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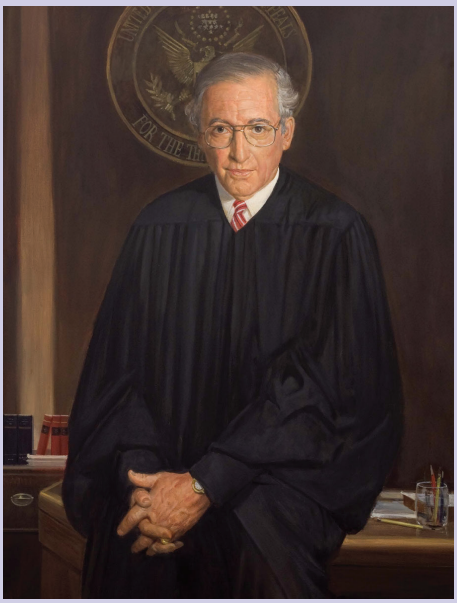
A TRIBUTE TO JUDGE MORTON I. GREENBERG

Judge Michael A. Chagares
U.S. Court of Appeals for the Third Circuit

We mourn the passing earlier this year of Judge Morton I. Greenberg. I write this tribute about the man who gave me my start in the law as a law clerk, and who was also a mentor and friend and later a colleague on the United States Court of Appeals for the Third Circuit. Judge Greenberg was known in legal circles for his razor-sharp intellect, his commonsense solutions to conflicts, his fairness and open-mindedness, his incredible work ethic, and his polite and dignified treatment of all who appeared before him. Those who knew him off of the bench were struck by his wry sense of humor, his generosity of spirit, his zeal for life, his integrity, his humility, his love for his wife and family, and his humanity.



Judge Greenberg's impact on our system of justice cannot be underestimated. He served as a judge for an incredible forty-eight years. In 1973, after practicing law in Cape May County, New Jersey and at the New Jersey Attorney General's Office, he began as a judge of the Superior Court of New Jersey and joined the Court of Appeals for the Third Circuit in 1987. As a Circuit Judge alone, Judge Greenberg issued over 500 published opinions and many more unpublished opinions. His opinions are uniformly clear and practical, and his intellectual heft is unmistakable. He wrote many noteworthy opinions that will be cited for years to come but cared deeply about every opinion, as he understood the importance of his rulings to litigants. Moreover, Judge Greenberg moved incredibly quickly in pushing out his opinions. I can recall when I was a law clerk, Judge Greenberg noting that while precision was critical, we had to be conscious of not "polishing the apple too much," so the litigants could receive a decision as soon as possible. More than a few of my colleagues on the Court of Appeals have questioned "how does he do it?"

This intellectual giant could have comported himself with airs. But he did not. He spoke plainly and treated every person respectfully and as an equal. Judge Greenberg genuinely liked people and that was obvious by the way he treated those around him. On one occasion, for instance, I bore witness to Judge Greenberg patiently demonstrating to a group of interested children in a sporting goods store how to shoot a basketball. I recall when I was

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A TRIBUTE TO JUDGE MORTON I. GREENBERG — continued from page 1

clerking that my parents (who are not attorneys) came to see where I worked. I wondered whether I should interrupt Judge Greenberg's work to introduce them. To my surprise and delight, Judge Greenberg bounded out of his office and volunteered his valuable time to conduct a tour of the courthouse and speak to them about our justice system and his role in it. They quickly realized how fortunate I was to have the opportunity to work for such a man. I am certain that all of Judge Greenberg's many law clerks would enthusiastically agree.

Judge Greenberg highly valued our Court traditions, including our important tradition of collegiality. He was rightfully proud to be a member of the "Mighty Third" and was always available to assist a colleague, take on more work, and offer some guidance. People of a certain age may remember the tagline, "When E.F. Hutton talks, people listen." The same was true of Judge Greenberg. When he spoke, for instance at Court meetings and conferences, others paused and waited for what would come. He would offer perspectives that had not occurred to others. He would offer wisdom. And he would offer humor. He might disagree with others but as an exemplary colleague, he was never disagreeable. Judge Greenberg has played an important role in shaping the Court.

