Case Brief: *State v. Flow*—Did the Trial Court Put the Cart Before the Horse?*

INTRODUCTION

A defendant's right not to stand trial in a criminal case unless they are competent to do so is a bedrock principle of American jurisprudence.[1] This right is enshrined in the Due Process Clause of both the Fifth and Fourteenth Amendments of the U.S. Constitution.[2] The General Statutes of North Carolina codify this right as well by providing that a criminal defendant may not be "tried, convicted, sentenced, or punished for a crime" when they are not competent.[3]

In *State v. Flow*,[4] Scott Warren Flow's statutory right to stand trial only when competent was arguably violated.[5] After both Mr. Flow and the State had presented their closing arguments, but before the jury had received its instructions and begun its deliberations, Mr. Flow jumped off a second-story mezzanine at the Gaston County Jail.[6] While he was in the hospital receiving surgery for his injuries,[7] Mr. Flow asserted his statutory right not to stand trial because he was incompetent.[8] His defense attorney asked the trial court, pursuant to section 15A-1002(a) of the General Statutes of North Carolina, to delay any further proceedings until it determined whether Mr. Flow had the

1. *See* Medina v. California, 505 U.S. 437, 439 (1992) (citing Drope v. Missouri, 420 U.S. 162, 171 (1975)) (holding that it is "well established" that the Due Process Clause of the Fourteenth Amendment prohibits the criminal prosecution of a defendant who is not competent to stand trial).

2. U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law."); *id.* amend. XIV, § 1 ("[N]or shall any state deprive any person of life, liberty, or property, without due process of law.").

3. *See* N.C. GEN. STAT. § 15A-1001(a) (2024) (providing that no one may be "tried, convicted, sentenced, or punished for a crime" if they are not competent); *id.* § 15A-1002(a) (providing that the issue of competency may be raised at any time by any party, including the court); *id.* § 15A-1002(b)(1) (providing that the court shall hold a competency hearing when the issue is raised).

4. 384 N.C. 528, 886 S.E.2d 71 (2023).

5. *Id.* at 529, 886 S.E.2d at 75. Although Mr. Flow raised both constitutional and statutory claims in his appeal to the Supreme Court of North Carolina, this Case Brief focuses exclusively on Mr. Flow's statutory claim pursuant to sections 15A-1001(a), 15A-1002(a), and 15A-1002(b)(1) of the General Statutes of North Carolina. For the majority's analysis of Mr. Flow's constitutional claims, see *id.* at 549–56, 886 S.E.2d at 87–91; for the dissent's analysis, see *id.* at 560–66, 886 S.E.2d at 94–97 (Earls, J., dissenting).

6. *Id.* at 541, 886 S.E.2d at 82 (majority opinion).

7. *Id.*

8. *Id.* at 546, 886 S.E.2d at 84.

capacity to proceed.[9] The trial court subsequently conducted a hearing into whether Mr. Flow's actions were voluntary, concluding that they were and that, therefore, the trial could proceed in his absence.[10] On appeal, Mr. Flow argued that the hearing was insufficient because the trial court inquired into whether his actions were *voluntary* instead of whether he had the *capacity* to proceed as required by section 15A-1002(b)(1).[11]

The Supreme Court of North Carolina disagreed.[12] Addressing whether the trial court erred by not inquiring further into Mr. Flow's capacity to proceed after concluding he had voluntarily absented himself,[13] the Supreme Court of North Carolina held that the trial court's hearing was statutorily sufficient.[14] In resolving the issue, the court concluded that the hearing requirement in section 15A-1002(b)(1) is satisfied as long as a defendant is given "an opportunity to present any and all evidence" during a hearing.[15]

FACTS OF THE CASE

Prior to what the Supreme Court of North Carolina went on to label an "apparent suicide attempt,"[16] the defendant, Mr. Flow, had been present for each day of the trial.[17] During the trial, the trial court conducted several lengthy colloquies, during which Mr. Flow affirmed that he was making decisions

9. *Id.* at 541–42, 886 S.E.2d at 82; *see also* N.C. GEN. STAT. § 15A-1002(a) (2024) ("The question of the capacity of the defendant to proceed may be raised at any time on motion by the prosecutor, the defendant, the defense counsel, or the court.").

