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What Does A Sua Sponte Grant of Rehearing Teach Us About Seeking Rehearing?

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By Michael T. Brody

A recent U.S. Court of Appeals for the Seventh Circuit en banc decision opens a window into that court's grant of petitions for rehearing. It is not a window any of us can open—the court sua sponte granted rehearing in a criminal case after the government, which lost before the panel, announced that it would not seek rehearing and that it did not oppose the immediate release of the defendant whose conviction the panel had reversed. The full court still reheard the case, reversed the decision suppressing the evidence on which the conviction was based, and kept the defendant in jail. Despite its unusual procedure, the decision reveals what the Seventh Circuit might be looking for when considering whether to grant rehearing.

7TH CIRCUIT SPOTLIGHT

The panel decision in the case—*United States v. Cole*, 21 F.4th 421 (7th Cir. 2021) (en banc)—may not have appeared particularly noteworthy for anyone not named Cole. As recited by the court, while driving through Illinois, well below the speed limit, Janhoi Cole attracted the attention of State Trooper Clayton Chapman who "trailed him with the intent to catch him in a traffic violation to provide a pretext for a roadside stop." That happened when Chapman observed another car cut off Cole. From his vantage point of about a football field behind Cole, Chapman concluded Cole had followed the other car at an unreasonably close distance. The trooper pulled over Cole and engaged in a lengthy traffic stop, including interrogating Cole about his travel plans. Ultimately, Chapman directed Cole to proceed to a nearby gas station to complete the paperwork for the warning the trooper would give him. While Chapman questioned Cole about his travel plans and other topics, he had arranged to be joined at the gas station by another trooper and a drug sniffing dog. The dog alerted on the vehicle, the troopers searched the car, and Cole was found to be in possession of illegal drugs.

On appeal from his conviction, the Seventh Circuit, with Judge David Hamilton writing for a divided panel, concluded that even a traffic stop that was lawful at its inception can violate the Fourth Amendment if it is prolonged beyond the time reasonably required to complete the mission of the traffic stop. Chapman "slow walked" that process and prolonged the stop to investigate possible additional crimes without reasonable suspicion. Those actions led to the discovery of evidence that the Seventh Circuit ordered suppressed. Judge Amy St. Eve dissented. She concluded the trooper developed reasonable suspicion justifying his investigation into Cole's travel plans, and other topics.

courtesy photo

Michael T. Brody, co-chair of Jenner & Block.

After the panel decision, the court granted the government's motion to extend the time to petition for rehearing. Cole, who remained in jail on a now-reversed conviction, moved for immediate release. He argued that after suppressing

the fruits of the *Terry* stop there was insufficient evidence to try him. On the day a rehearing petition was due, the government indicated that it would not seek rehearing en banc and it did not oppose Cole's release. Several days later, the court voted to rehear the appeal en banc, sua sponte, denied the motion for immediate release, and directed the parties to submit further briefs concerning a Supreme Court decision discussed in the panel's opinion. After supplemental briefing and argument, the full court reversed the panel's decision by a 7 to 3 vote, with St. Eve now writing for the majority and Hamilton in dissent. The full court found the trooper's questions regarding Cole's travel plans not to exceed the scope of his permitted conduct, therefore justifying the continued *Terry* stop and the eventual seizure. Cole remains in jail, serving a 74-month sentence.

Discussing the procedure in the case, which may be more unusual than the decision itself, the dissent commented "the extraordinary nature of this en banc rehearing also should not be passed by in silence." Hamilton observed that granting sua sponte rehearing "is an extraordinary step that this court has taken very rarely."

A litigant cannot increase its odds of this procedural rarity—what must have seemed like "manna from heaven" to the government and a punishing lightning bolt to Cole. So what does this "extraordinary" decision teach us about persuading the court to grant rehearing en banc?

First, don't get your hopes up. Like many courts of appeals, the Seventh Circuit grants rehearing only sparingly. Members of that court have said a litigant has a better chance of obtaining certiorari review from the U.S. Supreme Court than rehearing en banc. While that may no longer be arithmetically true—perhaps because the Supreme Court is hearing even fewer cases—it is certainly true that rehearing en banc remains rare in the Seventh Circuit. While an appeal often presents an issue of critical importance to the parties, it may not to the Seventh Circuit. Do not seek rehearing reflexively.

Second, *Cole* reminds us that appellate courts grant rehearing to address an issue of interest to the court. The Seventh Circuit knows when a decision creates a split in the circuits. Its Rule 40(e) requires the court to identify when it creates a split and circulate the opinion to the full court before issuance. A known circuit split may be grounds for certiorari, but it is not ordinarily grounds for rehearing. Likewise, the full court will not often rehear a case just to correct the outcome. Maybe the panel will modify an opinion to correct an error, but the full court does not often rehear cases for that reason.

This case is an example of the Seventh Circuit granting rehearing to decide an issue the court cares about, even if the losing party was willing to let it go. In recent years, the Seventh Circuit has decided other cases involving investigative *Terry* stops, often in split decisions, reflecting disagreement among members of the court about the appropriate limits on this law enforcement technique. The court apparently saw *Cole* as a chance to clarify and correct the Circuit's law on an issue of concern to the court, even if the government was content to let Cole walk free. There are other issues percolating through the Seventh Circuit that have also resulted in divided votes.

Third, litigants should strive to position cases to trigger consideration of an issue that has been dividing the court. A strong dissent, as was the case in *Cole*, may define the precise issue of interest to at least one member of the court. A dissent may be an encouraging signal to a litigant to seek rehearing and to colleagues to join. It may pay to take the hint. Even if there is no dissent, familiarity with the court's recent case law may reveal an issue that is of concern to members of the court not on the panel and increase chances for further review by demonstrating a panel decision addresses an unsettled area of circuit law in which members of the court have expressed different opinions. Demonstrating the panel's decision has muddied the law of the circuit on an important issue that is likely to recur increases the likelihood that your petition for en banc review will be granted.

In *Cole*, the court granted relief that no party even requested. While an extreme situation, *Cole* shows there are issues that currently divide the members of the Seventh Circuit and are of such interest to the court that it may seek to resolve them irrespective of the parties' views. In a less extreme case, you may be able to turn your loss into rehearing and maybe a win.

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