The humble Yale Law School graduate who early on opened a small-town solo practice cast a long shadow in his eighty-seven years. Some will remember him as a Superior Court judge offering famous quips such as "you are throwing around nickels like manhole covers" when trying to settle cases. Others will remember his eloquent opinions and breathtaking intellect. Still others will remember him as a gentle and caring human being. His influence on the Court, his many grateful law clerks, and the cause of justice is indelible. We will miss Judge Greenberg.

THIRD CIRCUIT HOLDS THAT DENIAL OF MOTION TO PROCEED ANONYMOUSLY IS A COLLATERAL ORDER

Doe v. College of New Jersey, 997 F.3d 489 (3d Cir. 2021)

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In a case of first impression, the Third Circuit held that orders denying motions to proceed anonymously are immediately appealable under the collateral order doctrine. In *Doe v. College of New Jersey*, 997 F.3d 489 (3d Cir. 2021), Doe claimed that she was not reappointed to her teaching job at The College of New Jersey ("TCNJ") as a form of retaliation and discrimination for being pregnant. Doe sought to proceed anonymously due to her fear that she would face harassment, reputational damage, economic harm, and professional stigma, as well as the publicizing of very personal information involving her minor children, pregnancy, and miscarriage, if she were forced to reveal her name. The district court held that Doe had not presented the kind of exceptional circumstances that would permit her to proceed anonymously. Doe then took an immediate appeal.

On appeal, the Third Circuit recognized a question of first impression: whether orders denying motions to proceed anonymously fall within the collateral order doctrine such that they can be appealed immediately. The Court began its analysis by determining that the three-prong test for the collateral order doctrine promulgated in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), was the appropriate test to apply to the category of orders denying motions to proceed anonymously. In *Cohen*, the Supreme Court explained that to fall within the collateral order doctrine, the order must (1) conclusively determine the disputed issue, (2) resolve an important issue separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment. The Court went through each prong of the *Cohen* test in coming to the conclusion that orders denying motions to proceed anonymously fall within the collateral order doctrine.

First, the Court determined that the first prong was met because an order denying a motion to proceed anonymously is conclusive—it would be impossible for a district court to meaningfully reconsider its order once the litigant amends the pleadings to include his or her real name.

Second, the Court concluded that the second prong was also met because denying a motion to proceed anonymously resolves an important issue separate from the underlying merits of the dispute. In *In re Search of Electronic Communications*, 802 F.3d 516 (3d Cir. 2015), the Court had explained that "an issue is important if the interests that would potentially go unprotected without immediate appellate review are significant relative to efficiency interests sought to be advanced by adherence to the final judgment Rule." *Id.* at 524. Here, Doe's asserted interests in seeking anonymity could be "enormously significant when compared to the interest in efficient litigation; in certain cases, severe harm may result from litigating without a pseudonym." Moreover, the Court reiterated its previous holding that "litigants may proceed anonymously in exceptional cases where a reasonable fear of severe harm exists." *Doe v. Megless*, 654 F.3d 404, 408 (3d Cir. 2011) (quotation marks and citations omitted). The Court also pointed out that the merits of the case and the issue of proceeding anonymously are separate and distinct.

Finally, the Court reasoned that the third prong had been met because the denial of a motion to proceed anonymously is effectively unreviewable on appeal of a final judgment. Once the motion is denied and the litigant has amended the pleadings to include his or her true identity, the Court "cannot anonymize a litigant's already publicized identity with a new trial. That bell cannot be unrung."

Ultimately, the Court found that District Court did not abuse its discretion in denying Doe's motion. Nonetheless, in this case of first impression, the Third Circuit joined the Fourth, Fifth, Seventh, and Ninth Circuits in concluding that orders denying motions to proceed anonymously are immediately appealable under the collateral order doctrine. Litigators in the Third Circuit can now add another egg to the basket of orders immediately appealable under the collateral order doctrine.

