1-1-1990

Waiver of Constitutional Issues in Criminal Cases: Confusion in the Illinois Supreme Court, 11 N. Ill. U. L. Rev. 55 (1990)

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I. INTRODUCTION

If a criminal defendant does not challenge the constitutionality of a statute at trial, is he precluded from raising the issue on appeal? On December 30, 1988, the Appellate Court of Illinois, First District, decided *People v. King*.[1] The appellant, convicted under Illinois' Habitual Criminal Act,[2] challenged the constitutionality of that statute for the first time on appeal. The court found the appellant had waived the issue, stating "[i]t is well settled that the question of the constitutionality of a statute cannot be properly raised for the first time in a court of review, but must have been presented to the trial court and ruled upon by it, and the person challenging its validity must have preserved proper objections to such rulings."[3] In support of this proposition the court cited *People v. Amerman*,[4] a 1971 Illinois Supreme Court case.

The citation of *Amerman* came as no surprise. Over the previous two decades, *Amerman* had been the standard citation for the prop-

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** The author wishes to acknowledge the invaluable research assistance of Nicholas Geiorbano, Esq.

1. 178 Ill. App. 3d 340, 533 N.E.2d 520 (1st Dist. 1988) (defendant's failure to challenge constitutionality of statute at trial constitutes waiver of the issue on appeal).

2. ILL. REV. STAT. ch. 38, para. 33B-1 (1985).

3. 178 Ill. App. 3d at 347, 533 N.E.2d at 523-24 (citing People v. Amerman, 50 Ill. 2d 196, 279 N.E.2d 353 (1971); People v. Pettigrew, 123 Ill. App. 3d 649, 462 N.E.2d 1273 (1984)).

4. 50 Ill. 2d 196, 279 N.E.2d 353 (1971) (defendant's failure to challenge constitutionality of statute at trial constitutes waiver of the issue on appeal). In People v. Bryant, 128 Ill. 2d 448, 453-54, 539 N.E.2d 1221, 1224 (1989), the Illinois Supreme Court claimed to have overruled *Amerman* in its 1973 decision in People v. Frey, 54 Ill. 2d 28, 294 N.E.2d 257 (1973). *See infra* notes 107-116 and accompanying text.

osition that in Illinois a constitutional challenge to a statute could not be raised for the first time on appeal. Numerous appellate court decisions relied on *Amerman* in support of that proposition.[5]

What did come as a surprise was an Illinois Supreme Court case decided less than five months after *King*. In *People v. Bryant*,[6] a defendant convicted under a section of the Illinois Vehicle Code[7] challenged the constitutionality of that provision for the first time on appeal. The Illinois Supreme Court cited *Amerman*, but stated that it had *overruled that case in 1973*.[8] Since 1973, the court said, a constitutional challenge to a statute could "be raised at any time."[9]

Needless to say, the Illinois Supreme Court's observation that *Amerman* had not been good law for the last sixteen years may have come as a shock to those appellate courts which had regularly cited it during that period. Why would these courts have continued to rely on a case which had been overruled years before? Who was responsible for this confusion?

II. THE ILLINOIS SUPREME COURT AND "JUDICIAL SIN"

Karl Llewellyn in *The Common Law Tradition*[10] described a practice of appellate courts which he characterized as "judicial sin."[11] It is a situation in which an appellate court produces "divergent lines of [decisions] which deliberately ignore each other."[12] This article

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5. *See, e.g.*, People v. King, *supra* notes 1-3 and accompanying text; People v. Mays, 176 Ill. App. 3d 1027, 1043-44, 532 N.E.2d 843, 853 (1st Dist. 1988); People v. Kauffman, 172 Ill. App. 3d 1040, 1043, 527 N.E.2d 645, 647 (1st Dist. 1988); People v. Cannady, 159 Ill. App. 3d 1086, 1088-89, 513 N.E.2d 118, 119-20 (1st Dist. 1987); People v. Kokoraleis, 154 Ill. App. 3d 519, 527 n.1, 507 N.E.2d 146, 151 n.1 (1st Dist. 1987); People v. Strong, 151 Ill. App. 3d 28, 35, 502 N.E.2d 744, 749 (3d Dist. 1986); People v. Nester, 123 Ill. App. 3d 501, 507, 462 N.E.2d 1011, 1016 (2d Dist. 1984); People v. Denby, 102 Ill. App. 3d 1141, 1146, 430 N.E.2d 507, 511 (5th Dist. 1981).

6. 128 Ill. 2d 448, 539 N.E.2d 1221 (1989).

7. ILL. REV. STAT. ch. 95 1/2, para. 4-103(b) (1985).

8. People v. Bryant, 128 Ill. 2d 448, 453-54, 539 N.E.2d 1221, 1223-24 (1989). The court said that *Amerman* was overruled by People v. Frey, 54 Ill. 2d 28, 294 N.E.2d 257 (1973). It also noted that *Frey* had overruled People v. Luckey, 42 Ill. 2d 115, 245 N.E.2d 769 (1969) (holding that the constitutionality of a statute could not be challenged in an appellate court unless the issue had been raised and ruled on by the trial court). *See Bryant*, 128 Ill. 2d at 453-54, 539 N.E.2d at 1223-24.

9. *Bryant*, 128 Ill. 2d 448, 454, 539 N.E.2d 1221, 1224 (1989).

10. K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS (1960).

11. *Id.* at 459.

