was extensive, and the important issues and collateral impact of the decision are such that substantial legal research and review by counsel is required, including review of relevant state court decisions applying due process principles. Hence, petitioner seeks this extension of time.

Reasons For Granting An Extension Of Time

The time to file a Petition for a Writ of Certiorari should be extended for thirty days for the following reasons:

1. Due to case-related and other reasons additional time is necessary and warranted for counsel to research the decisional conflicts, and prepare a clear, concise, and comprehensive petition for certiorari for the Court's review.
2. The press of other matters makes the submission of the petition difficult absent an extension. Counsel presently faces appellate filing deadlines in numerous cases from March 28, 2017 to April 27, 2018, including in Fifth Circuit No. 17-60721, and Eleventh

Circuit Nos. 18-10755, 17-15714, 17-15383, 17-13535, 17-13085, 17-12805, 16-17175, 16-13616, and 16-10400.

3. The forthcoming petition is likely to be granted in light of, among other things, the need to address the important circuit conflict regarding the scope and application of the abatement doctrine.

Conclusion

For the foregoing reasons, the time to file a Petition for a Writ of Certiorari in this matter should be extended thirty days to and including May 12, 2018.

Respectfully submitted,

/s/ Richard C. Klugh

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March 2018

1 Before: WINTER and DRONEY, *Circuit Judges*, and DONNELLY, *District Judge*.[†]

2
3 Appeal from a judgment of the United States District Court for the Eastern
4 District of New York (Seybert, J.) entered following a jury verdict finding
5 defendant David Brooks guilty of offenses related to fraud and securities laws
6 violations, and Brooks's guilty plea to tax evasion. After Brooks filed his appeal,
7 he died while incarcerated and his estate and members of his family moved to
8 abate his convictions. We conclude that Brooks's counts of conviction resulting
9 from the verdict abated with his death, but not the counts resulting from his
10 guilty plea; the bail bond subscribed by Brooks and his family remains forfeited;
11 and the order of restitution related to the fraud and securities laws counts is
12 abated but not the order of restitution related to the tax counts. Accordingly, the
13 estate-appellant's motion for abatement is GRANTED in part and DENIED in
14 part, Brooks's judgment of conviction for the non-tax counts is VACATED, the
15 motion by Brooks's family members for abatement of the bail bond forfeiture is
16 DENIED, the order denying the motion to set aside bond forfeiture is
17 AFFIRMED, the Government's cross-appeal is DISMISSED, and the case is
18 REMANDED for the dismissal of the non-tax counts of the indictment.

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28 *Appellant Terry Brooks*.

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31 *Brooks*.

[†] Judge Ann M. Donnelly, United States District Court for the Eastern District of New York, sitting by designation.

1 (Michael J. Gilbert, (Andrew J. Levander, *on the*
2 *brief*), Dechert LLP, New York, NY, *for Appellants*
3 *Andrew, Victoria, & Elizabeth Brooks.*)

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9 States Attorney for the Eastern District of New
10 York, Brooklyn, NY, *for Appellee-Cross-Appellant.*

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12 DRONEY, *Circuit Judge*:

13 On September 14, 2010, David H. Brooks was convicted in the United
14 States District Court for the Eastern District of New York (Seybert, *J.*) after a jury
15 trial on multiple counts of offenses relating to securities fraud, mail and wire
16 fraud, and obstruction of justice. He was also convicted of related tax offenses
17 based on his guilty pleas, which occurred after the jury's verdict. Shortly before
18 trial, the district court found that Brooks had violated the terms of his release
19 conditions and ordered the forfeiture of a substantial cash security on the bond
20 executed by Brooks and members of his family as sureties.

21 Following his convictions, Brooks was sentenced to 204 months'
22 imprisonment, ordered to pay restitution and a fine, and ordered to forfeit assets.
23 He appealed his convictions based on the jury verdict but not the tax counts.

1 After the verdict, Brooks's ex-wife and their children moved to set aside the
2 forfeited bail bond security. The district court denied the motion and the family
3 members appealed that decision. Brooks died while he was incarcerated and
4 while these appeals were pending.¹

5 As a result of Brooks's death, his estate has now moved for abatement of
6 his convictions, the order of forfeiture, the orders of restitution, the fine, and the
7 special assessment that accompanied the judgment of conviction.² His estate, as
8 well as his ex-wife and their children, have also moved for abatement of the bail
9 bond forfeiture.³ The Government does not oppose the abatement of Brooks's
10 convictions on the non-tax counts and accompanying order of forfeiture, fine,

¹ Brooks's appeal was consolidated with the appeal filed by his family members. We address both in this opinion, and refer to them as one appeal.

² We refer to both Brooks and his estate in this opinion without concluding which is the proper party for this appeal. We note that no motion to substitute the estate for Brooks has been filed, and it appears that no substitution is necessary for us to consider the appeal. *See United States v. Volpendesto*, 755 F.3d 448, 451–52 (7th Cir. 2014) (concluding substitution of the estate not necessary to consider abatement *ab initio*); *see also United States v. Libous*, 858 F.3d 64, 65 n.1 (2d Cir. 2017) (granting Fed. R. App. P. 43(a)(1) motion to substitute executrix of appellant's estate for appellant).

³ These appellants did not file a motion to abate, but requested that relief in a supplemental brief. Appellants' Suppl. Br., Docket No. 13-3213-cr, ECF No. 533. We treat that request as a motion for abatement.

1 and special assessment, but opposes the abatement of the restitution obligations
2 and the forfeiture of his bail bond.

3 We conclude that the counts of conviction based on the jury verdict must
4 abate as well as the orders of forfeiture, fine, special assessment, and restitution
5 for the offenses Brooks contested at trial. We also hold, though, that the forfeiture
6 of the bail bond does not abate, nor do the convictions and order of restitution
7 imposed on the tax counts. Accordingly, Brooks's motion for abatement is
8 GRANTED in part and DENIED in part, Brooks's judgment of conviction is
9 VACATED in part, the motion for abatement by the other appellants is DENIED,
10 the order denying the motion to set aside the bond forfeiture is AFFIRMED, the
11 Government's cross-appeal is DISMISSED,⁴ and the case is REMANDED for the
12 dismissal of the indictment as to counts I-XI, XV-XVII.

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⁴ The Government filed a notice of cross-appeal of the district court's Amended Preliminary Order of Forfeiture, *see* Notice of Crim. Appeal, Docket No. 13-3213-cr, ECF No. 23, but the Government did not file its response brief to Brooks's direct appeal until after Brooks's death and so submitted no brief on the merits of the cross-appeal. *See* Appellee-Cross-Appellant United States' Br., Docket No. 13-3213-cr, ECF No. 542. The Government's brief withdrew the Government's cross-appeal and addressed the requests for abatement.

BACKGROUND

I. Brooks's Offense Conduct

David Brooks was the founder, Chair of the Board of Directors, and CEO of DHB Industries, Inc., a publicly traded company that manufactured and sold body armor to law enforcement agencies and the U.S. military.⁵

In October 2007, Brooks was indicted in a superseding indictment on charges of participating in several schemes to defraud shareholders, including overvaluing inventory of DHB and its subsidiaries, reclassifying costs to inflate DHB's profitability, falsely adding non-existent inventory to the company's books, and obstructing a Securities and Exchange Commission ("SEC") investigation.

In addition to the allegations concerning manipulation of the DHB books and false SEC disclosures, the indictment alleged that Brooks also defrauded DHB shareholders by diverting DHB assets for the benefit of Brooks, the Brooks family, and other DHB executives. Brooks routinely used DHB funds to pay expenses for his personal horse-racing business, and gave company credit cards

⁵ DHB shares were traded on the American Stock Exchange from 2002-2005, and on the "over-the-counter" market following this period.

1 and checks to his family to cover their personal expenses including clothing,
2 home renovations, plastic surgery, vacations and airfare, automobiles,
3 entertainment, and gifts. These personal expenses totaled millions of dollars.

4 Brooks also sold substantial shares of DHB stock while the stock price was
5 artificially inflated, making hundreds of millions of dollars in profit. Finally, the
6 indictment alleged that Brooks paid himself millions of dollars through DHB that
7 were not reported as income to the Internal Revenue Service, and did not pay
8 income taxes on those payments.

9 A second superseding indictment (the “indictment”) was returned in July
10 2009, with the same charges directed at Brooks.⁶

11 The district court entered a pre-trial restraining order on fourteen bank
12 and investment accounts held by Brooks and his family that the court found
13 would be subject to forfeiture in the event of a conviction.

14 Brooks pled not guilty to all of the charges. The court later granted
15 Brooks’s motion to sever the tax counts. Brooks proceeded to trial on the non-tax
16 counts in January 2010.⁷

⁶ Co-defendants were also named in the indictments.

II. Brooks's Forfeiture of Bail Bond

After Brooks's arrest in October 2007, the Government sought to have Brooks detained or his release be subject to a substantial bond and the full disclosure of his financial holdings, and on Brooks returning all of his assets from overseas back to the United States. The district court held a hearing and determined that Brooks was a flight risk on the basis of his considerable wealth and the potential for access to foreign accounts if he fled the country. The district court was also concerned that undisclosed and unmonitored accounts could be used to facilitate witness tampering. The district court issued a Bail Release Order (the "Order") on January 3, 2008, granting Brooks's motion for pre-trial release. The Order included such restrictions as home detention monitored by a private security firm, monitored conversations, independent auditing of bank accounts and assets, and a prohibition on liquid assets being held overseas without the approval of the U.S. Attorney's office.

⁷ There were three other codefendants: Sandra Hatfield (DHB's Chief Operating Officer), Dawn Schlegel (DHB's Chief Financial Officer), and Patricia Lennex (an officer of a DHB-related company). Schlegel and Lennex pled guilty before trial and Hatfield was tried with Brooks and was convicted of all but two counts directed against her. She and Brooks jointly appealed their convictions. After Brooks's death, this Court granted the Government's motion to unconsolidate Hatfield's appeal, which has been heard and resolved by this Court. *See United States v. Schlegel*, 687 F. App'x 26 (2d Cir. 2017), *petition for cert. filed*, No. 16-9701 (June 23, 2017).