10. *Flow*, 384 N.C. at 542–43, 886 S.E.2d at 82–83.

11. *Id.* at 546–47, 886 S.E.2d at 84–85; *see also* § 15A-1002(b)(1) ("When the capacity of the defendant to proceed is questioned, the court shall hold a hearing to determine the defendant's capacity to proceed.").

12. *Flow*, 384 N.C. at 546, 886 S.E.2d at 84.

13. *Id.* at 546, 886 S.E.2d at 84.

14. *Id.* at 548, 886 S.E.2d at 86.

15. *Id.* at 548, 886 S.E.2d at 85–86.

16. The Supreme Court of North Carolina refers to Mr. Flow's action of jumping off the second-story prison mezzanine as an "apparent suicide attempt" from the outset of the opinion. *Id.* at 529, 886 S.E.2d at 75. The court presumably qualifies Mr. Flow's "suicide attempt" as "apparent" because the trial court never actually made a finding of whether Mr. Flow's actions were a "suicidal gesture." *See id.* at 548, 886 S.E.2d at 86. For the sake of continuity, this Case Brief adopts the Supreme Court of North Carolina's language and refers to Mr. Flow's action of jumping off the second-story prison mezzanine as an "apparent suicide attempt."

17. *See id.* at 529, 886 S.E.2d at 75. Mr. Flow was charged with and stood trial for a number of criminal offenses, including: (1) first-degree rape, (2) first-degree burglary, (3) first-degree kidnapping, (4) first-degree sexual offense, (5) possession of a firearm by a convicted felon, and (6) violation of a protective order. *Id.* The charges were all in connection to events that occurred in Dallas, North Carolina, on May 26 and 27, 2018. *Id.* For the court's description of the events, see *id.* at 531–37, 886 S.E.2d at 76–80; for media coverage, see *Man Arrested After Forcing Way into Home, Holding Woman Hostage in Gaston County*, WBTV, https://www.wbtv.com/story/38286909/man-arrested-after-forcing-way-into-home-holding-woman-hostage-in-gaston-county/ [https://perma.cc/6VKM-JCWC] (last updated May 27, 2018, 3:22 PM).

pertaining to his trial freely, voluntarily, and intelligently.[18] Yet, on the sixth day of the trial, Mr. Flow appeared to attempt to take his own life.[19] On the morning of the sixth day of his trial—the day that the jury was scheduled to receive instructions and commence its deliberations—Mr. Flow jumped off a second-story mezzanine at the Gaston County Jail.[20] He fell sixteen feet, struck a steel table feetfirst, and was subsequently transported to the hospital where he received surgery for a broken femur and ribs.[21]

Following Mr. Flow's apparent suicide attempt, his defense counsel raised the issue of Mr. Flow's competency under section 15A-1002(a) of the General Statutes of North Carolina.[22] In doing so, the defense counsel asked the trial court to delay any further proceedings until it conducted an inquiry into Mr. Flow's competency pursuant to section 15A-1002(b)(1).[23] In response to the motion, the trial court instructed Mr. Flow's defense counsel to gather and present information on the "defendant's condition" and "the events leading to his absence."[24] In turn, Mr. Flow's defense counsel put on evidence regarding Mr. Flow's condition and the events, including testimony from an investigator with the public defender's office, further testimony from an Assistant Chief Deputy of the Gaston County Sheriff's Office, and video footage of the events.[25] However, the trial court limited its inquiry to the "very narrow issue" of whether the defendant's actions were voluntary.[26] Ultimately, the trial court concluded that it could proceed in Mr. Flow's absence because his absence was the result of injuries that Mr. Flow had voluntarily brought about himself.[27]

LEGAL ISSUE AND OUTCOME

In addition to the Due Process Clause of the Fifth and Fourteenth Amendments,[28] the General Statutes of North Carolina protect criminal

18. For instance, at the beginning of the trial, Mr. Flow told the court he freely, voluntarily, and intelligently entered a stipulation to the existence of a prior felony. *Flow*, 384 N.C. at 529–31, 886 S.E.2d at 75–76. Later in the trial, Mr. Flow told the court he freely, voluntarily, and intelligently made the decision not to testify or present evidence on his own behalf on December 13, 2019, *id.* at 537–40, 886 S.E.2d at 80–81, and affirmed this decision again a few days later on December 16, *id.* at 540–41, 886 S.E.2d at 81.