12. *Id.* at 459-60. Earlier in the book Llwellyn characterized this as "Precedent Technique Number 39" and labeled it "[f]latly illegitimate." *Id.* at 85.

contends that Llewellyn's description perfectly characterizes the muddle created by the Illinois Supreme Court regarding whether the constitutionality of a statute can be challenged for the first time on appeal. As will be illustrated, the Illinois Supreme Court unthinkingly constructed two parallel lines of authority on this issue which arrived at exactly opposite conclusions.[13] If the court chose to characterize the issue as whether a constitutional challenge could be raised for the first time on appeal, it could point to a long line of authority exemplified by *People v. Amerman* stating that the issue was waived.[14] If, on the other hand, it chose to characterize the issue as one challenging the validity of an indictment predicated upon an unconstitutional statute, it could cite a similarly long line of authority holding that a void indictment could be challenged at any time.[15]

Thus, the Illinois Supreme Court in *Bryant* was being disingenuous when it stated that it had overruled *Amerman* in 1973. Instead of acknowledging its sloppy jurisprudence in creating parallel, contradictory lines of authority, it pretended that no such conflict existed. This article will discuss the consequences of the court's clumsy attempt to re-write history in *Bryant*. The *Bryant* opinion, however, cannot be understood without first considering *People v. Amerman* and its progeny.

III. *PEOPLE V. AMERMAN* AND *PEOPLE V. FREY*: THE SEEDS OF CONFUSION

The defendant in *Amerman* had been convicted pursuant to the Firearm Owner's Identification Act.[16] He asked the Illinois Supreme Court to find that statute unconstitutional. The court noted that, although defendant's trial attorney's opening statement had included a claim that the statute in question was "totally unconstitutional," no other reference to this claim appeared in either the trial record or post-trial motions.[17] The court then held that a challenge to the constitutionality of a statute cannot be raised for the first time in a reviewing court, and that the comment in the opening statement was "obviously inadequate as a foundation for appeal."[18]

Illinois appellate courts immediately began to cite *Amerman* to support a finding that a defendant had waived a constitutional

13. *See infra* notes 16-26 and 46-52 and accompanying text.
14. *See supra* note 5 and accompanying text.
15. *See infra* notes 46-52 and accompanying text.
16. ILL. REV. STAT. ch. 38, para. 83-1 (1968).
17. People v. Amerman, 50 Ill. 2d 196, 197, 279 N.E.2d 353, 354 (1971).
18. *Id.*

argument by failing to raise the issue in the trial court.[19] This continued unabated until 1989, when the Illinois Supreme Court in *Bryant* claimed it had overruled *Amerman* in *People v. Frey*[20] in 1973.

In *Frey*, the Illinois Supreme Court had reviewed two consolidated cases dealing with criminal prosecutions under the Illinois Abortion Statute.[21] In one case, the defendant Frey had filed a motion to dismiss the indictment, alleging that the statute was unconstitutional. The trial court had granted the motion and the State appealed. During the pendency of the appeal, however, the United States Supreme Court decided *Roe v. Wade*.[22] On the basis of *Roe*, the Illinois Supreme Court affirmed the ruling of the trial court dismissing the indictment.

The consolidated case, *People v. Mirmelli*,[23] was different procedurally. There the defendant, Mirmelli, was tried and convicted under the statute. His convicition was affirmed by the Appellate Court of Illinois, First District.[24] The appellate court opinion notes that Mirmelli challenged the constitutionality of the abortion statute for the first time in his reply brief. Because he had failed to raise the issue in the trial court, the appellate court found the issue to have been waived.[25] The Illinois Supreme Court, however, made no mention of either the appellate court opinion or the waiver issue. Instead, the court simply reversed the conviction, tersely noting that because the statute creating the offense was invalid, "a judgment entered thereon [was] erroneous and void."[26]

Thus, *People v. Frey* — the case which *Bryant* said had overruled *Amerman* — not only does not even mention the *Amerman* case, but fails to discuss anything even approaching the waiver issue. The problem, then, was how courts could harmonize *Amerman*, which demanded that a constitutional challenge to a statute be raised at trial or waived, with *Frey*, which entertained a constitutional challenge

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19. *See supra* note 5.

20. 54 Ill. 2d 28, 294 N.E.2d 257 (1973).

21. ILL. REV. STAT. ch. 38, para. 23-1 (1971).

22. 410 U.S. 113 (1973) (holding Texas criminal abortion statutes unconstitutional).

23. People v. Mirmelli, 130 Ill. App. 2d 1, 264 N.E.2d 470 (1st Dist. 1970) was consolidated with, and is known at the supreme court level as, People v. Frey, 54 Ill. 2d 28, 294 N.E.2d 257 (1973).

24. People v. Mirmelli, 130 Ill. App. 2d 1, 264 N.E.2d 470 (1st Dist. 1970).

25. *Id.* at 15-16, 264 N.E.2d at 478.

26. People v. Frey, 54 Ill. 2d 28, 32, 294 N.E.2d 257, 259 (citing People v. Collins, 50 Ill. 2d 295, 278 N.E.2d 792 (1972); People v. Hudson, 50 Ill. 2d 1, 276 N.E.2d 345 (1971); People v. Eisen, 357 Ill. 105, 191 N.E. 219 (1934)).

without even inquiring as to whether the issue was raised below.

IV. APPELLATE COURT ATTEMPTS TO RECONCILE *AMERMAN* AND *FREY*

A year after the Illinois Supreme Court's decision in *Frey*, the Appellate Court of Illinois, First District, faced a situation in which a defendant convicted of unlawful use of weapons[27] challenged the constitutionality of the statute for the first time on appeal. That case, *People v. Graves*,[28] held that the constitutional issue was properly before the court, finding that *Frey* had "impliedly overruled" *Amerman*.[29] It based this observation on the fact that the appellate court report of *Mirmelli* — the case consolidated with *Frey*[30] — had noted that Mr. Mirmelli had not raised the issue at the trial court level.[31] *Graves* thus concluded that *Frey-Mirmelli* must stand for the proposition that a defendant who has been convicted under an unconstitutional statute may raise the constitutional issue for the first time on appeal. Therefore, reasoned *Graves*, *Amerman* is no longer good law.

