A MOTION FOR EN BANC REHEARING IN THE NORTH CAROLINA COURT OF APPEALS: A PETITION FOR PANEL REHEARING IN DISGUISE?

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In December 2016, the North Carolina General Assembly authorized the North Carolina Court of Appeals to sit en banc,[1] and the North Carolina Supreme Court promulgated rules to establish the en banc procedure. In the following six years, 172 motions for en banc rehearing[2] were filed in 158 individual cases. Of those 172 motions, one was initially allowed, but the order allowing the motion was rescinded one week later, and one was allowed, but the Supreme Court accepted the case before the Court of Appeals reheard it. Consequently, no case has been heard en banc by the Court of Appeals.

Even though nearly every motion for en banc rehearing was denied or dismissed in these 158 cases, 23 opinions in 19 individual cases were withdrawn, amended, and refiled by the three-judge panel that issued the opinion, in direct or indirect response to a motion for en banc rehearing. An analysis of the en banc

*Judge, North Carolina Court of Appeals. I thank Duke University School of Law's Bolch Judicial Institute for allowing me to be a member of its L.L.M. in Judicial Studies Program and to graduate with the class of 2023. This article is adapted from my thesis for the Program, and I could not have completed my thesis without the encouragement, advice, and constructive criticism of my classmates and professors. I extend special thanks to Professor Ernest A. Young, my thesis advisor, for his guidance and to Lindsey Cooper, my Administrative Law Clerk for her research, editing, and administrative help.

1. "En banc" is defined as having "all judges present and participating; in full court." *En Banc*, BLACK'S LAW DICTIONARY (10th ed. 2015).

2. An additional ten motions for initial en banc hearing were filed and denied. This article does not explore these motions.

motions practice in the Court of Appeals indicates that the ability to seek en banc rehearing prior the opinion's mandate issuing has in effect allowed parties to seek, and three-judge panels to engage in, expedient panel rehearing in all types of cases.

While facilitating expedient panel rehearing has had a positive impact on North Carolina's jurisprudence, North Carolina's Rules of Appellate Procedure should accurately prescribe and reflect the process and procedure for seeking panel rehearing and en banc rehearing. By amending the North Carolina Rules of Appellate Procedure governing the petition for panel rehearing[3] and the motion for en banc rehearing to align with the current petitions/motions practice, the procedure and practice of seeking review of an opinion in the Court of Appeals would be more transparent and efficient for litigants, attorneys, Court of Appeals staff, and Court of Appeals judges.

Part I gives a brief history and overview of the federal court system, including the authorization of an en banc procedure in the circuit courts and the federal rules governing the panel and the en banc rehearing processes. Part II gives a brief history and overview of the North Carolina court system, including the authorization of the en banc procedure in the Court of Appeals and the state rules governing the panel and en banc hearing processes.

Part III explores the en banc motions practice in the Court of Appeals between January 2017 and October 2022 and analyzes the court's dispositions of those motions. This part concludes that the motion for en banc rehearing has become a de facto petition for panel rehearing and that the rules governing those rehearing processes should be amended to accurately reflect the current practice and implement the best practice. Part

3. Although North Carolina Rule of Appellate Procedure 31 and Federal Rule of Appellate Procedure 40 both refer to this mechanism as a "petition for rehearing," for purposes of clarity and consistency, this article will refer to a "petition for panel rehearing." *See* N.C. R. APP. P. 31; *see also* FED. R. APP. P. 40(a).

IV recommends amending the North Carolina Rules governing the panel and en banc rehearing processes to allow litigants to seek panel rehearing in all types of cases prior to the mandate issuing and prior to the court hearing a motion for en banc rehearing. Part V briefly summarizes the article and concludes.

This article is not a detailed survey, or comparative analysis, of federal and state en banc procedures, nor does it delve into the debate over the constitutionality of North Carolina's en banc procedure. This article analyzes data publicly available online and upon request from the Clerk of the Court of Appeals and relies upon labels given the various filed documents by the parties themselves.

I. A BRIEF HISTORY AND OVERVIEW OF THE FEDERAL COURT SYSTEM

To put the North Carolina Court of Appeals' en banc process in context, it is helpful to first understand how our federal intermediate appellate courts, and their relevant processes, have evolved.

A. The Origin and Evolution of the Federal Court System

Article III of the Constitution of the United States established a Supreme Court but left to Congress the authority to create lower federal courts as needed.[4] The Judiciary Act of 1789, officially titled "An Act to establish the Judicial Courts of the United States" and signed into law by President George Washington on September 24, 1789, established the structure and jurisdiction of the federal court system.[5] The Act prescribed that the United States be divided into 13 districts, with a district

4. "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1.

5. Judiciary Act of 1789, ch. 20, 1 Stat. 73 (1789).

court and a district court judge in each.[6] The Act further divided the districts[7] into three circuits—eastern, middle, and southern—each of which would hold court twice annually, called circuit courts.[8] The Act did not create judgeships in the circuits but rather provided that a circuit court would be composed of two Supreme Court Justices and one district court judge from the district in which the case was pending.[9] The circuit courts were given concurrent jurisdiction with the state courts over various matters,[10] concurrent jurisdiction with the federal district courts over various matters,[11] exclusive jurisdiction over various matters,[12] and the authority to review various matters on writ of error or on direct appeal.[13]

The Judiciary Act of 1869, formally titled "An Act to amend the Judicial System of the United States,"[14] established separate judgeships for each of the then-nine circuits and further gave these judges the power to hold circuit court sessions by themselves.[15] The law significantly reduced the burden on Supreme Court Justices to "ride circuit" by requiring each Justice to attend circuit court in each district within his circuit only once every two years.[16] The Judiciary Act of 1891,[17] also known as the Evarts Act, created nine new courts, known as the United States "circuit courts of appeals" and reassigned the jurisdiction of most routine appeals from the district and circuit courts to these appellate courts.[18]

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6. *Id.* §§ 2–3.
7. Except those of Maine and Kentucky. *Id.* § 4.
8. *Id.*
9. *Id.*
10. *Id.* § 11.
11. *See id.*
12. *See id.*
13. *See id.* §§ 11, 21–22.
14. Judiciary Act of 1869, ch. 22, 16 Stat. 44 (1869).
15. *See id.* § 2.
16. *See id.* § 4.
17. Judiciary Act of 1891, ch. 517, 26 Stat. 826 (1891).
18. *Id.* § 2.

Each circuit court of appeals[19] was composed of two circuit judges and one district judge. The original circuit courts themselves were abolished by the Judicial Code of 1911,[20] which transferred their trial jurisdiction to the federal district courts.[21] Additionally, the Code kept the circuit courts of appeals established by the Evarts Act and carried forward the three-judge panel requirement.[22]

In the following years, as court dockets and caseloads grew, Congress continued to increase the number of circuit courts of appeals judgeships across all the circuits, but the circuits continued the practice of sitting in divisions of three judges rather than sitting as an entire court.[23] The increased number of circuit judges, however, presented the likelihood of inconsistent panel decisions within a circuit and created the need for an administrative solution.[24]

The en banc procedure was first sanctioned by the Supreme Court in 1941 in *Textile Mills Securities Corp. v. Commissioner*,[25] after the Third and Ninth Circuits issued conflicting opinions over whether their respective courts had the authority to sit en banc.[26] In light of "the

19. These courts will be referred to interchangeably as circuit courts or circuit courts of appeals.

20. Judicial Code of 1911, ch. 231, 36 Stat. 1087 (1911).

21. *See id.* § 1.

22. *See id.* § 117.

23. A. Lamar Alexander, Jr., Note, *En Banc Hearings in the Federal Courts of Appeals: Accommodating Institutional Responsibilities (Part 1)*, 40 N.Y.U. L. REV. 563, 570 (1965).

24. *See id.* at 570–72.

25. 314 U.S. 326 (1941).

26. The Ninth Circuit, on June 27, 1938, was the first circuit court to address the permissibility of circuit courts sitting en banc. *See* Lang's Estate v. Comm'r, 97 F.2d 867 (9th Cir. 1938). In *Bank of America National Trust & Savings Ass'n v. Commissioner*, 90 F.2d 981 (9th Cir. 1937), a divided Ninth Circuit panel decided a question regarding estate taxes. *See id.* at 981–82. One year later, in *Lang's Estate*, a different Ninth Circuit panel addressed the same question but disagreed with the decision of the *Bank of America* panel. *See Lang's Estate*, 97 F.2d at 869. The panel in *Lang's Estate* concluded, however, that the Judicial Code of 1911 did not allow "more than three judges [to] sit in the Circuit Court of Appeals, [and] there [was] no method of hearing or rehearing by a larger number." *See id.* Thus, rather than overrule the *Bank of America* decision, the *Lang's Estate* panel presented a certificate to the Supreme Court to answer the

public importance" of the en banc question and to resolve the conflict between the Third and Ninth Circuits,[27] the Supreme Court granted certiorari in *Textile Mills*.[28] The Supreme Court unanimously held that the federal circuit courts of appeals have the power to convene themselves en banc.[29]

Congress codified the *Textile Mills* decision on June 25, 1948, in section 46(c) of the Judicial Code of 1948.[30] Section 46(c) provides:

> Cases and controversies shall be heard and determined by a court or panel of not more than three judges . . . unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges in regular active service . . . .[31]

However, neither *Textile Mills* nor the Judicial Code of 1948 prescribed procedures for a circuit court to implement en banc review or indicated the types of cases that would be appropriate for en banc review. The Supreme Court provided some clarity on the courts' power to convene en banc in *Western Pacific Railroad Corp. v. Western Pacific Railroad Co.*[32] In *Western Pacific*, the Supreme Court held that 28 U.S.C. § 46(c) empowers, but does not compel, federal circuit courts to

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estate tax question. *See id.* at 869–70. The Supreme Court granted certiorari and agreed with the second panel on the estate tax question but did not address whether a circuit court had the power to convene itself en banc. *See generally* Lang v. Comm'r, 304 U.S. 264 (1938). By contrast, two years later, in *Commissioner v. Textile Mills Securities Corp.*, 117 F.2d 62 (3d Cir. 1940) (en banc), *aff'd*, 314 U.S. 326 (1941), the Third Circuit, sitting en banc, noted that although the Ninth Circuit had held otherwise, a circuit court has the power to sit en banc. *See id.* at 67–71.

27. *Textile Mills Securities Corp.*, 314 U.S. at 327.

28. Textile Mills Securities Corp. v. Comm'r, 312 U.S. 677 (1941).

29. *Textile Mills Securities Corp.*, 314 U.S. at 331–35.

30. *See* United States v. Am.-Foreign S.S. Corp., 363 U.S. 685, 689 (1960) (noting that section 46(c) "was added to the Judicial Code in 1948 simply as a legislative ratification of *Textile Mills*" (internal quotation marks omitted)).

31. 28 U.S.C. § 46(c).

32. 345 U.S. 247 (1953).

sit en banc.[33] The Court further determined that section 46(c) does not give litigants the power to compel a circuit court to entertain each motion for a hearing or rehearing en banc, and a party cannot challenge the circuit court's decision to grant or deny a request for an en banc hearing.[34] Rather, section 46(c) allows a circuit court "to devise its own administrative machinery to provide the means whereby a majority may order" a hearing or rehearing en banc.[35] The Court, in the "exercise of [its] 'general power to supervise the administration of justice in the federal courts,'" articulated "certain fundamental requirements [that] should be observed by the Courts of Appeals" to ensure "section 46(c) achieve[s] its fundamental purpose."[36]

The Court enunciated five requirements: First, a circuit court must clearly articulate the procedure "whereby the court convenes itself en banc."[37] Second, the circuit may adopt a practice where a majority of the full court determines whether to convene en banc or it may delegate this decision to a division of the full court; however, a majority of the full court always has the power to revise the circuit's en banc procedures and withdraw any decision-making power delegated to a division of the court.[38] Third, the circuit must give a litigant the opportunity "to suggest to the court, or to the division . . . that a particular case is appropriate for consideration by all the judges."[39] Fourth, a circuit has the power to initiate an en banc hearing sua sponte.[40] Fifth, the question of whether to hear a case en banc

33. *See id.* at 250 ("In our view, § 46(c) is not addressed to litigants. It is addressed to the Court of Appeals. It is a grant of power. It vests in the court the power to order hearings en banc. It goes no further. It neither forbids nor requires each active member of a Court of Appeals to entertain each petition for a hearing or rehearing en banc.").

34. *See id.*

35. *Id.*

36. *Id.* at 260 (citation omitted).

37. *Id.* at 260–61.

38. *Id.* at 261.

39. *Id.*

40. *Id.* at 262.

must be decided separately from the question of whether there should be a rehearing by the three-judge panel that originally issued the opinion.[41]

Following the Supreme Court's *Western Pacific* decision, each circuit court enacted its own rules and developed its own case law governing the en banc procedure. Intending to standardize the en banc procedures across the circuits, Congress ratified Rule 35 of the Federal Rules of Appellate Procedure in 1967.[42]

C. Federal Rules of Appellate Procedure 35, 40, and Other Relevant Rules

Pursuant to Federal Rule 35, an appeal or other proceeding may be heard or reheard by the court en banc upon an order of "[a] majority of the circuit judges who are in regular active service and who are not disqualified . . . ."[43] An en banc hearing or rehearing is disfavored and ordinarily will not be ordered unless "en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or . . . the proceeding involves a question of exceptional importance."[44]

"A party may petition for a hearing or rehearing en banc," and the petition must state either that consideration by the full court is "necessary to secure and maintain uniformity of the court's decisions" because "the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed," or that "the proceeding involves one or more questions of exceptional importance . . . ."[45] A question of exceptional importance may, for example, "involve[] an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue."[46] A

41. *Id.*
42. FED. R. APP. P., hist. n. at VII (COMM. ON THE JUDICIARY 2016).
43. FED. R. APP. P. 35(a).
44. *Id.* 35(a)(1)–(2).
45. *Id.* 35(b)(1)(A)–(B).
46. *Id.* 35(b)(1)(B).

response to a petition for en banc hearing or rehearing is permitted only when ordered by the court.[47] "A vote need not be taken to determine whether the case will be heard or reheard en banc unless a judge calls for a vote."[48]

A petition for en banc rehearing "must be filed within the time prescribed by Rule 40" of the Federal Rules of Appellate Procedure for filing a petition for panel rehearing.[49] Pursuant to Federal Rule 40, a petition for panel rehearing must generally be filed within 14 days after entry of judgment, unless the time is changed by order or local rule.[50]

A petition for panel rehearing "must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition."[51] A party may only respond to a petition for panel rehearing upon request of the court, and oral argument on the petition is not permitted.[52] If a petition for panel rehearing is granted, the court may make a final disposition without reargument, "restore the case to the calendar for reargument or resubmission," or "issue any other appropriate order."[53]

Each circuit court of appeals has the authority to make and amend "local rules" governing its own practice and procedure.[54] Rule 47 of the Federal Rules of Appellate Procedure requires "local rules" to be enacted by a majority of the circuit's judges "in regular active service."[55] It also provides that a local rule must be consistent with federal law, the appellate rules, and local

47. *Id.* 35(e).

48. *Id.* 35(f).

49. *Id.* 35(c).

50. *See* FED. R. APP. P. 40(a)(1). In civil cases where a party is the United States or an agency or officer thereof, the time for filing a petition for panel rehearing is within 45 days after entry of judgment. *See id.* 40(a)(1)(A)–(D).

51. *Id.* 40(a)(2).

52. *Id.* 40(a)(2)–(3).

53. *Id.* 40(a)(4)(A)–(C).

54. *See* 28 U.S.C. § 2071(a); FED. R. APP. P. 47(a)(1).

55. FED. R. APP. P. 47(a)(1).

circuit rules.[56] Every circuit has a local rule governing the en banc procedure.[57] Additionally, the First, Second, Third, Fifth, Sixth, Seventh, and Eleventh Circuits have "internal operating procedures" governing petitions for en banc hearings or rehearings.[58]

II. A BRIEF HISTORY AND OVERVIEW OF THE NORTH CAROLINA COURT SYSTEM

While the North Carolina court system's origin and evolution followed a different path from that of the federal system, North Carolina now has a very similar structure to that of the federal system. Additionally, North Carolina's rules of appellate procedure are similar in many aspects to the federal rules; however, there are some key differences in the procedures for panel rehearing that this article will discuss in detail below.

A. The Origin and Evolution of the North Carolina Court System

In 1965, the North Carolina Constitution was amended to allow for the creation of the Court of Appeals.[59] Article IV, Section 7, of the 1971 Constitution authorizes the Court of Appeals:

> The structure, organization, and composition of the Court of Appeals shall be determined by the General Assembly. The Court shall have not less than five members, and may be authorized to sit in divisions, or other than en banc.[60]

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56. *Id.* 47(b).

57. *See* 1st CIR. R. 35.0; 2d CIR. R. 35.1; 3d CIR. R. 35.0; 4th CIR. R. 35; 5th CIR. R. 35; 6th CIR. R. 35; 7th CIR. R. 35; 8th CIR. R. 35A; 9th CIR. R. 35-1 to -4; 10th CIR. R. 35.1; 11th CIR. R. 35-1 to -10, 35; D.C. CIR. R. 35; FED. CIR. R. 35.