EXPLORING THE CONTOURS OF PLAIN-ERROR REVIEW: THIRD CIRCUIT VACATES CRIMINAL SENTENCE FOR GUIDELINES MISCALCULATION

United States v. Aguirre-Miron, 988 F.3d 683 (3d Cir. 2021)

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Every so often, the Third Circuit issues an opinion which, at first blush, appears largely pertinent to a specific area of law, but which, on closer inspection, involves widely applicable principles of which all appellate practitioners should take note. The Court's recent decision in *United States v. Aguirre-Miron*, which vacated a criminal sentence based on the district court's plain error in failing to group counts as required by the Sentencing Guidelines, is such a case.

District Court Proceedings

In *Aguirre-Miron*, the defendant pleaded guilty to five child-pornography crimes: three counts of production, one count of receipt, and one count of possession. At sentencing, the district court adopted the Sentencing Guidelines calculation from the Presentence Investigation Report ("PSR"), which grouped the receipt and possession counts. The PSR did not, however, group the three production counts or group the production counts with the receipt and possession counts.

After grouping the counts, the PSR determined that the offense level for the receipt and possession counts was 40 and the offense level for production counts was 38. As relevant here, the offense level of 40 on the receipt and possession counts included a five-level pattern enhancement under U.S.S.G. § 2G2.2(b)(5) because the defendant "engaged in a pattern of activity involving the sexual abuse or exploitation of a minor" when he produced child pornography.

Ultimately, after calculating the combined offense level and accounting other enhancements and reductions, the PSR reached an offense level of 46, which was capped under the Guidelines at 43. The Guidelines range at offense level 43 was life imprisonment, but the district court varied downward to 42—which led to a Guidelines range of 360 months to life imprisonment—and sentenced the defendant to 360 months' imprisonment.

Third Circuit's Decision

While the defendant failed to object to the district court's adoption of the PSR and Guidelines calculation at sentencing, he appealed his sentence arguing that the district court miscalculated the Guidelines range by not grouping the production counts with the receipt and possession counts. Applying plain-error review to the defendant's unpreserved sentencing challenge, a unanimous panel of the Third Circuit agreed with the defendant and exercised its discretion to vacate the sentence and remand for resentencing. In so doing, the panel held the defendant satisfied the three prerequisites for plain error—specifically, (1) an error; (2) that is plain; and (3) that affects the defendant's substantial rights. It further concluded that because the forfeited error seriously affected the fairness, integrity, and public reputation of judicial proceedings, the Court should exercise its discretion to cure the error.

On the "error" inquiry, after finding the defendant could assert his challenge because he did not intentionally abandon it, the panel ruled the district court erred by not grouping the production counts with the receipt and possession counts. The panel ruled that because U.S.S.G. § 3D1.2(c) requires the grouping of "counts embody[ing] conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts," and the offense level for the receipt and possession counts was increased five levels based on conduct embodied in the production counts, the district court erred in not grouping those counts.

The panel next concluded that the district court's error was "plain" because it was clear under current law. In so holding, the panel looked to both the plain meaning of the applicable Guidelines provisions, which clearly required grouping where one count embodies conduct used as a specific offense characteristic in the guideline applicable to another count, as well as its own precedent which required grouping of counts under similar circumstances. Notably, the panel found the error was clear under its precedent even if the statements on which it relied were dicta because its precedent showed the plain language of the Guidelines was clear.

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EXPLORING THE CONTOURS OF PLAIN-ERROR REVIEW: THIRD CIRCUIT VACATES CRIMINAL SENTENCE FOR GUIDELINES MISCALCULATION — continued from page 4

After finding plain error, the panel then reasoned that the error affected the defendant's substantial rights. In this regard, the panel emphasized that absent "unusual circumstances" prejudice is presumed when a defendant is sentenced under an incorrect Guidelines range. Here, moreover, the government did not point to record evidence to overcome the presumption.

