Rule 317, Appeal as a Matter of Right

The contours and meaning of Rule 317 and appealing to the Illinois Supreme Court.

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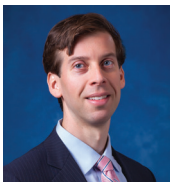

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GETTING TO THE ILLINOIS SUPREME COURT IS A LONG SHOT. In any given year, the Supreme Court receives more than a thousand petitions for leave to appeal under Rule 315.[1] From those thousand-plus petitions, the Court will allow leave to appeal in roughly 50 or 60 cases—about half of which are criminal and the other half civil. During the past five years, the odds of making it to the Supreme Court have ranged from one in 20 to one in 25. The odds are long and purposefully so—the Supreme Court is not intended as "a court of error correction"[2] and it requires the vote of four of its members before granting a petition for leave to appeal.[3]

1. Administrative Office of the Illinois Courts, Illinois Courts Statistical Summary for 2019, Summary Table 2B Dispositions, *available at* law.isba.org/3dD57fZ.
2. *In re Estate of Boyar*, 2013 IL 113655, ¶ 54 (Burke, J., dissenting).
3. *People v. Lee*, 433 Ill. Dec. 449, 449 (Ill. 2019) (Burke, J., dissenting).

ISBA RESOURCES >>

- ISBA Free On-Demand CLE, *Civil Appeal Basics: Handling an Appeal in the Illinois Appellate Court* (recorded Feb. 2020), law.isba.org/2WpdXMX.
- Edward J. Kionka, *Appeals to the Illinois Supreme Court and Appellate Courts: 2018 Edition*, available at the ISBA Store, law.isba.org/2NsX2T7.
- J. Timothy Eaton, *Petitions for Leave to Appeal: Smoothing Your Path to Illinois Supreme Court Review*, 104 Ill. B.J. 40 (Mar. 2016), law.isba.org/3cUfYat.

The background of Rule 317

Rule 315 is not the only avenue for seeking review in the Illinois Supreme Court from the Appellate Court. Rule 316 permits appeals from the Appellate Court to the Supreme Court on certificate.[4] Rule 317, meanwhile, permits appeals from the Appellate Court

> "… to the Supreme Court as a matter of right in cases in which a statute of the United States or of this state has been held invalid or in which a question under the Constitution of the United States or of this state arises for the first time in and as a result of the action of the Appellate Court."[5]

The first part of Rule 317 is clear and provides for automatic review in the Supreme Court when an appellate court has invalidated a state or federal statute. The second part of Rule 317, however, is less clear; but it provides an intriguing source for an appeal, as of right, to the Supreme Court.

Rule 317 owes its origins to Article VI, section 4(c), of the Illinois Constitution, which provides that appeals from the Appellate Court to the Supreme Court are "a matter of right if a question under the Constitution of the United States or of this State arises for the first time in and as a result of the action of the Appellate Court …."[6] Rule 317 became effective on Jan. 1, 1967. Before 1967, appeals under Article VI, section 4, were taken by "notice of appeal."[7] However, the "experience of the Supreme Court was that this procedure was *often invoked improperly*, a fact which the court would not usually discover until full briefs on the merits were filed and the case was scheduled for oral argument."[8] With the adoption of Rule 317, a party can no longer invoke the constitutional-question issue and have their case set in the Supreme Court. Instead, the party must petition for review, giving the Supreme Court the opportunity to determine—as a preliminary matter—whether the party has properly invoked Rule 317.[9]

Properly invoking Rule 317

Rule 317 requires that a 1) constitutional question 2) arise for the first time in the Appellate Court and 3) as a result of the action of the Appellate Court. A constitutional question does not necessarily mean a constitutional challenge to a statute. "[W]here it is contended that if the court construes a statute in a certain way it renders the statute invalid, *the question raised is one of the proper construction and not the question of its constitutionality*."[10] Recent denials of review provide additional support for this principle.