1 Brooks and his family sureties also provided \$48 million in cash as security
2 for the \$400 million bond the court ordered.⁸ The Order provided that if Brooks
3 concealed assets, that conduct would be grounds for revocation of Brooks's bail
4 and for the forfeiture of the \$48 million cash security.⁹

5 The district court reviewed the terms of the Order with Brooks and the
6 family sureties prior to its approval at a December 21, 2007, hearing. In
7 particular, the district court asked at the hearing about "failure to disclose assets"
8 and Brooks's counsel confirmed that any such failure "subjects him to immediate
9 remand, and it subjects him to the loss of the . . . [security]." J.A. 481.¹⁰ The
10 district court canvassed Terry Brooks (Brooks's wife), Jeffrey Brooks (Brooks's

⁸ The cash was held in a segregated account and was posted by two entities, Wildfire Holdings LLC and Perfect World Partners LLC. Brooks's now ex-wife Terry Brooks owns approximately 36% of Wildfire LLC through her interests in member entities of that LLC, and 3% of Perfect World, and the Brooks children own approximately 41% of Perfect World.

⁹ Specifically, the Order stated that "[a]ny knowing violation of this agreement, including . . . an attempt . . . to conceal assets . . . will be grounds for revocation of his bail release and for forfeiture of the \$[48] million in bond security." J.A. 421. The entire \$400 million personal recognizance bond was only enforceable against the sureties if Brooks attempted to leave home confinement without approval, to escape from his security monitor, or to commit the crime of witness tampering defined at 18 U.S.C. § 1512. The parties characterized the Order as having a two-tier violation system, with lesser violations triggering forfeiture of the bond security and greater violations triggering forfeiture of the \$400 million.

¹⁰ "J.A." references are to the Joint Appendix filed by Terry Brooks. "App." references are to the Appendix filed by David Brooks.

1 brother), Victoria Brooks (Brooks's 23-year-old daughter), and Andrew Brooks
2 (Brooks's 19-year-old son), who executed the bond along with Brooks. The court
3 later modified the Order upon subsequent motions by Brooks, but these
4 modifications did not affect the asset disclosure terms or the restriction on
5 maintaining funds overseas.

6 In January 2010, shortly before trial, the Government moved to revoke
7 Brooks's bail on the basis that Brooks and his family had hidden substantial
8 assets in violation of the terms of the Order. The Government sought forfeiture of
9 the entire \$400 million bond. The district court revoked Brooks's bail and
10 ordered his detention, but ordered forfeiture of only the cash security of \$48
11 million.

12 The district court did not hold an evidentiary hearing for the forfeiture,
13 over the objections of defense counsel, and proceeded by Government proffer.¹¹

¹¹ It is well established that the Government may proceed by proffer at a bail revocation hearing. *United States v. LaFontaine*, 210 F.3d 125, 130–31 (2d Cir. 2000); *see also United States v. Galanis*, 656 F. App'x 560, 562–63 (2d Cir. 2016) (summary order); *United States v. Bartok*, 472 F. App'x 25, 27 (2d Cir. 2012) (summary order). While "Congress did intend to give defendants an opportunity to testify and to present evidence on their own behalf," *United States v. Davis*, 845 F.2d 412, 415 (2d Cir. 1988), this Court has also concluded that bail revocation hearings are "typically informal." *LaFontaine*, 210 F.3d at 131 (quoting *United States v. Acevedo-Ramos*, 755 F.2d 203, 206 (1st Cir. 1985)); *see also United States v. Martir*, 782 F.2d 1141, 1145 (2d Cir. 1986). This Court has acknowledged the district courts' wide discretion in evaluating the type of proceeding to hold and the accuracy of the evidence presented by the Government. *See Martir*,

1 The district court credited the extensive affidavit (with numerous exhibits) of FBI
2 Special Agent Angela Jett, which described the results of her investigation into
3 Brooks's concealment of assets abroad.

4 According to the affidavit, prior to the entry of the bail bond Order, a
5 confidential source had met with David and Jeffrey Brooks as well as other
6 family members to create various corporations and bank accounts around the
7 world to conceal millions of dollars in assets. The source set up a scheme called
8 "Czerny Kot" (Polish for "black cat") using the passports of Jeffrey Brooks,
9 Elizabeth Brooks, Andrew Brooks, and Victoria Brooks to open nominee
10 accounts. Special Agent Jett also pointed to Grand Jury testimony of Brooks's
11 personal pilot to show that Brooks, Jeffrey, and other family members (including
12 Terry Brooks and the children) flew to Switzerland in a private plane to deposit
13 assets in Swiss safe deposit boxes.

782 F.2d at 1147. However, a presiding judicial officer should include "a clear record of the district court's findings and its reasons for revocation and detention, which may be embodied in a transcript of the proceedings." *Davis*, 845 F.2d at 415. After review of the hearing undertaken in this case, we conclude that Brooks had adequate notice and opportunity to present his own witnesses and that the district court appropriately conducted the hearing and thoroughly explained its reasoning in accepting the Government's proffer. This hearing was also not a case where the Government proceeded *ex parte*. See, e.g., *United States v. Abuhamra*, 389 F.3d 309, 323–24 (2d Cir. 2004) (noting that bail hearings should be public proceedings). We are also satisfied with Terry Brooks's and the children's notice and opportunity to participate in the hearing.

1 Based principally on Special Agent Jett’s affidavit, the district court found
2 that David and Jeffrey Brooks violated the conditions of Brooks’s release by clear
3 and convincing evidence. Specifically, the court found that (1) the two Brooks
4 brothers conspired to hide assets through the Czerny Kot scheme in the Republic
5 of San Marino,¹² (2) that Jeffrey Brooks had concealed over \$3 million in currency
6 in a London safe deposit box, and (3) that David Brooks secretly transported an
7 unknown amount of currency to Switzerland.

8 Concluding that these actions constituted a violation of the Order, the
9 district court ordered the forfeiture of the cash security. The amount of cash
10 remaining as security on that bond (after the prior withdrawals, as permitted by
11 the court) totaled approximately \$22.5 million, of which Terry Brooks and the
12 children claimed ownership of \$17.7 million and Brooks claimed \$1.8 million (the
13 remaining \$3 million went to legal fees, as permitted by the court). Brooks filed
14 an emergency motion with this Court to reverse the district court’s revocation of
15 bond, which this Court denied.

¹² The Republic of San Marino is a “microstate” surrounded by Italy.

III. Convictions and Post-Trial Events

On September 14, 2010, after an eight-month trial, a jury returned a guilty verdict against Brooks on all counts. Brooks subsequently pled guilty to one count of conspiracy to defraud the IRS and two counts of tax evasion in August 2011. Brooks also agreed, in his plea agreement regarding the tax counts, to pay \$2.8 million in restitution to the IRS and waived his appeal rights as to the tax convictions and the sentence for them.

On August 22, 2013, judgment was entered against Brooks, and he was sentenced to 204 months' imprisonment for all his counts of conviction. The August 2013 judgment also reflected the imposition of a special assessment of \$1,700, a fine of \$8.7 million, restitution of \$2.8 million on the tax counts, and also made final a preliminary order of forfeiture. Restitution on the fraud and securities laws counts of conviction was to be subsequently determined by the district court.

a. Restitution Order on Fraud and Securities Laws Violations

In March 2015, the district court issued an extensive opinion and accompanying final order of restitution, pursuant to the Mandatory Victim's Restitution Act ("MVRA"), for the non-tax counts. The amended judgment that

1 followed reflected the imposition of \$53.9 million in restitution to Point Blank
2 Solutions (the then-successor to DHB, Inc.), plus \$37.6 million to individual
3 victims identified by the Government, as well as the previously-ordered \$2.8
4 million to the IRS for the tax counts.¹³

5 Brooks filed a timely appeal of the fraud and securities laws convictions
6 and the restitution order based on those counts. He also appealed the revocation
7 and forfeiture of his bail bond.

8 On May 16, 2015, Brooks moved in the district court to stay disbursement
9 of the assets that had been previously deposited with the clerk of court. The
10 district court granted the stay, and noted that it was restraining approximately
11 \$160 million in assets. App. 2783–84. The court reasoned that if these assets were
12 disbursed to victims prior to the resolution of the appeal, it would be difficult to
13 recover that money from the victims if Brooks was ultimately successful on
14 appeal.¹⁴ App. 2783–84.

¹³ The judgment set forth special instructions that the restitution was payable “at the rate of \$25 quarterly while the defendant is incarcerated, then 20 per cent of his gross income monthly during [the] term of supervised release,” with any outstanding balance to be the subject of a civil judgment in the future. J.A. 1406.

¹⁴ These assets are also currently the subject of a parallel civil forfeiture action, and Terry Brooks and her children have filed as claimants in that contested action. *See United States v. All Assets Listed on Schedule I Attached Hereto and All Proceeds Traceable Thereto* (No. CV-10-4750 E.D.N.Y.).

1 **b. Motion to Set Aside Bail Forfeiture**

2 In April 2015, Terry Brooks and the children filed a motion with the
3 district court under Fed. R. Crim. P. 46(f)(2) to set aside the earlier bail forfeiture
4 and release the cash security. The two bases of their motion were that (1) the
5 equitable reasons for the bail bond no longer applied as Brooks was in custody
6 and (2) the indictment upon which the bond was based was a nullity because the
7 grand jury that returned that superseding indictment had not been properly
8 empaneled.¹⁵ The district court denied the motion in June 2015.

David Brooks was also named as a defendant in a class action and derivative shareholder action and was the subject of an SEC investigation and enforcement action. *See In Re DHB Indus., Inc. Derivative Litigation* (05-cv-4345 E.D.N.Y.) (derivative litigation); *In Re DHB Indus., Inc. Class Action Litigation* (05-cv-4296 E.D.N.Y.) (class action); *see also S.E.C. v. Brooks* (07-61526 S.D. Fla.).