Finally, having ruled that the district court committed a plain error that affected the defendant's substantial rights by sentencing him under an erroneous Guidelines range, the panel chose to exercise its discretion to cure the error by vacating the sentence and remanding for resentencing. In so doing, the panel emphasized two considerations. First, the panel noted that, absent vacatur of the defendant's sentence, citizens may have a diminished view of the judicial process and the integrity of the courts. Second, the panel reasoned that because the error only affected the sentence, and not a jury verdict, the error could be easily fixed on remand.

Conclusion

Plain-error review is an essential part of appellate practice that all practitioners, and especially those who handle criminal appeals, should know. Under plain-error review, a party must satisfy three "stringent" criteria, and even then, the decision to correct the error is entirely discretionary. While plain error challenges are largely unsuccessful as a result, and oftentimes quickly disposed of in not-precedential rulings, the panel's precedential opinion in *Aguirre-Miron* provides a helpful roadmap for mounting plain-error challenges in future cases.

THIRD CIRCUIT GRANTS RULE 38 MOTION AGAINST ATTORNEY WHO COPY-AND-PASTED APPELLATE BRIEF

Conboy v. United States Small Business Administration, 992 F.3d 153 (3d Cir. 2021)

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Lawyers are no strangers to long work days and the heavy pressure caused by tight deadlines in high-stakes cases. It is not unusual to be working on several important cases at the same time, and to have several significant court filings due within the same short time period. Judges have an interest in moving their cases along, and they are not always sympathetic to a lawyer requesting an extension because other work in other cases must also be completed.

When faced with competing obligations and limits on time, a lawyer could be tempted to cut some corners to ensure that other work gets done. However, lawyers should think twice before doing so, as it could not only violate their duty to their clients, but could also result in the lawyer being responsible for paying the other side's fee. A recent Third Circuit case, *Conboy v. United States Small Business Administration*, 992 F.3d 153 (3d Cir. 2021), Illustrates this point.

In *Conboy*, two borrowers took out a loan from the United States Small Business Association ("SBA") to convert a commercial property into a restaurant. To secure the loan, the borrowers executed a note, a mortgage, and personal guarantees. The borrowers defaulted on the loan. They obtained the SBA's consent to sell the property, but the SBA did not agree to release the borrowers from their personal guarantees. The SBA attempted to recover the debt from the borrowers, and eventually assigned the debt to a collection agency.

The borrowers responded by suing the SBA and others, and, following discovery, the defendants moved for and were granted summary judgment. The defendants also sought sanctions under Rules 11 and 37 of the Federal Rules of Civil Procedure on the grounds that the borrowers had brought frivolous claims and disregarded their discovery obligations. The district court, however, denied the motion for sanctions.

The borrowers appealed to the Third Circuit. In reading the borrowers' brief, however, the Court noticed some apparent errors in syntax. For example, the borrowers' brief stated: "the district court **has** subject matter jurisdiction," and "summary judgment should be denied." Upon further review, the Court discovered that, with the exception of some minor edits, the borrowers' counsel had copy-and-pasted the opposition to the defendants' motion for summary judgment from their filing in the district court. The word "Defendant" had been replaced with "Appellee," but aside from a few other similar changes, the briefs were substantially the same. The Court noted that "the lack of appellate argument reflects the correctness of the District Court's summary judgment," and in just one paragraph, disposed of any of the arguments the borrowers could have made on appeal.

Picking up on the borrowers' copy-and-pasted briefing, one of the defendants moved for sanctions under Rule 38 of the Federal Rules of Appellate Procedure. Under this Rule, the court can "award just damages and single or double costs" if the court "determines an appeal is frivolous." In their response, the borrowers' counsel again (with insignificant edits) copy-and-pasted their previous response to the motion for sanctions in the district court.