The *Graves* court's contention that *Frey-Mirmelli* implicitly overruled *Amerman* was rejected by at least four courts.[32] Perhaps the best reasoned of these cases is *People v. Koppen*,[33] in which the Second District explained how the Illinois Supreme Court could have decided *Mirmelli* without overruling *Amerman*. According to *Koppen*, the rule of *Frey* is that "[o]nly where the unconstitutionality of a statute has first been established [does] it become a matter of fundamental justice to apply to subsequent (*or consolidated*) cases on appeal even though the issue has not been raised in the trial court."[34] Thus, the finding of unconstitutionality in the *Frey* case applied to *Mirmelli*

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27. ILL. REV. STAT. ch. 38, para. 24-1(a)(10) (1973).

28. 23 Ill. App. 3d 762, 320 N.E.2d 95 (1st Dist. 1974).

29. *Id.* at 765, 320 N.E.2d at 98.

30. *See supra* note 20 and accompanying text.

31. People v. *Graves*, 23 Ill. App. 3d at 765, 320 N.E.2d at 98 (quoting People v. Mirmelli, 130 Ill. App. 2d 1, 15, 264 N.E.2d 470, 478 (1st Dist. 1970)). Again, it should be emphasized that the supreme court's decision in *Frey* makes no mention of the *Mirmelli* decision at the appellate court level. *See supra* notes 23-26 and accompanying text.

32. People v. Koppen, 29 Ill. App. 3d 29, 329 N.E.2d 421 (2d Dist. 1975); People v. Grammer, 24 Ill. App. 3d 648, 321 N.E.2d 735 (3d Dist. 1974); People v. Nelson, 26 Ill. App. 3d 227, 324 N.E.2d 719 (5th Dist. 1975); People v. Diaz, 33 Ill. App. 3d 866, 338 N.E.2d 579 (3d Dist. 1975).

33. 29 Ill. App. 3d 29, 329 N.E.2d 421 (2d Dist. 1975).

34. *Id.* at 31, 329 N.E.2d at 423 (emphasis added).

only because the two cases had been consolidated; for that reason, each defendant could receive the benefit of *Roe v. Wade*.

In support of this reading of *Frey*, the *Koppen* court also cited another Illinois Supreme Court case, *People v. Sarelli*,[35] decided six months after *Frey*. In *Sarelli*, the defendant had filed a petition pursuant to the Post-Conviction Hearing Act[36] challenging his conviction under the Narcotic Drug Act.[37] Though the circuit court dismissed the petition, during the pendency of Sarelli's appeal the supreme court held unconstitutional the very statute Sarelli had challenged.[38] Thus, the supreme court had to decide whether Sarelli's failure to raise the issue either at trial or on direct appeal should be deemed waiver. The court found no waiver and reversed Sarelli's conviction.

Koppen contended that *Sarelli* supported its view that *Frey-Mirmelli* had merely created an exception to the *Amerman* waiver rule.[39] *Koppen* emphasized that *Sarelli* did not refer to either *Amerman* or *Frey*, and that "if *Frey* had overruled *Amerman*, the supreme court could merely have held that the voidness of the statute was a jurisdictional question which could be raised at any time; the opinion, however, made no such reference . . . . The *Frey-Mirmelli* case has not overruled *Amerman*."[40]

Koppen's argument that *Frey* had no effect on the decision in *Amerman* is persuasive. Indeed, eight months after deciding *Frey* the supreme court itself cited *Amerman* with no suggestion that the case had been overruled.[41] The Illinois Supreme Court cited *Amerman* again in 1979,[42] 1980,[43] and as recently as 1986,[44] without any indication that the case had been overruled. Moreover, in 1981 in *People v. Myers*[45] the supreme court, without citing *Amerman*, refused to consider a defendant's challenge to the constitutionality of the statute under which he was convicted, because the defendant had failed to raise the issue below.

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35. 55 Ill. 2d 169, 302 N.E.2d 317 (1973).

36. ILL. REV. STAT. ch. 38, para. 122-1 (1969).

37. ILL. REV. STAT. ch. 38, para. 22-1 (1969) (repealed 1971).

38. The supreme court took this action in *People v. McCabe*, 49 Ill. 2d 338, 275 N.E.2d 407 (1971).

39. People v. Koppen, 29 Ill. App. 3d 29, 31, 329 N.E.2d 421, 423 (2d Dist. 1975).

40. *Id. Accord* People v. Diaz, 33 Ill. App. 3d 866, 338 N.E.2d 579 (3d Dist. 1975).

41. People v. Curry, 56 Ill. 2d 162, 170, 306 N.E.2d 292, 296 (1973).

42. People v. Lykins, 77 Ill. 2d 35, 38, 394 N.E.2d 1182, 1184 (1979).

43. People v. Walker, 83 Ill. 2d 306, 315, 415 N.E.2d 1021, 1025 (1980).

44. People v. Dale, 112 Ill. 2d 460, 467, 493 N.E.2d 1060, 1062 (1986).

45. 85 Ill. 2d 281, 426 N.E.2d 535 (1981).

Thus, at the time the supreme court decided *Bryant*, there was no reason to doubt that *Amerman* was still good law. Why, then, did *Bryant* claim *Amerman* had been overruled sixteen years before?

V. Two Paradigms

One possible explanation was the existence of an alternative paradigm in Illinois courts for considering a challenge to the constitutionality of a statute when the issue was raised for the first time on appeal. Under the paradigm described thus far, an Illinois court would look at a case characterized as a "constitutional challenge raised for the first time on appeal," find *Amerman* to be controlling, and hold the argument to be "waived."