For instance, in *People v. Grant,* the defendant challenged the constitutionality of the aggravated-unlawful-use-of-a-weapon statute.[11] And even though the challenge to this statute presented "an issue of first impression" in the Fourth District of the Illinois Appellate Court,[12] the Supreme Court

4. For a discussion of Rule 316, see *Rozsavolgyi v. City of Aurora*, 2017 IL 121048, ¶¶ 16-19.
5. Ill. S. Ct. R. 317.
6. Ill. S. Ct. R. 317, Committee Comments; Ill. Const. art. VI, §4.
7. Ill. S. Ct. R. 317, Committee Comments.
8. *Id*. (emphasis added).
9. The Supreme Court regularly denies petitions that have invoked Rule 317. See, *e.g.*, *Springfield Right to Life v. Norwood*, 427 Ill. Dec. 754 (Ill. 2019); *People ex rel. Village of Lake Bluff v. Shriners Hospitals for Crippled Children*, 145 Ill. 2d 643 (1992).
10. *Compass Sales Corp. v. National Mineral Co.*, 388 Ill. 281, 282 (1944) (rejecting appeal as a matter of right) (emphasis added).
11. *People v. Grant*, 339 Ill. App. 3d 792, 802-03 (4th Dist. 2003) (challenging 720 ILCS 5/24-1.6(a)(1)).
12. *Id*.

TAKEAWAYS >>

- Invoking Rule 317 before the Illinois Supreme Court requires a constitutional question that arises in the Illinois Appellate Court as a result of an appellate court's action.
- Rule 317 envisions situations where a constitutional issue *arises* in the Appellate Court *because* of a ruling made in the circuit court.
- When making a Rule 317 petition to the Illinois Supreme Court, consider seeking discretionary review under Rule 315 as part of the petition.

THE FIRST PART OF RULE 317 IS CLEAR AND PROVIDES FOR AUTOMATIC REVIEW IN THE SUPREME COURT WHEN AN APPELLATE COURT HAS INVALIDATED A STATE OR FEDERAL STATUTE. THE SECOND PART OF RULE 317, HOWEVER, IS LESS CLEAR; BUT IT PROVIDES AN INTRIGUING SOURCE FOR AN APPEAL, AS OF RIGHT, TO THE SUPREME COURT.

denied the defendant's request to appeal.[13] *Grant* is not alone. There are several other examples—even just looking to the past year—in which a party has unsuccessfully challenged the constitutionality of a statute in the Appellate Court only for the Supreme Court to deny the subsequent request to appeal.[14] Simply challenging the constitutionality of a statute cannot confer the right to appeal to the Supreme Court. Were it otherwise, any party raising a constitutional challenge to a statute would have an avenue for *automatically* getting their case before the Supreme Court—an outcome that would expand the Supreme Court's docket beyond recognition.

The constitutional question must also originate in the Appellate Court.[15] This does not mean that the Appellate Court is the first court to rule on a constitutional question. For instance, in *Austin Highlands Development,* the plaintiff challenged the constitutionality of a statute of limitations.[16] The First District of the Illinois Appellate court was the first court to address the constitutional question; the circuit court had not addressed the "constitutionality of the statute of limitations in its written order."[17] And yet, after the First District rejected the constitutional challenge, the Supreme Court *denied* the plaintiff's request to appeal.[18]

Rule 317 & civil cases?