¹⁵ In August 2012, well after his trial, Brooks discovered that the first superseding indictment was returned by a grand jury whose term had expired. At the time that first superseding indictment was returned, the Government was not aware that the grand jury's term had expired. Without the Government's knowledge of the issue as to the first superseding indictment, a new grand jury was empaneled and a second superseding indictment was returned, and it was this indictment that was in effect at the time of Brooks's trial. At the arraignment for the second superseding indictment, the district court reimposed the bond and its conditions. In this appeal Brooks contested numerous proceedings below on the basis of the invalidly-returned first superseding indictment, and pressed a similar argument with respect to the return of his forfeited bail security. All of these arguments are foreclosed by this Court's decision in *United States v. Schlegel*, 687 F. App'x 26 (2d Cir. 2017), *petition for cert. filed*, No. 16-9701 (June 23, 2017), in which the Court concluded that the "district court properly declined to dismiss the second superseding indictment." *Id.* at 29. Brooks contested the application of *United States v. Schlegel* in a Fed. R. App. P. 28(j) letter on April 27, 2017, but his arguments fail.

1 Terry Brooks and the children filed a timely appeal of the district court's
2 decision not to set aside the forfeiture of the cash security on the bail bond.

3 On October 27, 2016, David Brooks died while serving his term of
4 imprisonment, and while this appeal was pending.

5 DISCUSSION

6 In this appeal Brooks's estate has moved for an abatement of his
7 convictions, restitution and forfeiture orders, fines, forfeited bail bond security,
8 and special assessments. Terry Brooks and the Brooks children appeal the denial
9 of their motion by the district court for the return of the forfeited cash security
10 under Fed. R. Crim. P. 46, and also argue that the forfeiture of their bail bond
11 security should abate with Brooks's death.

12 "[W]hen a convicted defendant dies while his direct appeal as of right is
13 pending, his death abates not only the appeal but also all proceedings had in the
14 prosecution from its inception." *United States v. Libous*, 858 F.3d 64, 66 (2d Cir.
15 2017) (quoting *United States v. Wright*, 160 F.3d 905, 908 (2d Cir. 1998)); *see also*
16 *Durham v. United States*, 401 U.S. 481, 483 (1971) (per curiam), *overruled on other*
17 *grounds by Dove v. United States*, 423 U.S. 325 (1976) (per curiam). This general
18 rule, almost unanimously followed by the federal Courts of Appeals, has its roots

1 in the common law doctrine of abatement *ab initio*: “everything associated with
2 the case is extinguished, leaving the defendant as if he had never been indicted
3 or convicted.” *Libous*, 858 F.3d at 66 (quoting *United States v. Estate of Parsons*, 367
4 F.3d 409, 413 (5th Cir. 2004) (en banc)); *United States v. Logal*, 106 F.3d 1547, 1551–
5 52 (11th Cir. 1997).

6 We must consider the application of the abatement *ab initio* doctrine to
7 three specific parts of this appeal: the convictions, the orders of restitution, and
8 the forfeiture of the bail bond.

9 I. Abatement of Convictions

10 Brooks’s convictions based on the jury verdict must abate because he died
11 while his direct appeal was pending. *See Libous*, 858 F.3d at 66. As this Court has
12 recently recognized, a defendant’s conviction must be abated upon his death
13 during appeal for two reasons: the interests of finality and just punishment. *Id.*
14 Finality requires that “a defendant not stand convicted without resolution of the
15 merits of an appeal,” and recognition of the purposes of just punishment leads to
16 the conclusion that “to the extent that the judgment of conviction orders
17 incarceration or other sanctions that are designed to punish the defendant, that
18 purpose can no longer be served.” *Id.* (quoting *Wright*, 160 F.3d at 908).

1 We note, however, that the application of the doctrine of abatement is not
2 indivisible; many defendants (like Brooks) are charged with multiple counts and
3 may be convicted by a jury on some counts and by a plea of guilty on others.
4 Those convictions may become final at different times, and a defendant may
5 choose not to appeal every conviction. The doctrine of abatement leaves the
6 deceased defendant “as if he had never been indicted or convicted,” *Libous*, 858
7 F.3d at 66, *only as to those counts* as to which the conviction has not yet become
8 final.

9 We recognize that courts have often considered abatement to be justified by
10 the finality and just punishment principles stated above, and that by not abating
11 all of the convictions, some of the resulting punishments may continue even
12 though the purpose of those punishments can no longer be served. In weighing
13 the two principles, we conclude that finality is the paramount consideration.
14 “[A]batement *ab initio* is premised at least as much, if not more, on the fairness of
15 allowing a conviction and penalties to stand when a defendant dies pending an
16 appeal as of right as it is on the futility of punishing the deceased.” *Libous*, 858
17 F.3d at 67. Otherwise, we would abate all convictions, even if such convictions
18 were final and unappealed, upon the death of a convicted defendant who had

1 not yet completed her term of imprisonment, paid her entire fine, or completed
2 restitution to her victims. Therefore, when faced with a multi-count indictment,
3 where a defendant is convicted on some or all counts but appeals only certain
4 convictions, the defendant's death shall only abate the appealed convictions and
5 the resulting punishments or consequences that relate to those convictions.

6 Brooks's convictions on the counts that were decided by the jury and the
7 associated forfeiture order, fine, and special assessment are abated upon his
8 death. As Brooks pled guilty to the tax evasion counts, waived his right to appeal
9 as to those counts, and did not appeal them, his convictions on those counts do
10 not abate. The case shall be remanded to the district court for dismissal of the
11 indictment on the non-tax counts and those related sanctions. *See Krantz v. United*
12 *States*, 224 F.3d 125, 126 (2d Cir. 2000) (per curiam).

13 We now turn to whether abatement applies to the restitution orders and the
14 bail bond forfeiture.

15 **II. Abatement of Restitution**

16 We have not yet decided whether restitution abates upon the death of a
17 criminal defendant while his direct appeal is pending. *See Wright*, 160 F.3d at 909
18 (“[W]e conclude that in the circumstances of the present case, we need not

determine whether an order of restitution should be abated as a general matter, for here, retention of the restitutionary order would be a futile act.”). Although the federal Courts of Appeals generally follow the doctrine of abatement *ab initio*, there is a split as to its application to restitution. *See Volpendesto*, 755 F.3d at 453. The Courts of Appeals that hold that restitution abates with the death of a defendant typically do so because restitution depends on a valid, final conviction, *see, e.g., id.* at 453–54, while the Courts of Appeals that hold that restitution does not abate with the death of a defendant do so because they consider restitution to be compensatory, not punitive in nature, *see, e.g., United States v. Christopher*, 273 F.3d 294, 299 (3d Cir. 2001) (concluding that although restitution may be “compensatory, punitive, or a combination of both,” the order of restitution in that case was “more compensatory in nature than penal”).

Brooks’s restitution was imposed both for his offenses for which he was convicted by a jury (and appealed) and for the tax-related offenses to which he pled guilty (but did not appeal). We address these orders of restitution separately.

1 **a. Restitution for Offenses Following Return of Jury Verdict**

2 “Federal courts have no inherent power to order restitution, which is
3 traditionally a civil remedy.” *United States v. Zangari*, 677 F.3d 86, 91 (2d Cir.
4 2012). “A sentencing court’s power to order restitution, therefore, depends upon,
5 and is necessarily circumscribed by, statute.” *Id.* Brooks’s order of restitution was
6 imposed pursuant to the Mandatory Victim’s Restitution Act, which provides:

7 Notwithstanding any other provision of law, when sentencing a
8 defendant convicted of an offense described in subsection (c), the
9 court shall order, in addition to, or in the case of a misdemeanor,
10 in addition to or in lieu of, any other penalty authorized by law,
11 that the defendant make restitution to the victim of the offense or,
12 if the victim is deceased, to the victim’s estate.

13 18 U.S.C. § 3663A(a)(1).

14 Following the recent guidance of the U.S. Supreme Court, we hold that
15 when a criminal conviction abates upon the death of a defendant, any restitution
16 ordered as a result of that conviction must also abate. “When a criminal
17 conviction is invalidated by a reviewing court and no retrial will occur,” the state
18 must “refund fees, court costs, *and restitution* exacted from the defendant upon,
19 and as a consequence of, the conviction.” *Nelson v. Colorado*, 137 S. Ct. 1249, 1252
20 (2017) (emphasis added).

1 In *Nelson*, the Supreme Court concluded that a Colorado state law violated
2 due process where that law required defendants whose convictions have been
3 reversed or vacated to additionally prove their innocence in a subsequent civil
4 proceeding by clear and convincing evidence in order to obtain a refund of funds
5 paid to the state, including restitution payments. *Nelson*, 137 S. Ct. at 1254–58. In
6 *Nelson*, one of the two defendants had his conviction reversed on direct appeal
7 and the other had one count reversed on direct appeal and the other on post-
8 conviction review. *Id.* at 1253. The former was acquitted on retrial, and the state
9 chose not to retry the other defendant. *Id.* The state court had imposed costs, fees,
10 and restitution on both defendants as part of their original sentences. *Id.* The
11 Court stated that “once those convictions were erased, the presumption of their
12 innocence was restored,” and a state “may not presume a person, adjudged
13 guilty of no crime, nonetheless guilty *enough* for monetary exactions,” including
14 costs, fees, and restitution. *Id.* at 1255–56.

15 *Nelson* was resolved on the basis of due process violations rather than the
16 application of the abatement *ab initio* doctrine. Nevertheless, the reasoning of
17 *Nelson* also compels abating monetary penalties where a defendant dies during
18 his direct appeal, as “there is no longer a valid conviction to support the

1 government's retention of the [penalty]." *Libous*, 858 F.3d at 68. The statutory
2 predicate for restitution under the MVRA is a conviction, and once that
3 conviction has been vacated—even by abatement upon the death of the
4 defendant—there is no longer a basis to require payment of restitution.