Yet under a second paradigm, the same claim could be transformed into one challenging the validity of an indictment. This paradigm would find the indictment to be "void" for being based on an unconstitutional statute. Traditionally, if an Illinois court views an indictment or a judgment as "void," waiver does not apply.

It is well established in Illinois that a void judgment may be attacked and vacated at any time.[46] A judgment is characterized as void where the court lacks jurisdiction over the parties or subject matter.[47] As to criminal cases, a trial court lacks jurisdiction if the indictment does not state a claim. In 1925 the Illinois Supreme Court stated:

> To give a court jurisdiction of the subject matter in a criminal case it is essential that the accused be charged with a crime. If that is not done, . . . [and] a judgment is so rendered it is void and may be attacked collaterally. . . . Inasmuch as the defendant was not charged in the former indictment with a violation of any criminal law the court had no jurisdiction to try, convict and sentence him for the commission of a criminal offense. The former judgment was void and subject to collateral attack.[48]

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46. Fox v. Department of Revenue, 34 Ill. 2d 358, 361, 215 N.E.2d 271, 272 (1966) (dictum); Federal Sign and Signal Corp. v. Czubak, 57 Ill. App. 3d 176, 178, 372 N.E.2d 965, 967 (1st Dist. 1978) (recognizing principle); Cooper v. United Development, 122 Ill. App. 3d 850, 854, 462 N.E.2d 629, 632 (1st Dist. 1984) (recognizing principle).

47. Horzely v. Horzely, 71 Ill. App. 3d 542, 545, 390 N.E.2d 28, 30 (1st Dist. 1989). *See also Cooper, supra* note 46.

48. People v. Buffo, 318 Ill. 380, 384, 149 N.E. 271, 272 (1925). *See also* People v. Minto, 318 Ill. 293, 149 N.E. 241 (1925); People v. Wallace, 316 Ill. 120, 146 N.E. 486 (1925); Klawanski v. The People, 218 Ill. 481, 75 N.E. 1028 (1905).

The Code of Criminal Procedure of 1963 promulgated stricter rules concerning waiver when the defendant failed to make a pre-trial motion to dismiss the charge.[49] Nevertheless, the Code specifically provided that the failure to file such a motion would not waive either a claim of lack of jurisdiction or a claim that the charge did not state an offense.[50] Moreover, the Committee Comments to Section 114-1 stated:

> Subsection (a) (8) permits the motion to dismiss where the charge does not state an offense. In accordance with Article III, charge refers to the complaint, indictment or information. Since a charge which does not state an offense does not give defendant a full notice of why he is being tried, and the charge will not support a judgment unless an offense is stated therein, due process would be violated and [consequently such a charge] may be attacked at any time.[51]

Decisions from the Illinois Supreme Court continued to hold that indictments which failed to charge an offense were void and could be attacked at any time.[52]

Thus, two very different lines of authority could be applied to the same set of circumstances. As a consequence, a defendant alleging for the first time on appeal that the statute supporting his indictment was unconstitutional could meet two very different fates. On the one hand, a court could cite *Amerman* and hold that constitutional issues not properly preserved were waived. On the other hand, if the court chose to view the argument as one challenging the validity of the indictment, it could cite the long line of Illinois authority holding that a void indictment may be challenged at any time, and thus allow the defendant to prevail.

This conflict is succinctly illustrated in *People v. Wagner*.[53] There the defendant was convicted of selling a substance he represented to be heroin. Before the appellate court, he contended that the statute

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49. ILL. REV. STAT. ch. 38, para. 114-1 (1963).

50. ILL. REV. STAT. ch. 38, para. 114-1(b) (1963).

51. Committee Comments to Section 114-1, ILL. ANN. STAT. ch. 38, para. 114-1 (Smith-Hurd 1977). *See also* People v. Clark, 256 Ill. 14, 99 N.E. 866 (1912).

52. People v. Gregory, 59 Ill. 2d 111, 112-13, 319 N.E.2d 483, 484 (1974); People v. Wallace, 57 Ill. 2d 285, 288, 312 N.E.2d 263, 265 (1974); People v. Heard, 47 Ill. 2d 501, 505, 266 N.E.2d 340, 343 (1970); People v. Reed, 33 Ill. 2d 535, 538-39, 213 N.E.2d 278, 280 (1965).

53. 91 Ill. App. 3d 254, 414 N.E.2d 773 (5th Dist. 1980), *rev'd*, 89 Ill. 2d 308, 433 N.E.2d 267 (1982).

under which he was tried and convicted was unconstitutional because it punished delivery of innocuous substances more severely than delivery of controlled substances.[54] The State countered that the defendant's failure to have raised the issue in a post-trial motion should result in a waiver.[55] The Fifth District agreed with the State that a finding of waiver was appropriate and specifically cited *Amerman* in support of the decision.[56] However, even though the court said it had "no obligation to do so," it agreed to consider the issue "as a matter of grace."[57]

The Illinois Supreme Court subsequently granted defendant's petition for leave to appeal. Significantly, the supreme court, without citing *Amerman*, simply ignored the "waiver" line of cases and held:

> Since the conviction here is under an unconstitutional statute and is therefore a nullity, it was not necessary for defendant to preserve the error by a post-trial motion. The conviction is void and can be attacked at any time.[58]

After reading *Wagner*, one might ask why the defendant in *Amerman* was in any different position than the defendant in *Wagner*. Both Wagner and Amerman contended that the statutes under which they were convicted were unconstitutional; yet, arbitrarily, the Illinois Supreme Court viewed *Wagner* as a "void indictment" case and *Amerman* as a "waiver of a constitutional issue" case. The court could just as easily have viewed *Wagner* as the "waiver of a constitutional issue" case and *Amerman* as the "void indictment" case.