58. *See* 1st CIR. I.O.P. X.; 2d CIR. I.O.P. 35.1; 3d CIR. I.O.P. 2.2, 9.1 to -.6; 5th CIR. I.O.P. (Petition for Rehearing En Banc); 6th CIR. I.O.P. 35; 7th CIR. APP. III I.O.P. 5; 11th CIR. I.O.P. (accompanying FED. R. APP. P. 35).

59. *See* Act of June 9, 1965, ch. 877, 1965 N.C. Sess. Laws 1173.

60. N.C. CONST. art. IV, § 7.

Pursuant to this amendment, North Carolina General Statute section 7A-16 established the North Carolina Court of Appeals, effective January 1, 1967.[61] Per statute, the Court of Appeals initially consisted of six judges, elected for eight-year terms.[62] The Chief Justice of the Supreme Court was to designate a Chief Judge of the Court of Appeals, to serve "at the pleasure of the Chief Justice."[63] On or after July 1, 1967, the governor was to make temporary appointments to the initial six judgeships, to serve until January 1, 1969.[64] Their successors were to be elected at the general election in November 1968 and take office on January 1, 1969, "to serve for the remainder of the unexpired term [that] began on January 1, 1967."[65] "Upon the appointment of at least five judges, and the designation of a Chief Judge," the court was authorized "to convene, organize, and promulgate, subject to the approval of the Supreme Court, such supplementary rules as it deems necessary and appropriate for the discharge of the judicial business lawfully assigned to it."[66]

B. The History and Authorization of an En Banc Procedure in North Carolina

Section 7A-16 has been periodically amended to add—and occasionally subtract—judges, and the Court of Appeals presently consists of 15 judges. Until December 2016, section 7A-16 authorized the Court of Appeals to sit only in three-judge panels, prescribing that "[t]he Court of Appeals shall sit in panels of three judges each" and "[t]hree judges shall constitute a quorum for the transaction of the business of the

61. *See* N.C. GEN. STAT. § 7A-16 (1967).
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*

court . . . ."[67] However, there had been some public interest in authorizing the court to convene en banc.

In 1997, John C. Orth, Professor of Law Emeritus from the University of North Carolina Law School, argued that the North Carolina Court of Appeals should have a procedure for sitting en banc.[68] Without an en banc procedure, Orth argued, all succeeding panels of the Court of Appeals are constrained to follow a precedent set by a prior panel, two inconsistent lines of cases could develop on a single issue, and successive panels of the Court of Appeals might develop a rule that is inconsistent with Supreme Court precedent.[69] Orth asserted that an en banc process is more desirable than appeal or petition to the North Carolina Supreme Court because "[n]eedless appeals to a higher court are thereby avoided," "appeals that do go forward have the benefit of a fully developed record," and a "procedure for sitting en banc . . . preserves the dignity of the [Court of Appeals by] preventing it from speaking with many voices."[70]

Upon occasion, litigants moved or petitioned the Court of Appeals to hear a case en banc.[71] The Court routinely denied these motions, "not[ing] that neither the legislature nor the Supreme Court by rule-making has

67. N.C. GEN. STAT. § 7A-16 (amended 2016).

68. *See* John V. Orth, *Why the North Carolina Court of Appeals Should Have a Procedure for Sitting En Banc*, 75 N.C. L. REV. 1981, 1985–86 (1997).

69. *Id.* at 1982–84.

70. *Id.* at 1982.

71. *See, e.g.*, State v. Cates, 573 S.E.2d 208, 209 (N.C. Ct. App. 2002) ("In addition to his appeal, defendant filed a Motion for Appropriate Relief with this Court, in which he contends (1) that his conviction violates his right to due process under the Fourteenth Amendment to the United States Constitution and (2) that he may not be punished for a crime of which he was acquitted. Defendant also filed a 'Motion for En Banc Hearing, or in the Alternative, Second Motion for Appropriate Relief' with this Court requesting that the Court sit en banc to consider overruling one of its own previous decisions. Finding no merit in defendant's contentions, we deny these motions and note that neither the legislature nor the Supreme Court by rule-making has established a procedure by which this Court may sit en banc, if indeed the North Carolina Constitution permits such sitting."). *See also* State v. Cates, 577 S.E.2d 898 (N.C. 2003) (mem.) ("Motion by Defendant for Order Directing the North Carolina Court of Appeals to Propose Procedures to Sit En Banc . . . [.] 'Motion Denied by order of the Court in conference this the 27th day of February 2003.'").

established a procedure by which this Court may sit en banc, if indeed the North Carolina Constitution permits such sitting."[72]

On December 16, 2016, the General Assembly amended section 7A-16 to allow the Court of Appeals to sit not only "in panels of three judges each" but also to "sit en banc to hear or rehear any cause upon a vote of the majority of the judges of the court."[73] The General Assembly also amended section 7A-32 to provide that when sitting in panels of three, "three judges shall constitute a quorum for the transaction of the business of the court" but that when sitting en banc, "a majority of the then sitting judges on the Court of Appeals shall constitute a quorum for the transaction of the business of the court . . . ."[74]

C. North Carolina Rules of Appellate Procedure 31.1, 31, and Other Relevant Rules

The North Carolina Supreme Court entered an Order Adopting Rule 31.1 of the North Carolina Rules of Appellate Procedure on December 22, 2016, implementing the en banc hearing and rehearing process.[75] Pursuant to the authority of Article IV of the Constitution of North Carolina[76] and section 7A-33,[77] the Supreme Court amended the North Carolina Rules of Appellate Procedure by adding Rule 31.1, Motion for En Banc Consideration by Court of Appeals.

Pursuant to Rule 31.1, upon an order of a majority of the judges, the Court of Appeals may order an appeal be heard in the first instance or reheard en banc.[78] An en

72. *Cates*, 573 S.E.2d at 209.

73. 2016 N.C. Sess. Laws 2016-125 Sec. IV § 22(a).

74. *Id.*

75. Order Adopting Rule 31.1 of the North Carolina Rules of Appellate Procedure, 370 N.C. 761, 761–62 (2018).

76. N.C. CONST. art. IV, § 7.

77. "The Supreme Court shall prescribe rules of practice and procedure designed to procure the expeditious and inexpensive disposition of all litigation in the appellate division." N.C. GEN. STAT. § 7A-33 (1967).

78. N.C. R. APP. P. 31.1(a).

banc hearing or rehearing is disfavored and ordinarily will not be ordered unless "en banc consideration is necessary to secure or maintain uniformity of the court's decisions" or "the case involves a question of exceptional importance that must be concisely stated."[79]

A motion for en banc hearing or rehearing[80] must "explain with particularity why en banc consideration is necessary"[81] and be filed "within fifteen days after the opinion of the court has been filed."[82] A party may file a response thereto within ten days of service of the motion.[83] The court shall rule on the motion within 30 days after its filing.[84]

The denial or dismissal of the motion triggers the time for taking an appeal of right to the Supreme Court in a case which directly involves a substantial constitutional question[85] when the court sits in a three-judge panel, pursuant to section 7A-30.[86] The denial or dismissal of the motion also triggers the time for filing a petition for discretionary review with the Supreme

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79. *Id.* 31.1(a)(1)-(2).

80. This article only analyzes motions for en banc rehearings. However, the Rules provide the following for motions for initial en banc hearings:

> Motions for Initial En Banc Hearing. At any point after the appellant's brief is filed but no later than fifteen days after the filing of the appellee brief, any party may file a motion for en banc consideration. The motion shall be accompanied by proof of service upon all other parties. Within ten days after service of the motion, any party may file a response thereto. The filing shall be accompanied by proof of service upon all other parties. The court will rule upon the motion within thirty days after the case is fully briefed and may rule upon it prior to that time. The filing of the motion will not stay the time for briefs to be filed. When a motion for en banc consideration is allowed, the case will be calendared as soon as practicable.

N.C. R. APP. P. 31.1(c).

81. *Id.* 31.1(b).

82. *Id.* 31.1(d).

83. *Id.*

84. The Rules provide that the court "will either allow or deny the motion" within 30 days after its filing. *Id.* The court has also routinely dismissed motions for en banc rehearing, presumably because they were not timely filed or otherwise failed to comply with the Rules.

85. An appeal as of right from an opinion in which there was a dissent was repealed by House Bill 259, which became effective July 1, 2023. *See* H.B. 259, Gen. Assemb., Sess. L. 134, §§ 16.21(d), 43.8 (N.C. 2023).

86. N.C. R. APP. P. 31.1(d).

Court, pursuant to Rule 15.[87] Both an appeal as of right and a petition for discretionary review must be filed and served "within fifteen days after the mandate of the Court of Appeals has been issued to the trial tribunal."[88] The mandate issues "twenty days after the written opinion of the court has been filed with the clerk," unless the court orders otherwise.[89]

The filing of a motion for en banc rehearing does not automatically stay the mandate's issuance. Because the time for taking an appeal as of right to or filing a petition for discretionary review in the Supreme Court is tied to the mandate's issuance, a movant may obtain a stay of the mandate from the Court of Appeals in accordance with Rule 8.[90] However, the court has entered orders on its own motion staying the mandate where motions for en banc rehearing have been filed without the movant seeking a stay.[91] When the court issues an order denying or dismissing a motion for en banc rehearing, the order typically also dissolves the stay and deems the mandate to issue upon the date of the order, triggering the time for seeking review in the Supreme Court.[92]

When the court grants a motion for en banc rehearing, the en banc court is to consider the case "solely upon the record on appeal, the motion for en banc rehearing[,] and any responses thereto."[93] The court may

87. *Id.*

88. N.C. R. APP. P. 14(a), 15(b).

89. N.C. R. APP. P. 32(b).

90. N.C. R. APP. P. 31.1(e). It is unclear how Rule 8 governs this process, as Rule 8 governs stays of execution or enforcement of the judgment, order, or other determination in the trial court to which the mandate of the appellate court has been issued. *See* N.C. R. APP. P. 8.

91. *See, e.g.*, AVR Davis Raleigh, LLC v. Triangle Constr. Co., No. COA17-958 (N.C. Ct. App. Aug. 24, 2018) (order staying mandate).

92. *See* N.C. R. APP. P. 31.1(d).

93. N.C. R. APP. P. 9(a), 31.1(d). "The components of the record on appeal include: the printed record, transcripts, exhibits and other items included in the record on appeal pursuant to Rule 9(d), any supplement prepared pursuant to Rule 11(c) or Rule 18(d)(3), and any additional materials filed pursuant to this Rule 9." N.C. R. APP. P. 9(a).

also request new briefs and/or oral argument.[94] "Entry of the en banc opinion vacates the original panel opinion."[95]

Rule 31.1 works in concert with Rule 31, which governs petitions for panel rehearing. A petition for panel rehearing must "state with particularity the points of fact or law that, in the opinion of the petitioner, the court has overlooked or misapprehended" and argument in support thereof as petitioner desires to present.[96] Unlike petitions for panel rehearing under Federal Rule 40, a petition for panel rehearing in North Carolina may only be filed in a civil action[97] and must be accompanied by a certificate of at least two attorneys[98] who attest that they "have carefully examined the appeal and the authorities cited in the decision, and that they consider the decision in error on points specifically and concisely identified."[99] Also unlike under Federal Rule 40, which generally requires a petition for panel rehearing to be filed within 14 days after entry of judgment,[100] the petition for panel rehearing in North Carolina must be filed within 15 days "*after the mandate* of the court has been issued."[101] An opposing party may not file a written response and oral argument will not be permitted.[102] "The petitioner may obtain a stay of execution" on or enforcement of the judgment, order, or other determination "in the trial court to which the mandate of the appellate court has been issued," in accordance with Rule 8.[103]

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94. *Id.*

95. *Id.*

96. N.C. R. APP. P. 31(a).

97. *See id.* 31(a), (g).

98. *Id.* 31(a) ("[The petition] shall be accompanied by a certificate of at least two attorneys who for periods of at least five years, respectively, shall have been members of the bar of this State and who have no interest in the subject of the action and have not been counsel for any party to the action . . . .").

99. *Id.*

100. *See* FED. R. APP. P. 40(a)(1), (d)(1). However, in civil cases where a party is the United States or an agency or officer thereof, the time for filing a petition for panel rehearing is "within 45 days after entry of judgment." *Id.*

101. N.C. R. APP. P. 31(a) (emphasis added).

102. *Id.* 31(c).

103. *Id.* 31(e).

Within 30 days of its filing, the court will rule on the petition.[104] If the court grants a petition for panel rehearing, "[t]he case will be reconsidered solely upon the record on appeal, the petition to rehear, new briefs of both parties, and the oral argument if one has been ordered by the court."[105] The right to petition for panel rehearing in the Court of Appeals is waived by timely filing a notice of appeal or a petition for discretionary review in the Supreme Court.[106] Furthermore, a petition for rehearing pending in the Court of Appeals is deemed abandoned by the filing of a timely notice of appeal or petition for rehearing in the Supreme Court.[107]

A litigant may file a motion for en banc rehearing, a petition for panel rehearing (in a non-criminal case), or both.[108] If a litigant files both, "the court will rule on the motion for en banc rehearing first."[109] "The time for ruling on the Rule 31 petition for rehearing shall commence" on "the date of entry by the Court of Appeals of an order denying the en banc motion."[110]

While both motions for en banc rehearing and petitions for panel rehearing are filed by litigants in an effort to persuade judges at the Court of Appeals to rehear their case after an opinion has been filed, there are significant differences between the two.

104. *Id.* 31(c).
105. *Id.* 31(d).
106. *Id.* 31(f).
107. *Id.*
108. *See* N.C. R. APP. P. 31.1(f).
109. *Id.*
110. *Id.*

	Motion for En Banc Rehearing	Petition for Rehearing
Timing	Must be filed up to 5 days *before* the mandate issues.	Must be filed within 15 days *after* the mandate has issued.
Contents (standard)	Must explain with particularity why (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the case involves a question of exceptional importance.	Shall state with particularity the points of fact or law that petitioner believes the court has overlooked or misapprehended and shall contain argument in support of the petition.
Attorney affidavits	Not required.	Must be accompanied by certificates of at least two attorneys.
To whom directed	The Court of Appeals.	The Court of Appeals panel that issued the opinion.
Response allowed	Yes.	No.
Allowed in a criminal case	Yes.	No.
Stay	The running of the time for filing and serving notice of appeal is not automatically tolled. Movant may seek a stay of issuance of the mandate from the Court of Appeals.	The running of the time for filing and serving notice of appeal is automatically tolled. Movant may seek a stay of execution on or enforcement of the judgment, order, or other determination in the trial court to which the mandate of the appellate court has been issued, in accordance with Rule 8.

In addition to, or instead of, filing a motion for en banc rehearing and/or a petition for panel rehearing, parties regularly cite Rules 2 and 37 as authority for filing a motion for a panel to withdraw, reconsider,

and/or amend an opinion, particularly in criminal cases where a petition for panel rehearing is not allowed.[111]

Under Rule 2, "[t]o prevent manifest injustice to a party, or to expedite decision in the public interest," the court may, "except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it . . . ."[112] This rule "expresses an obvious residual power" to suspend or vary operation of the rules "in specific cases where this is necessary to accomplish a fundamental purpose of the rules."[113] Whether a party has "demonstrated that [its] matter is the rare case meriting suspension" of the rules is a "discretionary determination to be made" by the court "on a case-by-case basis."[114] The court may invoke its residual power "upon application of a party or upon its own initiative" and "may order proceedings in accordance with its directions."[115]

Rule 37 provides the procedural mechanism by which a party may move the court for an "order or for other relief available under these [R]ules."[116] A motion must be filed with the clerk of the court and served on all parties, and may be filed and served "at any time before the case is called for oral argument," "unless another

111. *See, e.g.*, Motion for Temporary Stay at 5, State v. Harding, 813 S.E.2d 254 (N.C. Ct. App. 2018) (No. COA17-448).

112. N.C. R. APP. P. 2. "The phrase 'except as otherwise expressly provided' refers to the provision in Rule 27(c) that the time limits for taking appeal laid down in these Rules (i.e. Rules 14 and 15) or in 'jurisdictional' statutes which are then replicated or cross-referred in these Rules, i.e. Rules 3 (civil appeals), 4 (criminal appeals) and 18 (agency appeals), may not be extended by any court." N.C. R. APP. P. 2. cmt. (1975).

113. N.C. R. APP. P. 2 cmt. (1975) ("This Rule expresses an obvious residual power possessed by any authoritative rule-making body to suspend or vary operation of its published rules in specific cases where this is necessary to accomplish a fundamental purpose of the rules. The power does not of course depend upon its express reservation by the Court in the body of the Rules. It is included here as a reminder to counsel that the power does exist, and that it may be drawn upon by either appellate court where the justice of doing so or the injustice of failing to do so is made clear to the court.").