5 We recognize that this result may work to frustrate the purpose of
6 Congress to compensate victims through restitution. *See Christopher*, 273 F.3d at
7 299 (reasoning that restitution was an "equitable remedy . . . intended to
8 reimburse a person wronged by the actions of another" and "[t]o absolve the
9 estate from refunding the fruits of the wrongdoing would grant an undeserved
10 windfall"); *see also United States v. Johnson*, 937 F.2d 609 (6th Cir. 1991)
11 (unpublished opinion); *United States v. Dudley*, 739 F.2d 175, 177–78 (4th Cir.
12 1984). Such "consequences of abatement can be unsettling" and "can surely be
13 devastating to those affected by the defendant's conduct." *Libous*, 858 F.3d at 68.
14 Congress's purpose may seem especially frustrated by the abatement *ab initio*
15 doctrine for restitution ordered under the MVRA, which *requires* restitution to be
16 ordered for victims of certain crimes who have suffered as a result of a
17 defendant's conduct. 18 U.S.C. § 3663A(a)(1). Yet, because the language of the
18 statute requires restitution in cases only where a defendant has been "convicted

1 of an offense,” we cannot separate restitution from conviction. *Id.* Without a
2 valid conviction, the statute-based restitution order must be vacated.¹⁶

3 In so concluding, we join a number of our sister circuits. *See Volpendesto*,
4 755 F.3d at 453 (concluding that “[r]estitution ordered under [the MVRA], we
5 believe, cannot be disentangled from the criminal conviction that underlies the
6 sentence” because the statute states “in addition to . . . any *other* penalty
7 authorized by law” (quoting 18 U.S.C. § 3663A(a)(1)); *United States v. Rich*, 603
8 F.3d 722, 729 (9th Cir. 2010) (“Just as it is inappropriate to impose restitution on a
9 living individual who was never indicted or convicted, so it is inappropriate to
10 impose restitution on the estate of a deceased individual who, in the eyes of the
11 law, was never indicted or convicted. Abatement *ab initio* means what it says.”);
12 *see also Estate of Parsons*, 367 F.3d at 416. Furthermore, the Supreme Court’s
13 specific inclusion in *Nelson* of restitution in a list of vacated “monetary exactions”
14 imposed “by reason of the conviction” directs us to that conclusion. *Nelson*, 137
15 S. Ct. at 1256.

¹⁶ Victims of criminal offenses may also be compensated through a civil action against the estate of the defendant, and there are multiple such actions pending against Brooks’s estate. *See Volpendesto*, 755 F.3d at 454.

1 The Government contends that because Brooks’s funds were available to
2 the Government at the time that he was convicted—and are still in the district
3 court’s control as restrained assets—those proceeds were available to
4 compensate the victims immediately upon the imposition of the order and prior
5 to Brooks’s death. Thus, the situation is unlike the one in *Wright*, 160 F.3d at 907,
6 where the defendant died before his monthly restitution payments were to begin
7 upon his release from prison. Had the restitution been already paid, the
8 Government argues, then such payment and punishment would have been
9 complete, and would have been irretrievable as of the time that Brooks began
10 serving his prison sentence while his appeal was pending.

11 We need not decide that issue here. The district court stayed the payment
12 of Brooks’s restitution while this case was on appeal. The disbursement of the
13 restitution by the district court in this case was dependent on a *final* conviction,
14 not on an earlier availability of funds as the Government suggests.¹⁷

¹⁷ At Brooks’s sentencing, the district court stated that restitution was “due immediately,” while the final judgment provided that Brooks was to pay \$25 quarterly during his period of incarceration to be followed by payments of 20% of his gross income during his term of supervised release. Any potential tension between these two statements is addressed by the district court’s stay of restitution payment and by the abatement of Brooks’s convictions and restitution order.

1 We have recently applied the doctrine of abatement *ab initio* in a similar
2 context. In *Libous*, relying on the Supreme Court’s ruling in *Nelson*, we held that
3 the Government could not retain a fine previously paid by a defendant when
4 that defendant died while his appeal was pending. *Libous*, 858 F.3d at 67. We
5 reached this conclusion because we treated *Libous* “as if he never had been
6 indicted or convicted,” and thus there was “no legal basis on which the state
7 [could] retain a fine exacted from *Libous*.” *Id.* (internal quotation marks omitted).
8 Similarly, here, since Brooks’s convictions have abated and will therefore never
9 be final, the Government lacks the authority to keep the funds related to those
10 abated convictions.¹⁸ *See id.* at 67 (“Once *Libous*’s conviction is vacated, the state
11 is as much entitled to retain the fine as if *Libous* had been acquitted.”); *United*
12 *States v. Hayes*, 385 F.3d 1226, 1229–30 (9th Cir. 2004) (holding “that if the
13 government still retains funds . . . it must return those amounts” upon
14 successful collateral attack of a conviction).

¹⁸ We also need not decide in this appeal whether a defendant’s estate is entitled to recover restitution that has already been disbursed to victims. The Supreme Court’s majority opinion in *Nelson v. Colorado* does not directly address this issue, as it indicated that the restitution was in the control of the state, not the victims. *Nelson*, 137 S. Ct. at 1256. *But see Nelson*, 137 S. Ct. at 1262–63 (Alito, J., concurring in the judgment) (noting potential problems recovering payments made to victims and suggesting that “at least in some circumstances[,] refunds of restitution payments made under later reversed judgments are not constitutionally required”).

1 The Government also contends that the Supreme Court’s decision in
2 *Kokesh v. S.E.C.* distinguishes restitution from penalties or punishments, and
3 therefore Brooks’s restitution payments should not abate because they are not in
4 the nature of punishment. In *Kokesh*, the Supreme Court held that disgorgement
5 ordered as a consequence of a violation of securities laws was a “penalty” for
6 purposes of 28 U.S.C. § 2462, which imposes a five-year statute of limitation on
7 “enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise.”
8 137 S. Ct. 1635, 1639 (2017) (quoting 28 U.S.C. § 2462). The Supreme Court
9 concluded that a pecuniary sanction such as disgorgement constitutes a penalty
10 under § 2462 only if its purpose is punishment and deterrence, “as opposed to
11 compensating a victim for his loss.” *Id.* at 1642. Our holding here is not to the
12 contrary. We agree that restitution’s goal is victim compensation, not
13 punishment. Yet, a court may only order restitution as a consequence of a valid
14 conviction pursuant to statutory authority. Whether restitution is compensatory
15 rather than in the nature of punishment is irrelevant to this inquiry when the
16 conviction underlying the order of restitution has abated. Brooks’s restitution
17 order is therefore vacated for those counts on which he was convicted by a jury.

1 **b. Restitution for Convictions Obtained by Guilty Pleas**

2 Brooks pled guilty to three counts of certain tax offenses following a plea
3 agreement and plea proceeding in August 2011. In that plea agreement, he
4 waived his right to appeal the convictions or sentence imposed by the district
5 court if the term of imprisonment for the three counts was below 63 months and
6 ran concurrently to any other sentence. The court imposed a 60-month sentence
7 on one of the counts and concurrent 36-month sentences for the other two
8 counts. The court also imposed restitution of \$2.8 million, to be paid to the IRS.
9 Brooks did not appeal this sentence or convictions.

10 Because these counts of conviction were resolved by a guilty plea and he
11 did not appeal them, those convictions became final prior to Brooks's death. Any
12 restitution imposed as a result of the convictions on those counts, therefore, does
13 not abate because those convictions do not abate.

14 **III. Abatement and Forfeiture of Bail Bond**

15 Federal criminal defendants facing trial may be released on their own
16 recognizance. 18 U.S.C. § 3142(a)(1), (b). When a district court imposes a bail
17 bond order, however, the court has determined that an unsecured appearance

1 bond “will not reasonably assure the appearance of the person as required or will
2 endanger the safety of any other person or the community.” 18 U.S.C. § 3142(c).

3 As noted above, following Brooks’s sentencing (and before his death) the
4 family sureties moved to return the forfeited cash security under Fed. R. Crim. P.
5 46(f). Rule 46(f) governs bail forfeiture and provides that “the court must declare
6 the bail forfeited if a condition of the bond is breached,” but also states that “[t]he
7 court may set aside in whole or in part a bail forfeiture upon any condition the
8 court may impose if . . . it appears that justice does not require bail forfeiture.”
9 Fed. R. Crim. P. 46(f)(1), (2)(B). “[A] bail bond and its collateral may be forfeited
10 not only for the defendant’s failure to appear, but also for other violations of
11 bond conditions, including the defendant’s commission of a crime.” *United States*
12 *v. Gigante*, 85 F.3d 83, 85 (2d Cir. 1996) (per curiam). The district court denied the
13 motion of the family members to return the cash security.

14 The district court must evaluate the following factors in deciding a
15 remission of bond motion:

16 whether the defendant’s breach of the bond conditions was
17 willful; the cost, inconvenience and prejudice suffered by the
18 government as a result of the breach; . . . any explanation or
19 mitigating factors presented by the defendant; . . . whether the
20 surety has assisted in the apprehension of the defendant; and

1 whether the surety is a professional or a friend or member of the
2 defendant's family.

3 *United States v. Gambino*, 17 F.3d 572, 574 (2d Cir. 1994) (quoting *United States v.*
4 *Carvajal*, 674 F. Supp. 973, 974 (E.D.N.Y. 1987)). We review a district court's
5 denial of remission of forfeited bail security for abuse of discretion. *See id.*

6 In *Gambino*, two sureties appealed a district court's granting of a motion
7 for forfeiture of bail bond posted for the defendant who had been charged with
8 narcotics and racketeering violations. *Id.* at 573–74. Before trial, Gambino fled in
9 violation of his bail conditions, and was found after an extensive search at a hotel
10 in Florida. *Id.* The Government obtained forfeiture of the bail bond, but the
11 sureties later moved for remission of the bond under Fed. R. Crim. P. 46. *Id.* The
12 district court denied that motion, and upon review of the district court's orders
13 for abuse of discretion, this Court affirmed. In particular, we noted that in the
14 *Gambino* prosecution, which was a "high-profile narcotics and racketeering
15 case[]," the "deterrence value served by total forfeiture is especially important."
16 *Id.* at 575.