Following the supreme court's decision in *Wagner*, then, a defendant challenging the constitutionality of the statute supporting his conviction for the first time on appeal had a "50-50" chance of prevailing. Whether his conviction was affirmed or reversed depended on whether the court used *Wagner* or *Amerman*.

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54. Wagner was convicted of violating Section 404 of the Controlled Substances Act (ILL. REV. STAT. ch. 56 1/2, para. 1404 (1977)) dealing with sustances merely represented to be controlled substances. This was a Class 3 felony. He argued that if he had delivered an actual controlled substance, he would have only been punished for a Class 4 felony. ILL. REV. STAT. ch. 56 1/2, para. 1401(e), (f) (1977).

55. The State argued that the failure to raise the issue in a post-trial motion resulted in a waiver even though the defendant had, in fact, presented this issue before the trial court. *People v. Wagner*, 91 Ill. App. 3d 254, 256, 414 N.E.2d 773, 775 (5th Dist. 1980), *rev'd*, 89 Ill. 2d 308, 433 N.E.2d 267 (1982).

56. *Id.*

57. *Id.*

58. People v. Wagner, 89 Ill. 2d 308, 311, 433 N.E.2d 267, 269 (1982).

As an illustration of the bind in which this placed defendants, consider three Fourth District cases. In a 1984 case disputing the constitutionality of the Habitual Offender Act,[59] the court cited *Amerman* and found waiver.[60] Yet in a 1986 case disputing the constitutionality of the retail theft statute,[61] the same court cited *Wagner* and found no waiver.[62] Again, however, in a 1987 case challenging the constitutionality of a section of the obscenity statute,[63] the court cited *Amerman* and found waiver.[64]

The chaos continues. A defendant questioning the constitutionality of the Illinois Domestic Violence Act[65] for the first time on appeal was told by the Fourth District that *Amerman* applied and that he had waived the issue.[66] Yet less than two months later, another defendant challenged the constitutionality of the aggravated arson statute[67] for the first time in a supplemental brief following oral argument in the First District. In that case, the court held on the basis of *Wagner* that a conviction based upon an unconstitutional statute is void and can be attacked at any time.[68] However, another defendant challenging his conviction under the Illinois Narcotics Racketeering Statute[69] was told by the Second District that he had waived the issue under *Amerman*.[70] It should be emphasized that in *none* of the six cases just discussed did any court ever suggest that a split of authority existed; none of the cases relying on *Wagner* cited *Amerman* and *vice versa*.

VI. PARADIGMS LOST: THE EXPERIENCE OF THE SECOND DISTRICT

The Second District is an example of a court which has tried to make sense out of the *Wagner/Amerman* muddle, apparently assum-

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59. ILL. REV. STAT. ch. 38, para. 33B-1 (1981).

60. People v. Pettigrew, 123 Ill. App. 3d 649, 650, 462 N.E.2d 1273, 1274-75 (4th Dist. 1984).

61. ILL. REV. STAT. ch. 38, para. 16A-10(3) (1983).

62. People v. James, 148 Ill. App. 3d 536, 537, 499 N.E.2d 1036, 1037 (4th Dist. 1986).

63. ILL. REV. STAT. ch. 38, para. 11-20 (1983).

64. People v. McGeorge, 156 Ill. App. 3d 860, 871, 510 N.E.2d 1032, 1039 (4th Dist. 1987).

65. ILL. REV. STAT. ch. 40, para. 2301-1 (1983).

66. People v. Whitfield, 147 Ill. App. 3d 675, 498 N.E.2d 262 (4th Dist. 1986).

67. ILL. REV. STAT. ch. 38, para. 20-1.1(a)(1) (1981).

68. People v. Orr, 149 Ill. App. 3d 348, 500 N.E.2d 665 (1st Dist. 1986).

69. ILL. REV. STAT. ch. 56 1/2, paras. 1652, 1654 (1985).

70. People v. Hominick, 177 Ill. App. 3d 18, 38, 531 N.E.2d 1049, 1062 (2d Dist. 1988) (citing People v. Myers, 85 Ill. 2d 281, 426 N.E.2d 535 (1981); People v. Amerman, 50 Ill. 2d 196, 279 N.E.2d 353 (1971); People v. Coleman, 120 Ill. App. 3d 851, 459 N.E.2d 5 (2d Dist. 1983)).

ing that the Illinois Supreme Court considered both decisions to be good law.

On December 29, 1983, the Second District decided *People v. McNeal*.[71] There, for the first time on appeal, the defendant claimed that the retail theft statute[72] under which he was convicted was unconstitutional. Unlike the cases cited earlier,[73] here the court *explicitly rejected Amerman* and relied on *Wagner* stating: "Where, as here, a substantial question of constitutionality is raised, which if sustained, would make void the statute under which defendants were charged and convicted, we decline to apply the waiver rule."[74]

McNeal leaves several issues unsettled. First, it fails to precisely define the relationship, if one exists, between *Amerman* and *Wagner*. Second, the source of *McNeal*'s "substantial question of constitutionality" language is unclear.[75] It is not found in *Wagner*. Can *Amerman* be distinguished for its failure to confront a "substantial question of constitutionality" or does *Wagner* simply announce a new rule? Third, the *McNeal* court reaches the merits of the issue only by "declin[ing] to apply the waiver rule."[76] This makes the court's decision appear to be one of judicial *discretion*. Yet *Wagner* seemed predicated on the lack of jurisdiction found when a void statute is used.[77] *Wagner* suggested that courts had the *duty* to entertain such an issue at any time, rather than merely the discretion to decline to use waiver.