The Court granted defendants' Rule 38 motion and awarded damages. It began its analysis by noting that Rule 38 allows parties to recover compensatory damages (rather than sanctions or punishment) for being forced to defend a judgment against a frivolous appeal. Rule 38 also acts as a deterrent against appeals that waste the court's time, thus allowing courts to focus on cases worthy of their limited attention.

The Court determined that the merits of this appeal did not warrant the Court's attention. Instead of engaging with the district court's analysis in its appellate brief, the borrowers' counsel simply copy-and-pasted the opposition to summary judgment filed in the district court. According to the Court, it was "hard to imagine a clearer case for Rule 38 damages."

As for who must pay Rule 38 damages, the Court can order they be paid by the losing party. However, "when a frivolous appeal stems from counsel's professional error," the Court can require counsel to pay the damages. In this case, the Court determined the damages should be paid by the borrowers' counsel, who recycled the work done in the district court and failed to engage with the district court's analysis of the merits of the case.

Conboy serves as a reminder that, no matter what pressures the lawyer is facing, the judges and their clerks will read your brief, sometimes more than once. Make sure their time reading and rereading your brief is worth it. The failure to do so may result in a bad outcome for your client, or, in extreme cases, leave you with a bill for the other side's fee.

PRESIDENT'S NOTE

Deena Jo Schneider
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I am pleased to begin these remarks with the news that the Third Circuit will be hosting a Bench Bar Reception on the afternoon of September 23 to showcase its new Judicial Independence Display. The Third Circuit Bar Association is co-sponsoring the reception along with the Pennsylvania and Philadelphia Bar Associations. All are welcome. Please put the date on your calendar and watch your inboxes for more details soon.

This reception is a welcome sign that the legal world is transitioning to a more interactive professional environment. While remote work and online gatherings have proven their viability and value, we all have a new appreciation of live connections. Our association is working to find a new balance between in-person and virtual activities to benefit both our members and the Court.

As we plan for the future, we have reorganized the committees through which we do our work and involved more members of our Board of Governors in their leadership:

Our **Programming Committee** is led by Matt Stiegler, Katie Romano, and Ilana Eisenstein. This fall it will be reactivating our series of CLE programs on effective appellate advocacy that has already been presented in various districts within the Circuit. It is also exploring other programming initiatives.

Our **Rules Committee** is led by David Fine, Howard Bashman, and Carl Marchioli. It educates practitioners on the Court's local rules of procedure, internal operating procedures, and other Circuit-wide rules, procedures, forms, and standing orders. It also analyzes proposed changes to these rules and procedures and occasionally suggests other changes for the Court's possible consideration.

Our **Publications Committee** is led by Lisa Rodriguez, Patrick Yingling, and Ti Harper. It oversees the creation of this newsletter *On Appeal* and other publications, including a new more informal ebulletin we are planning.

Our **Membership Committee** is led by Steve Sanders, Nilam Sanghvi, and Donna Doblick. You may be hearing from one of them about renewing your membership, updating our membership records, or encouraging colleagues to join.

Finally, our new **Communications Committee** is led by Rebecca Haywood, Lisa Rodriguez, and Namosha Boykin. It is focusing on how to share information better with our members through email, social media, and other means, including a new website being designed with the assistance of our **Website Committee**, which is led by Andy Simpson, Ti Harper, and me.

Please consider joining one or more of these groups and getting involved with their work. The more people who participate, the more we can do to benefit all of us and also the Court. Reach out to any of the Committee leaders listed above or to me and let us help you find a project of interest. And thank you for your support!

COURT ORDER RE: HIGHLY SENSITIVE DOCUMENTS

In response to recent widespread breaches of both private sector and government computer systems, federal courts are implementing new procedures to protect highly sensitive sealed documents (HSDs) filed with the courts. The Court has issued a standing order, dated February 23, 2021, detailing the court's policies and procedures for designating, filing, and maintaining highly sensitive documents.

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