17 In this appeal, Terry Brooks and the Brooks children contest the district
18 court's denial of their motion to set aside the forfeited bail bond, and also
19 contend that Brooks's death abates the forfeiture of the cash security. Brooks's

1 estate contends that Brooks’s death abates the forfeiture of the portion of the cash
2 security posted by Brooks personally. Brooks also argued in his direct appeal
3 that his cash portion of the bond should be returned to him because of the defect
4 in the prior indictment, and the lack of clear and convincing evidence of his
5 violations of his bond conditions.¹⁹

6 **a. The Claim for Abatement of the Forfeited Bond Security**

7 First, we must decide whether the death of a criminal defendant while his
8 case is pending on appeal abates the previous forfeiture of a bond security where
9 the defendant violated pre-trial release orders and conditions. The Brooks family
10 and estate argue that because “death abates not only the appeal but also all
11 proceedings had in the prosecution from its inception,” *Libous*, 858 F.3d at 66
12 (quoting *Wright*, 160 F.3d at 908), the doctrine of abatement must also apply to
13 the forfeiture of the bail bond. We disagree. Although the district court’s finding
14 of Brooks’s violation of the terms of his bail bond order was a “proceeding,” that

¹⁹ As noted in footnote 15, *supra*, Brooks’s argument regarding the defective indictment is foreclosed by this Court’s decision in *United States v. Schlegel*, 687 F. App’x 26 (2d Cir. 2017), *petition for cert. filed*, No. 16-9701 (June 23, 2017). Brooks’s appeal of the district court’s revocation of his bond and the forfeiture of his security for lack of clear and convincing evidence is foreclosed by this Court’s denial of his prior interlocutory appeal. *See* No. 10-225-cr, *United States v. Brooks*. In any event, for the reasons discussed above, the district court did not clearly err in concluding that Brooks had violated the terms of his bail release order and ordering his bail revoked. Brooks did not join his family’s Rule 46 motion, nor did he file such a motion on his own behalf.

1 conclusion was not made to adjudicate Brooks's guilt or innocence for the
2 charged offenses. Rather, the bail forfeiture hearing was collateral to the
3 determination of guilt or innocence in Brooks's criminal case, arising out of a
4 violation of separate orders and conditions entered by the court and agreed to by
5 Brooks and his family members.

6 At Brooks's bond hearing, the district court was primarily concerned with
7 Brooks having access to financial resources to flee the country, following its
8 conclusion that he was a serious flight risk. In order to satisfy the district court
9 that Brooks would not flee, the conditions of Brooks's release included
10 surrendering his passport, returning all foreign assets to the United States,
11 subjecting his financial dealings to court oversight, disclosing all assets, and
12 posting a considerable cash security and an even higher bond. After the district
13 court approved the bond and its conditions, the Government subsequently
14 demonstrated that Brooks was violating these terms of the Order.

15 The Government did not argue that these actions were evidence of
16 independent criminal conduct or related to conduct for which Brooks was on
17 trial. Rather, the Government's extensive proffer showed violations of the terms
18 of the Order that were put in place to assure the district court that Brooks would

1 not flee. The terms of the Order were not part of the direct prosecution of the
2 case, but were part of the district court’s responsibility to assure the appearance
3 of a criminal defendant separate from the ultimate—and subsequent—
4 determination of the criminal defendant’s ultimate guilt or innocence.

5 We have also long held that a bail bond is interpreted “within the general
6 framework of suretyship and contract law.” *United States v. Martinez*, 151 F.3d 68,
7 73 (2d Cir. 1998) (quoting *United States v. Martinez*, 613 F.2d 473, 476 (3d Cir.
8 1980)). In other words, “[a] bail bond is a civil contractual agreement between the
9 government and the surety on behalf of the criminal defendant, and, if a
10 forfeiture is ordered the surety becomes the debtor of the government.” *United*
11 *States v. Santiago*, 826 F.2d 499, 502 (7th Cir. 1987). Even though the contract is
12 formed in relation to an adjunct criminal proceeding, “[w]hat a court can do to a
13 defendant and what it can do to a bail bond are quite different matters.” *United*
14 *States v. Beard*, 960 F.2d 153 (9th Cir. 1992) (unpublished opinion). The forfeiture
15 of a bail bond functions as damages for breach of the civil contract, not as a
16 punishment for the commission of a criminal offense. *See, e.g., United States v.*
17 *Barger*, 458 F.2d 396, 396 (9th Cir. 1972) (per curiam) (“This penalty [forfeiture of
18 bail bond] is one for damages and is deemed civil, not criminal, in nature.”);

1 *United States v. Roher*, 706 F.2d 725, 726 (5th Cir. 1983) (“[A] bond forfeiture
2 motion is a civil matter.” (quoting *United States v. Cervantes*, 672 F.2d 460, 461 n.2
3 (5th Cir. 1982)). Because bail bonds are an independent and collateral matter, the
4 forfeiture of a bail bond does not abate with the death of a criminal defendant
5 under the doctrine of abatement *ab initio*. Indeed, this Court, as well as others,
6 has concluded that the death of a defendant subject to a forfeited bail bond does
7 not by itself require return of the security. *United States v. Agueci*, 379 F.2d 277,
8 278 (2d Cir. 1967) (per curiam) (affirming district court forfeiting bond of
9 defendant who had died while on bail); *see also United States v. Parr*, 594 F.2d 440,
10 442 (5th Cir. 1979) (“The fact that [defendant] later died and the criminal
11 proceeding against him abated does not constitute a defense to [surety] in the
12 forfeiture proceeding.”); *Detroit Fid. & Sur. Co. v. United States*, 59 F.2d 565, 568
13 (8th Cir. 1932) (“[I]f the appellant was legally liable under the facts or conditions
14 as they existed at the time of the forfeiture, the fact that subsequently the
15 principal died and the criminal proceeding was therefore dismissed, would not
16 constitute a defense in a proceeding of this nature.”). These decisions recognize
17 that the doctrine of abatement *ab initio*—focused on avoiding improper *criminal*

1 consequences for a deceased defendant—does not apply in the context of bond
2 forfeiture proceedings.

3 Further, bond forfeiture also does not implicate the two principles
4 underlying the doctrine of abatement *ab initio* (finality and punishment). Brooks
5 previously filed a interlocutory appeal of the revocation of his bail to this Court,
6 and we affirmed the revocation. We address the family's later motion for return
7 of the forfeited bail security pursuant to Fed. R. Crim. P. 46(f) below. But in
8 neither case is there a non-final matter to abate, one that is tied to the ultimate
9 determination of guilt or innocence. Similarly, a forfeited bail bond is not a
10 punishment for a criminal offense that ceases to have purpose after a defendant's
11 death, but instead is a remedy for a breach of the terms of the bail release order.

12 It is also noteworthy that the *Gambino* factors do not specifically include
13 determining whether the defendant's conviction remained valid. *See Gambino*, 17
14 F.3d at 574. As a result, if a defendant is later acquitted or his conviction is
15 vacated, a district court is not required to return a forfeited bail bond. *See, e.g.,*
16 *Cervantes*, 672 F.2d at 461 n.2 (rejecting argument that acquittal is a basis for

1 setting aside forfeiture); *United States v. Nordenholz*, 95 F.2d 756, 758 (4th Cir.
2 1938) (denying return of forfeited bond after Government had case dismissed).²⁰

3 While it is true that “but-for” the prosecution of the case against him,
4 Brooks would not have been subject to the bail bond and the resulting forfeiture,
5 this argument fails. When the district court in this case imposed the terms of pre-
6 trial release on Brooks, it did so for reasons independent of the determination of
7 his guilt or innocence. These terms and conditions were not determined by the
8 outcome of the offenses prosecuted, and therefore the principles of abatement do
9 not apply.

10 **b. The Denial of the Motion to Set Aside under Fed. R. Crim. P. 46**

11 Having concluded that the bail forfeiture does not abate with Brooks’s
12 death, we now turn to whether the district court erred in its conclusion that, in
13 applying the *Gambino* factors, the interests of justice did not require the return of
14 the security. Brooks’s family members particularly dispute the district court’s
15 finding that Terry Brooks and the children were involved in the Czerny Kot
16 scheme.

²⁰ We have found no cases in which a defendant whose conviction has been vacated has subsequently obtained the return of forfeited bail under Fed. R. Crim. P. 46(f). If the validity of the forfeiture depended only on the validity of the conviction, then such motions under Fed. R. Crim. P. 46 would be commonplace and successful.

1 The district court concluded that forfeiture was proper because, during the
2 course of his pre-trial release, “Brooks repeatedly misrepresented to the Court
3 that he was compliant with the financial monitoring terms of his bail agreement”
4 while “he was working feverishly to secret [sic] his assets in nearly every corner
5 of the world.” J.A. 1439–40 (emphasis in original). The ruling recounted the facts
6 detailed in the Jett affidavit, and noted that the court had been presented “with
7 sufficient evidence that Brooks ha[d] violated the terms of the Court’s Bail
8 Release Order” and therefore revoked bail. J.A. 1441.

9 In denying the motion, the district court considered the willfulness of
10 Brooks’s breaches “heavily against” him, J.A. 1443, and noted that “[m]ovants do
11 not offer any explanation for the violations or mitigating circumstances,” J.A.
12 1444. The district court noted that the Government presented evidence that other
13 family members than David and Jeffrey had taken a plane to Switzerland to
14 bring assets to a bank and that the passports of David’s children were used to set
15 up the Czerny Kot scheme. The court cited other district court rulings for the rule
16 that the costs and efforts made to apprehend a defendant who had fled were not
17 the only considerations in revoking bail, but that forfeiture can be a sanction for
18 any violation of the terms of a bail order. The district court termed movants’

1 argument that “they did not participate in violations of Brooks’[s] bail agreement
2 because their involvement in Czerny Kot predated the execution of Brooks’[s]
3 bail agreement” as “senseless” because movants do not dispute that they helped
4 form Czerny Kot.²¹ J.A. 1445.