Any doubt that these were very real issues was soon dispelled. One day after deciding *McNeal*, the Second District filed an opinion in *People v. Coleman*.[78] In *Coleman*, the defendant for the first time on appeal challenged the constitutionality of the statute on which she was convicted.[79] The court's opinion began by citing *Amerman* for the "fundamental"[80] rule that failure to raise a constitutional question

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71. 120 Ill. App. 3d 625, 458 N.E.2d 630 (2d Dist. 1983).

72. ILL. REV. STAT. ch. 38, para. 16A-3 (1981).

73. *See supra* notes 59-70 and accompanying text.

74. People v. McNeal, 201 Ill. App. 3d 625, 627, 458 N.E.2d 630, 631 (2d Dist. 1983) (citing People v. Wagner, 89 Ill. 2d 308, 311, 433 N.E.2d 267, 269 (1982)).

75. *Id.*

76. *Id.*

77. The supreme court in *Wagner* called the conviction "a nullity" and described it as "void." This is hardly the language of "discretion." 89 Ill. 2d at 311, 433 N.E.2d at 269. *See also supra* note 53.

78. 120 Ill. App. 3d 851, 459 N.E.2d 5 (2d Dist. 1983).

79. The offense was bringing contraband into a penal institution. ILL. REV. STAT. ch. 38, para. 31A-1(a)(3) (1981).

80. 120 Ill. App. 3d at 853, 459 N.E.2d at 6 (citing People v. Amerman, 50 Ill. 2d 196, 279 N.E.2d 353 (1971); People v. Luckey, 42 Ill. 2d 115, 245 N.E.2d 769

in the trial court constitutes a waiver of that issue. The court noted that the defendant had cited *Wagner*, however, for the proposition that the Illinois Supreme Court had established that a conviction under a void statute could be attacked at any time.[81] The court said that although some language from *Wagner* and other cases "arguably is helpful to the defendant's contention, . . . we [nevertheless] perceive no indication in those opinions that the waiver rule articulated in *People v. Amerman* has been overruled."[82] The court then proceeded to distinguish the instant case from *Wagner* because Coleman's constitutional challenge centered not on the language of the statute, but rather on a procedural infirmity in its enactment.[83] Moreover, the court criticized the quality of Coleman's evidence[84] and concluded that it did not feel "compelled"[85] to deviate from the waiver rule.

Ms. Coleman, however, filed a Petition for Rehearing alleging that the court had arbitrarily applied waiver in *her* case when it had *refused* to invoke waiver in the *McNeal* case decided only one day earlier. In its Supplemental Opinion on Denial of Rehearing, the *Coleman* court lamely contended that it had considered the substance of Coleman's constitutional arguments, but that it was not "obliged" to deal with every constitutional argument raised for the first time on appeal.[86]

Several months later, the Second District in *People v. Nester*[87] confronted an appellant contending for the first time on appeal that the sentencing statute the trial court applied to him was unconstitutional.[88] The court summarily held the issue to be waived, citing

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(1969); People v. Denby, 102 Ill. App. 3d 1141, 430 N.E.2d 1157 (5th Dist. 1981); People v. Lenninger, 88 Ill. App. 3d 801, 410 N.E.2d 1157 (2d Dist. 1980); People v. Jones, 86 Ill. App. 3d 253, 408 N.E.2d 79 (5th Dist. 1980); People v. Myers, 85 Ill. 2d 281, 426 N.E.2d 535 (1981)).

81. *Id.* The defendant cited two other cases in support of this proposition, People v. McCarty, 94 Ill. 2d 28, 445 N.E.2d 298 (1983) and *In re* T.E., 85 Ill. 2d 326, 423 N.E.2d 910 (1981).

82. *Id.*

83. Coleman contended that the statute under which she was convicted (ILL. REV. STAT. ch. 38, para. 31A-1(a)(3) (1981)) was void because the language of the statute was added in its entirety by the Governor in his amendatory veto letter to the Illinois Senate. *Coleman*, 120 Ill. App. 3d at 852, 459 N.E.2d at 6.

84. People v. Coleman, 120 Ill. App. 3d 851, 853-54, 459 N.E.2d 5, 6-7 (2d Dist. 1983).

85. *Id.* at 854, 459 N.E.2d at 7 (2d Dist. 1983).

86. 120 Ill. App. 3d at 854-55, 459 N.E.2d at 7 (citing People v. Myers, 85 Ill. 2d 281, 426 N.E.2d 535 (1981)).

87. 123 Ill. App. 3d 501, 462 N.E.2d 1011 (2d Dist. 1984).

88. The statute alleged to be unconstitutional was ILL. REV. STAT. ch. 38, para. 1005-8-1(a)(1)(b) (1981).

Amerman and *Coleman*.[89] There was no sign of the "substantial constitutional question" language of *McNeal*. Moreover, the *Coleman* citation is ironic since *Coleman* itself had cited two Illinois Supreme Court cases which permitted an appellant to raise a constitutional challenge to a sentencing statute for the first time on appeal, asserting that a sentence based upon an unconstitutional statute is void.[90] *Nester*, unlike *Coleman*, makes no mention of these cases.

It is interesting to compare *Nester* with *People v. Moorhead*,[91] a Second District cased decided only six months later. Like *Nester*, *Moorhead* also dealt with the constitutionality of a sentencing scheme.[92] Responding to the State's claim that the appellant had waived the issue by not raising it in the trial court, the court cited *Wagner* and *McNeal* and refused to invoke the waiver rule.[93] The court neither cited *Nester* nor provided a clue as to why *Nester* should have been decided differently.