Rule 317 envisions situations where a constitutional issue *arises* in the Appellate Court *because* of a ruling made in the circuit court. This situation will most likely occur in criminal cases,[19] for criminal cases have the potential to raise far more constitutional issues than civil cases—such as *Batson* challenges,[20] Confrontation-Clause problems,[21] sentencing issues,[22] and issues of double jeopardy[23] (to name a handful). Constitutional issues may also be raised by the parties for the first time on appeal in criminal cases, without forfeiture concerns.[24] This is not true for civil cases, where the "general rule … is that constitutional arguments which are not raised by objection at trial are considered waived for purposes of appeal."[25] Of course, it is conceivable that a constitutional question could also arise in a civil context.[26]

Petitioning under Rule 315

As it stands, Rule 317 offers a rarely invoked and not-so-easily understood[27] mechanism for automatic review of an appellate court's decision. Given the lack of clarity surrounding Rule 317, a party appealing to the Supreme Court is advised to seek discretionary review under Rule 315 as part of its Rule 317 petition for appeal as a matter of right. Rule 317 contemplates this very action, advising parties that if "leave to appeal [under Rule 315] is to be sought in the alternative, the request … must be included in the same petition …."[28] Under Rule 317, the Supreme Court will decide the combined Rule 315 and Rule 317 requests in a single order.[29]

The road to the Supreme Court may be long; but hopefully, some of the starting points are now a little clearer.

13. *People v. Grant*, 205 Ill. 2d 608 (2003).
14. See, *e.g.*, *People v. Baxton*, 2020 IL App (5th) 150500, ¶ 1 (constitutional challenge to the aggravated unlawful use of a weapon statute, 720 ILCS 5/24-1.6(a)(1)), *appeal denied*, No. 126219, 2020 WL 5943511 (Ill. Sept. 30, 2020); *Guns Save Life, Inc. v. Raoul*, 2019 IL App (4th) 190334, ¶ 1 (constitutional challenge to the Firearm Owners Identification Card Act, 420 ILCS 65/0.01)), *appeal denied,* 144 N.E. 3d 1180 (Ill. 2020).
15. *Abatangelo v. Wells Fargo Bank, N.A.*, 719 F. App'x 520, 523 (7th Cir. 2017) (Order) ("[I]f the constitutional claims did not arise until the appellate court gave its reasons for ruling against them, then they could have appealed to the supreme court as of right under Illinois Supreme Court Rule 317.").
16. *Austin Highlands Development Co. v. Midwest Insurance Agency, Inc.*, 2020 IL App (1st) 191125, ¶ 25 (challenging 735 ILCS 5/13-214.4).
17. *Id.*
18. *Austin Highlands Development Co. v. Midwest Insurance Agency, Inc.*, 439 Ill. Dec. 15 (Ill. 2020).
19. See, *e.g.*, *People v. Stewart*, 179 Ill. 2d 556, 559 (Ill. 1997) ("We allowed the defendant's petition for leave to appeal as a matter of right pursuant to Supreme Court Rule 317.").
20. *People v. Rivera*, 348 Ill. App. 3d 168, 172 (1st Dist. 2004).
21. *People v. Burnett*, 2015 IL App (1st) 133610, ¶ 88.
22. *People v. Royer*, 2020 IL App (3d) 170794, ¶ 33 ("Because the sentencing court failed to consider the defendant's youth and its attendant characteristics as mitigation, his sentence violates the eighth amendment.").
23. *People v. Busch*, 2020 IL App (2d) 180229, ¶ 70 ("Our reversal of the defendant's conviction raises the double jeopardy issue.").
24. *In re N.G.*, 2018 IL 121939, ¶ 57.
25. *Flood v. Wilk*, 2019 IL App (1st) 172792, ¶ 29; see also *People v. Koy*, 2014 IL App (2d) 130906, ¶ 21 ("In a criminal case, a constitutional challenge to a statute may be raised for the first time on appeal … [but] in a civil case, such a challenge is normally forfeited if not raised below.").
26. See *Gilbert v. Illinois State Board of Education*, 591 F. 3d 896, 899 (7th Cir. 2010) ("Curiously, Gilbert did not try to use Illinois Supreme Court Rule 317, which permits appeals as a matter of right when a constitutional claim arises for the first time as a result of an appellate court decision.").
27. Kansas has an identical provision in its statutes, but offers little in the way of interpretation of that provision. Kan. Stat. Ann. § 60-2101(b).
28. Ill. S. Ct. R. 317.
29. *Id.*