5 The Appellants’ arguments to the contrary fail for two reasons. First, Fed.
6 R. Crim. P. 46 does not require that sureties be involved in the violation of the
7 terms of the bond order to forfeit their interests. All that is required for the
8 security (or the bond) to be forfeited is that the defendant violate one of the
9 terms. Even if the district court erred in determining the extent of the family’s
10 involvement, they were still liable as sureties for Brooks’s breach. Second, the
11 district court’s findings of facts were not clearly erroneous as to the sureties’
12 involvement, given the Government’s extensive investigation and presentation to
13 the district court regarding the family’s direct involvement in the concealment
14 and manipulation of the funds.

15 Upon review, the district court’s application of the *Gambino* factors here
16 did not constitute an abuse of discretion. *See Gambino*, 17 F.3d at 574. First, the
17 district court correctly found that Brooks’s breach of the bond conditions was

²¹ The Government admits that the Appellants did not concede their involvement, but contends that the family does not dispute that they were involved in setting up the scheme.

1 willful, as Brooks had multiple opportunities to disclose the existence and
2 concealment of his overseas assets and did not. Second, Brooks presented no
3 adequate explanation or mitigating factors for his lack of disclosure. Third, in the
4 context of this bail security forfeiture—where the defendant subject to the bail
5 did not flee but rather violated terms of the order related to disclosure of assets—
6 the sureties’ assistance in recovering the defendant is not dispositive. As for the
7 final *Gambino* factor, in this case the sureties were members of the defendant’s
8 family, which would usually weigh in favor of returning the forfeited security.
9 However, given the nature of the sureties’ obligations under the Order and the
10 nature of the breach—and their involvement in it—the district court did not
11 commit error in denying the motion to set aside the forfeited security to the
12 sureties.

13 These appellants also challenge the limited expenses and efforts incurred
14 by the Government as a result of this breach. Because Brooks did not flee, they
15 assert that the forfeiture was not necessary to deter future violations of the Order
16 for lack of disclosure, and also assert that the forfeited amount was excessive in
17 comparison to other cases. These arguments also fail after applying the *Gambino*
18 factors. Further, they do not diminish the valid concerns of the district court in

1 imposing the bail bond Order under the terms that it did, given the unusual
2 circumstances of this case and Brooks's extensive assets at the time of his arrest.

3 The amount of the entire bond was \$400 million, apparently the largest
4 ever imposed on an individual defendant, and the cash security posted was
5 originally \$48 million, also an extraordinary cash security. These amounts were
6 required by the district court because of the nature of the crime, the amounts
7 allegedly involved in the crimes, and Brooks's wealth. They arose out of a
8 concern that Brooks would be able to flee and access those accounts to aid his
9 flight.²²

10 The fact that Brooks did not actually flee does not outweigh the other
11 factors that favored forfeiture of the security under the specific terms of this
12 Order. The district court did not order the entire bail bond forfeited—only the
13 cash security—because the Order's terms “did not include attempts to conceal
14 assets within the category of violations that would result in [the] forfeiture of the
15 entire personal recognizance bond” under the two-tier arrangement. J.A. 1260.
16 See footnote 9, *supra*. Also, as the Government demonstrated, it expended

²² The district court was also concerned in 2008, well prior to the evidence submitted before trial in 2010, that Brooks and his brother Jeffrey had a history of financial regulatory violations and undertaking actions that appeared to be secreting assets.

1 significant resources in investigating Brooks's concealment and transfer of assets.
2 Finally, in light of the scope of the fraudulent scheme and wealth of Brooks, the
3 amount of the bail security forfeited was not excessive.

4 For these reasons, the district court did not abuse its discretion in denying
5 the motion to set aside their forfeited security.

6 CONCLUSION

7 The death of David Brooks abates all of his convictions that were pending
8 appeal at the time of his death and any corresponding restitution. His death does
9 not abate the other convictions or restitution nor the order of bail bond forfeiture
10 for the cash security imposed as a result of his violations of the terms of his
11 release on bond. For the foregoing reasons, the motion to abate by Brooks is
12 **GRANTED** in part and **DENIED** in part, Brooks's judgment of conviction is
13 **VACATED** in part, the motion for abatement by the other appellants is
14 **DENIED**, the order denying the motion to set aside the bail forfeiture is
15 **AFFIRMED**, the Government's cross-appeal is **DISMISSED**, and the case is
16 **REMANDED** for the dismissal of the indictment as to counts I-XI, XV-XVII.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 13-3213(L), 13-4288(CON), 14-2577(CON),
14-2682(CON), 15-1156(CON), 15-2058(CON), 13-3672(XAP)

UNITED STATES OF AMERICA,
Appellee-Cross-Appellant,

-v.-

DAWN SCHLEGEL, PATRICIA LENNEX, SANDRA HATFIELD,
Defendants,

DAVID H. BROOKS,
Defendant-Appellant-Cross-Appellee,

TERRY BROOKS, VICTORIA BROOKS,
ANDREW BROOKS, ELIZABETH BROOKS,
Interested Parties-Appellants,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

PETITION FOR PANEL REHEARING AND REHEARING EN BANC
AND MOTION FOR PANEL RECONSIDERATION AND
RECONSIDERATION EN BANC BY APPELLANT DAVID BROOKS

RICHARD C. KLUGH, ESQ.
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STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the Panel decision conflicts with the following decisions of the Supreme Court of the United States and the precedents of this Court and that consideration by the full Court is necessary to secure and maintain uniformity of this Court's decisions:

Durham v. United States, 401 U.S. 481, 483 (1971) (adopting abatement *ab initio* rule 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”), *overruled on other grounds*, *Dove v. United States*, 423 U.S. 325 (1976);

United States v. Macklin, 523 F.2d 193, 195–97 (2d Cir. 1975) (indictment by grand jury after its term expired is void *ab initio* and may be challenged at any time, including by defendant who pled guilty);

United States v. Jacobson, 691 F.2d 110, 116 (2d Cir. 1982) (courts have power to dismiss indictment, even post-trial, based on improper actions by prosecutor in grand jury); and

Menna v. New York, 423 U.S. 61, 62 (1975) (guilty plea does not waive appeal of constitutional issues arising from prosecutorial impropriety in filing indictment); *Loving v. Virginia*, 388 U.S. 1 (1967) (same).

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves the following questions of exceptional importance:

1. Does a conviction resulting from a guilty plea become final despite the timely filing of a notice of appeal from the judgment of conviction and the pendency of the appeal at the time of the defendant's death?
2. Where a defendant dies during appeal, but abatement is granted only as to part of the appeal, must the appeal proceed to full briefing and merits resolution on the appeal's unabated components?

Respectfully submitted,

/s/ Richard C. Klugh
Richard C. Klugh

TABLE OF CONTENTS

Certification by Counsel Regarding Request for En Banc Review	i
Table of Citations	iv
Statement of the Issues Asserted to Merit En Banc Consideration	1
Course of Proceedings and Statement of Facts	1
Argument and Citations of Authority	5
I. The Panel violated the abatement <i>ab initio</i> rule by rejecting the government’s concession of abatement of the convictions and by creating an unwarranted abatement exception for appeals involving guilty pleas	5
II. The merits of appellant’s claims regarding fundamental indictment defects and the highly-punitive bail forfeiture should not have been dismissed following appellant’s death and the bail forfeiture should have abated where it was a punitive sanction for contumacious failure to follow a court order and the appeal rested in part on merits claims of jurisdictional error and prosecutorial misconduct in prosecuting Brooks for nearly two years without an indictment	12
Conclusion	15
Certificate of Compliance	16
Appendix <i>United States v. Brooks</i> , No. 13-3213, 872 F.3d 78 (Sept. 20, 2017)	

TABLE OF CITATIONS

CASES

<i>Blackledge v. Perry</i> , 417 U.S. 21 (1974)	9
<i>Clay v. United States</i> , 537 U.S. 522 (2003)	11
<i>Durham v. United States</i> , 401 U.S. 481 (1971)	i, 5, 7, 12
<i>Dove v. United States</i> , 423 U.S. 325 (1976)	i, 12
<i>Loving v. Virginia</i> , 388 U.S. 1 (1967)	i
<i>Menna v. New York</i> , 423 U.S. 61 (1975)	i, 9
<i>Southern Union Co. v. United States</i> , 567 U.S. 343 (2012)	13
<i>United States v. Agueci</i> , 379 F.2d 277 (2d Cir. 1967)	14
<i>United States v. Cordoba-Murgas</i> , 422 F.3d 65 (2d Cir. 2005)	10
<i>United States v. DeMichael</i> , 461 F.3d 414 (3d Cir. 2006)	8
<i>United States v. DiBruno</i> , 438 Fed.Appx. 198 (4th Cir. 2011)	8
<i>United States v. Jacobson</i> , 691 F.2d 110 (2d Cir. 1982)	i
<i>United States v. Macklin</i> , 523 F.2d 193 (2d Cir. 1975)	i, 7, 10
<i>United States v. Miranda</i> , 780 F.3d 1185 (D.C. Cir. 2015)	9
<i>United States v. Pogue</i> , 19 F.3d 663 (D.C. Cir. 1994)	5, 8
<i>United States v. Reyna-Breceda</i> , 109 Fed.Appx. 651 (5th Cir. 2003)	8
<i>United States v. Ruiz</i> , 536 U.S. 622 (2002)	9

United States v. Schlegel, 687 Fed.Appx. 26 (2d Cir. 2017) 4

United States v. Wright, 160 F.3d 905 (2d Cir. 1998) 5

STATUTORY AUTHORITY

U.S. Const., amend. V 6, 7

U.S. Const., amend. VI 13

Fed. R. Crim. P. 11 9

Fed. R. Crim. P. 11(b)(1)(N) 9

Fed. R. Crim. P. 46 14

STATEMENT OF EN BANC ISSUES

- I. Did the Panel err in rejecting the government's concession that appellant's death during appeal of his convictions required abating all of the convictions and dismissing the indictment where the Panel failed to abate convictions arising from a guilty plea?
- II. Did the Panel err by foreclosing review of claims regarding fundamental indictment defects and a highly-punitive bail forfeiture, where:
 - (a) due process requires that properly-raised appellate issues that are not abated must proceed on the merits; and
 - (b) bail forfeiture should have abated where appellant's challenge to bail forfeiture included merits claims of jurisdictional error and prosecutorial misconduct in prosecuting him for nearly two years without a grand jury indictment?