114. State v. Campbell, 799 S.E.2d 600, 603 (N.C. 2017).

115. N.C. R. APP. P. 2.

116. N.C. R. APP. P. 37(a).

time is expressly provided" by the Rules.[117] "The motion shall contain or be accompanied by any matter required by a specific provision of these rules governing such a motion . . . ."[118] By its plain language, Rule 37 does not provide authority for motions seeking relief not expressly available under the Rules. Because the Rules do not provide for panel reconsideration in a criminal case or for panel reconsideration in a civil case prior to the mandate's issuance, Rule 37 does not provide authority for a party to move the court for such relief. Nonetheless, as we will see, the court has granted motions seeking this type of relief, particularly where a motion for en banc rehearing has also been filed.

III. EN BANC MOTIONS PRACTICE IN THE NORTH CAROLINA COURT OF APPEALS

The impact of the differences between the federal and North Carolina Rules on petitions and motions for panel rehearings and en banc rehearings becomes clearer upon review of the data on en banc motions practice in the North Carolina Court of Appeals.

A. Analysis of En Banc Motions Filed Between January 2017 and October 2022

The first motion for en banc rehearing was filed on January 4, 2017, in *Corwin v. British American Tobacco*.[119] Between January 4, 2017, and September 31, 2022, a total of 172 motions for en banc rehearing were filed in 158 individual cases.

The table on the next page aggregates the following statistics:

- The number of motions for en banc rehearing filed in the number of individual cases,

117. *Id.*
118. *Id.*
119. 796 S.E.2d 324 (N.C. Ct. App. 2016).

- The number of motions to withdraw and petitions for panel rehearing also filed in those individual cases, and
- The number of opinions withdrawn in the number of individual cases in which motions for en banc rehearing were filed.

Year	Motions for En Banc Rehearing Filed	Individual Cases	Motions to Withdraw	Petitions for Panel Rehearing	Opinions Withdrawn	Individual Cases
2017	30	27	3	4	5	5
2018	36	34	9	5	7	5
2019	36	33	8	2	6	5
2020	24	23	6	2	0	0
2021	26	23	5	4	1	1
2022	20	18	7	3	4	3
Totals	172	158	38	20	23	19

The table on the next page aggregates the following statistics:

- The number of motions for en banc rehearing filed in civil and criminal cases,
- The number of individual civil and criminal cases in which motions for en banc rehearing were filed,
- The number of pro se cases, and
- The number of opinions withdrawn by civil and criminal case.

Year	Motions for En Banc Rehearing Filed		Cases in Which Motions for En Banc Rehearing Filed		Pro Se Cases		Opinions Withdrawn	
	Civ.	Crim.	Civ.	Crim.	Civ.	Crim.	Civ.	Crim.
2017	12	18	10	17	3	7	1	4
2018	12	24	10	24	3	11	6	1
2019	21	15	19	14	3	7	3	3
2020	11	13	11	12	3	4	0	0
2021	13	13	13	10	5	5	1	0
2022	7	13	7	11	0	5	0	4
Totals	76	96	70	88	17	39	11	12

B. Analysis of the Court's Disposition of En Banc Motions and Related Filings

Of the 172 motions for en banc rehearing filed, two were initially allowed, 107 were denied, and 62 were dismissed. Of the two that were initially allowed, one order was rescinded a week later[120] and the other case was accepted by the Supreme Court before it was reheard by the Court of Appeals.[121] Both allowed motions were in civil cases.

Even though all but one motion for en banc rehearing were ultimately denied, 23 opinions were withdrawn, amended, and refiled in 19 individual cases in which motions for en banc were filed. Of the 23 opinions withdrawn, six were withdrawn in four individual cases when the court allowed a motion to

120. *See In re* A.C., No. COA20-508 (N.C. Ct. App. Aug. 31, 2021) (order rescinding the order allowing motion for en banc hearing).

121. *See* Harper v. Hall, 865 S.E.2d 301, 302–03 (N.C. 2021) (order allowing plaintiff's petitions for discretionary review prior to determination by the Court of Appeals).

withdraw or granted a petition for rehearing,[122] and two opinions were withdrawn in two individual cases to fix clerical errors.[123]

Accordingly, of 23 opinions that were withdrawn, amended, and refiled in 19 individual cases in which motions for en banc were filed, 15 opinions in 13 individual cases were withdrawn, reheard by the panel, and refiled in direct response to a motion for en banc rehearing. In seven of these cases, a party filed a second motion for en banc rehearing after the amended opinion was filed; all were denied or dismissed. In one of those cases, the amended opinion was nonetheless withdrawn, amended, and refiled, after which a party filed a third motion for en banc rehearing, which was dismissed.

1. Cases in Which Only a Motion for En Banc Rehearing Was Filed and Was Dismissed or Denied

Below I analyze each of the cases in which a motion for en banc rehearing was filed and was either dismissed or denied, but the opinion was nonetheless withdrawn and reissued by the panel with substantive changes.

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122. Of the 38 motions to withdraw filed in addition to a motion for en banc rehearing, five were allowed in three individual cases. *See In re* R.R., 812 S.E.2d 407 (N.C. Ct. App. 2018); State v. Wright, No. COA18-209, 2019 N.C. App. LEXIS 37 (N.C. Ct. App. Jan. 15, 2019), *withdrawn and superseded by* 825 S.E.2d 1 (N.C. Ct. App.), *withdrawn and superseded by* 826 S.E.2d 833 (N.C. Ct. App. 2019) (two allowed); State v. Perkins, No. COA20-572, 2022 N.C. App. LEXIS 36 (N.C. Ct. App., Jan. 18, 2022), *withdrawn and superseded by* 2022 WL 10219728 (N.C. Ct. App. Oct. 18, 2022), *withdrawn and superseded by* 881 S.E.2d 842 (N.C. Ct. App. 2022) (two allowed). Of the 20 petitions for panel rehearing filed in addition to a motion for en banc rehearing, one was allowed. *See* Grodensky v. McLendon, 812 S.E.2d 914 (N.C. Ct. App.), *superseded by* 816 S.E.2d 267 (N.C. Ct. App. 2018).

123. *See* State v. Smith, 808 S.E.2d 621 (N.C. Ct. App. 2018) (Motion to Withdraw Opinion to Correct a Manifest and Material Mistake of Fact denied but the "Material Mistake of Fact" has been corrected, and a corrected opinion has been filed by this Court); *In re* L.V., 814 S.E.2d 928 (N.C. Ct. App. 2018) (mem.), *overruled by In re* L.E.M., 831 S.E.2d 341 (N.C. 2019) (opinion withdrawn and amended to correct a scrivener's error in footnote 2).

In re A.C.

In *In re A.C.*,[124] the court filed[125] a unanimous, unpublished opinion on June 15, 2021, in a case involving a permanency planning order granting guardianship of respondent-father's child to the child's foster parents.[126] The court affirmed the trial court's order wherein the trial court determined that mother and father had "acted inconsistently with their constitutional rights to parent" and that "it is in [the child's] best interest and welfare for guardianship to be granted to [the foster parents]."[127] Citing *In re T.P.*[128] and its progeny, the court held that father had "failed to object, present argument, or otherwise raise the issue of his constitutionally protected parental status at the permanency planning hearing," and thus had "waived appellate review of the trial court's determination he acted inconsistently with his constitutionally protected parental rights."[129]

Father filed both a motion for en banc rehearing and a petition for rehearing on June 30, 2021.[130] By sua sponte order, the court stayed the mandate on July 1, 2021.[131] The guardian ad litem filed a response to the en banc rehearing motion on July 12, 2021.[132] The county

124. No. COA20-508, 2021 N.C. App. LEXIS 269 (N.C. Ct. App. June 15, 2021), *withdrawn and superseded by* 868 S.E.2d 113 (N.C. Ct. App. 2021).

125. The Court of Appeals generally operates through three-judge panels. All opinions and orders filed, except where specifically noted, are done so by a three-judge panel speaking for the court or the court engaging in administrative duties on behalf of a three-judge panel.

126. *See In re A.C.*, 2021 N.C. App. LEXIS 269, at *6–7.

127. *Id.* at *7 (second alteration in original) (internal quotation marks and citation omitted).

128. 718 S.E.2d 716 (N.C. Ct. App. 2011).

129. *In re A.C.*, 2021 N.C. App. LEXIS 269, at *1.

130. Motion for En Banc Rehearing, *In re A.C.*, 2021 N.C. App. LEXIS 269 (No. COA20-508); Petition for Rehearing, *In re A.C.*, 2021 N.C. App. LEXIS 269 (No. COA20-508).

131. *In re* A.C., No. COA20-508 (N.C. Ct. App. July 1, 2021) (order staying mandate).

132. Response to Motion En Banc Rehearing, *In re A.C.*, 2021 N.C. App. LEXIS 269 (No. COA20-508).

Department of Social Services filed a response the next day.[133]

Father's en banc rehearing motion was allowed by order of the court on July 30, 2021,[134] and on August 12, 2021, the court entered an order withdrawing the opinion.[135] However, by order entered August 31, 2021, the court ordered that "after further consideration by the Court as a whole, the Court's 30 July 2021 order allowing en banc rehearing of the appeal is rescinded. The appeal is returned to the original panel for further consideration."[136] father's petition for rehearing, filed June 30, 2021, was dismissed as moot.[137]

The court, with a different authoring judge, issued a superseding, unanimous, published opinion on November 16, 2021.[138] Without addressing whether father had properly preserved his arguments for appellate review, the opinion addressed the merits of his appeal. The court vacated the trial court's order and remanded it for a new permanency planning hearing "[b]ecause the trial court erred by applying an improper evidentiary standard and failed to make the statutorily required findings before ceasing reunification efforts toward guardianship . . . ."[139] The Supreme Court denied further review of the case.[140]

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133. Response to Motion En Banc Rehearing, *In re A.C.*, 2021 N.C. App. LEXIS 269 (No. COA20-508).

134. *In re* A.C., No. COA20-508 (N.C. Ct. App. July 30, 2021) (order allowing motion for en banc hearing).

135. *In re* A.C., No. COA20-508 (N.C. Ct. App. Aug. 12, 2021) (order withdrawing opinion).

136. *In re* A.C., No. COA20-508 (N.C. Ct. App. Aug. 31, 2021) (order rescinding the order allowing motion for en banc hearing).

137. *In re* A.C., No. COA20-508 (N.C. Ct. App. Sept. 1, 2021) (order dismissing as moot the petition for rehearing). Per Rule 31(a), this petition for rehearing was not timely filed because it was filed before the mandate issued. *See* N.C. R. APP. P. 31(a). With the mandate stayed, there was no point at which a petition for rehearing could have been timely filed prior to the superseding opinion being issued. In theory, the petition could have been dismissed as untimely.

138. *In re* A.C., 868 S.E.2d 113 (N.C. Ct. App. 2021).

139. *Id.* at 114–15.

140. *See, e.g.*, *In re* A.C., No. 430P21, 2022 N.C. LEXIS 413 (N.C. Feb. 9, 2022), *denying cert. to* 868 S.E.2d 113 (N.C. Ct. App. 2021).

Although the court allowed and then rescinded its order allowing father's motion for en banc rehearing, and the court dismissed as moot father's petition for rehearing, the en banc motion ultimately functioned as a petition for panel rehearing prior to the mandate being issued. The case was reheard by the original panel, and the panel essentially reversed the outcome of its original opinion. While the superseding opinion does not directly distinguish *In re T.P.* and its progeny, as a published opinion, *In re A.C.* provides authority, or at least an avenue, for future panels to address the merits of similar issues in similar procedural postures.

In re A.C. is the only case wherein a motion for en banc rehearing was allowed, even if only briefly, after an opinion was issued.[141] However, the following cases involved motions for en banc rehearing that were dismissed but that also effectively functioned as motions for panel rehearing prior the mandate being issued.

In each of the following eight cases, four civil and four criminal, a movant filed a motion for en banc rehearing that was dismissed by the court "without prejudice to its refiling if appropriate after the withdrawn opinion has been refiled."[142] The panel, nonetheless, withdrew the opinion in each case and issued a new opinion, addressing the arguments the movant made in the motion for en banc rehearing. In five of the cases, the movant filed a second motion for en banc rehearing,[143] which was also denied, and the Supreme Court declined further review.

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141. The order allowing the motion for an en banc rehearing in *North Carolina League of Conservation Voters, Inc. v. Representative Destin Hall* was entered after an order allowing a motion for a temporary stay had been entered, not after an opinion in the case had been issued. *See* N.C. League of Conservation Voters, Inc. v. Hall, P21-525 (N.C. Ct. App. Dec. 6, 2021) (order allowing motion for en banc rehearing).

142. *See, e.g.*, State v. Hill, No. COA16-744 (N.C. Ct. App. Apr. 3, 2017) (order dismissing motion for rehearing en banc).

143. In *Grodner v. Grodner*, in addition to two motions for en banc rehearing the movant filed a motion to withdraw. 815 S.E.2d 748 (N.C. Ct. App.), *superseded by* 817 S.E.2d 505 (N.C. Ct. App. 2018).

State v. Hill

In *State v. Hill*,[144] the court's unanimous, unpublished opinion filed on March 7, 2017, found no error in defendant's trial or sentence for various drug-related convictions.[145] Defendant filed a motion for en banc rehearing on March 24, 2017, asserting that the "decision is at odds with previous decisions on the issue of the admissibility of lay opinion testimony concerning the identity of a perpetrator from video footage" and that the court's analysis that the testifying witness may have identified defendant based on a general investigation into the matter instead of based on the video was merely speculative.[146] Defendant also argued that the opinion erroneously concluded that he had made "only a general objection" to the admission of testimony he then sought to challenge on appeal, and thus failed to preserve the issue for appeal, because this overlooked the stipulation in the record on appeal that counsel specifically objected.[147]

On April 3, 2017, the court issued orders withdrawing the opinion[148] and dismissing the motion for en banc rehearing "without prejudice to its refiling if appropriate after the withdrawn opinion has been refiled."[149] The court filed a superseding, unanimous, unpublished opinion on April 18, 2017,[150] wherein the

144. No. COA16-744, 2017 N.C. App. LEXIS 153 (N.C. Ct. App. Mar. 7, 2017), *withdrawn and superseded by* 798 S.E.2d 553 (N.C. Ct. App. 2017).

145. *See id.* at *1.

146. *See* Defendant/Appellant's Motion for Rehearing En Banc at 2, *Hill*, 2017 N.C. App. LEXIS 153 (No. COA16-744).

147. *Id.* at 5. While the opinion did conclude that defendant failed to preserve for appellate review his argument that the trial court allowed a law enforcement officer to give improper lay opinion testimony that identified defendant as the person depicted in the video, the opinion nonetheless addressed the merits of the argument: "Assuming, arguendo, that Defendant's argument was preserved, we do not find merit in his assertions." *Hill*, 2017 N.C. App. LEXIS 153, at *6–7.

148. State v. Hill, No. COA16-744 (N.C. Ct. App. Apr. 3, 2017) (order withdrawing the opinion).

149. State v. Hill, No. COA16-744 (N.C. Ct. App. Apr. 3, 2017) (order dismissing motion for rehearing en banc).

150. State v. Hill, 798 S.E.2d 553 (N.C. Ct. App. 2017).

court directly addressed the two issues raised in the motion for en banc rehearing. The opinion omitted its previous discussion regarding defendant's failure to preserve his objection to testimony and addressed the merits of the issue.[151] The opinion also augmented its analysis regarding the witness identification.[152] Ultimately, the result remained the same as the court found no error.[153] Discretionary review was denied by the Supreme Court.[154]

State v. Moore

In *State v. Moore*,[155] the court filed a unanimous, published opinion on May 16, 2017, finding no error in part and no prejudicial error in part in defendant's judgment entered upon his convictions for various offenses including fleeing to elude arrest and resisting an officer.[156] Defendant had argued "that the trial court erred by denying his motion for a continuance, by allowing the State to introduce into evidence a copy of a convenience store['s] surveillance video, and by denying his motion to suppress statements" he had made.[157] The court concluded "that the trial court did not err by denying defendant's motion for a continuance or his motion to suppress," and that although "the trial court erred by admitting the [surveillance] video, . . . its admission was not prejudicial."[158]

Defendant filed motions to stay the mandate and for en banc rehearing on May 26, 2017, asserting that "[e]n banc consideration is necessary to maintain the

151. *See id.* at 554.

152. *See id.*

153. *Id.*

154. State v. Hill, 803 S.E.2d 391 (N.C.), *denying cert. to* 798 S.E.2d 553 (N.C. Ct. App. 2017).

155. No. COA16-999, 2017 N.C. App. LEXIS 398 (N.C. Ct. App. May 16, 2017), *withdrawn and superseded by* 803 S.E.2d 196 (N.C. Ct. App. 2017).

156. *Id.* at *2, *31.

157. *Id.* at *1.

158. *Id.* at *1–2.

uniformity of this Court's decisions."[159] Defendant specifically argued that the opinion "creates new, stringent requirements in order for counsel to obtain a continuance in a criminal matter," and "rejects counsel's reasonable reliance on a trial judge's statement that the case would be continued."[160] Defendant also argued that the opinion "fail[ed] to apply the appropriate standard set forth in N.C. Gen. Stat. § 15A-1443(a)" "[i]n its analysis of the prejudice resulting from the erroneous admission" of video evidence.[161]

By order entered May 30, 2017, the court stayed the mandate.[162] On June 15, 2017, the court withdrew the opinion and issued an amended order dismissing the motion for en banc rehearing without prejudice to its refiling if appropriate after the withdrawn opinion has been refiled.[163] A superseding, unanimous, published opinion was filed on July 18, 2017,[164] again finding no error in part and no prejudicial error in part.[165] The opinion thoroughly addressed the points raised by defendant's motion for en banc rehearing and ultimately found no merit in any of the arguments.[166]

On August 22, 2017, defendant refiled his motion for en banc rehearing as well as a motion to stay the mandate and withdraw the opinion.[167] By orders entered

159. Defendant-Appellant's Motion for Rehearing En Banc at 2, *Moore*, 2017 N.C. App. LEXIS 398 (No. COA16-999); *see also* Motion to Stay Mandate, *Moore*, 2017 N.C. App. LEXIS 398 (No. COA16-999).

160. Defendant-Appellant's Motion for Rehearing En Banc at 1, *Moore*, 2017 N.C. App. LEXIS 398 (No. COA16-999).

161. *Id.* at 2.

162. State v. Moore, No. COA16-999 (N.C. Ct. App. May 30, 2017) (order staying mandate).

163. State v. Moore, No. COA16-999 (N.C. Ct. App. June 15, 2017) (order dismissing motion for rehearing en banc and indicating the opinion had been withdrawn).

164. State v. Moore, 803 S.E.2d 196 (N.C. Ct. App. 2017).

165. *Id.* at 214.

166. *See generally id.*

167. *See* Defendant-Appellant's Motion for Rehearing En Banc, *Moore*, 803 S.E.2d 196 (No. COA16-999); *see also* Defendant-Appellant's Motion to Stay Issuance of the Mandate and to Withdraw the Court's Opinion, *Moore*, 803 S.E.2d 196 (No. COA16-999).

August 30, 2017, the court dismissed those motions.[168] Defendant sought review in the Supreme Court by various motions and petitions but was denied.[169]

Grodner v. Grodner

In *Grodner v. Grodner*, [170] the court filed an unpublished opinion[171] on July 3, 2018, in a child custody and support action between defendant, a Polish-born American citizen, and plaintiff.[172] The trial court had given plaintiff sole authority and decision-making regarding any applications for a passport for the parties' minor child, required defendant to surrender his passports to the clerk, and required defendant to make an application to the trial court in the event he had any travel plans that required a passport.[173] The court affirmed the trial court's denial of defendant's Rule 60(b) motion and dismissed as interlocutory defendant's appeal from an order staying the proceedings.[174]

On July 12, 2018, defendant filed a pro se motion for en banc rehearing,[175] arguing that the opinion failed to address whether the North Carolina family courts have jurisdiction over a parent's passport and that the concurring opinion erroneously stated that "Defendant (. . .) has not included the passport or a copy thereof in

168. *See* State v. Moore, No. COA16-999 (N.C. Ct. App. Aug. 30, 2017) (order dismissing motion for rehearing en banc); *see also* State v. Moore, No. COA16-999 (N.C. Ct. App. Aug. 30, 2017) (order dismissing motion to stay mandate and withdraw the court's opinion).

169. *See* State v. Moore, 805 S.E.2d 690 (N.C. 2017), *denying cert. to* 803 S.E.2d 196 (N.C. Ct. App. 2017).

170. 815 S.E.2d 748 (N.C. Ct. App.), *superseded by* 817 S.E.2d 505 (N.C. Ct. App. 2018). Two appeals were consolidated for disposition: No. COA17-570 and No. COA17-813.

171. One judge concurred in part, concurred in result only in part, and concurred by separate opinion in part.

172. *See generally Grodner*, 815 S.E.2d 748.

173. *See generally id.*

174. *See generally id.*

175. Motion for En Banc Consideration and for the Decision on the Appealed Issue at 1, *Grodner*, 815 S.E.2d 748 (No. COA17-570).

the the [*sic*] record."[176] The court sua sponte stayed the mandate on July 16, 2018.[177] On July 17, 2018, the court issued orders withdrawing the opinion and dismissing the motion for en banc rehearing without prejudice to its refiling if appropriate after the withdrawn opinion has been refiled.[178]

The court issued a substituted, unpublished opinion on August 7, 2018,[179] removing from the concurring opinion the statement, "Defendant (. . .) has not included the passport or a copy thereof in the record for our independent review."[180] The opinion otherwise remained essentially the same.[181]

On August 14, 2018, defendant filed a motion to withdraw the substituted opinion for various reasons; that motion was denied on August 23, 2018.[182] Defendant filed a motion for en banc rehearing on August 21, 2018, and an amended motion for en banc rehearing on August 24, 2018.[183] The motion for en banc rehearing was denied, the amended motion was dismissed, and the stay of the mandate was dissolved by orders entered September 13, 2018.[184] Defendant's

176. *Id.* at 2–3 (internal quotation marks and citation omitted).

177. Grodner v. Grodner, COA17-570 (N.C. Ct. App. July 16, 2018) (order staying mandate).

178. *See* Grodner v. Grodner, COA17-570 (N.C. Ct. App. July 17, 2018) (order withdrawing opinion); *see also* Grodner v. Grodner, COA17-570 (N.C. Ct. App. July 17, 2018) (order dismissing motion for en banc consideration).

179. Grodner v. Grodner, 817 S.E.2d 505 (N.C. Ct. App. 2018). One judge concurred in part, concurred in result only in part, and concurred by separate opinion in part.

180. *See generally id.*

181. *See generally id.*

182. Motion to Withdraw an Opinion and Request to Prepare New One That Includes the Decision on the Appealed Issue, *Grodner*, 817 S.E.2d 505 (No. COA17-570); Grodner v. Grodner, COA17-570 (N.C. Ct. App. Aug. 23, 2018) (order denying motion to withdraw opinion).

183. Motion for En Banc Rehearing and for the Decision on the Appealed Issues, *Grodner*, 817 S.E.2d 505 (No. COA17-570); Amended Motion for En Banc Rehearing and for the Decision on the Appealed Issues, *Grodner*, 817 S.E.2d 505 (No. COA17-570).

184. Grodner v. Grodner, COA17-570 (N.C. Ct. App. Sept. 13, 2018) (order denying motion for en banc rehearing and dissolving stay of mandate); Grodner v. Grodner, COA17-570 (N.C. Ct. App. Sept. 13, 2018) (order dismissing amended motion for en banc rehearing).

attempts to gain review in the Supreme Court were denied.[185]

Rmah v. USAA Casualty

In *Rmah v. USAA Casualty Insurance Co.*,[186] the court filed a unanimous, unpublished opinion on February 5, 2019, affirming the trial court's order dismissing plaintiff's claims against defendant insurance company for breach of contract and unfair and deceptive trade practices because plaintiff was not in privity of contract with defendant and therefore lacked standing to bring those claims.[187] The court reversed the trial court's order dismissing plaintiff's breach of settlement agreement claim.[188]

On February 18, 2019, plaintiff filed a motion for en banc rehearing,[189] arguing in part that the court's holding that plaintiff was not in privity of contract with defendant "disregards and is in conflict with"[190] *Nash Hospitals, Inc. v. State Farm Mutual Automobile Insurance Co.*,[191] which held that "[o]nce a claimant and an insurance company enter into a settlement agreement, they are therefore in privity."[192] The court issued a sua sponte order on February 20, 2019, staying the mandate.[193] On March 7, 2019, the court issued orders withdrawing the opinion and dismissing the motion for en banc rehearing without prejudice to its

185. *See, e.g.*, Grodner v. Grodner, 854 S.E.2d 796 (N.C. 2021) (mem.), *denying cert. to* 817 S.E.2d 505 (N.C. Ct. App. 2018).

186. 822 S.E.2d 791 (N.C. Ct. App.), *superseded by* 828 S.E.2d 674 (N.C. Ct. App. 2019).

187. *See id.* at 792.

188. *See id.*

189. Plaintiff-Appellant's Motion for En Banc Consideration by Court of Appeals, *Rmah*, 822 S.E.2d 791 (No. COA18-623).

190. *Id.* at 2.

191. 803 S.E.2d 256 (N.C. Ct. App. 2017).

192. Plaintiff-Appellant's Motion for En Banc Consideration by Court of Appeals at 3, *Rmah*, 822 S.E.2d 791 (No. COA18-623) (internal quotation marks omitted) (quoting *Nash Hosps. Inc.*, 803 S.E.2d at 263).

193. Rmah v. USAA Cas. Ins. Co., No. COA18-623 (N.C. Ct. App. Feb. 20, 2019) (order staying mandate).

refiling, if appropriate, after a new opinion has been filed.[194]

The panel issued a second, unanimous, unpublished opinion on March 26, 2019, wherein the court's amended analysis and outcome were essentially consistent with plaintiff's arguments in his motion for en banc rehearing.[195] Citing *Nash Hospitals* for the proposition that plaintiff was in privity of contract with defendant once the parties entered into a settlement agreement, the court reversed the trial court's order dismissing plaintiff's claim for breach of contract, reversed in part and affirmed in part the trial court's order dismissing plaintiff's claim for unfair and deceptive trade practices, and again reversed the trial court's order dismissing plaintiff's claim for breach of settlement agreement.[196]

Ramsey v. Ramsey

In *Ramsey v. Ramsey*,[197] the court filed a divided, published opinion on February 5, 2019, dismissing for non-jurisdictional appellate rules violations plaintiff's appeal from the trial court's civil contempt order.[198] The court concluded plaintiff had violated "at least eight mandatory rules of the North Carolina Rules of Appellate Procedure,"[199] including that plaintiff "did not timely file the record on appeal within the fifteen-day period prescribed under Rule 12(a)."[200] The dissenting opinion agreed that plaintiff's brief contained numerous non-jurisdictional violations but disagreed that the

194. *See* Rmah v. USAA Cas. Ins. Co., No. COA18-623 (N.C. Ct. App. Mar. 7, 2019) (order dismissing motion for en banc consideration); *see also* Rmah v. USAA Cas. Ins. Co., No. COA18-623 (N.C. Ct. App. Mar. 7, 2019) (order withdrawing opinion).

195. *See generally* Rmah v. USAA Cas. Ins. Co., 828 S.E.2d 674 (N.C. Ct. App. 2019).

196. *See generally id.*

197. No. COA18-600, 2019 N.C. App. LEXIS 106 (N.C. Ct. App. Feb. 5, 2019), *withdrawn and superseded by* 826 S.E.2d 459 (N.C. Ct. App. 2019).

198. *See id.* at *4, *9.

199. *Id.* at *4.

200. *Id.* at *7.

errors warranted dismissal of the appeal.[201] The dissent would have reached the merits of the appeal and "affirm[ed] in part and reverse[d] in part the order of civil contempt."[202]

Plaintiff filed a motion for en banc rehearing on February 20, 2019, asserting that "en banc consideration is necessary to secure or maintain uniformity of the court's decisions" in that dismissal of the appeal was an inappropriate sanction under *Dogwood Development & Management Co. v. White Oak Transport Co.*[203] Plaintiff also argued that the record on appeal was timely filed.[204] The court sua sponte stayed the mandate on February 22, 2019.[205]

On March 8, 2019, the court issued orders withdrawing the opinion and dismissing the motion for en banc rehearing without prejudice.[206] The court filed a superseding, divided, published opinion filed March 19, 2019,[207] again dismissing the appeal for non-jurisdictional appellate rules violations.[208] This time the majority concluded that plaintiff had violated "at least seven mandatory rules of the North Carolina Rules of Appellate Procedure," but "note[d] that the record leaves some doubt as to whether [p]laintiff timely filed the Record on Appeal" and included an extensive analysis to support its notation.[209] The dissent remained the same.[210] Plaintiff filed a second motion for en banc rehearing on April 3, 2019, asserting the same grounds

201. *Id.* at *10 (Dillon, J., dissenting).

202. *Id.* (Dillon, J., dissenting).

203. Motion for En Banc Rehearing by Court of Appeals at 1, *Ramsey*, 2019 N.C. App. LEXIS 106 (COA18-600) (citing Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co., 657 S.E.2d 361 (N.C. 2008)).

204. *Id.* at 3.

205. Ramsey v. Ramsey, COA18-600 (N.C. Ct. App. Feb. 22, 2019) (order staying mandate).

206. Ramsey v. Ramsey, COA18-600 (N.C. Ct. App. Mar. 8, 2019) (order withdrawing opinion); *see also* Ramsey v. Ramsey, COA18-600 (N.C. Ct. App. Mar. 8, 2019) (order dismissing motion for en banc rehearing).

207. Ramsey v. Ramsey, 826 S.E.2d 459 (N.C. Ct. App. 2019).

208. *See id.* at 460–61.

209. *Id.* at 462–63.

210. *See id.* at 464–65 (Dillon, J., dissenting).

and argument as in the first motion.[211] The mandate was stayed sua sponte on April 5, 2019.[212] By order entered April 29, 2019, the motion for en banc rehearing was denied and the stay of the mandate dissolved.[213]

State v. Thompson

In *State v. Thompson*,[214] the court issued a published opinion[215] on April 16, 2019, finding no error in part and dismissing in part defendant's appeal "from judgments entered on his convictions for assault with a deadly weapon with intent to kill inflicting serious injury and possession of a firearm by a felon."[216] The court concluded, in part, that the trial court did not allow the prosecutor to elicit improper testimony concerning defendant's constitutional right to remain silent and thus, the trial court did not err, much less plainly err, by admitting the testimony.[217]

On April 30, 2019, defendant filed a motion for en banc rehearing and a motion stay the mandate.[218] Defendant argued that en banc rehearing was "necessary to secure or maintain the uniformity of this Court's decisions" because "the opinion fail[ed] to properly apply the plain error analysis of 'testimony referr[ing] to [a] defendant's exercise of his right to silence'" as set forth

211. *See* Motion for En Banc Rehearing by Court of Appeals at 1–3, *Ramsey*, 826 S.E.2d 459 (COA18-600).

212. Ramsey v. Ramsey, COA18-600 (N.C. Ct. App. Apr. 5, 2019) (order staying mandate).

213. Ramsey v. Ramsey, COA18-600 (N.C. Ct. App. Apr. 29, 2019) (order denying motion for rehearing en banc and dissolving stay of mandate).

214. No. COA18-885, 2019 N.C. App. LEXIS 352 (N.C. Ct. App. Apr. 16, 2019), *withdrawn and superseded by* 827 S.E.2d 556 (N.C. Ct. App. 2019) (on file with author).

215. One judge concurred in the result only.

216. Thompson, 2019 N.C. App. LEXIS 352, at *1 (on file with author).

217. *See id.* at *13–14 (on file with author).

218. *See* Defendant-Appellant's Motion for Rehearing En Banc, *Thompson*, 2019 N.C. App. LEXIS 352 (COA18-885); *see also* Motion to Stay Mandate, *Thompson*, 2019 N.C. App. LEXIS 352 (COA18-885).

in *State v. Moore*[219] and applied in *State v. Richardson*,[220] "and thereby conflict[ed] with decisions of this Court interpreting *Moore*."[221] By separate orders entered May 1, 2019, the court withdrew the opinion and dismissed the en banc rehearing motion without prejudice.[222] The following day, the court dismissed the motion to stay the mandate.[223]

The court issued a substituted, unanimous, published opinion on May 21, 2019,[224] wherein the court amended its analysis based on defendant's argument in the motion for en banc rehearing. The court stated, "Assuming *arguendo* the prosecutor elicited improper evidence concerning defendant's invocation of his right to silence, the testimony did not constitute plain error."[225] Analyzing the evidence under the factors set forth in *Richardson*, the court found that the alleged error did not constitute plain error.[226] The remainder of the opinion's analysis and the outcome remained unchanged.[227]

219. 726 S.E.2d 168, 172 (N.C. 2012).

220. 741 S.E.2d 434 (N.C. Ct. App. 2013).

221. Defendant-Appellant's Motion for Rehearing En Banc at 1–2, 5, *Thompson*, 2019 N.C. App. LEXIS 352 (COA18-885) (second and third alteration in original) (quoting *Moore*, 726 S.E.2d at 172) (citing *Richardson*, 741 S.E.2d 434).

222. *See* State v. Thompson, No. COA18-885 (N.C. Ct. App. May 1, 2019) (order withdrawing motion); *see also* State v. Thompson, No. COA18-885 (N.C. Ct. App. May 1, 2019) (order dismissing motion for rehearing en banc).

223. State v. Thompson, No. COA18-885 (N.C. Ct. App. May 2, 2019) (order dismissing motion to stay mandate).

224. State v. Thompson, 827 S.E.2d 556 (N.C. Ct. App. 2019).

225. *Id.* at 562.

226. *See id.* (citing *Richardson*, 741 S.E.2d at 442).

227. *See generally id.*

In re K.J.

In *In re K.J.*,[228] the court filed a unanimous, published opinion on June 18, 2019, dismissing respondent's appeal from an involuntary commitment order.[229] The opinion stated that respondent argued on appeal that the petition for involuntary commitment "did not state facts sufficient to grant the trial court subject matter jurisdiction over the commitment hearing"[230] and that "[r]espondent's only argument on appeal is that the trial court lacked jurisdiction to order a commitment because [the p]etition lacked sufficient facts to show reasonable grounds for involuntary commitment."[231] The court held that because respondent failed to challenge the sufficiency of the affidavit during the hearing before the trial court, *In re Moore*[232] mandated that the argument was waived.[233]

On June 28, 2019, respondent filed a motion for en banc rehearing.[234] The court sua sponte stayed the mandate on July 2, 2019.[235] By order entered July 15, 2019, the court withdrew the opinion.[236] The court dismissed the motion for en banc rehearing without prejudice on July 18, 2019.[237] On September 3, 2019, the court issued a superseding, unanimous, published opinion[238] that removed the two references to subject matter jurisdiction and stated that "[r]espondent's only

228. 828 S.E.2d 753 (N.C. Ct. App.), *superseded by* 834 S.E.2d 145 (N.C. Ct. App. 2019).

229. *Id.* at 753.

230. *Id.* at 754.

231. *Id.*

232. 758 S.E.2d 33 (N.C. Ct. App. 2014).

233. *See In re K.J.*, 828 S.E.2d at 754 (citing *In re Moore*, 758 S.E.2d at 37).

234. Motion for En Banc Reconsideration, *In re K.J.*, 828 S.E.2d 753 (No. COA18-639.

235. *In re* K.J., No. COA18-639 (N.C. Ct. App. July 2, 2019) (order staying mandate).

236. *In re* K.J., No. COA18-639 (N.C. Ct. App. July 15, 2019) (order withdrawing opinion).

237. *In re* K.J., No. COA18-639 (N.C. Ct. App. July 18, 2019) (order dismissing motion for en banc rehearing).

238. *In re* K.J., 834 S.E.2d 145 (N.C. Ct. App. 2019).

argument on appeal is that [the p]etition lacked sufficient facts to show reasonable grounds for involuntary commitment."[239] The remainder of the opinion was essentially identical to the first.[240] Respondent filed a second motion for en banc rehearing on September 12, 2019.[241] The court sua sponte stayed the mandate the following day.[242] On October 11, 2019, the court issued an order denying the motion for en banc rehearing and dissolving the mandate's stay.[243] The Supreme Court declined to further review the case.[244]

State v. Teague

In *State v. Teague*,[245] the court filed a published opinion on September 6, 2022, affirming the trial court's denial of defendant's motion to suppress and finding no prejudicial error in defendant's trial for various marijuana-related charges.[246] The lead opinion concluded that defendant lacked standing to assert a Fourth Amendment violation, but even if he had standing, the Fourth Amendment issues were not properly preserved and were thus waived.[247] The lead opinion also overruled plain error review on the ground that defendant had waived all appellate review.[248] The

239. *Id.* at 145.

240. *See generally id.*

241. Motion for En Banc Rehearing, *In re K.J.*, 834 S.E.2d 145 (No. COA18-639).

242. *In re* K.J., No. COA18-639 (N.C. Ct. App. Sept. 13, 2019) (order staying mandate).

243. *In re* K.J., No. COA18-639 (N.C. Ct. App. Oct. 11, 2019) (order denying motion for en banc rehearing and dissolving stay of mandate).

244. *In re* K.J., 841 S.E.2d 531 (N.C. 2020), *denying cert. to* 834 S.E.2d 145 (N.C. Ct. App. 2019).

245. 877 S.E.2d 450 (N.C. Ct. App.), *withdrawn and superseded by* 879 S.E.2d 881 (N.C. Ct. App. 2022). After being withdrawn, the opinion was removed from all digital databases but can be found in the appendix of a later filed motion for en banc rehearing. *See* Motion to Stay the Mandate and for En Banc Rehearing app. at 2–56, *Teague*, 877 S.E.2d 450 (COA21-10).

246. Motion to Stay the Mandate and for En Banc Rehearing app., *supra* note 245, at 51.

247. *Id.* at 29.

248. *Id.*

two other panel members each concluded that defendant did have standing to assert a Fourth Amendment violation; one judge concurred in the opinion but wrote separately while the other judge concurred in the result only and wrote separately.[249]

Defendant filed a motion to stay the mandate and for en banc rehearing on September 21, 2022, asserting that en banc rehearing was necessary because the lead opinion's Fourth Amendment standing analysis and conclusion was inconsistent with the jurisprudence of North Carolina appellate courts and the Supreme Court of the United States and because the court's decision created legal uncertainty and criminal liability for North Carolina hemp businesses and consumers alike under the original Industrial Hemp Act.[250] The mandate was stayed by the court on September 23, 2022.[251] By orders of the court entered September 30, 2022, the opinion was withdrawn and the motion for en banc rehearing was dismissed without prejudice.[252]

The court issued a new, unanimous, published opinion on November 1, 2022,[253] again affirming the trial court's denial of defendant's motion to suppress in part and finding no prejudicial error in part.[254] The opinion omitted all discussion of defendant's standing to assert a Fourth Amendment violation and addressed the merits of his argument.[255] The remainder of the opinion was essentially the same.[256]

Defendant filed a second motion to stay the mandate and for en banc rehearing on November 16, 2022,

249. *See id.* at 52–56.

250. Motion to Stay the Mandate and for En Banc Rehearing at 1–3, *Teague*, 877 S.E.2d 450 (COA21-10).

251. State v. Teague, COA21-10 (N.C. Ct. App. Sept. 23, 2022) (order staying mandate).

252. *See* State v. Teague, COA21-10 (N.C. Ct. App. Sept. 30, 2022) (order withdrawing opinion); *see also* State v. Teague, COA21-10 (N.C. Ct. App. Sept. 30, 2022) (order dismissing motion for en banc rehearing).

253. State v. Teague, 879 S.E.2d 881 (N.C. Ct. App. 2022).

254. *Id.* at 903.

255. *See generally id.*

256. *See generally id.*

asserting similar arguments to those made in his first motion.[257] The court stayed the mandate the following day.[258] On December 16, 2022, the court issued an order denying the motion and dissolving the stay.[259] Defendant's petitions for writs of supersedeas and discretionary review were denied.[260]

Summary

The following can be inferred from the filings and orders in each of the above eight cases:

- The full court considered the motion for en banc rehearing and at least a majority of the judges concluded that the issues raised in the motion were not worthy of en banc review.
- At least a majority of the judges on the panel considered the issues raised in the motion for en banc rehearing to be worthy of immediate panel reconsideration and capable of being addressed by the panel.
- The panel sua sponte withdrew the opinion because no motion for panel reconsideration was properly before the panel.

2. Cases in Which a Movant Simultaneously Filed a Motion for En Banc Rehearing and Either a Motion to Withdraw or a Petition for Rehearing, Both of Which Were Either Dismissed or Denied

In each of the following three cases, a movant simultaneously filed a motion for en banc rehearing and either a petition for rehearing or a motion to withdraw,

257. Motion to Stay the Mandate and for En Banc Rehearing at 1–3, *Teague*, 879 S.E.2d 881 (COA21-10).

258. State v. Teague, COA21-10 (N.C. Ct. App. Nov. 17, 2022) (order staying mandate).

259. State v. Teague, COA21-10 (N.C. Ct. App. Dec. 16, 2022) (order denying motion to stay mandate and for en banc rehearing and dissolving stay of mandate).

260. State v. Teague, 891 S.E.2d 281 (N.C. 2023) (mem.), *denying cert. to* 879 S.E.2d 881 (N.C. Ct. App. 2022).

both within the time prescribed for filing a motion for en banc rehearing. In both the motion for en banc rehearing and the accompanying petition for rehearing or motion to withdraw, the movant made essentially the same arguments. The court dismissed each motion for en banc rehearing "without prejudice to its refiling if appropriate after the withdrawn opinion has been refiled" and dismissed or denied each petition for rehearing or motion to withdraw. The court withdrew the opinion and issued a new opinion, addressing the movant's arguments. In each case, the movant filed a second motion for en banc rehearing, which was denied, and the Supreme Court declined to further review the case.

Department of Transportation v. Riddle

In *Departmemt of Transportation v. Riddle*,[261] the court's unanimous, published opinion filed on December 30, 2016, dismissed as interlocutory and not affecting a substantial right both parties' appeals from the trial court's order in a condemnation proceeding.[262] The Riddles filed a combined motion for en banc rehearing and petition for rehearing on January 13, 2017, arguing that en banc rehearing was needed "to secure or maintain uniformity of the [c]ourt's decisions" or, in the alternative, panel rehearing was necessary "on the points of law enumerated" in the petition, which "were overlooked or misapprehended."[263] Specifically, the Riddles argued that the court had already ruled in an opinion issued in a prior appeal between the parties "that a decision regarding the area affected by the taking of acreage" from certain lots "affect[ed] a substantial right

261. 795 S.E.2d 610 (N.C. Ct. App. 2016), *withdrawn and superseded by* 813 S.E.2d 449 (N.C. Ct. App. 2017).

262. *See id.* at 611.

263. Defendants-Appellants' Petition for En Banc Rehearing and Alternatively, Petition for Rehearing at 1, *Riddle*, 795 S.E.2d 610 (No. COA16-445).

and that an appeal of this issue, though interlocutory, must be immediate."[264]

On February 9, 2017, the court issued orders withdrawing the opinion and dismissing the motion for en banc rehearing without prejudice.[265] The court dismissed as moot the petition for rehearing on February 14, 2017.[266]

The court issued a superseding, unanimous, published opinion on April 18, 2017.[267] The court concluded, contrary to its original opinion and consistent with the Riddles' arguments in their motion for en banc rehearing and petition for rehearing, that the appeal affected a substantial right.[268] The court thus addressed the merits of the appeal, affirming the trial court's conclusion that lots 3–6 were not part of the "entire tract," but reversing the trial court's conclusion that lot 1 was part of the "entire tract."[269]

The Riddles filed a second motion for en banc rehearing on May 3, 2017, arguing that en banc rehearing was needed "to secure or maintain uniformity of the Court's decisions, pursuant to Rule 31.l(a)(l) of the North Carolina Rules of Appellate Procedure, on the points of law enumerated below, which were overlooked or misapprehended."[270] The court denied the motion by order issued May 30, 2017,[271] and the Supreme Court

264. *Id.* at 2.

265. *See* Dep't of Transp. v. Riddle, No. COA16-445 (N.C. Ct. App. Feb. 9, 2017) (order withdrawing opinion); *see also* Dep't of Transp. v. Riddle, No. COA16-445 (N.C. Ct. App. Feb. 9, 2017) (order dismissing motion for en banc rehearing). The court also issued an order substituting Judge Dillon on the panel for Judge Stephens, who had left the court. *See* Dep't of Transp. v. Riddle, No. COA16-445 (N.C. Ct. App. Feb. 9, 2017) (order assigning judge).

266. Dep't of Transp. v. Riddle, No. COA16-445 (N.C. Ct. App. Feb. 14, 2017) (order dismissing as moot petition for rehearing). As the petition for rehearing was filed prior to the mandate being issued, it was not timely filed. *See* N.C. R. APP. P. 31(a).

267. Dep't of Transp. v. Riddle, 813 S.E.2d 449 (N.C. Ct. App. 2017).

268. *Id.* at 451.

269. *Id.* at 455.

270. Defendants-Appellants' Motion for En Banc Rehearing at 1, *Riddle*, 813 S.E.2d 449 (No. COA16-445).

271. Dep't of Transp. v. Riddle, No. COA16-445 (N.C. Ct. App. May 30, 2017) (order denying motion for en banc rehearing).

denied discretionary review by order entered August 17, 2017.[272]

Conleys Creek Ltd. Partnership v. Smoky Mountain Country Club Property Owners Ass'n

In *Conleys Creek Ltd. Partnership v. Smoky Mountain Country Club Property Owners Ass'n*,[273] the court's unanimous, published opinion filed on April 4, 2017, affirmed in part, reversed in part, and remanded the matter involving a dispute concerning a residential planned community.[274] On April 19, 2017, defendant filed a motion to stay the mandate, a motion for en banc rehearing, and a petition for rehearing. [275] Defendant argued that en banc rehearing was necessary to address conflicts between the opinion and prior decisions of the court on the following two critical issues of property law: "(I) the Panel's creation of a 'condominium' style property with horizontal boundaries under the Planned Community Act and (II) the Panel's failure to cite or consider the long body of historical precedent governing the law of real covenants verses personal covenants."[276]

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272. Dep't of Transp. v. Riddle, 803 S.E.2d 153 (N.C.) (mem.), *denying cert. to* 813 S.E.2d 449 (N.C. Ct. App. 2017).

273. No. COA16-647, 2017 N.C. App. LEXIS 225 (N.C. Ct. App. Apr. 4, 2017), *withdrawn and superseded by* 805 S.E.2d 147 (N.C. Ct. App. 2017).

274. *See id.* at *1, *26.

275. *See* Counterclaimant/Appellant Smoky Mountain Country Club Property Owners Association, Inc.'s Motion for Temporary Stay of the Issuance of the Mandate, *Conleys Creek Ltd. P'ship*, 2017 N.C. App. LEXIS 225 (No. COA16-647); *see also* Counterclaimant/Appellant Smoky Mountain Country Club Property Owners Association, Inc.'s Motion for En Banc Rehearing, *Conleys Creek Ltd. P'ship*, 2017 N.C. App. LEXIS 225 (No. COA16-647); *see also* Counterclaimant/Appellant Smoky Mountain Country Club Property Owners Association, Inc.'s Motion for Rehearing, *Conleys Creek Ltd. P'ship*, 2017 N.C. App. LEXIS 225 (No. COA16-647). The "Motion for Rehearing" was filed pursuant to Rule 31, which governs petitions for panel rehearing. As a petition for panel rehearing, it was not timely filed. *See* N.C. R. APP. P. 31(a).

276. Counterclaimant/Appellant Smoky Mountain Country Club Property Owners Association, Inc.'s Motion for En Banc Rehearing at 1–2, *Conleys Creek Ltd. P'ship*, 2017 N.C. App. LEXIS 225 (No. COA16-647).

The court issued an order staying the mandate on April 20, 2017.[277] The following day, the court entered orders dismissing defendant's en banc rehearing motion, dismissing defendant's petition for rehearing, and withdrawing the opinion.[278]

The court filed a substituted, unanimous, published opinion on September 5, 2017, affirming in part, dismissing in part,[279] reversing in part, and remanding the matter to the trial court.[280] The opinion directly addressed the issues raised by defendant's motion for en banc rehearing and ultimately changed its disposition on certain issues.[281]

Plaintiff filed a motion for en banc rehearing on September 19, 2017,[282] which was denied on October 12, 2017.[283] Plaintiff then sought review in the Supreme

277. Conleys Creek Ltd. P'ship v. Smoky Mountain Country Club Prop. Owners Ass'n, No. COA16-647 (N.C. Ct. App. Apr. 20, 2017) (order staying mandate).

278. On April 24, 2017, Judge McCullough resigned. On May 2, 2017, the plaintiff filed a motion requesting a new judge be assigned to the panel and that briefing by the parties be ordered on an issue addressed by the original opinion but never briefed. *See* Motion of Conleys Creek Limited Partnership, Marshall Cornblum, Michael Cornblum, Madeline Cornblum, Corndermay Partners, M&D Creek, Inc., SMCC Clubhouse, LLC, and Carolyn Cornblum at 5–6, *Conleys Creek Ltd. P'ship*, 2017 N.C. App. LEXIS 225 (No. COA16-647). This motion was denied on May 9, 2017. Conleys Creek Ltd. P'ship v. Smoky Mountain Country Club Prop. Owners Ass'n, No. COA16-647 (N.C. Ct. App. May 9, 2017) (order denying motion to assign new judge). On May 11, 2017, Judge Stroud was assigned to the panel. Conleys Creek Ltd. P'ship v. Smoky Mountain Country Club Prop. Owners Ass'n, No. COA16-647 (N.C. Ct. App. May 11, 2017) (order assigning judge).

279. The opinion dismissed as moot an argument that the original opinion had determined was moot but had failed to specifically dismiss.

280. Conleys Creek Ltd. P'ship v. Smoky Mountain Country Club Prop. Owners Ass'n, 805 S.E.2d 147 (N.C. Ct. App. 2017).

281. *See generally id.*

282. Conleys Creek Limited Partnership, Marshall Cornblum, Michael Cornblum, Madeline Cornblum, Corndermay Partners, M&D Creek, Inc., SMCC Clubhouse, LLC, and Carolyn Cornblum's Motion for En Banc Rehearing, *Conleys Creek Ltd. P'ship*, 805 S.E.2d 147 (N.C. Ct. App. 2017).

283. Conleys Creek Ltd. P'ship v. Smoky Mountain Country Club Prop. Owners Ass'n, No. COA16-647 (N.C. Ct. App. Oct. 12, 2017) (order denying motion for en banc rehearing).

Court, but its appeal based on a constitutional question was dismissed.[284]

State v. Hahn

In *State v. Hahn*,[285] the court filed a unanimous, unpublished opinion on February 1, 2022, finding no error in defendant's trial and convictions for various offenses, all stemming from defendant's arrest for trespassing on a public sidewalk.[286] The court held there was probable cause to effectuate defendant's arrest for second-degree trespassing[287] "where the evidence demonstrated [d]efendant 'committed acts sufficient to render the implied consent [for an individual to occupy a public space] void Ab initio.'"[288]

On February 16, 2022, defendant filed a combined motion to stay the mandate and withdraw the opinion, or, in the alternative, for en banc rehearing.[289] Defendant asserted that the opinion should be withdrawn or reviewed en banc because the "holding that police can order any person to leave a public sidewalk and arrest them for trespass if they refuse" is unsupported by case law or statute and "creates a dangerous expansion of police power."[290] On February 21, 2022, the court denied defendant's motion to stay the

284. Conleys Creek Ltd. P'ship v. Smoky Mountain Country Club Prop. Owners Ass'n, 811 S.E.2d 596 (N.C. 2018) (mem.), *denying cert. to* 805 S.E.2d 147 (N.C. Ct. App. 2017).

285. No. COA21-190, 2022 N.C. App. LEXIS 56 (N.C. Ct. App. Feb. 1, 2022), *withdrawn and superseded by* 2022 N.C. App. LEXIS 373 (N.C. Ct. App. May 17, 2022).

286. *See id.* at *4–5, *16.

287. Defendant was acquitted of second-degree trespass at trial. *Id.* at *5.

288. *Id.* at *11 (second alteration in original) (quoting State v. Winston, 262 S.E.2d 331, 333 (N.C. Ct. App. 1980) ("reversing an unlawful entry charge because the evidence did not support that the defendant 'committed acts [after entry] sufficient to render the implied consent void'" (alteration in original))).

289. Motion to Stay the Mandate and Withdraw the Opinion, or, in the Alternative, for En Banc Rehearing, *Hahn*, 2022 N.C. App. LEXIS 56 (No. COA21-190).

290. *Id.* at 8–9.

mandate and withdraw the opinion.[291] Also on that day, the court issued an order staying the mandate.[292] On March 11, 2022, the court issued orders withdrawing the opinion and dismissing the motion for en banc rehearing without prejudice to its refiling after a new opinion is filed.[293]

A superseding, unanimous, unpublished opinion was filed May 17, 2022, wherein the court again found no error in defendant's trial but substantially changed its reasoning for finding so.[294] Instead of holding that the officer had sufficient probable cause to arrest defendant for trespassing on the public sidewalk, the court held that the officer had "sufficient probable cause to arrest [d]efendant for violating [Asheville's] loitering ordinance while in the officer's presence."[295] The court reasoned that, even though "law enforcement officers arrested [d]efendant for the offense of second-degree trespass," for which defendant was later acquitted, the officer's "subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause."[296]

On June 1, 2022, defendant filed another combined motion to stay the mandate and withdraw the opinion, or, in the alternative, for en banc rehearing.[297] Defendant argued that the court had failed in both

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291. State v. Hahn, No. COA21-190 (N.C. Ct. App. Feb. 21, 2022) (order denying motion to stay mandate and withdraw opinion).

292. State v. Hahn, No. COA21-190 (N.C. Ct. App. Feb. 21, 2022) (order staying mandate). The order indicates that the mandate was stayed in response to the motion for en banc rehearing: "A motion for en banc rehearing was filed in this case on the 16th day of February 2022. The issuance of the mandate is hereby stayed." *Id.*

293. *See* State v. Hahn, No. COA21-190 (N.C. Ct. App. Mar. 11, 2022) (order withdrawing opinion); *see also* State v. Hahn, No. COA21-190 (N.C. Ct. App. Mar. 11, 2022) (order dismissing motion for en banc rehearing).

294. *See* State v. Hahn, No. COA21-190, 2022 N.C. App. LEXIS 373, at *19–20. (N.C. Ct. App. May 17, 2022).

295. *Id.* at *13.

296. *Id.* at *10 (internal quotation marks omitted) (quoting Devenpeck v. Alford, 543 U.S. 146, 153 (2004)).

297. Motion to Stay the Mandate and Withdraw the Opinion, or, in the Alternative, for En Banc Rehearing, *Hahn*, 2022 N.C. App. LEXIS 373 (No. COA21-190).

opinions to address certain arguments raised in his briefs and failed in the second opinion to address his argument that the State was bound at trial by the theory stated in its indictments that the officer had probable cause to arrest defendant for trespass.[298] The court stayed the mandate by order entered June 3, 2022.[299] The court denied the motion to withdraw on June 7, 2022, and denied the motion for en banc rehearing on June 30, 2022.[300] The Supreme Court declined to review the case further.[301]

Summary

The following can be inferred from the filings and orders in each of the above three cases:

- The full court considered the motion for en banc rehearing and at least a majority of the judges concluded that the issues raised in the motion were not worthy of en banc review.
- At least a majority of the judges on the panel considered the issues raised in the motion for en banc rehearing to be worthy of immediate panel reconsideration and capable of being addressed by the panel.
- The panel sua sponte withdrew the opinion because there was no motion for panel reconsideration properly before it: the petitions for rehearing were not timely filed in *Riddle* and *Conleys Creek*; furthermore, the Rules do not specifically authorize the motion to withdraw filed in *Hahn* and

298. *Id.* at 1–2.

299. State v. Hahn, No. COA21-190 (N.C. Ct. App. June 3, 2022) (order staying mandate). The order again indicates that the mandate was stayed in response to the motion for en banc rehearing. *See id.*

300. *See* State v. Hahn, No. COA21-190 (N.C. Ct. App. June 7, 2022) (order denying motion to withdraw opinion); *see also* State v. Hahn, No. COA21-190 (N.C. Ct. App. June 30, 2022) (order denying motion for en banc rehearing and dissolving stay of mandate).

301. State v. Hahn, 880 S.E.2d 701 (N.C.), *denying cert. to* 2022 N.C. App. LEXIS 373 (N.C. Ct. App. May 17, 2022).

invoking Rule 2 was not appropriate in *Hahn*.

3. Cases in Which a Movant Simultaneously Filed a Motion for En Banc Rehearing and a Motion to Withdraw, the Motion to Withdraw Was Allowed, and the Motion for En Banc Rehearing Was Dismissed

Unlike in *Hahn*, in each of the following three criminal cases, the movant simultaneously filed a motion for en banc rehearing and a motion to withdraw within the time prescribed for filing a motion for en banc rehearing. In both the motion for en banc rehearing and the accompanying motion to withdraw, the movant made essentially the same arguments. The court allowed the motion to withdraw and dismissed the motion for en banc rehearing "without prejudice to its refiling if appropriate after the withdrawn opinion has been refiled." The court issued a superseding opinion addressing the movant's arguments. In two of the cases, the movant filed a second motion for en banc rehearing and motion to withdraw. The motion to withdraw was again allowed, and the motion for en banc rehearing was again dismissed without prejudice. The court issued a superseding opinion, addressing the movant's arguments. The Supreme Court declined to further review the case.

State v. Perkins

In *State v. Perkins*,[302] the court filed a unanimous, published opinion on January 18, 2022,[303] finding no error in part and dismissing in part defendant's challenges to his convictions for sexual offenses and the requirement that he enroll in satellite-based monitoring for life.[304] The defendant filed a motion to stay the mandate, for en banc rehearing, and to withdraw the opinion on January 27, 2022.[305]

By orders entered February 7, 2022, the court stayed the mandate, allowed the motion to withdraw, and dismissed the motion for en banc rehearing without prejudice to its refiling, if appropriate, after a new opinion has been filed.[306] The court filed an amended opinion on October 18, 2022, with a majority holding in part that the satellite-based monitoring orders at issue were "properly before the [c]ourt. . . . upon issuance of a

302. No. COA20-572, 2022 N.C. App. LEXIS 36 (N.C. Ct. App., Jan. 18, 2022), *withdrawn and superseded by* 2022 WL 10219728 (N.C. Ct. App. Oct. 18, 2022), *withdrawn and superseded by* 881 S.E.2d 842 (N.C. Ct. App. 2022).

303. This case has an extensive history. On July 1, 2014, the court issued an unpublished opinion finding no error in a 2012 trial that culminated in defendant's conviction of first-degree rape of a child, incest, and two counts of first-degree sexual offense. *See* State v. Perkins, 760 S.E.2d 38 (N.C. Ct. App. 2014), *superseded by* 763 S.E.2d 928 (N.C. Ct. App. 2014). On July 21, 2014, the court entered an order withdrawing the opinion and retaining the case for disposition by the original panel to which it had been assigned. State v. Perkins, No. 13-1352 (N.C. Ct. App. July 21, 2014) (order withdrawing opinion). On August 5, 2014, the court issued an amended unpublished opinion. *See* State v. Perkins, 763 S.E.2d 928 (N.C. Ct. App. 2014). This amended opinion also found no error in defendant's trial; however, it omitted some of the analysis from the first opinion. *See generally id.*

304. *Perkins*, 2022 N.C. App. LEXIS 36, at *2, *28.

305. *See* Motion for En Banc Rehearing, *Perkins*, 2022 N.C. App. LEXIS 36 (No. COA20-572); *see also* Motion to Stay the Mandate and Withdraw the Opinion, *Perkins*, 2022 N.C. App. LEXIS 36 (No. COA20-572).

306. *See* State v. Perkins, No. COA20-572 (N.C. Ct App. Feb. 7, 2022) (order dismissing motion for en banc rehearing); *see also* State v. Perkins, No. COA20-572 (N.C. Ct App. Feb. 7, 2022) (order staying mandate and allowing motion to withdraw).

writ of certiorari per opinion, in the exercise of [the court's] discretion."[307]

On October 19, 2022, defendant again filed a motion to stay the mandate, motion for en banc rehearing, and motion to withdraw.[308] On November 4, 2022, the court "ordered by majority vote that the opinion filed in this case on 18 October 2022 be withdrawn."[309] The court filed an amended, divided, published opinion on December 6, 2022,[310] explaining that the withdrawal of previous opinion made the mooting of the petition for writ of certiorari to review the 2020 satellite-based monitoring orders itself moot.[311] The remainder of the opinion was essentially the same in analysis and outcome.[312]

State v. Walker

In *State v. Walker*,[313] the court filed a unanimous, unpublished opinion on June 6, 2017, finding no error in judgments entered upon jury verdicts of guilty of assault and battery and of felonious breaking and entering to terrorize and injure.[314] Defendant raised three

307. *See* State v. Perkins, No. COA20-572, 2022 WL 10219728, at *3 (N.C. Ct. App. Oct. 18, 2022), *withdrawn and superseded by* 881 S.E.2d 842 (N.C. Ct. App. 2022) (citation omitted).

308. Motion to Stay the Mandate and Withdraw the Opinion, or in the Alternative, for En Banc Rehearing, *Perkins*, 2022 WL 10219728 (No. COA20-572).

309. State v. Perkins, No. COA20-572 (N.C. Ct. App. Nov. 4, 2022) (order withdrawing opinion).

310. State v. Perkins, 881 S.E.2d 842 (N.C. Ct. App. 2022).

311. *See id.* at 846.

312. *See generally id.*

313. No. COA16-1195, 2017 WL 2437009 (N.C. Ct. App. June 6, 2017), *withdrawn and superseded by* 2017 WL 26080572 (N.C. Ct. App. June 6, 2017). After being withdrawn, the opinion was removed from all digital databases but can be found in the appendix of a later filed motion for rehearing en banc. *See* Defendant-Appellant's Motion to Stay the Mandate, Withdraw and Correct the Opinion, or in the Alternative for Rehearing En Banc app. at 1–15, *Walker*, 2017 WL 2437009 (No. COA16-1195).

314. *See* Defendant-Appellant's Motion to Stay the Mandate, Withdraw and Correct the Opinion, or in the Alternative for Rehearing En Banc app., *supra* note 313, at 5, 15.

arguments on appeal, including that the trial court erred by failing to give an instruction on defense of family.[315] By its opinion, the court dismissed as unpreserved defendant's appeal of this issue, holding that defendant failed to object at trial and failed to argue plain error on appeal.[316]

On June 7, 2017, defendant filed a "Motion to Stay the Mandate, Withdraw and Correct the Opinion, or in the Alternative for Rehearing En Banc."[317] Defendant asserted that rehearing was "necessary to secure or maintain uniformity of the court's decisions" and that "either the panel or the full [c]ourt should correct" the panel's opinion because the opinion

> is in direct conflict with a well-established and uniform rule applied in decisions of this Court and the North Carolina Supreme Court: namely, where a party requests a jury instruction, the court agrees to give it, and the court subsequently fails to give it, no further objection is necessary to preserve the issue for appellate review.[318]

In support of this argument, defendant asserted that trial counsel "requested the pattern jury instruction on this defense at the charge conference";[319] "the trial court initially agreed to give the instruction, then changed its mind and did not give it";[320] trial counsel "objected to this change in decision in a bench conference";[321] and trial counsel "did not object further following the instructions to the jury."[322] Defendant further noted that "[i]n its brief, the State argued the merits of the issue and did not contend it was unpreserved."[323]

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315. *Id.* at 6.

316. *Id.* at 12–14.

317. Defendant-Appellant's Motion to Stay the Mandate, Withdraw and Correct the Opinion, or in the Alternative for Rehearing En Banc, *Walker*, 2017 WL 2437009 (COA16-1195).

318. *Id.* at 1–2.

319. *Id.* at 2.

320. *Id.*

321. *Id.* (citation omitted).

322. *Id.* (citation omitted).

323. *Id.* at 3.

By orders entered June 15, 2017, the court allowed defendant's motion to withdraw the opinion, denied the motion to stay the mandate, and dismissed the motion for en banc rehearing.[324] The court filed a corrected, unanimous, unpublished opinion, also dated June 6, 2017,[325] wherein the court determined that defendant had properly preserved the argument concerning the defense of family instruction but held that the trial court properly denied the instruction.[326]

State v. Wright

In *State v. Wright*,[327] the court issued a unanimous, published opinion on January 15, 2019, concluding that defendant had "waived his right to have a jury determine the presence of an aggravating factor," and thus, finding no error with the State's notice of its intent to prove aggravating factors at defendant's trial for various drug-related charges.[328] The court also found defendant's ineffective assistance of counsel claim to be without merit and denied his related motion for appropriate relief but remanded the case to correct a clerical error in the judgment.[329]

On January 17, 2019, defendant filed a motion to withdraw the opinion or, in the alternative, for en banc

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324. State v. Walker, No. COA16-1195 (N.C. Ct. App. June 15, 2017) (order allowing motion to withdraw and correct opinion, denying motion to stay mandate, and dismissing motion for rehearing en banc).

325. State v. Walker, No. COA16-1195, 2017 WL 26080572 (N.C. Ct. App. June 6, 2017). The opinion itself does not denote that it is a corrected or amended opinion.

326. *Id.* at *7.

327. No. COA18-209, 2019 N.C. App. LEXIS 37 (N.C. Ct. App. Jan. 15, 2019), *withdrawn and superseded by* 825 S.E.2d 1 (N.C. Ct. App.), *withdrawn and superseded by* 826 S.E.2d 833 (N.C. Ct. App. 2019). The opinion is not online but is attached to defendant's first motion for en banc rehearing. *See* Motion to Withdraw Opinion or, in the Alternative, for Rehearing En Banc app. at 1, *Wright*, 2019 N.C. App. LEXIS 37 (No. COA18-209).

328. Motion to Withdraw Opinion or, in the Alternative, for Rehearing En Banc app. at 1, 8–10, *Wright*, 2019 N.C. App. LEXIS 37 (No. COA18-209).

329. *Id.* at 14, 16.

rehearing, and a motion to stay the mandate.[330] In the motion to withdraw or for en banc rehearing, defendant argued "[t]he opinion should be withdrawn or reviewed *en banc* because [the c]ourt's conclusion that [defendant] was not prejudiced by trial counsel's failure to object to the aggravating factor is directly contradicted by [the c]ourt's ruling in *State v. Mackey*,"[331] thus "creat[ing] a split in authority . . . ."[332] Defendant also asserted that the opinion "failed to address additional clerical errors raised in [defendant's] . . . brief."[333]

The court issued orders allowing the motion to withdraw the opinion, dismissing the motion to stay the mandate, and dismissing the motion for en banc rehearing without prejudice.[334] The court issued a second, unanimous, published opinion on February 19, 2019,[335] again finding no error and remanding to fix clerical errors.[336] The court augmented its analysis of defendant's waiver of his right to notice by directly distinguishing *Mackey* and remanded to the trial court to fix clerical errors.[337]

On March 4, 2019, defendant again filed a motion to withdraw the opinion or, in the alternative, for en banc

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330. *See* Motion to Withdraw Opinion or, in the Alternative, for Rehearing En Banc, *Wright*, 2019 N.C. App. LEXIS 37 (No. COA18-209); *see also* Motion for Stay of Mandate, *Wright*, 2019 N.C. App. LEXIS 37 (No. COA18-209).

331. *See* Motion to Withdraw Opinion or, in the Alternative, for Rehearing En Banc at 1–2, *Wright*, 2019 N.C. App. LEXIS 37 (No. COA18-209) (citing State v. Mackey, 708 S.E.2d 719, 722 (N.C. Ct. App. 2011)).

332. *Id.* at 2.

333. *Id.*

334. *See* State v. Wright, COA18-209 (N.C. Ct. App. Jan. 18, 2019) (order allowing motion to withdraw opinion); *see also* State v. Wright, COA18-209 (N.C. Ct. App. Jan. 24, 2019) (order dismissing motion to stay mandate); *see also* State v. Wright, COA18-209 (N.C. Ct. App. Jan. 24, 2019) (order dismissing motion for rehearing en banc).

335. State v. Wright, 825 S.E.2d 1 (N.C. Ct. App.), *withdrawn and superseded by* 826 S.E.2d 833 (N.C. Ct. App. 2019). The opinion is not online but is attached to defendant's second motion for en banc rehearing. *See* Motion to Withdraw Opinion or, in the Alternative, for Rehearing En Banc app. at 18, *Wright*, 825 S.E.2d 1 (No. COA18-209).

336. Motion to Withdraw Opinion or, in the Alternative, for Rehearing En Banc app. at 18, *Wright*, 825 S.E.2d 1 (No. COA18-209).

337. *See id.* at 26, 34.

rehearing, and a motion to stay the mandate.[338] Defendant argued that the court's second opinion should be withdrawn or reviewed en banc because the court's conclusion that defendant "was not prejudiced by trial counsel's failure to object to the aggravating factor [was] once again directly contradicted by this [c]ourt's rulings" in *Mackey* as well as *State v. Snelling*.[339] Defendant further argued that the opinion's analysis of defendant's ineffective assistance of counsel claim was "contrary to and involve[d] an unreasonable application of clearly established . . . law."[340]

The court issued an order staying the mandate[341] and on March 13, 2019, the court issued orders allowing the motion to withdraw the opinion and dismissing the motion for en banc rehearing without prejudice.[342]

The court issued a third, unanimous, published opinion in the case on May 7, 2019.[343] The court again concluded that defendant had "waived his right to have a jury determine the presence of an aggravating factor," and thus found no error with the State's notice of its intent to prove aggravating factors.[344] However, instead of denying defendant's ineffective assistance of counsel claim, as it had in its first two opinions, the court dismissed the claim "without prejudice to his right to assert his claim in a motion for appropriate relief at the

338. *See* Motion to Withdraw Opinion or, in the Alternative, for Rehearing En Banc, *Wright*, 825 S.E.2d 1 (No. COA18-209); *see also* Motion for Stay of Mandate, *Wright*, 825 S.E.2d 1 (No. COA18-209).

339. Motion to Withdraw Opinion or, in the Alternative, for Rehearing En Banc at 11, *Wright*, 825 S.E.2d 1 (No. COA18-209) (citing State v. Mackey, 708 S.E.2d 719, 722 (N.C. Ct. App. 2011); State v. Snelling, 752 S.E.2d 739, 744 (N.C. Ct, App. 2014)).

340. *Id.* at 2.

341. See *State v. Wright*, COA18-209 (N.C. Ct. App. Mar. 8, 2019) (order allowing motion to stay mandate).

342. *See* State v. Wright, COA18-209 (N.C. Ct. App. Mar. 13, 2019) (order allowing motion to withdraw opinion); *see also* State v. Wright, COA18-209 (N.C. Ct. App. Mar. 13, 2019) (order dismissing motion for rehearing en banc).

343. State v. Wright, 826 S.E.2d 833 (N.C. Ct. App. 2019).

344. *Id.* at 835.

trial level."[345] The court again remanded to correct clerical errors in the judgment.[346]

Summary

The following can be inferred from the filings and orders in the above three cases:

- The full court considered the motion for en banc rehearing and at least a majority of the judges concluded that the issues raised in the motion were not worthy of en banc review.
- At least a majority of the judges on the panel considered the issues raised in the motion for en banc rehearing and accompanying motion to withdraw to be worthy of panel reconsideration.
- Even though the Rules do not specifically authorize a motion to withdraw, the panel concluded that invoking Rule 2 was appropriate in each case, perhaps because each case involved whether the defendant had waived his rights to appellate review.

C. Why the Current Practice is Not Ideal

In each of the cases summarized above, a party filed a timely motion for en banc rehearing that was dismissed.[347] Yet the opinion was withdrawn and the panel issued a new opinion directly addressing arguments in the motion for en banc rehearing. In some cases, this process happened more than once. Although filing a motion for en banc rehearing has not resulted in

345. *Id.* at 838.

346. *Id.* at 839.

347. In *In re A.C.*, No. COA20-508, 2021 N.C. App. LEXIS 269 (N.C. Ct. App. June 15, 2021), *withdrawn and superseded by* 868 S.E.2d 113 (N.C. Ct. App. 2021), the motion for en banc rehearing was originally allowed but that order was rescinded, and the motion was denied. *See* In re A.C., No. COA20-508 (N.C. Ct. App. July 30, 2021) (order allowing motion for en banc rehearing); *see also* In re A.C., No. COA20-508 (N.C. Ct. App. Aug. 31, 2021) (order rescinding order allowing motion for en banc rehearing).

a case being reheard en banc, it has directly or indirectly resulted in panel rehearings in 12% of the cases.[348] Although the opportunity for expedient panel rehearing is beneficial for the litigants, the current procedure is problematic for at least three reasons.

First, the Rules of Appellate Procedure are designed, in part, to level the playing field for the parties from a process standpoint. When the rules clearly and accurately prescribe the required processes and procedures, all litigants in the court—including attorneys who frequently represent clients in the court, attorneys who infrequently represent clients in the court, and pro se litigants, alike—can be confident that they are playing by the same rules and that no party has an unfair procedural advantage. However, where, as here, there is a disconnect between the rules as written and rules as applied, attorneys who frequently represent clients in the court are more likely to understand the unwritten rules and thus to have an unfair advantage.

Second, the present system wastes attorneys' time, creating stress for attorneys and expense for clients. Instead of being able to abide by and rely upon explicit rules for panel and en banc rehearing processes, attorneys are filing pointless motions and/or petitions in an effort to ensure that they have not missed a potential opportunity for rehearing.

Third, the present process wastes valuable administrative and judicial resources. Once a motion for en banc review is filed, it begins consuming administrative staff time and effort to process. The motion is disseminated to all 15 judges, 12 of whom have never considered the case before. Ultimately, 15 judges review what may essentially be a petition for panel rehearing, wasting valuable judicial resources.

348. Nineteen out of 158.

IV. RECOMMENDATIONS

With a few procedural adjustments, the rehearing processes would be more efficient, effective, and transparent for all involved. We should codify a rehearing process that reflects and implements the different scope and standards for review: panel rehearing is appropriate to address particular points of fact or law that the panel may have overlooked or misapprehended when it decided the case; on the other hand, en banc review is only appropriate to maintain the uniformity of the court's jurisprudence or when the case involves a question of exceptional importance. Thus, our appellate Rules should be amended to allow and encourage a petition for rehearing to be filed by a party and heard by the three-judge panel that issued the opinion before the full court considers a party's motion for en banc rehearing. To achieve this, the North Carolina Rules governing petitions for rehearing should be amended to mirror the Federal Rules governing the same such that petitions for rehearing are allowed in criminal cases, attorney affidavits are not required to accompany a petition for rehearing, and the time for filing a petition for rehearing aligns with the time for filing a motion for en banc rehearing. Furthermore, as in the Federal Rules, if both a petition for rehearing and a motion for en banc rehearing are filed, the petition for rehearing must be heard and decided first.

These changes would end the litigation practice of filing what is designated as a motion for en banc rehearing but what is essentially a petition for rehearing without attorney affidavits filed prior to the time allowed. Furthermore, these changes would help ensure that the different standards for a petition for rehearing and for a motion for en banc rehearing are clearly addressed in each separate filing.

A. Allow Petitions or Rehearing in Criminal Cases

Currently, no rule authorizes a party to seek panel rehearing in a criminal case. Rule 31 only allows a petition for rehearing to be "filed in a civil action"[349] and specifically states that "courts will not entertain petitions for rehearing in criminal actions."[350] The prohibition against petitions for rehearing in criminal cases has been codified in North Carolina's Rules of Appellate Procedure since 1975[351] and judicially determined since at least 1873.[352] The prohibition is based on the questionable analysis that in equity cases and civil actions, "this Court makes decrees and passess [*sic*] judgments, which may be reviewed. But in criminal cases we do not pass judgment. Such cases are sent up for our opinion only which we certify to the Court below, and there our jurisdiction ends."[353] Conversely, Federal Rule of Appellate Procedure 40, which governs petitions for rehearing in the federal system, does not prohibit petitions for rehearing in criminal cases.[354]

Parties sometimes invoke Rule 37 as authority for filing a motion to withdraw in a criminal case,[355] but Rule 37 does not authorize such relief. First, Rule 37 is merely the procedural mechanism by which a party may move the court for an "order or for other relief available

349. N.C. R. APP. P. 31(a).

350. N.C. R. APP. P. 31(g).

351. *See* 287 N.C. 671, 749–50 (1975) (N.C. R. APP. P. 35(a), (g) as officially published in 1975 by the North Carolina Supreme Court in the North Carolina Reports).

352. *See* State v. Jones, 69 N.C. 16, 16 (1873) ("At this term of the Court the defendant files a petition to have the case reheard in this Court, upon the ground that his counsel was not present when the case was heard in this Court, and that on that account the attention of this Court was not called to a defense which would have availed him. Neither the learned counsel for the prisoner nor the Attorney General has been able to cite any authority showing that we have the *power* to rehear the case. In equity cases and in civil actions the practice has been common, but in criminal cases never to our knowledge.").

353. *See id.* at 16–17.

354. *See generally* FED. R. APP. P. 40.

355. *See generally* N.C. R. APP. P. 37(d).

under these [R]ules,"[356] and an order withdrawing an opinion in a criminal case is not available under the Rules. Furthermore, Rule 37 only allows a motion to be "filed and served at any time *before the case is called for oral argument*"[357] and thus, does not authorize a motion to withdraw to be filed after an opinion is issued. Parties also invoke Rule 2 as authority for filing a motion to withdraw or a petition for rehearing in a criminal case.[358] Rule 2 permits the court to "suspend or vary the requirements or provisions of any of" the Rules of Appellate Procedure only "[t]o prevent manifest injustice to a party, or to expedite decision in the public interest . . . ."[359] While Rule 2 does allow the court to accept motions to withdraw or petitions for rehearing in criminal cases, it can do so only under very limited circumstances, and parties should not have to rely on the court exercising its discretion to accept such filings.

The court already receives and allows in criminal cases motions to withdraw and de facto motions/petitions for panel rehearing in the form of motions for en banc rehearing, which suggests that an official process is needed. Although formally allowing petitions for rehearing in criminal cases may result in more petitions being filed in the court, there has been no apparent effort to restrict petitions for rehearing in other courts, which suggests that any increase in the number of petitions in the Court of Appeals likewise would be manageable. With good reasons to allow petitions for panel rehearing in criminal cases and no good reason to prohibit them, Rule 31 should be amended to remove the prohibition[360] and allow for petitions for rehearing in all types of cases.

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356. *Id.* 37(a).

357. *Id.* (emphasis added).

358. *See generally* N.C. R. APP. P. 2.

359. *Id.*

360. Rule 31(a) of the North Carolina Rules of Appellate Procedure should be amended as follows: "A petition for rehearing may be filed ~~in a civil action~~ within fifteen days after the mandate of the court has been issued." N.C. R. APP. P. 31(a). Rule 31(g) should be repealed entirely: ~~"(g) No Petition in Criminal Cases. The courts will not entertain petitions for rehearing in criminal actions."~~ *Id.* 31(g).

B. Eliminate the Requirement of Attorney Affidavits for Petitions for Rehearing

Rule 31 requires a petition for rehearing to be accompanied by two attorney affidavits:

> [A petition for rehearing] shall be accompanied by a certificate of at least two attorneys who for periods of at least five years, respectively, shall have been members of the bar of this State and who have no interest in the subject of the action and have not been counsel for any party to the action, that they have carefully examined the appeal and the authorities cited in the decision, and that they consider the decision in error on points specifically and concisely identified.[361]

The motion for en banc rehearing does not require such affidavits and neither does Federal Rule of Appellate Procedure 40. The affidavits contribute little to the court's review of the petition for rehearing and serve an unnecessary gatekeeping function by effectively prohibiting an incarcerated pro se litigant from filing a petition for panel rehearing. With no good reason to require attorney affidavits, Rule 31 should be amended to remove the requirement.[362]

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361. N.C. R. APP. P. 31(a).

362. Rule 31(a) of the North Carolina Rules of Appellate Procedure should be amended as follows:

> The petition shall state with particularity the points of fact or law that, in the opinion of the petitioner, the court has overlooked or misapprehended and shall contain such argument in support of the petition as petitioner desires to present. ~~It shall be accompanied by a certificate of at least two attorneys who for periods of at least five years, respectively, shall have been members of the bar of this State and who have no interest in the subject of the action and have not been counsel for any party to the action, that they have carefully examined the appeal and the authorities cited in the decision, and that they consider the decision in error on points specifically and concisely identified.~~ Oral argument in support of the petition will not be permitted.

Id.

C. Align the Times for Filing a Petition for Rehearing and a Motion for En Banc Rehearing

Currently, a motion for en banc rehearing must be filed up to five days before the mandate issues, meaning within 14 days after the opinion has been filed. A petition for rehearing must be filed within 15 days after the mandate has issued, meaning between 20 and 35 days after the opinion has been filed. If a movant files both, "the court will rule on the motion for en banc rehearing first."[363] Requiring 15 judges to rule on a motion for en banc rehearing before three judges receive and consider a petition for rehearing is highly inefficient. The judges who sat on the original panel are familiar with the case and are positioned to quickly consider and address any issues raised by a petition. In stark contrast, the remaining 12 judges must put aside the cases before them and familiarize themselves with a case for the first time and expediently rule on a motion for en banc rehearing. Furthermore, current practice indicates that the original three-judge panel is already considering motions for en banc rehearing when deciding whether to withdraw an opinion and conduct what is essentially a panel rehearing.

Under the Federal Rules of Appellate Procedure, a petition for panel rehearing generally must "be filed within 14 days after entry of judgment"[364] and "[a] petition for a rehearing en banc must be filed within the time . . . for filing a petition for rehearing."[365] Accordingly, both a petition for panel rehearing and a motion for en banc rehearing must be filed within 14 days after entry of judgment.[366] This process is clearer and more efficient for both movants and the court.

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363. N.C. R. APP. P. 31.1(f).

364. FED. R. APP. P. 40(a)(1).

365. FED. R. APP. P. 35(c).

366. This is the same as requiring the motion or petition be filed up to five days before the mandate issues.

In summary, Rule 31 should be amended to require a petition for rehearing to be filed within the time prescribed by Rule 31.1 for filing a motion for en banc rehearing and to require the three-judge panel to hear the petition for rehearing before the full court hears a motion for en banc review. Additionally, Rule 33.1 should be amended to omit the requirement that the Court rule on a motion for en banc rehearing before a petition for rehearing.

V. CONCLUSION

The North Carolina General Assembly statutorily authorized an en banc procedure for the North Carolina Court of Appeals in December 2016, and the North Carolina Supreme Court promulgated rules to implement that procedure. In the almost six years since its implementation, 172 motions for en banc rehearing have been filed in 158 individual cases, yet only two motions have been allowed, and neither resulted in the Court of Appeals hearing the case en banc.

Despite these statistics, however, the en banc procedure has had a tangible effect on the North Carolina appellate rehearing process as 23 opinions in 19 individual cases have been withdrawn, amended, and refiled by the three-judge panel that issued the opinion, in direct response to a motion for en banc rehearing. By enabling and promoting panel rehearing before en banc rehearing, the en banc and panel review process can be more efficient, transparent, and effective for litigants, attorneys, court staff, and judges.

APPENDIX

Below is a breakdown of the motions for en banc rehearing filed by year and the Court's dispassion of those motions.

In 2017:

- A total of 30 motions for en banc rehearing were filed in 27 individual cases (16 denied, 14 dismissed).
  - 12 motions were filed in 10 individual civil cases.
  - 18 motions were filed in 17 individual criminal cases.
  - 10 motions were filed by pro se litigants: 3 in civil cases and 7 in criminal cases.
  - 2 motions were filed in each of 3 individual cases: *Department of Transportation v. Riddle*[1] (denied, dismissed); *State v. Moore*[2] (dismissed, dismissed); *Conleys Creek Ltd. Partnership v. Smoky Mountain Country Club Property Owners Ass'n*[3] (denied, dismissed).
  - A motion to withdraw was also filed in 3 cases: *State v. Eaves*[4] (denied); *Moore*[5] (dismissed); *State v. Faulk*[6] (denied).
- A petition for rehearing was also filed in 4 cases: *State v. Williams*[7] (dismissed);

1. 795 S.E.2d 610 (N.C. Ct. App. 2016), *withdrawn and superseded by* 813 S.E.2d 449 (N.C. Ct. App. 2017).

2. No. COA16-999, 2017 N.C. App. LEXIS 398 (N.C. Ct. App. May 16, 2017), *withdrawn and superseded by* 803 S.E.2d 196 (N.C. Ct. App. 2017).

3. No. COA16-647, 2017 N.C. App. LEXIS 225 (N.C. Ct. App. Apr. 4, 2017), *withdrawn and superseded by* 805 S.E.2d 147 (N.C. Ct. App. 2017).

4. 805 S.E.2d 540 (N.C. Ct. App. 2017).

5. 2017 N.C. App. LEXIS 398.

6. 805 S.E.2d 562 (N.C. Ct. App. 2017).

7. 796 S.E.2d 823 (N.C. Ct. App. 2017).

Department of Transportation v. Riddle[8] (dismissed as moot); *Conleys Creek Ltd. Partnership v. Smoky Mountain Country Club Property Owners Ass'n*[9] (dismissed); *Buckner v. UPS*[10] (denied).

- 5 opinions were withdrawn in 5 cases: *State v. Walker*;[11] *Riddle*;[12] *Conleys Creek Ltd. Partnership*;[13] *State v. Hill*;[14] *State v. Moore.*[15]

In 2018:

- A total of 36 motions for en banc rehearing were filed in 34 individual cases (24 denied, 12 dismissed).
  - 12 motions were filed in 10 individual civil cases.
  - 24 motions were filed in 24 individual criminal cases.
  - 15 motions were filed by pro se litigants: 3 civil cases (2 in *Grodner v. Grodner*)[16] and 11 criminal cases.
  - 3 motions were filed in *Grodner v. Grodner*[17] (dismissed, denied, dismissed); 2 motions were filed in *In re E.W.P.*[18] (dismissed, denied).

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8. 795 S.E.2d 610 (N.C. Ct. App. 2016), *withdrawn and superseded by* 813 S.E.2d 449 (N.C. Ct. App. 2017).

9. No. COA16-647, 2017 N.C. App. LEXIS 225 (N.C. Ct. App. Apr. 4, 2017), *withdrawn and superseded by* 805 S.E.2d 147 (N.C. Ct. App. 2017).

10. 799 S.E.2d 280 (N.C. Ct. App. 2017).

11. No. COA16-1195, 2017 WL 2437009 (N.C. Ct. App. June 6, 2017), *withdrawn and superseded by* 2017 WL 26080572 (N.C. Ct. App. June 6, 2017).

12. 795 S.E.2d 610.

13. 2017 N.C. App. LEXIS 225.

14. No. COA16-744, 2017 N.C. App. LEXIS 153 (N.C. Ct. App. Mar. 7, 2017), *withdrawn and superseded by* 798 S.E.2d 553 (N.C. Ct. App. 2017).

15. No. COA16-999, 2017 N.C. App. LEXIS 398 (N.C. Ct. App. May 16, 2017), *withdrawn and superseded by* 803 S.E.2d 196 (N.C. Ct. App. 2017).

16. 815 S.E.2d 748 (N.C. Ct. App.), *superseded by* 817 S.E.2d 505 (N.C. Ct. App. 2018).

17. *Id.*

18. 820 S.E.2d 131 (N.C. Ct. App. 2018).

- A motion to withdraw was also filed in 9 cases: *State v. Ledbetter*[19] (denied); *State v. Pinnix*[20] (denied); *State v. Graves*[21] (denied); *State v. Harding*[22] (denied); *Grodner v. Grodner*[23] (denied); *State v. Lindsey*[24] (denied); *State v. Muhammad*[25] (denied); *State v. Smith*[26] (Motion to Withdraw Opinion to Correct a Manifest and Material Mistake of Fact denied but the "Material Mistake of Fact" has been corrected, and a corrected opinion has been filed by this Court); *In re R.R.*[27] (allowed; motion for en banc rehearing filed after new opinion issued).
- A petition for rehearing was also filed in 5 cases: *State v. Perez*[28] (denied); *Bartlett v. North Carolina Department of Public Safety*[29] (denied); *AVR Davis Raleigh, LLC v. Triangle Construction Co.*[30] (denied); *Carlton v. Burke County Board of Education*[31] (denied); *Grodensky v. McLendon*[32] (allowed; motion for en banc rehearing filed after new opinion issued).
- 7 opinions were withdrawn in 5 individual cases: *State v. Smith*;[33] *Grodner v. Grodner*[34]

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19. 779 S.E.2d 164 (N.C. Ct. App. 2015).
20. 821 S.E.2d 316 (N.C. Ct. App. 2018).
21. 821 S.E.2d 490 (N.C. Ct. App. 2018).
22. 813 S.E.2d 254 (N.C. Ct. App. 2018).
23. 815 S.E.2d 748 (N.C. Ct. App.), *superseded by* 817 S.E.2d 505 (N.C. Ct. App. 2018).
24. 818 S.E.2d 344 (N.C. Ct. App. 2018).
25. 812 S.E.2d 911 (N.C. Ct. App. 2018).
26. 808 S.E.2d 621 (N.C. Ct. App. 2018).
27. 812 S.E.2d 407 (N.C. Ct. App. 2018).
28. 817 S.E.2d 795 (N.C. Ct. App. 2018).
29. 811 S.E.2d 241 (N.C. Ct. App. 2018).
30. 818 S.E.2d 184 (N.C. Ct. App. 2018).
31. 822 S.E.2d 146 (N.C. Ct. App. 2018).
32. 812 S.E.2d 914 (N.C. Ct. App.), *superseded by* 816 S.E.2d 267 (N.C. Ct. App. 2018).
33. 808 S.E.2d 621 (N.C. Ct. App. 2018).
34. 815 S.E.2d 748 (N.C. Ct. App.), *superseded by* 817 S.E.2d 505 (N.C. Ct. App. 2018).

(withdrawn 3 times); *In re L.V.*;[35] *Grodensky v. McLendon*;[36] and *In re R.R.*[37]

In 2019:

- A total of 36 motions for en banc rehearing were filed in 33 individual cases (26 denied, 10 dismissed).
  - 21 motions were filed in 19 individual civil cases.
  - 15 motions were filed in 14 individual criminal cases.
  - 10 motions were filed by pro se litigants: 3 in civil cases and 7 in criminal cases.
  - 2 motions were filed in *State v. Wright*;[38] *Ramsey v. Ramsey*;[39] and *In re K.J.*[40]
- A motion to withdraw was also filed in 8 cases: *Mangum v. Bond*[41] ("Motion for Amendment" denied); *State v. Gilliam*[42] (denied); *In re L.B.*[43] (denied); *Ragland v. North Carolina Department of Public Instruction*[44] (denied); *State v. Marzouq*[45] (denied); *State v. Weathers*[46] (denied); *State v. Wright*[47] (allowed, allowed).

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35. 814 S.E.2d 928 (N.C. Ct. App. 2018) (mem.), *overruled by In re* L.E.M., 831 S.E.2d 341 (N.C. 2019).

36. 812 S.E.2d 914.

37. 812 S.E.2d 407 (N.C. Ct. App. 2018).

38. No. COA18-209, 2019 N.C. App. LEXIS 37 (N.C. Ct. App. Jan. 15, 2019), *withdrawn and superseded by* 825 S.E.2d 1 (N.C. Ct. App.), *withdrawn and superseded by* 826 S.E.2d 833 (N.C. Ct. App. 2019).

39. No. COA18-600, 2019 N.C. App. LEXIS 106 (N.C. Ct. App. Feb. 5, 2019), *withdrawn and superseded by* 826 S.E.2d 459 (N.C. Ct. App. 2019).

40. 828 S.E.2d 753 (N.C. Ct. App.), *superseded by* 834 S.E.2d 145 (N.C. Ct. App. 2019).

41. 830 S.E.2d 705 (N.C. Ct. App. 2019).

42. 823 S.E.2d 694 (N.C. Ct. App. 2019).

43. 828 S.E.2d 752 (N.C. Ct. App. 2019).

44. 834 S.E.2d 191 (N.C. Ct. App. 2019).

45. 836 S.E.2d 893 (N.C. Ct. App. 2019).

46. 833 S.E.2d 261 (N.C. Ct. App. 2019).

47. No. COA18-209, 2019 N.C. App. LEXIS 37 (N.C. Ct. App. Jan. 15, 2019), *withdrawn and superseded by* 825 S.E.2d 1 (N.C. Ct. App.), *withdrawn and superseded by* 826 S.E.2d 833 (N.C. Ct. App. 2019).

- A petition for rehearing was also filed in 2 cases: *Walsh v. Cornerstone Health Care*[48] (denied); *Davis & Taft Architecture v. DDR-Shadowline, LLC*[49] (denied).
- 6 opinions were withdrawn in 5 individual cases: *State v. Wright*[50] (withdrawn twice); *Ramsey v. Ramsey*;[51] *Rmah v. USAA Casualty*;[52] *In re K.J.*;[53] *State v. Thompson*.[54]

In 2020:

- A total of 24 motions for en banc rehearing were filed in 23 individual cases (19 denied, 5 dismissed).
  - 11 motions were filed in 11 individual civil cases.
  - 13 motions were filed in 12 individual criminal cases.
  - 6 motions were filed by pro se movants: 3 in civil cases and 3 in criminal cases.
  - 2 motions were filed in *State v. Gettleman*[55] (denied, denied).
- A motion to withdraw were also filed in 6 cases: *State v. Patterson*[56] (denied); *State v. Wheeler*[57] (denied); *State v. Cain*[58] (denied);

48. 829 S.E.2d 513 (N.C. Ct. App. 2019).

49. 835 S.E.2d 473 (N.C. Ct. App. 2019).

50. No. COA18-209, 2019 N.C. App. LEXIS 37 (N.C. Ct. App. Jan. 15, 2019), *withdrawn and superseded by* 825 S.E.2d 1 (N.C. Ct. App.), *withdrawn and superseded by* 826 S.E.2d 833 (N.C. Ct. App. 2019).

51. No. COA18-600, 2019 N.C. App. LEXIS 106 (N.C. Ct. App. Feb. 5, 2019), *withdrawn and superseded by* 826 S.E.2d 459 (N.C. Ct. App. 2019).

52. 822 S.E.2d 791 (N.C. Ct. App.), *superseded by* 828 S.E.2d 674 (N.C. Ct. App. 2019).

53. 828 S.E.2d 753 (N.C. Ct. App.), *superseded by* 834 S.E.2d 145 (N.C. Ct. App. 2019).

54. No. COA18-885, 2019 N.C. App. LEXIS 352 (N.C. Ct. App. Apr. 16, 2019), *withdrawn and superseded by* 827 S.E.2d 556 (N.C. Ct. App. 2019).

55. 853 S.E.2d 447 (N.C. Ct. App. 2020).

56. 839 S.E.2d 68 (N.C. Ct. App. 2020).

57. 836 S.E.2d 782 (N.C. Ct. App. 2020).

58. 847 S.E.2d 84 (N.C. Ct. App. 2020).

State v. Batts[59] (denied); *State v. Gettleman*[60] (denied, denied).

- A petition for rehearing was also filed in 2 cases: *Martin v. Irwin*[61] (denied); *Fairley v. North Carolina Department of Transportation*[62] (denied).
- No opinions were withdrawn.

In 2021:

- A total of 26 motions for en banc rehearing were filed in 23 individual cases (2 allowed, then 1 rescinded; 13 denied; 11 dismissed).
  - 13 motions were filed in 13 individual civil cases.
  - 13 motions were filed in 10 individual criminal cases.
  - 13 motions were filed by pro se litigants: 5 civil cases (3 in *Evans v. State*)[63] and 5 criminal cases (2 in *State v. Neal*).[64]
  - 3 motions were filed in *Evans v. State*;[65] 2 motions were filed in *State v. Neal*.[66]
- A motion to withdraw was also filed in 5 cases: *State v. Austin*[67] (denied); *State v. Taylor*[68] (denied); *State v. Geter*[69] (denied);

59. 847 S.E.2d 82 (N.C. Ct. App. 2020).

60. 853 S.E.2d 447.

61. 836 S.E.2d 781 (N.C. Ct. App. 2020).

62. 844 S.E.2d 626 (N.C. Ct. App. 2020).

63. None of these cases have an opinion. The defendant sought review by the North Carolina Court of Appeals by filing a motion or petition for rehearing en banc—among other motions and petitions—in each case, which was denied each time. *See* Evans v. State, P20-524 (N.C. Ct. App. Oct. 27, 2021) (order dismissing petition for rehearing en banc); Evans v. State, P20-526 (N.C. Ct. App. Oct. 27, 2021) (order dismissing petition for rehearing en banc); Evans v. State, P21-66 (N.C. Ct. App. June 28, 2021) (order dismissing motion for en banc rehearing).

64. 866 S.E.2d 311 (N.C. Ct. App. 2021).

65. *See supra* note 63.

66. 866 S.E.2d 311.

67. 865 S.E.2d 350 (N.C. Ct. App. 2021).

68. 858 S.E.2d 143 (N.C. Ct. App. 2021).

69. 856 S.E.2d 916 (N.C. Ct. App. 2021), *aff'd*, 881 S.E.2d 209 (N.C. 2022).

State v. Harris[70] (denied); *State v. Tirado*[71] (denied).

- A petition for rehearing was also filed in 4 cases: *State v. Fuller*[72] (dismissed, not allowed in criminal cases); *Anderson v. Mystic Lands, Inc.*[73] (denied); *Anderson v. Mystic Lands, Inc.*[74] (denied); *In re A.C.*[75] (dismissed).
- 1 opinion was withdrawn: *In re A.C.*;[76] 2 opinions were amended but not withdrawn: *Asbun v. North Carolina Department of Health and Human Services*;[77] *State v. Tarlton*.[78]

In the first three quarters of 2022:

- A total of 20 motions for en banc rehearing were filed in 18 individual cases.
  - 7 motions were filed in 7 civil cases.
  - 11 motions were filed in 13 individual criminal cases.
  - 5 motions were filed by pro se litigants in 5 criminal cases.
  - 2 motions were filed in *State v. Hahn*;[79] *State v. Perkins*.[80]

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70. 855 S.E.2d 302 (N.C. Ct. App. 2021).

71. 858 S.E.2d 628 (N.C. Ct. App. 2021).

72. 865 S.E.2d 372 (N.C. Ct. App. 2021).

73. 852 S.E.2d 735 (N.C. Ct. App. 2020).

74. 852 S.E.2d 734 (N.C. Ct. App. 2020).

75. No. COA20-508, 2021 N.C. App. LEXIS 269 (N.C. Ct. App. June 15, 2021), *withdrawn and superseded by* 868 S.E.2d 113 (N.C. Ct. App. 2021).

76. *Id.*

77. 857 S.E.2d 147 (N.C. Ct. App. 2021).

78. 864 S.E.2d 810 (N.C. Ct. App. 2021).

79. No. COA21-190, 2022 N.C. App. LEXIS 56 (N.C. Ct. App. Feb. 1, 2022), *withdrawn and superseded by* 2022 N.C. App. LEXIS 373 (N.C. Ct. App. May 17, 2022).

80. No. COA20-572, 2022 N.C. App. LEXIS 36 (N.C. Ct. App., Jan. 18, 2022), *withdrawn and superseded by* 2022 WL 10219728 (N.C. Ct. App. Oct. 18, 2022), *withdrawn and superseded by* 881 S.E.2d 842 (N.C. Ct. App. 2022).

- 7 motions to withdraw were also filed in 5 individual cases: *State v. Perkins*[81] (allowed, allowed); *In re McIlwain*[82] (denied); *In re T.S.*[83] (denied); *State v. Bowens*[84] (denied); *State v. Hahn*[85] (denied).
- A petition for rehearing was also filed in 3 cases: *In re McIlwain*[86] (denied); *State v. Johnson*[87] (denied); *Fleming v. Cedar Management Group, LLC*[88] (denied).
- 4 opinions were withdrawn in 3 individual cases: *State v. Perkins*[89] (twice withdrawn); *State v. Hahn*;[90] *State v. Teague*.[91]

81. *Id.*

82. 873 S.E.2d 58 (N.C. Ct. App. 2022).

83. 874 S.E.2d 680 (N.C. Ct. App. 2022).

84. 866 S.E.2d 536 (N.C. Ct. App. 2022).

85. No. COA21-190, 2022 N.C. App. LEXIS 56 (N.C. Ct. App. Feb. 1, 2022), *withdrawn and superseded by* 2022 N.C. App. LEXIS 373 (N.C. Ct. App. May 17, 2022).

86. 873 S.E.2d 58.

87. This case has no opinion. The defendant sought review by the North Carolina Court of Appeals through a petition for writ of certiorari, a petition for rehearing en banc, and a petition for panel rehearing, which were all denied. *See, e.g.*, State v. Johnson, P22-213 (N.C. Ct. App. Sept. 1, 2022) (order denying petition for panel rehearing).

88. 866 S.E.2d 919 (N.C. Ct. App. 2022).

89. No. COA20-572, 2022 N.C. App. LEXIS 36 (N.C. Ct. App., Jan. 18, 2022), *withdrawn and superseded by* 2022 WL 10219728 (N.C. Ct. App. Oct. 18, 2022), *withdrawn and superseded by* 881 S.E.2d 842 (N.C. Ct. App. 2022).

90. No. COA21-190, 2022 N.C. App. LEXIS 56 (N.C. Ct. App. Feb. 1, 2022), *withdrawn and superseded by* 2022 N.C. App. LEXIS 373 (N.C. Ct. App. May 17, 2022).

91. 877 S.E.2d 450 (N.C. Ct. App.), *withdrawn and superseded by* 879 S.E.2d 881 (N.C. Ct. App. 2022).