19. *Id.* at 541, 886 S.E.2d at 82.

20. *Id.*

21. *Id.* at 541–42, 886 S.E.2d at 82.

22. *Id.*

23. *Id.*

24. *Id.* at 542, 866 S.E.2d at 82.

25. *Id.* at 542–43, 866 S.E.2d at 82.

26. *Id.* at 543, 866 S.E.2d at 82.

27. *Id.* at 543, 866 S.E.2d at 82–83. The trial proceeded, and the jury found Mr. Flow guilty. *Id.* at 543, 866 S.E.2d at 83. The trial court sentenced him to three consecutive sentences of incarceration of 276 to 392 months plus an additional 180 to 228 months and ordered him to register as a sex offender for the remainder of his natural life. *Id.*

28. *See supra* notes 1–2 and accompanying text.

defendants from standing trial unless they are competent to do so.[29] Specifically, section 15A-1001(a) establishes that

> [n]o person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner.[30]

Section 15A-1002(a) allows the issue of the defendant's capacity to be "raised at any time on motion by the prosecutor, the defendant, the defense counsel, or the court."[31] Section 15A-1002(b)(1) further provides that when the issue is raised, "the court shall hold a hearing to determine the defendant's capacity to proceed."[32] Subsequent provisions specify things the court may do when conducting a competency hearing,[33] though there are few express requirements.[34]

Pursuant to these statutory provisions, Mr. Flow filed a timely appeal following his conviction and sentencing, contending that the trial court erred by proceeding with the trial in his absence.[35] He maintained that he was not competent to stand trial and that the trial court's hearing on the issue was insufficient to satisfy the statutory requirements.[36] As to the latter point, he argued that, under section 15A-1002(b)(1), the court should have specifically inquired into whether he was competent to proceed with the trial in light of his apparent suicide attempt, which is distinct from the inquiry the trial court conducted as to whether his actions were voluntary.[37]

29. *See supra* note 3 and accompanying text.

30. N.C. GEN. STAT. § 15A-1001(a) (2024).

31. *Id.* § 15A-1002(a) ("The question of the capacity of the defendant to proceed may be raised at any time on motion by the prosecutor, the defendant, the defense counsel, or the court.").

32. *Id.* § 15A-1002(b)(1) ("When the capacity of the defendant to proceed is questioned, the court shall hold a hearing to determine the defendant's capacity to proceed.").

33. *See id.* § 15A-1002(b)(1a) ("[T]he court *may* appoint one or more impartial medical experts . . . to examine the defendant and return a written report describing the present state of the defendant's mental health." (emphasis added)); *see also id.* § 15A-1002(b)(2) ("[T]he court *may* order the defendant to a State facility for the mentally ill for observation and treatment for the period, not to exceed 60 days, necessary to determine the defendant's capacity to proceed." (emphasis added)).

34. *See id.* § 15A-1002(b)(2) ("If a defendant is ordered to a State facility without first having an examination . . . the judge *shall* make a finding that an examination pursuant to this subsection would be more appropriate to determine the defendant's capacity." (emphasis added)); *see also id.* § 15A-1002(b)(4) ("A presiding [judge] who orders an examination . . . *shall* order the release of relevant confidential information to the examiner . . . ." (emphasis added)).

35. State v. Flow, 384 N.C. 528, 545, 886 S.E.2d 71, 84 (2023).

36. *Id.* at 546, 886 S.E.2d at 85.

37. *Id.* The test of capacity requires a determination of whether, due to some "mental illness or defect," a defendant is unable to (1) "understand the nature and object of the proceedings against

