

A P P E L L A T E

A L E R T

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## THIRD CIRCUIT CLARIFIES WAIVER DOCTRINE BY DISTINGUISHING BETWEEN “ISSUES” AND “ARGUMENTS” IN A SUPPRESSION-OF-THE-EVIDENCE CASE

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Waiver is an important concept to any appellate attorney because it determines what can and cannot be raised on appeal. Generally, an appellate court will only consider arguments that were previously raised in the trial court.

In *United States v. Joseph*, No. 12-3808, ---F.3d---, 2013 U.S. App. LEXIS 19315 (3d Cir. Sept. 19, 2013), the Third Circuit explained the degree of particularity required for a party to preserve an argument on appeal in the context of a motion to suppress evidence. In a precedential opinion authored by Judge D. Brooks Smith and joined by Judges Marjorie Rendell and Patty Schwartz, the Court explained that there is an important distinction between raising an *argument* and raising an *issue*. For parties to preserve an argument for appeal, they must have raised the same argument in the district court; simply raising a broader issue that encompasses the appellate argument is insufficient.

The facts of the case are straightforward. The defendant, Akeem Joseph, was arrested by the police outside a gentlemen’s club in Philadelphia. The arresting officers found numerous counterfeit bills in Joseph’s pockets. He was taken in for questioning by the Secret Service and, after waiving his *Miranda* rights, provided an agent with incriminating text messages and confessed to attempting to pass the counterfeit bills.

Joseph moved the district court to suppress the counterfeit bills, the text messages, and his confession. Importantly, he contended that the stop was unlawful only because (1) it was an illegal stop and frisk under *Terry v. Ohio*, and (2) the officers did not have probable cause to arrest him because they did not have sufficient expertise in counterfeiting to determine whether the bills were fake. The district court denied Joseph’s motion.

On appeal to the Third Circuit, Joseph raised the probable cause issue again, but made a new argument: the officers did not have enough evidence to establish his intent to defraud at the time he passed and possessed the counterfeit

bills. Thus, whereas in the district court Joseph attacked whether the officers’ had probable cause to believe Joseph’s engaged in acts that were criminal (that is, they did not have enough expertise to know whether the bills Joseph passed were fake — what the court called the “actus reus”), on appeal he attacked the officers’ probable cause to believe Joseph acted with the necessary criminal intent — the “mens rea.”

The Third Circuit held that Joseph had waived his mens rea argument by not raising it until his appeal. Recognizing that its precedent on waiver was “less than clear,” the Court provided important clarification. First, the Court explained that, for purposes of waiver, there is a critical distinction between a legal “question” or “issue” and a legal “argument,” “contention,” “theory,” “ground,” or “basis.” The former words (question and issue) encompass *more* than the later category of words. That is, “issues and questions may include multiple legal arguments, contentions, theories, grounds, or bases.”

Thus, the Court framed the debate as whether “raising an issue in a suppression motion or hearing [was] sufficient to preserve any argument within that issue.” The Court held that it was not: “raising an issue in the District Court is insufficient to preserve for appeal all arguments bearing on that issue.” Rather, “a party must make the same argument in the District Court that he makes on appeal.”

The Court did not stop there. It then provided a two-step framework for analyzing future waiver cases. First, a court should determine whether the legal challenge is an issue or an argument. An issue is a “legal challenge that presents multiple avenues for granting relief.” An argument, on the other hand, is a “single point of contention, which may not be recast or reframed to address a conceptually distinct contention.” Second, once arguments have been identified, the remaining step is to determine whether the same argu-

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ments are being advanced in both the trial and the appellate courts. Identical arguments share at least two characteristics: (1) they depend on the same legal standard, and (2) they depend on the same facts. Therefore, put succinctly, to “preserve an argument and avoid waiver, the argument presented to the Court of Appeals must depend on both the same legal rule and the same facts as the argument presented in the District Court.”

This concept was well illustrated by the facts of *Joseph*. Even though the defendant raised probable cause in the district court, probable cause was an *issue* that could be distilled into separate *arguments*. Thus, merely raising probable cause was not enough. The arguments had to be the same — and they were not. In the district court, Joseph argued that the officers lacked evidence of an actus reus. This was not the same as his appellate argument that there was no evidence of Joseph’s mens rea. The two arguments did not depend on the same legal rule or standard; nor did they depend on the same facts. Accordingly, the new appellate argument was waived.

It is not at all clear that, in the future, the Court will apply this framework beyond suppression-of-the-evidence arguments. The Court expressly confined its analysis to the waiver of suppression arguments under Federal Rule of Criminal Procedure 12, which explicitly says that suppression motions are waived if not made before trial and which the Third Circuit has held is not subject to Criminal Rule 52(b)’s exception for a “plain error that affects substantial rights.” Thus, the Court reserved decision on whether the

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teachings in *Joseph* will be extended to other waiver contexts, including in civil cases. Nevertheless, it is important for any appellate attorney — whether he or she practices criminal or civil litigation — to pay attention to the direction in which the Third Circuit apparently is moving. If the Court does decide to apply *Joseph* in other contexts, it will be all the more important for the appellate attorney to work with trial counsel so that arguments are appropriately preserved for appeal. ♦

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