Next, the *Moorhead* court went on to consider the merits of the issue and held for the State by finding the sentencing scheme to be constitutional.[94] Contrast this with the approach used by the Second District in *People v. Treece*.[95] For the first time on appeal, Treece challenged the constitutionality of certain sexual offense statutes[96] because of what he alleged to be irrational scaling of possible sentences.[97] The *Treece* court, after citing *Amerman* and *Coleman* for the general waiver rule, then cited *McNeal* for the proposition that a "substantial question of constitutionality" could be raised without having been preserved at the trial level.[98] Finding that the issue raised

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89. People v. Nester, 123 Ill. App. 3d 501, 507, 462 N.E.2d 1011, 1016 (citing People v. Amerman, 50 Ill. 2d 196, 279 N.E.2d 353 (1971); People v. Coleman, 120 Ill. App. 3d 851, 459 N.E.2d 5 (2d Dist. 1983)).

90. The two cases are People v. McCarty, 94 Ill. 2d 28, 445 N.E.2d 298 (1983) and *In re* T.E., 85 Ill. 2d 326, 423 N.E.2d 910 (1981).

91. 128 Ill. App. 3d 137, 470 N.E.2d 531 (2d Dist. 1984).

92. Moorhead contended that it was a violation of due process for Illinois to punish the offense of solicitation more severely than the offense of conspiracy. People v. Moorhead, 128 Ill. App. 3d 137, 138, 470 N.E.2d 531, 533 (2d Dist. 1984) (holding that conviction under unconstitutional statute is void and can be attacked at any time).

93. *Id.* at 139, 470 N.E.2d at 533-34.

94. *Id.* at 139-45, 470 N.E.2d at 533-38.

95. 159 Ill. App. 3d 397, 511 N.E.2d 1361 (2d Dist. 1987).

96. ILL. REV. STAT. ch. 38, paras. 12-12 to 12-18 (1984 Supp.).

97. *Treece*, 159 Ill. App. 3d at 414, 511 N.E.2d at 1371.

98. *Treece*, 159 Ill. App. 3d at 415, 511 N.E.2d at 1372 (citing People v. McNeal, 120 Ill. App. 3d 625, 627, 458 N.E.2d 630, 631 (2d Dist. 1983); People v. Wagner, 89 Ill. 2d 308, 311, 433 N.E.2d 267, 269 (1982)).

by Treece had been decided adversely to his position by other courts, the court concluded that it was not a "substantial question" and therefore held that it had been waived.[99]

Note the circular reasoning in *Treece*: first, in order to decide if a question is "substantial" a court should consider the merits; second, if a defendant loses on the merits, it is not a substantial question; third, if it is not a substantial question, then a court can refuse to reach the merits by finding waiver; fourth, thus, waiver will be found where a defendant would lose on the merits. In a nutshell, according to *Treece* the court must answer the question before it chooses whether to consider the question! Why the Second District decided *Moorhead* and *Treece* in such disparate ways is a mystery.[100]

The Second District's confused, yet well-intentioned, attempts at harmonizing *Amerman* and *Wagner* culminated in its opinion in *People v. Hominick*,[101] decided merely five months before the Illinois Supreme Court's opinion in *Byrant*. Hominick challenged, for the first time on appeal, the constitutionality of Illinois' narcotics racketeering statute.[102] The *Hominick* court cited *Amerman*, of course, for the general proposition of waiver. Yet instead of following its *McNeal* approach of considering whether the constitutional question was "substantial,"[103] the court found waiver by citing the Second District decision in *Koppen*[104] — decided *seven years before* the supreme court's sentencing decision in *Wagner*[105] — for the proposition that only where the unconstitutionality of a statute had already been established would the waiver rule be relaxed.[106]

It is easy to criticize the legal gyrations used by the Second District in attempting to harmonize *Amerman* and *Wagner*. Yet the real culprit was the Illinois Supreme Court, which stubbornly refused

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99. *Id.*

100. *See also*, People v. Leonard, 171 Ill. App. 3d 380, 385, 526 N.E.2d 397, 400 (2d Dist. 1988) (holding that a constitutional challenge was not a "substantial question" without providing any reason).

101. 177 Ill. App. 3d 18, 531 N.E.2d 1049 (2d Dist. 1988).

102. People v. Hominick, 177 Ill. App. 3d 18, 37-38, 531 N.E.2d 1049, 1062 (2d Dist. 1988) (citing ILL. REV. STAT. ch. 56 1/2, paras. 1652, 1654 (1985)).

103. *See supra* notes 71-77 and accompanying text.

104. People v. Koppen, 29 Ill. App. 3d 29, 329 N.E.2d 421 (2d Dist. 1975). *See supra* notes 33-40 and accompanying text.

105. People v. Wagner, 89 Ill. 2d 308, 433 N.E.2d 267 (1982). *See supra* notes 53-58.

106. People v. Hominick, 177 Ill. App. 3d at 38, 531 N.E.2d at 1062 (citing People v. Gully, 151 Ill. App. 3d 795, 502 N.E.2d 1091 (5th Dist. 1986); People v. Koppen, 29 Ill. App. 3d 29, 329 N.E.2d 421 (2d Dist. 1975).

to recognize that it had spawned two irreconcilable lines of authority in a crucial area of constitutional criminal procedure. The misguided way in which it created the problem was matched by the equally misguided way it attempted to solve the problem in *People v. Bryant*.