Although the Supreme Court of North Carolina indicated that there was no doubt that Mr. Flow's defense counsel's motion was sufficient to trigger a hearing pursuant to section 15A-1002(b)(1),[38] the majority ultimately held the trial court's hearing on the issue was sufficient to satisfy the statutory requirements.[39] Emphasizing the "permissive language delineating what the trial court *may* do when conducting a competency hearing,"[40] the court asserted that the "method of inquiry is . . . largely within the discretion of the trial judge."[41] So long as a defendant making a motion pursuant to section 15A-1002(b)(1) is "provided an opportunity to present any and all evidence [that they are] prepared to present," the inquiry conducted by a trial court is sufficient to satisfy the statutory requirements.[42] Applying this standard to the present case, the majority determined that between the testimony and video footage, Mr. Flow was allowed to introduce "any and all evidence" for the trial court's consideration.[43] The majority further determined that the trial court's failure to contemplate whether Mr. Flow's actions were a "suicidal gesture" did not render the inquiry insufficient because "[s]uicidality does not automatically render one incompetent."[44] Having established that the trial court's hearing was statutorily sufficient, the majority concluded that the trial court did not err.[45]

In her dissent, Justice Earls criticized the majority's approach for "put[ting] the cart before the horse."[46] Specifically, she contended that the majority's "any and all evidence" standard failed to ensure the statutory

[them]," (2) "comprehend [their] own situation in reference to the proceedings," or (3) "assist in [their] defense in a rational or reasonable manner." *See* § 15A-1001(a). In contrast, whether a defendant has waived their right to be present at their trial implied through their absence requires the defendant to explain why their absence was not becoming of their own actions. *See* State v. Richardson, 330 N.C. 174, 178, 180, 410 S.E.2d 61, 63, 64 (1991).

38. *Flow*, 384 N.C. at 547, 886 S.E.2d at 85.

39. *Id.* at 549, 886 S.E.2d at 86.

40. *See id.* at 547, 886 S.E.2d at 85; *see also supra* notes 33–34 and accompanying text.

41. *Flow*, 384 N.C. at 547, 886 S.E.2d at 85 (quoting State v. Gates, 65 N.C. App. 277, 282, 309 S.E.2d 498, 502 (1983)).

42. *Id.* at 548, 886 S.E.2d at 85–86 (quoting *Gates*, 65 N.C. App. at 283, 309 S.E.2d at 502).

43. *Id.* at 548, 886 S.E.2d at 86. The majority pointed out that the testimony and video footage provided the trial court with evidence of (1) the defendant's "history of mental illness," (2) "previous instances of mental or emotional disturbance from defendant," and (3) the "defendant's behavior leading up to, and at the time of, his apparent suicide attempt." *Id.* A peculiar irony that is absent from the analysis, however, is that Mr. Flow was not entirely afforded an opportunity to present "any and all evidence" because Mr. Flow himself was unable to attend the hearing and provide testimony on his competency due to being hospitalized for his injuries. *See id.*

44. *Id.*

45. *Id.* at 549, 886 S.E.2d at 86. The court noted that because it had determined the trial court's hearing was statutorily sufficient, it did not need to reach the issue of whether it had demonstrated prejudice, a second step that would have been necessary for Mr. Flow to prevail on appeal. *Id.* In dicta, the court went on to observe that Mr. Flow had not made a showing that he was prejudiced in any way by the trial court proceeding in his absence. *Id.*

46. *Id.* at 560, 886 S.E.2d at 94 (Earls, J., dissenting) (quoting State v. Sides, 376 N.C. 449, 457, 852 S.E.2d 170, 176 (2020)).

requirements were fully satisfied because it did not address (1) "what question the hearing is intended to resolve," (2) "what facts are relevant to that question," and (3) "what legal standard applies."[47] She argued that these shortcomings were crucial because whether a defendant had the "capacity to proceed" is a completely different question from whether they took a "voluntary action."[48] That is to say, a court cannot consider whether a defendant's actions are voluntary without first determining whether they had the capacity to proceed.[49] And a court cannot make an initial determination on whether a defendant had the capacity to proceed without first holding a hearing on that issue pursuant to the requirements set forth in section 15A-1002(b)(1).[50] Because Mr. Flow received a hearing to determine whether "his absence from the courtroom was the result of a voluntary action" instead of a hearing to determine whether he had the "capacity to proceed," Justice Earls would have held that the trial court erred.[51]

POTENTIAL IMPACT

Even if the majority did not entirely "put[] the cart before the horse" as Justice Earls suggested,[52] the "any and all evidence" standard that the Supreme Court of North Carolina adopted in *Flow* certainly loosened the requirements mandated in another of its recent cases, *State v. Sides*.[53] In that case, the court held that, once a trial court has substantial evidence that a defendant lacks the capacity to proceed, it should conduct, *sua sponte*, a capacity hearing pursuant to section 15A-1002(b)(1) of the General Statues of North Carolina.[54] In *Sides*, the defendant attempted suicide by ingesting sixty one-milligram tablets of Xanax

47. *Id.* at 559–60, 886 S.E.2d at 93.