COURSE OF PROCEEDINGS AND STATEMENT OF FACTS

David Brooks died while appealing his convictions and sentences in a prosecution arising from his founding and operating a successful body armor company that produced protective gear for the United States military. See Appendix (*United States v. Brooks*, 872 F.3d 78, 82 (2d Cir. 2017)).

In his initial brief filed shortly before his death, appellant Brooks challenged the denial of his motion to dismiss his indictment, and alternatively requested a remand for evidentiary proceedings, on claims of jurisdictional indictment defects and

prosecutorial misconduct in concealing the government’s use of an invalid indictment for 21 months. Br:16, 21–50.

Brooks learned of the fundamental violation of his grand jury indictment rights when the district court entered an order, A-2097, providing notice of the defect—after Brooks’s guilty plea to tax counts and after his jury trial on securities offenses, but prior to sentencing. Brooks timely sought dismissal. See A-2103 (motion seeking release of grand jury transcripts, other discovery, an evidentiary hearing, and dismissal of all charges with prejudice); Br:13. All parties acknowledged that Brooks’s district court claim for dismissal applied to the entire indictment, including tax counts to which Brooks pled guilty. See A-2313 (district court order recognizing that Brooks’s motion sought “dismissal of all charges with prejudice”). Confirming that the parties understood Brooks had preserved the jurisdictional and related indictment challenges despite his guilty plea, the government agreed to entry of the district court’s order staying restitution—including as to the tax counts—pending Brooks’s appeal. *Brooks*, 872 F.3d 78, 90 (“The district court stayed the payment of Brooks’s restitution while this case was on appeal. The disbursement of the restitution by the district court in this case was dependent on a final conviction, not on an earlier availability of funds as the Government suggests.”).

Upon Brooks’s death, his counsel moved for abatement of his convictions and

sentence. Doc:507. The government responded, Doc:544, agreeing with Brooks that the convictions must be abated and the indictment dismissed, and contesting only abatement of restitution and of bail forfeiture sanctions that Brooks incurred when the district court found he had not repatriated all of his foreign assets. Gov't-Resp:2, 9, 22. Regarding the tax counts to which Brooks pled guilty, the government contended that a sentencing appeal waiver—in a plea agreement that is not part of the district court record, but was added to the appellate record by the government's filing of an appendix, GA-20, with their response to the abatement motion—permitted the tax count restitution to stand despite abatement of the tax count convictions. Gov't-Resp:22. Brooks replied to the government's response addressing only the contested issues of restitution and bail forfeiture. Doc:578.

Oral argument was granted on the abatement motion and was consolidated with oral argument in a related appeal by bail sureties (Brooks family members). Doc:591. At oral argument, the government maintained its limited opposition to abatement, offering argument only on two issues—restitution and bail forfeiture—having conceded abatement of the convictions and that the indictment must be dismissed.

The Panel, rejecting the government's concession that the convictions should be abated and the entire indictment dismissed, ruled that Brooks's guilty plea became final upon sentencing, was not pending on appeal when he died, and did not abate.

Brooks, 872 F.3d at 87 (“We note, however, that the application of the doctrine of abatement is not indivisible; many defendants (like Brooks) are charged with multiple counts and may be convicted by a jury on some counts and by a plea of guilty on others. Those convictions may become final at different times, and a defendant may choose not to appeal every conviction. The doctrine of abatement [applies] only as to those counts as to which the conviction has not yet become final.”).

The Panel also concluded that bail forfeiture sanctions should not abate and that Brooks’s indictment issues—applicable also to the bail forfeiture claim—were foreclosed on the merits along with Brooks’s other arguments on bail forfeiture. *Brooks*, 872 F.3d at 86 n. 15 (“In this appeal Brooks contested numerous proceedings below on the basis of the invalidly-returned first superseding indictment, and pressed a similar argument with respect to the return of his forfeited bail security. All of these arguments are foreclosed by this Court’s decision in *United States v. Schlegel*, 687 Fed.Appx. 26 (2d Cir. 2017) ... in which the Court concluded that the ‘district court properly declined to dismiss the second superseding indictment.’ *Id.* at 29.”). The Panel did not address the government’s concession that absent abatement the bail forfeiture matter should proceed on appeal and that “Brooks’s estate could pursue [a bail forfeiture] argument were it substituted for Brooks as suggested in the preceding section.” Gov’t-Resp:24.

ARGUMENT AND CITATIONS OF AUTHORITY

- I. The Panel violated the abatement *ab initio* rule by rejecting the government's concession of abatement of the convictions and by creating an unwarranted abatement exception for appeals involving guilty pleas.

In the 46 years since the Supreme Court adopted the rule of abatement *ab initio* in *Durham v. United States*, 401 U.S. 481, 483 (1971), the courts have steadfastly held that where a defendant dies during direct appeal, the indictment must be dismissed—including where the appeal followed a guilty plea—if the appeal could potentially affect the conviction. *See, e.g., United States v. Pogue*, 19 F.3d 663, 665 (D.C. Cir.1994) (“[A]ppellant had filed a timely appeal before his death; the appeal was not withdrawn; and, had he lived, appellant could have challenged the plea agreement and underlying conviction.”); *see also United States v. Wright*, 160 F.3d 905, 908 (2d Cir. 1998) (“First, ‘the interests of justice ordinarily require that [a defendant] not stand convicted without resolution of the merits of an appeal.’”) (citing *Pogue*, 19 F.3d at 665). Mr. Brooks has now become the only federal defendant since *Durham* to remain convicted despite his death during the pendency of his direct appellate challenge to his convictions and despite the government's concession that his convictions must be abated.

Even if there could be an abatement exception where a defendant raises only sentencing issues that could not affect the conviction, Brooks's case would not

qualify, where the notice of appeal announced appeal of convictions and sentences, A-2782, and where briefing by Brooks argued for dismissal of the entire indictment and vacatur of all convictions. Br:16 (“Brooks’ Fifth Amendment indictment clause rights were violated where all charges against him derived from a void charging document returned by former grand jurors and where the record showed no independent or curative procedural safeguards.”). That Brooks’s appeal challenged all of his convictions is confirmed by the government’s concession that all of his convictions must be abated. And the fact that all parties understood that Brooks’s pre-sentencing motion to dismiss applied to all counts of the indictment and was a permissible subject of appeal is confirmed by the district court’s granting of the stay of all restitution—including on the tax counts—pending appeal. A-2783 (“Defendant Brooks has moved for an order staying restitution pending the disposition of his appeal, and the government has consented to the entry of such an order.”).

It is clear that by challenging the jurisdictional invalidity of the indictment and government misconduct relating to the grand jury, Brooks perfected his appeal of all convictions in his case.¹ In fact, in addressing the invalidity of an indictment returned by an expired grand jury, this Court reversed the conviction despite the defendant’s

¹ Notably, because the government never filed an answer brief in response to Brooks’s initial brief, Brooks, if he had survived, could have sought leave to augment his initial filing if it somehow insufficiently challenged the entire indictment despite repeatedly stating in the brief that the relief sought applied to the entire indictment.

guilty plea. *United States v. Macklin*, 523 F.2d 193, 196 (2d Cir. 1975) (holding that the fundamental “defect cannot be waived by a defendant, even by a plea of guilty”).

The Panel decision does not address the government’s concession of abatement of all convictions, the import of the district court’s stay of restitution on the guilty plea counts, or the fact that the contested indictment issues on appeal affect the guilty-plea counts as well. Instead, the Panel decided the indictment issue on the merits—the very approach that *Durham* bars—and relied on an appeal waiver that, at most, merely mirrors the fact of the plea itself that the district court explained as waiving only pre-plea motions. See Dist. Ct. Dckt. 1623 at 8–9 (Aug. 10, 2011 transcript; court advises defendant: “[T]he variety of motions that you made with respect to the tax counts, those are all gone. You can’t come back and raise those again.”). No one involved in the case deemed any plea waiver to be applicable to the later-disclosed Fifth Amendment and jurisdictional issues arising from the 21 months of prosecution of the defendant under an invalid indictment and the failure of a successor grand jury to make an independent indictment decision.² See A-2311–30 (district court order on

² It is unclear whether the plea agreement formally bound the parties. It was not fully executed, it is not of record in the district court, and the record does not confirm its approval by the requisite officials. See GA-26–27 (“[T]his agreement must be signed by all signatories listed below and must be approved by the Tax Division of the United States Department of Justice.”). To the limited extent that the district court addressed an appeal waiver at the plea colloquy, it was treated as a *sentence* appeal waiver, not one that would bar review of the later-raised jurisdictional issues pertaining to the indictment’s validity. Dist. Ct. Dckt. 1623 at 1–19.

dismissal motion).

With regard to abatement of convictions imposed due to guilty pleas, even where no challenge to the conviction has been presented in an appellate brief, the Fourth, Fifth, and D.C. Circuits have all followed the rule of abatement *ab initio*. See *United States v. DiBruno*, 438 Fed.Appx. 198, 199 (4th Cir. 2011) (“Although DiBruno died before his counsel filed an opening appellate brief raising any issues for review, there existed at the time of DiBruno’s death at least the possibility that his convictions might be overturned.”); *United States v. Reyna-Breceda*, 109 Fed.Appx. 651 (5th Cir. 2003) (defendant was “convicted after a guilty plea” and his sentence was affirmed on direct appeal, but abatement was required where defendant died before issuance of the mandate); *United States v. Pogue*, 19 F.3d 663, 665 (D.C. Cir. 1994) (appellant’s counsel’s docketing statement asserting only an appeal from the sentence was not controlling); cf. *United States v. DeMichael*, 461 F.3d 414, 417 (3d Cir. 2006) (recognizing that abatement is required despite guilty plea if, at the time of defendant’s death, “**the possibility remains** that the conviction itself might be overturned”) (emphasis added).