VII. *PEOPLE V. BRYANT*: THE SUPREME COURT RECOGNIZES (AND EXACERBATES) THE PROBLEM

Interestingly, the first decision which appears to have simply declared that the *Amerman* and *Wagner* approaches were irreconcilable was the *appellate court opinion* in *People v. Bryant*.[107] There the First District described these approaches as representing "two divergent views."[108] Only in reviewing this decision did the Illinois Supreme Court finally claim that it had overruled *Amerman* through the *Frey* case in 1973.[109]

It is difficult to understand what compelled the court to make such a claim. As noted earlier, *Frey* contains no mention of *Amerman*.[110] The Illinois Supreme Court continued to cite *Amerman* throughout the 1970's and 1980's without any indication that it was no longer good law.[111] Moreover, its 1981 decision in *Myers*[112] implicitly showed that it considered the *Amerman* waiver rule to be sound.[113]

Furthermore, in the Illinois Supreme Court's haste to pretend that *Amerman* had been overruled sixteen years before, it may have conceded far more than it intended. Recall that the reason *Wagner* held that a defendant could raise the invalidity of the statute under which he was convicted for the first time on appeal was that a void indictment deprived the trial court of jurisdiction.[114] So, too, in *People*

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107. 165 Ill. App. 3d 996, 520 N.E.2d 890 (1st Dist. 1988), *rev'd on other grounds*, 128 Ill. 2d 448, 539 N.E.2d 1221 (1989). Note that the First District cites People v. Luckey, 42 Ill. 2d 115, 245 N.E.2d 769 (1969), instead of People v. Amerman, 50 Ill. 2d 196, 279 N.E.2d 353 (1971), for the supreme court's view on waiver. *Luckey* and *Amerman* exhibit similar approaches to waiver. For a discussion of *Luckey*, see *supra* note 8.

108. People v. Bryant, 165 Ill. App. 3d 996, 998-99, 520 N.E.2d 890, 892 (1st Dist. 1988), *rev'd on other grounds*, 128 Ill. 2d 448, 539 N.E.2d 1221 (1989).

109. *Bryant*, 128 Ill. 2d at 453-54, 539 N.E.2d at 1223-24 (1989). Note that the supreme court also found that *Frey* overruled *People v. Luckey*. For a discussion of *Luckey*, see *supra* note 8.

110. *See supra* notes 20-26 and accompanying text. *Frey* also includes no mention of *Luckey*.

111. *See supra* notes 41-45 and accompanying text.

112. *See supra* note 45 and accompanying text.

113. *See supra* note 45 and accompanying text. Note that the *Myers* court did not cite *Amerman*.

114. *See supra* notes 53-58 and accompanying text.

v. Wade[115] the court viewed a sentence which exceeded the court's authority to be similarly void. But note that in *Bryant* the supreme court does not limit its repeal of the *Amerman* waiver rule only to those constitutional claims which would result in void indictments or sentences. Instead, the court simply said "now, a constitutional challenge to a statute can be raised at any time."[116]

If that is true, consider a case such as *People v. Boclair*.[117] In the appellate court, the defendant for the first time alleged that the enactment of Supreme Court Rule 413[118] on prosecutorial discovery was unconstitutional because it violated separation of powers principles.[119] The appellate court found the issue to have been waived.[120] If the supreme court's holding in *Bryant* is taken seriously, it would suggest that valid judgments and sentences could always be collaterally attacked so long as a defendant is able to raise a constitutional challenge to *some aspect* of his case. Does *Bryant* really mean that a constitutional issue such as that raised in *Boclair* can be raised at "any time?" Only time, and the Illinois Supreme Court, will tell.

VIII. CONCLUSION

Re-writing history is a dangerous activity. The Illinois Supreme Court was long overdue in recognizing the existence of parallel "loops" — the "constitutional issue not raised at trial" loop and the "void judgment" loop — which enabled Illinois courts to come to opposite conclusions in identical cases of tardily raised constitutional issues. Before *Bryant*, the result had been determined solely by which "loop" of law a specific case happened to have been placed. Yet instead of acknowledging the problem in *People v. Bryant*, the supreme court simply "wished it away" by pretending that it had overruled contrary precedent sixteen years before.[121] The intellectual

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115. 116 Ill. 2d 1, 506 N.E.2d 954 (1987) (sentence of probation, entered by trial court in mistaken belief that defendant had no prior conviction, was void judgment).

116. *Bryant*, 128 Ill. 2d at 454, 539 N.E.2d at 1224 (citing People v. Zeisler, 125 Ill. 2d 42, 531 N.E.2d 24 (1988); People v. Sarelli, 55 Ill. 2d 169, 302 N.E.2d 317 (1973)).

117. 139 Ill. App. 3d 350, 487 N.E.2d 969 (4th Dist. 1985), *rev'd on other grounds*, 119 Ill. 2d 368, 519 N.E.2d 437 (1987).

118. ILL. REV. STAT. ch. 110A, para. 413 (1985).

119. *Boclair*, 139 Ill. App. 3d at 352, 487 N.E.2d at 971.

120. *Boclair*, 139 Ill. App. 3d at 352, 487 N.E.2d at 971.

121. *See* People v. Ward, 194 Ill. App. 3d 229, 232, n.1, 550 N.E.2d 1208,

dishonesty of such a project is clear enough. Yet, as shown above, in its rush to revise history, it may very well have promulgated a rule far broader than necessary. *Bryant* will result in new constitutional issues being raised in tangential areas of cases at every level of direct and collateral review.

In George Orwell's novel *1984*, Winston Smith's job was to change the past by destroying those documents not in keeping with the government's current views.[122] The repercussions of *People v. Bryant* may make the Illinois Supreme Court regret its attempt to engage in a similar activity.

1210, n.1 (1st Dist. 1990) (citing *Bryant* and stating that the waiver of constitutional issues "has had a confusing history in Illinois law"). The *Bryant* court, of course, would not acknowledge this.

122. G. ORWELL, 1984 (1949).