48. *Id.* at 559, 886 S.E.2d at 93. To illustrate her point that the capacity and voluntariness inquiries are separate and distinct from one another, Justice Earls first quotes *Ryan v. Gonzales*, 568 U.S. 57 (2013), for the proposition that a defendant is competent to stand trial when they have "sufficient present ability to consult with [their] lawyer with a reasonable degree of rational understanding and a rational as well as factual understanding of the proceedings against [them]." *Flow*, 384 N.C. at 559, 886 S.E.2d at 93 (Earls, J., dissenting) (quoting *Ryan*, 568 U.S. at 66). She then cites *Taylor v. United States*, 414 U.S. 17 (1973), for the proposition that a defendant waives their right to be present at their trial when they voluntarily absent themselves while being "aware of the processes taking place, of [their] right and obligation to be present and having no sound reason for remaining away." *Flow*, 384 N.C. at 559, 886 S.E.2d at 93 (Earls, J., dissenting) (citing *Taylor*, 414 U.S. at 19 n.3).

49. *Flow*, 384 N.C. at 560, 886 S.E.2d at 93 (Earls, J., dissenting).

50. *Id.*

51. *Id.* at 559–60, 866 S.E.2d at 93–94. Justice Earls was the lone dissenting justice in the case. *See id.* at 556, 886 S.E.2d at 91.

52. *Id.* at 560, 886 S.E.2d at 94 (quoting State v. Sides, 376 N.C. 449, 457, 852 S.E.2d 170, 176 (2020)).

53. 376 N.C. 449, 852 S.E.2d 170 (2020).

54. *Id.* at 457, 852 S.E.2d at 176 (citing State v. Young, 291 N.C. 562, 568, 231 S.E.2d 577, 580–81 (1977)).

after the third day of her trial.[55] Over objections from the defense counsel[56] and without conducting a competency hearing,[57] the trial court proceeded with the trial in the defendant's absence on the theory that the defendant had waived her right to be present because her absence was the result of a voluntary act.[58] The Supreme Court of North Carolina reasoned that the trial court erred in doing so because it incorrectly assumed that the defendant was competent in the process of concluding that she acted voluntarily.[59] The court made clear that capacity is a predicate for voluntary action—a predicate that must be determined in a separate hearing.[60]

While the majority in *Flow* did not deny that a hearing was warranted in light of Mr. Flow's apparent suicide attempt,[61] their ultimate holding eased the procedural requirements under section 15A-1002(b)(1).[62] After *Sides*, if a trial court had substantial evidence that a defendant lacked the capacity to proceed, it was required to conduct "a sufficient inquiry into [their] competency."[63] If the majority had faithfully applied this rule in *Flow*, it would have held that the trial court erred because the trial court conducted an inquiry into whether Mr. Flow's actions were voluntary—not whether he had the capacity to proceed.[64] Instead, the majority in *Flow* held that the hearing the trial court afforded Mr. Flow was statutorily sufficient because Mr. Flow was given the opportunity to introduce "any and all evidence" for the trial court's consideration.[65] This is a distinct and inherently broader standard than the one announced in *Sides*.[66]

55. *Id.* at 450, 852 S.E.2d at 172.

56. *Id.* at 451–55, 852 S.E.2d at 172–75.

57. *Id.* at 455, 852 S.E.2d at 175.

58. *Id.*

59. *Id.* at 459, 852 S.E.2d at 177.

60. *Id.* ("[A] defendant cannot be deemed to have voluntarily waived her constitutional right to be present at her own trial unless she was mentally competent to make such a decision in the first place. Logically, competency is a necessary predicate to voluntariness.").

61. State v. Flow, 384 N.C. 528, 547, 886 S.E.2d 71, 85 (2023) ("We agree that this motion was plainly sufficient to trigger the statutory requirement that the court 'hold a hearing to determine the defendant's capacity to proceed.'" (quoting N.C. GEN. STAT. § 15A-1002(b)(1) (2024))).

62. *See id.* at 560, 886 S.E.2d at 94 (Earls, J., dissenting).

63. *Sides*, 376 N.C. at 459, 852 S.E.2d at 177 ("[I]f there is substantial evidence suggesting that a defendant may lack the capacity to stand trial, then a sufficient inquiry into her competency is required before the trial court is able to conclude that she made a voluntary decision to waive her right to be present at the trial through her own conduct.").

64. *See Flow*, 384 N.C. at 543, 886 S.E.2d at 82.

65. *Id.* at 548, 886 S.E.2d at 86.

66. One possible explanation for the expansion of the standard in *Flow* is that the author of the majority opinion, Justice Morgan, dissented in *Sides*. *See id.* at 529, 886 S.E.2d at 75; *Sides*, 376 N.C. at 466, 852 S.E.2d at 182 (Morgan, J., dissenting). In *Sides*, Justice Morgan argued in his dissent that the majority "mistakenly conflate[d] [the] defendant's *willingness* to participate in her criminal trial with her *ability* to do so." *Sides*, 376 N.C. at 469, 852 S.E.2d at 184 (Morgan, J., dissenting). Justice Morgan's characterization of the majority's efforts in *Sides* to treat the inquiry into the defendant's

The court's relaxing of procedural requirements in capacity hearings proved consequential almost immediately.[67] In *State v. Minyard*,[68] the North Carolina Court of Appeals cited *Flow* to justify its decision to uphold the trial court's denial of the defendant's Motion for Appropriate Relief ("MAR").[69] During the jury's deliberation, the defendant in *Minyard* overdosed after consuming eight Alprazolam pills.[70] Without conducting a hearing on his competency,[71] the trial court proceeded with the trial in the defendant's absence after finding that he had voluntarily absented himself in "an attempt . . . to garner sympathy from the jurors."[72] Invoking the holding of *Sides*, the defendant in *Minyard* filed an MAR, contending that the trial court failed to conduct a competency hearing *sua sponte*, which was denied.[73]

In affirming the denial of the defendant's MAR in *Minyard*, the court of appeals cited the Supreme Court of North Carolina's holding in *Flow* as approval for deferring to determinations made by trial courts in connection with capacity hearings.[74] Specifically, the North Carolina Court of Appeals pointed to the Supreme Court of North Carolina's holding that the trial court in *Flow* was not required to determine whether Mr. Flow's actions were a "suicidal gesture."[75] From this holding, the court of appeals reasoned that it should defer to the trial court's judgment in *Minyard* that there was not substantial evidence to warrant a *sua sponte* competency hearing for the defendant.[76]

The defendant in *Minyard* has not sought further review by the Supreme Court of North Carolina.[77] Thus, as lower courts continue to grapple with how

capacity with care as a conflation may explain why in his majority opinion in *Flow*, he downplayed the fact that the trial court did not explicitly conduct an inquiry into Mr. Flow's capacity to proceed. *See Flow*, 384 N.C. at 547–48, 886 S.E.2d at 85–86.

67. The North Carolina Court of Appeals relied extensively on *Flow* in *State v. Minyard*, 289 N.C. App. 436, 890 S.E.2d 182 (2023), a case decided on June 20, 2023, *id.* at 436, 890 S.E.2d at 182, less than two months after *Flow* was decided by the Supreme Court of North Carolina on April 28, 2023, *Flow*, 384 N.C. at 528, 886 S.E.2d at 71.

68. 289 N.C. App. 436, 890 S.E.2d 182 (2023).

69. *Id.* at 446, 890 S.E.2d at 190.

70. *Id.* at 438, 890 S.E.2d at 185.

71. *Id.* at 438–39, 890 S.E.2d at 185.

72. *Id.* at 439, 890 S.E.2d at 186.

73. *Id.* at 443, 890 S.E.2d at 188.

74. *See id.* at 445–47, 890 S.E.2d at 189–90.

75. *See id.* at 446, 890 S.E.2d at 190 (quoting State v. Flow, 384 N.C. 528, 548–49, 886 S.E.2d 71, 86 (2023)).

76. *See id.*

77. Access is restricted to the court documents for *Minyard* because the prosecution involved a sexual offense committed against a minor. N.C. R. APP. P. 42(a)–(b) ("[I]tems filed with the appellate courts are under seal . . . [for] [a]ppeals filed under N.C.G.S. § 7A-27 that involve a sexual offense committed against a minor."); *Minyard*, 289 N.C. App. at 440, 890 S.E.2d at 186 ("A jury found Defendant guilty of five counts of taking indecent liberties with a child, one count of attempted first-degree sexual offense, and of attaining habitual felon status."). However, the clerks of both the North

to apply the "any and all evidence" standard, only time will further clarify the effect that *Flow* will have on criminal defendants' statutory right in North Carolina not to stand trial unless they are competent. But make no mistake: in the meantime, defendants—particularly those who are neurodivergent or mentally ill—are at risk of having their right to stand trial only when competent subverted to promote judicial efficiency.[78] That outcome is one that is all the more likely for defendants across North Carolina who are poor and do not have access to affordable legal representation.[79]

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Carolina Court of Appeals and the Supreme Court of North Carolina confirmed that the defendant in *Minyard* has not sought further review by the Supreme Court of North Carolina. Telephone Interview with Ct. Appeals Clerk, N.C. Ct. Appeals (Oct. 2, 2024) (notes on file with the North Carolina Law Review); Telephone Interview with Sup. Ct. Clerk, Sup. Ct. N.C. (Oct. 2, 2024) (notes on file with the North Carolina Law Review). Thus, the disposition is likely final because the defendant was statutorily barred from seeking discretionary review by the Supreme Court of North Carolina, see N.C. R. APP. P. 15(a) ("[N]o petition for discretionary review may be filed in any post-conviction proceeding under Article 89 of Chapter 15A of the General Statutes."), and the statutorily mandated window for filing an appeal of right has come and gone, see N.C. R. APP. P. 14(a) ("Appeals of right from the Court of Appeals to the Supreme Court are taken by filing notices of appeal . . . within fifteen days after the mandate of the Court of Appeals has been issued to the trial tribunal.").

78. *See* Zohra Ahmed, *The Right to Counsel in a Neoliberal Age*, 69 UCLA L. REV. 442, 505–06 (2022) (observing that "despite experiencing difficulties collaborating with their attorneys" many defendants who are neurodivergent are nevertheless found competent to stand trial "because no accommodations are made to address their neurodivergence"); Gianni Pirelli, William H. Gottdiener & Patricia A. Zapf, *A Meta-Analytic Review of Competency to Stand Trial Research*, 17 PSYCH., PUB. POL'Y & L. 1, 31 (2011) (finding that defendants "diagnosed with a Psychotic Disorder were approximately eight times more likely to be found incompetent than those without a psychotic diagnosis").

79. *See* John P. Gross, *Too Poor to Hire a Lawyer but Not Indigent: How States Use the Federal Poverty Guidelines to Deprive Defendants of Their Sixth Amendment Right to Counsel*, 70 WASH. & LEE L. REV. 1173, 1191–92, 1212, 1218–19 (2013) ("Across the country, defendants are being denied the right to counsel guaranteed to them in *Gideon* because of unrealistic eligibility guidelines for the appointment of counsel."); Heath Hamacher, *Legal Deserts: Scarcity of Lawyers Threatens Justice in Many Rural Areas*, N.C. LAWS. WKLY. (Oct. 18, 2023), https://nclawyersweekly.com/2023/10/18/legal-deserts-scarcity-of-lawyers-threatens-justice-in-many-rural-areas/ [https://perma.cc/ZHD7-LX62 (dark archive)] ("[L]egal deserts . . . are defined by the American Bar Association as counties with fewer than 1 attorney per 1,000 residents. . . . In North Carolina, nearly half of the state's 100 counties meet the definition of legal desert." (internal quotation marks omitted)). It is worth noting that it is far from uncommon that a criminal defendant's most viable option for legal representation is the labor of unpaid law students, as was the case for James Allen Minyard, who was represented by students in the Wake Forest University School of Law Appellate Advocacy Clinic. *See Minyard*, 289 N.C. App. at 436, 890 S.E.2d at 184.

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