The Supreme Court recently heard argument on whether its rule permitting appeal of a conviction’s constitutionality despite a guilty plea extends beyond the category of the prosecutor’s improper filing of an indictment. See *Class v. United*

States, No. 16-424, 2017 WL 4517133 (transcript of oral argument conducted October 4, 2017). In *Menna v. New York*, 423 U.S. 61, 62 (1975), the Supreme Court held that a defendant who pleads guilty can still raise on appeal any constitutional claim that does not depend on challenging his “factual guilt. “In *Blackledge* [*v. Perry*, 417 U.S. 21 (1974),] and *Menna*, ... the very act of haling the defendants into court completed the constitutional violation.” *United States v. Miranda*, 780 F.3d 1185, 1190 (D.C. Cir. 2015). Brooks made such a constitutional argument on appeal.

Nor has the Supreme Court approved any form of waiver of appellate rights preserved under *Menna*. The Supreme Court’s only examination of due process limits on plea-bargained waivers came in *United States v. Ruiz*, 536 U.S. 622 (2002). *Ruiz* held that the government may condition a plea agreement upon a waiver of the right to receive impeachment information from the government, but it left open whether the Constitution bars the government from insisting upon a waiver of the right to receive other *Brady* material or a waiver of other rights. *See id.* at 629. Rule 11 of the Federal Rules of Criminal Procedure, for example, contains no provision for any special appeal waiver other than a *sentence* appeal waiver. *See Fed. R. Crim. P. 11(b)(1)(N)*. The government’s failure to assert a waiver argument as to Brooks’s constitutional and jurisdictional claims was well founded in this case.

The Supreme Court’s decision in *Class* may clarify the extent to which a

defendant may pursue on appeal constitutional claims raised **prior** to entry of the guilty plea, but particularly as to constitutional issues that arise and are preserved **after** the plea and **before** sentencing, no waiver by guilty plea bars consideration of the issue. And it remains clear that where a prosecutor has violated the defendant's due process rights in seeking and maintaining an indictment lacking a foundational basis, in that no grand jury returned it, a defendant who learns of that defect after the plea may challenge its validity. *Macklin*, 523 F.2d at 195-97; *United States v. Cordoba-Murgas*, 422 F.3d 65, 70 (2d Cir. 2005) ("The government's indictment-waiver claim was effectively refuted thirty years ago [in *Macklin*].").

The issue raised by the panel's departure from precedent warrants en banc review because the decision conflicts with precedent and creates substantial due process concerns. Even if the guilty-plea convictions do not abate, the deceased Mr. Brooks was still entitled to have the appellate claims relating to them—concerning grand jury improprieties regarding a jurisdictionally invalid indictment that was not returned by a grand jury—heard on the merits, if necessary through substitution of his estate. And even if the Panel's conclusion of a valid sentence appeal waiver were correct, so as to bar abatement of the tax count restitution in this context, that issue is distinct from the requirement to abate the indictment *ab initio* where there was a potential for conviction relief based on Brooks's indictment claims. Br:21–50.

While the panel appears to have characterized the non-final tax convictions resulting from a guilty plea as *final* as of the date of entry of the plea or sentencing, that formulation violates finality principles and precedent. *See, e.g., Clay v. United States*, 537 U.S. 522, 524 (2003) (calculating finality of judgment from resolution of appellate proceedings). To the extent that Brooks’s agreement to pay a tax bill was not challenged on appeal and was the subject of an agreement with independent and mutual benefit, it could survive abatement despite the abatement of the convictions. Thus, there is no reason for this case to be resolved by discounting Brooks’s actual appellate claims where the government could preserve its tax lien under a waiver theory, but cannot maintain Brooks’s non-final convictions.

The government’s concession that all convictions must be abated in this case was not an accident. The government made the same concession in another guilty-plea case pending in this Court, even where it had filed—unlike Brooks’s case—a motion to dismiss appeal based on sentence appeal waiver and even though the defendant had raised no issue affecting his conviction: *See United States v. Ippolito*, No. 16-3425, Doc. 96, Gov’t Resp. to Abatement Motion at 14 (filed 6/26/2017) (“Ippolito’s conviction should be vacated and the case remanded for dismissal of the indictment against him.”). Thus, entirely apart from whether the tax count restitution survives due to a sentence appeal waiver, the tax count convictions must abate.

- II. The merits of appellant’s claims regarding fundamental indictment defects and the highly-punitive bail forfeiture should not have been dismissed following appellant’s death, and the bail forfeiture should have abated where it was a punitive sanction for contumacious failure to follow a court order and the appeal rested in part on merits claims of jurisdictional error and prosecutorial misconduct in prosecuting Brooks for nearly two years without an indictment.

Under *Durham v. United States*, 401 U.S. 481 (1971), “death pending direct review of a criminal conviction abates not only the appeal but also ***all proceedings had in the prosecution from its inception.***” *Id.* at 483 (emphasis added), *overruled on other grounds*, *Dove v. United States*, 423 U.S. 325 (1976) (holding that abatement is not required on certiorari review following the direct appeal).

The Panel ruled that forfeiture of \$19 million in bail deposits by Brooks and his family member sureties was not punitive, was merely a collateral part of the criminal proceeding, and did not abate. *Brooks*, 872 F.3d at 94 (“[A] forfeited bail bond is not a punishment for a criminal offense that ceases to have purpose after a defendant’s death, but instead is a remedy for a breach of the terms of the bail release order.”).

Brooks’s appeal raised arguments regarding the impropriety of the bail forfeiture due to the government’s grand jury misconduct, including Brooks’s request for a remand for further proceedings. Because the issues relating to bail forfeiture and indictment invalidity on appeal were interrelated, abatement of the proceedings *ab initio* compelled vacating the bail forfeiture, particularly where the wrongful

indictment led to substantial financial loss by Brooks in two years of defending the case and paying for private monitoring while on bond. And because the sanctions were extraordinarily punitive and untethered to any remedial need, they should not have been viewed as merely collateral to the criminal prosecution that served as the justification for their imposition and amount. *See Southern Union Co. v. United States*, 567 U.S. 343, 351–52 (2012) (“[W]here the defendant is an individual, a large fine may engender a significant infringement of personal freedom.”) (internal citations and quotation marks omitted). In *Southern Union*, the Supreme Court held that where “a fine is substantial enough,” it triggers additional constitutional protections. *Id.* at 352 (applying Sixth Amendment protections “in light of the seriousness of that punishment”). The Panel acknowledged the unprecedented amount of the bail forfeiture sanction, applied in a case where no criminal violation or flight was alleged and where the sanctions were linked to the nature of the charges, the very factor that Brooks challenged as jurisdictionally invalid.

Apart from the remedy of dismissal of the indictment, Brooks’s discovery demands and request for hearing on his indictment claims meant that the proceedings in the district court, including as to whether the government violated his constitutional rights through prosecutorial misconduct were still pending and formed part of the relevant criminal proceedings in which the bail forfeiture issues must be viewed.

Brooks's noncriminal conduct found by the district court was not a failure to appear or attempt to flee. But Brooks lost the opportunity to fully litigate the matter—and indeed had not yet even been able to seek remission of the bail forfeiture under Fed. R. Crim. P. 46 during the pendency of his appeal.

The merits of the case, and the significance of the charges wrongly filed, were inextricably linked to the exorbitant forfeiture. Abatement of all proceedings required abatement of the bail forfeiture penalty as well. But even if abatement were not required, due process compels a full appeal of the proffer-based forfeiture of \$19 million in this case. *See* Gov't-Resp:24 (agreeing that if not abated, the bail forfeiture should be subject to a merits appeal).³

In almost all bail forfeiture cases, the defendant is a fugitive, and being a fugitive, forfeits his right to appeal. The fugitive disentitlement doctrine did not apply in this case; hence the substantial merits of the abatement claims and the indictment issues remained. *Cf. United States v. Agueci*, 379 F.2d 277, 278 (2d Cir. 1967) (fugitive case where no appeal was filed by fugitive defendant).

³ The Panel resolved indictment issues and remedies without full briefing; the only matter set for argument was the abatement motion and the government conceded the bail forfeiture merits could not be fully reached and required substitution of the estate. The Panel based its merits ruling on a non-precedential decision in the severed appeal of a co-defendant that did not present or address all of appellant's indictment claims.

The Panel's claim of a prior appeal that resolved aspects of the bail forfeiture appeal is mistaken, at least in part. *Brooks*, 872 F.3d at 92 n. 19. The bail forfeiture order was not part of the prior emergency bond motion as to which only release of the defendant from custody was at issue; the forfeiture had yet not been decided by the district court when the bond motion was filed. The bail forfeiture should have abated or the matter should have been remanded to the district court. Alternatively, the bail forfeiture appeal should have proceeded on the merits.

WHEREFORE, the Court should grant rehearing or rehearing en banc, or alternatively, reconsideration or reconsideration en banc.

Dated: Miami, Florida
December 4, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This document complies with the word limit of Fed. R. App. P. 35 because, excluding the parts of the document exempted by the Rules, this document contains 3,872 words. This document complies with the typeface requirement of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 27(d)(1)(E) because the document has been prepared using WordPerfect in a proportionally spaced typeface with Times New Roman 14-point font.

s/ Richard C. Klugh
Richard C. Klugh

**UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT**

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 12th day of January, two thousand eighteen,

United States of America,

Appellee-Cross-Appellant,

v.

David H. Brooks,

Defendant- Appellant- Cross- Appellee,

Dawn Schlegel, Patricia Lennex,

Defendants,

Terry Brooks, Victoria Brooks, Andrew Brooks,
Elizabeth Brooks,

Appellants.

ORDER

Docket No: 13-3213(L)
13-3672(XAP)
13-4288(Con)
14-2577(Con)
14-2682(Con)

Appellant-Cross-Appellee David H. Brooks filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk


