No. TWENTY-SIXTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA )

 ) From Mecklenburg County

 v. ) 10 CRS 299528-29 ) 10 CRS 5669

JAMIE LAMONT DIXON )

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**PETITION FOR WRIT OF CERTIORARI**\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*

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**PETITION FOR WRIT OF CERTIORARI**\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*

TO THE HONORABLE NORTH CAROLINA COURT OF APPEALS:

 Jamie Lamont Dixon respectfully petitions this Court, pursuant to Rule 21 of the North Carolina Rules of Appellate Procedure, to issue its writ of certiorari to review the 7 April 2015 “Order Regarding Motion for Appropriate Relief” entered by the Superior Court in Mecklenburg County. As set forth below, the MAR court erred by ruling that Mr. Dixon’s trial attorney did not provide ineffective assistance of counsel (IAC) by failing to request a jury instruction on a lesser-included offense that was supported by the evidence. For that reason, Mr. Dixon should be granted a new trial with the effective assistance of counsel and proper jury instructions.

In addition, structural error occurred where Judge Bell presided over both the trial and the MAR hearing because, in reviewing Mr. Dixon’s IAC claim, Judge Bell necessarily had to review whether he had personally erred by failing to instruct the jury on the lesser‑included offense. No judge in the position of reviewing her own prior ruling could be and appear sufficiently impartial. For that reason, Mr. Dixon should receive at least a new MAR hearing before a different judge.

 In support of this petition, Mr. Dixon shows the following:

**PROCEDURAL AND FACTUAL BACKGROUND**

1. **The underlying facts and Mr. Dixon’s trial.[[1]](#footnote-1)**

In May of 2010, Matrix Mental Health Alliance, acting under the name Crisis Management, served as a mental health provider in Charlotte. (T pp 7, 23)[[2]](#footnote-2) The offices for Crisis Management were located on the second floor of the East Town Shopping Center. (T p 38) The employees of Crisis Management generally worked out in the community, responding “when somebody has a crisis related to mental health [or] substance abuse,” and did not see patients or clients at the office. (T p 23)

The evidence presented at trial tended to show that late at night on 2 May 2010, or early the next morning, Mr. Dixon broke into the offices of Crisis Management. While drunk, he used a rock to break through the glass near the front door, entered the office through the window, and broke into the supervisor’s office within the business itself. (T pp 9, 23‑28, 39; MAR T pp 14, 113) Several pieces of equipment were later deemed missing, including two desktops, a keyboard, one or more computer monitors, a laptop, a scanner, and a printer. (T p 29) The missing items were never found. (T p 71) Mr. Dixon later told his trial attorney, Jennifer Coulter, that he “squeezed into the window to look around” but had not taken anything. (MAR T p 113)

As a result of the break-in, the office was left in “general disarray” with tossed “desk drawers [and] opened papers messed up.” (T p 29) In addition, within either a storage closet or a waiting area, was “[a] file box containing what looks to be human feces and tissues.” (T p 61)

Fingerprints were collected from the scene the next morning. A print examiner with the Charlotte-Mecklenburg Police Department (CMPD) later identified several of them as matches for Mr. Dixon’s known prints. (T pp 87-90, 94) These prints came from both inside and outside the broken front window. (T pp 88-89)

Based on the break-in and the missing items, Mr. Dixon was charged with felony breaking and entering, felony larceny after breaking and entering, and attaining habitual felon status. The breaking and entering indictment alleged that he broke and entered “with the intent to commit a felony therein, to wit: larceny.” (App. p 1)

Mr. Dixon was tried on these charges at the 23 February 2011 Criminal Session of the Superior Court in Mecklenburg County before the Honorable W. Robert Bell, and represented by attorney Jennifer Coulter. (T pp 1, 8)[[3]](#footnote-3) After the State presented evidence regarding the break-in and the investigation, it rested and Mr. Dixon’s trial counsel moved to dismiss. (T pp 98-99) The charge conference then opened with the following exchange:

THE COURT: [The State], what do you say should be the verdicts?

[THE STATE]: Guilty or not guilty of felony breaking or entering. Guilty or not guilty, to felonious larceny after breaking or entering.

THE COURT: That is certainly an interesting interpretation of the evidence. I will instruct the jury on only guilty or not guilty. . . .

(T p 100) Mr. Dixon and Ms. Coulter, his trial attorney, later disagreed about whether, during this exchange, Ms. Coulter made a request for an instruction on misdemeanor breaking or entering that was not taken down by the court reporter. (MAR T pp 9, 55, 118-19, 124)

 Regarding the offense of felony breaking or entering, the trial court instructed the jury that it could convict only if it found beyond a reasonable doubt that Mr. Dixon broke or entered the office with the specific intent to commit larceny:

For you to find the defendant guilty of felonious breaking or entering, the State must prove four things beyond a reasonable doubt.

First, that there was either a breaking or an entry by the defendant.

Second, that it was a building that was entered into.

Third, that the owner did not consent to the breaking or entering.

Fourth, that at the time the defendant broke or entered, he intended to commit a larceny.

Thus, if you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant broke into or entered a building without the consent of the owner, intending at that time to commit larceny, it would be your duty to return a verdict of guilty of felonious breaking or entering.

If you do not so find or if you have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty on the breaking or entering charge.

(T pp 109-10) Judge Bell did not instruct the jury on misdemeanor breaking or entering.

Following the initial instructions, the jury sent a question back to Judge Bell asking him to “re-state [the] definition of ‘reasonable doubt’” and explain “the difference . . . between using common sense and being entirely convinced and fully satisfied[.]” (App. p 5) Judge Bell re‑instructed the jury on the meaning of reasonable doubt. (T p 117) Following this re-instruction, the jury found Mr. Dixon guilty of the breaking or entering, but unanimously acquitted him of larceny. (T p 121)

 Following the return of the split verdicts, Mr. Dixon pleaded guilty to attaining the status of habitual felon, and admitted the existence of an aggravating factor—that he had been found in willful violation of a condition of probation within the previous ten years. (T pp 125-29) He also stipulated that his previous convictions made him a prior record level VI. (T p 131)

 The State told the trial court that it “believe[d] that this individual should not be among the general population” because he was “a menace to society.” (T p 132) Despite finding two mitigating factors, the trial court sentenced Mr. Dixon, from the very top of the aggravated range, to 182 to 228 months imprisonment. (T p 135) This was the absolute highest sentence available for an unarmed breaking or entering in North Carolina.

1. **Mr. Dixon’s direct appeal.**

Mr. Dixon entered oral notice of appeal following the entry of judgment on the jury’s verdict. (T p 135) In his brief on direct appeal, Mr. Dixon raised one issue before this Court: whether the trial court erred by denying Ms. Coulter’s motion to dismiss based on insufficient evidence. Specifically, he argued that “the State’s evidence fail[ed] to establish that [Mr. Dixon’s] fingerprints could only have been impressed at the time the crime was committed, and thus the State failed to show that [Mr. Dixon] was the perpetrator of the crime.” *Dixon*, 2012 N.C. App. LEXIS 640, at \*3-4. He also argued that the trial court should have granted the motion to dismiss because “the State’s evidence failed to prove that he had the specific intent to commit a felony or larceny when he broke into the office.” *Id.* at \*5.

This Court rejected both arguments. In an unpublished opinion, this Court held that the evidence presented, viewed in the light most favorable to the State, created at least a jury question regarding (1) Mr. Dixon’s identity as the perpetrator, and (2) whether Mr. Dixon had the specific intent to commit larceny at the time he broke or entered the office. *Id.* at \*5-7. This Court therefore affirmed Mr. Dixon’s conviction. *Id.* at \*1, 7.

1. **Mr. Dixon’s Motion for Appropriate Relief.**

In September 2014, Mr. Dixon filed a *pro se* MAR. (App. pp 27-49) MAR counsel was appointed two months later.

In January 2015, through counsel, Mr. Dixon filed an “Amended Motion for Appropriate Relief” and a “Supplemental to Amended Motion for Appropriate Relief.” (App. pp 13-62) While these filings included several other claims and arguments regarding his lawyers’ effectiveness, their primary assertion was that Mr. Dixon received ineffective assistance from his trial counsel, in violation of the Sixth Amendment and Article I, § 23 of the North Carolina Constitution, because Ms. Coulter failed to request an instruction on misdemeanor breaking or entering, a lesser-included offense of felony breaking or entering.

The Amended MAR argued that such an instruction was warranted because there was at least some evidence of the lesser‑included offense. It also argued that the failure to request this instruction was prejudicial because the jury ultimately acquitted him of the larceny charge, and if properly instructed, it might have found him guilty of only misdemeanor breaking or entering. Had the jury been given the option, the Amended MAR argued, Mr. Dixon might have received a maximum sentence of 120 days rather than the 228 month maximum he actually received. (App. pp 6-9)

Two months after filing the Amended MAR, Mr. Dixon’s MAR counsel filed a motion asking Judge Bell to recuse himself from presiding over any hearing on Mr. Dixon’s MAR. (App. pp 63-93) The motion noted that Ms. Coulter had taken the position that she had, in fact, requested an instruction on misdemeanor breaking and entering. Therefore, the motion argued, there was a material factual dispute for which Judge Bell might be a fact witness, and he could not preside over a hearing at which he might be called to testify. However, the motion did not specifically argue that he should not preside over the MAR hearing because, in resolving Mr. Dixon’s IAC claim, he would necessarily have to review whether he had personally erred when he instructed the jury at trial.

Mr. Dixon’s MAR came on for a hearing at the 20 March 2015 Criminal Session of the Superior Court in Mecklenburg County. (MAR T p 5) Judge Bell presided over the MAR hearing and denied Mr. Dixon’s motion asking that he recuse himself from the MAR proceedings. (MAR T p 8)[[4]](#footnote-4)

At the MAR hearing before Judge Bell, Mr. Dixon’s case focused on presenting evidence regarding Ms. Coulter’s meetings and interactions with Mr. Dixon; her professional obligations to him as his defense counsel; and the factual issue of whether Ms. Coulter had asked Judge Bell at trial for a jury instruction on misdemeanor breaking or entering. (MAR T pp 10-101)

Regarding the request for the lesser-included instruction, Mr. Dixon’s mother, Patricia Dixon, testified that she was present at trial and that Ms. Coulter had not requested an instruction on misdemeanor breaking or entering. (MAR T p 55) Mr. Dixon and the State also stipulated to the admission of an affidavit from the court reporter averring that her “notes [did] not reflect that Attorney Jennifer Coulter requested for an instruction on the lesser-included offense.” (App. pp 91‑93)[[5]](#footnote-5)

In contrast, Ms. Coulter testified at the MAR hearing that she had, in fact, requested an instruction on misdemeanor breaking or entering:

Q. There’s been some questions here about whether or not a lesser included was asked for. First of all, what would be the lesser included of the charges that Mr. Dixon was on trial for?

A. My recollection it’s misdemeanor -- not misdemeanor -- misdemeanor breaking and entering.

Q. And did you ask for that?

A. My recollection is that I did.

Q. And when did you ask for this lesser included instruction?

A. My recollection is during the charge conference.

(MAR T pp 118-19) She later explained that, as she recalled, Judge Bell had “comment[ed] to [her] request for the lesser included, that it was an interesting interpretation of the facts . . . .” (MAR T p 124) Ms. Coulter also confirmed that, following the instructions on the felony offenses alleged, the jury “came back guilty on the felony B&E; not guilty on the larceny.” (MAR T p 129)

 Judge Bell entered a written order denying the MAR on 7 April 2015. (App. pp 94-100) In the written order, he made the following key findings of fact by a preponderance of the evidence:

5. The undersigned was the trial judge of this matter with no recollection of the trial.

. . . .

15. Ms. Coulter advised the Defendant that it would be difficult to craft a defense given that there were no eyewitnesses, no alibi witnesses and Defendant’s fingerprints were found both on the exterior of the building broken into (at the point of entry), on the interior of the building and on a drawer organizer found on the floor of an interior office and computer. Computers, a monitor and scanner were taken from the office.

16. Additionally, the Defendant admitted breaking into the Mobile Crisis Unit in a statement he voluntarily gave to Charlotte Mecklenburg Police Department investigators although he claimed to have been intoxicated at the time and denied taking anything.

. . . .

24. At trial, which lasted two days, including jury selection and deliberation, the State presented the following evidence. The Mobile Crisis Unit in Charlotte, North Carolina was broken into on May 3, 2010. The perpetrator entered the office by breaking the glass in the window next to the main office door. Inside the main office, a plate glass window had been broken, which allowed access to the supervisor’s office. The office was in general disarray, with desk drawers opened and papers thrown about. Several pieces of equipment were missing, including computers, a printer, and a scanner. The fingerprints of Jamie Lamonte Dixon were found on the interior and exterior of the window frame, two fragments of the window glass, and a drawer organizer found on the floor of the office.

25. The Defendant offered no evidence.

26. Pursuant to a charge conference, the Court instructed the jury on the substantive offenses of felonious breaking and entering, felonious larceny. Instructions on the lesser included offenses of misdemeanor breaking and entering and misdemeanor larceny were not requested or given.

. . . .

31. The jury found the Defendant guilty of felonious breaking and entering and not guilty of felonious larceny.

(App. pp 95-97) Based on these findings, Judge Bell made the following conclusions of law:

1. To prevail on an Ineffective Assistance of Counsel (lAC) claim, the Defendant must satisfy a two-part test. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984)

2. First, the Defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment.

3. Second, the [d]efendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

. . . .

6. At trial Ms. Coulter is alleged to have been ineffective because she did not request the lesser included instructions for felonious breaking and entering and felonious larceny.

7. There was no legal basis for Ms. Coulter to ask for the lesser included instructions.

8. Even in the absence of such a request the Court was obligated to give an instruction on a lesser included offense if there was evidence to support his conviction of the less grievous offense. State v. Richmond, 347 N.C. 412, 431, 495 S.E.2d 677,687, cert. denied, 523 U.S. 843, 119 S. Ct. 110, 142 L. Ed. 2d 88 (1998).

9. The trial court is not, however, obligated to give a lesser included instruction if there is “no evidence giving rise to a reasonable inference to dispute the State’s contention.” State v. McKinnon, 306 N.C. 288, 301, 293 S.E.2d 118, 127 (1982). The mere possibility that a jury might reject part of the prosecution’s evidence does not require submission of a lesser included offense. State v. Barnette, 96 N.C. App. 199,202,385 S.E.2d 163, 164 (1989). State v. Hamilton, 132 N.C. App. 316,321 (N.C. Ct. App. 1999)

. . . .

15. Because the Court finds that the legal representation Ms. Coulter rendered Mr. Dixon was not deficient, it need not address the second prong of the Strickland test.

(App. pp 99-100) Based on these findings and conclusions, Judge Bell denied Mr. Dixon’s MAR and Mr. Dixon entered notice of appeal. (MAR T p 200)

**REASONS WHY THE WRIT SHOULD ISSUE**

This Court should issue its writ of certiorari and review the 7 April 2015 order denying Mr. Dixon’s MAR for two reasons. First, the trial court erred in its conclusion that Mr. Dixon’s trial attorney did not provide ineffective assistance of counsel where she failed to request a jury instruction on a lesser-included offense.

Mr. Dixon was indicted for felony breaking or entering based on the legal theory that he broke into the office with the specific intent to commit larceny. That was also the sole legal theory on which the jury was instructed. If he had broken or entered with some other intent, he would not have been guilty of the felony as charged.

 A trial court is required to instruct the jury on a lesser-included offense when, viewing the evidence in the light most favorable to the defense, one or more jurors might vote to convict the defendant of the lesser offense while acquitting her of the more serious crime. Here, when viewed in the light most favorable to the defense, the evidence supported an inference that Mr. Dixon broke and entered without the specific intent to commit larceny, but with the intent to do something else, such as use the bathroom or commit vandalism. Trial counsel’s failure to request this instruction was prejudicial because the jury ultimately acquitted Mr. Dixon of larceny, and had it been given the option, one or more jurors may have chosen to convict him of only misdemeanor breaking or entering.

 Second, this Court should issue its writ of certiorari because structural error occurred at the MAR hearing. Mr. Dixon’s central MAR claim was that Ms. Coulter was ineffective because she failed to request the lesser-included instruction. Mr. Dixon could only prove this claim by showing that he was entitled to such an instruction.

 However, as he correctly noted in the written MAR order, Judge Bell was independently “obligated to give an instruction on a lesser included offense if there was evidence to support his conviction of the less grievous offense.” (App. p 99) This means that Judge Bell could not rule in Mr. Dixon’s favor on the IAC claim without concluding that he had personally erred at trial by failing to give a jury instruction that was supported by the evidence.

 No judge in the position of reviewing the legal correctness of her own prior ruling could be and appear sufficiently impartial to satisfy the demands of due process. For that reason, Mr. Dixon should receive at least a new MAR hearing before a different judge.

**I. The MAR court erred by denying Mr. Dixon’s ineffective assistance of counsel claim.**

1. **Standard of review.**

On appeal, this Court’s “review of a trial court’s ruling on a defendant’s MAR is whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court.” *State v. Peterson*, 228 N.C. App. 339, 343, 744 S.E.2d 153, 157 (2013) (citations and internal quotation marks omitted).

Because it reflects a conclusion of law, “[o]n appeal, this Court reviews whether a defendant was denied effective assistance of counsel *de novo*.” *State v. Perry*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 802 S.E.2d 566, 571 (2017) (citation omitted) (italics added). “Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.” *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (citations and quotation marks omitted).

1. **The basic principles of an IAC claim.**

The general contours of an IAC claim are well-settled: The defendant must show (1) that counsel’s performance fell below an objective standard of reasonableness, and (2) that the attorney’s deficient performance prejudiced the defendant. *See, e.g.*, *State v. Hole*, 240 N.C. App. 537, 542, 770 S.E.2d 760, 764 (2015) (citing *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984) and *State v. Braswell*, 312 N.C. 553, 561-62, 324 S.E.2d 241, 248 (1985)). This inquiry is the same under both the Sixth Amendment to the United States Constitution and Article I, §§ 19 and 23 of the North Carolina Constitution. *E.g.*, *Braswell*, 312 N.C. at 561-63, 324 S.E.2d at 247-48.

The first prong, concerning deficient performance, “sets a high bar.” *Buck v. Davis*, \_\_\_ U.S. \_\_\_, \_\_\_, 197 L. Ed. 2d 1, 18 (2017). “[T]rial counsel is given wide latitude in discretionary matters of trial strategy” and a reviewing court should presume, until shown otherwise, “that counsel’s conduct fell within the wide range of reasonable professional assistance.” *Hole*, 240 N.C. App. at 542, 770 S.E.2d at 764 (citations and internal quotation marks omitted).

Where it is clear, however, that an attorney’s mistake was due to inadvertence or misjudgment—rather than a tactical choice—the United States Supreme Court has found deficient performance. *See, e.g.*, *Hinton v. Alabama*, 571 U.S. 263, 273, 188 L. Ed. 2d 1, 9 (2014) (per curiam) (holding that trial counsel was ineffective where his actions were “based not on any strategic choice but on a mistaken belief” about available funding); *Williams v. Taylor*, 529 U.S. 362, 395, 146 L. Ed. 2d 389, 419 (2000) (finding deficient performance where counsel “failed to conduct an investigation that would have uncovered extensive [mitigating] records . . . not because of any strategic calculation but because they incorrectly thought that state law barred access to such records”); *accord* *State v. Rivera*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 826 S.E.2d 511, 518-19 (2019) (“We agree with Defendant that the record before us demonstrates that his counsel’s performance was deficient, thus satisfying the first prong of the *Strickland* test. . . . The fact that Defendant’s counsel attempted to make an oral motion to suppress at the pretrial motions hearing demonstrates that this failure was not intentional nor part of any trial strategy.” (citations, brackets, and internal quotation marks omitted)).

The prejudice prong is more forgiving. Under this prong, the defendant must show “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Buck*, \_\_\_ U.S. at \_\_\_, 197 L. Ed. 2d at 19 (citation omitted). Under this standard, a defendant asserting an IAC claim regarding her trial attorney’s performance need only show “a reasonable probability that . . . at least one juror would have harbored a reasonable doubt” regarding any fact the state needed to prove beyond a reasonable doubt. *Id.* at \_\_\_, 197 L. Ed. 2d at 19 (citation and internal quotation marks omitted).

1. **This Court has repeatedly indicated that an attorney provides IAC where she fails to request an instruction on a lesser-included offense that is supported by the evidence.**

Beyond reviewing these general principles, this Court has repeatedly addressed IAC claims regarding a trial attorney’s failure to request an instruction on a lesser-included offense. By dismissing IAC claims without prejudice to asserting them through motions for appropriate relief, this Court has implicitly held that a trial attorney can be defective by failing to request a supported instruction on a lesser-included offense.

For example, in *State v. Hole*, a published case, the defendant was convicted of larceny of a motor vehicle. *See* 240 N.C. App. at 537, 770 S.E.2d at 761. As this Court reviewed, unauthorized use of a motor vehicle is a lesser-included offense of larceny of a motor vehicle. *Id.* at 540, 770 S.E.2d at 763. On direct appeal to this Court, the defendant argued that his trial attorney had provided IAC by failing to request an instruction on the lesser-included offense. *Id.* at 542, 770 S.E.2d at 764. This Court dismissed the defendant’s argument, without prejudice to reasserting the claim through an MAR in the trial court, because “this Court [could] only speculate to whether defense counsel’s failure to request a jury instruction on [the lesser-included offense] constituted a reasonable trial strategy.” *Id.* at 543, 770 S.E.2d at 764 (citation omitted).

This disposition—dismissing the claim, rather than denying it—necessarily implies that a trial attorney can be ineffective by failing to request a supported instruction on a lesser-included offense. Otherwise, there would have been no point in allowing the defendant to reassert this issue in the trial court where counsel’s motives could be examined.

Several unpublished cases are similar. In *State v. Holden*, the defendant was convicted (as here) of felony breaking and entering. *See* 252 N.C. App. 265, 796 S.E.2d 838, 2017 N.C. App. LEXIS 147, \*1 (2017) (unpublished). The defendant testified at trial, admitting that he had entered the complainant’s home, but denying that he had entered with the intent to commit a felony or larceny therein. *See id.* at \*4. This Court agreed that an instruction on the lesser‑included offense was warranted because the jury could have believed the defendant’s version of events. *Id.* at \*7. Nevertheless, this Court dismissed the defendant’s IAC claim because it could not determine from the cold record whether trial counsel’s omission was strategic or mistaken. *See id.* at \*8-9; *see also State v. Robertson*, 241 N.C. App. 174, 772 S.E.2d 875, 2015 N.C. App. LEXIS 347, \*12-14 (2015) (unpublished) (dismissing, not denying, an IAC claim based on failure to concur in request for lesser-included in a burglary case); *State v. Boliek*, 222 N.C. App. 782, 731 S.E.2d 720, 2012 N.C. App. LEXIS 1076, \*4-5 (2012) (unpublished) (dismissing IAC claim for failure to request lesser-included in a felony breaking or entering case).

These cases reflect the same central insight: The omission of a request for an instruction on a lesser‑included offense could stem from either a reasoned tactical choice or ineffective performance. It might be strategic, for example, where the evidence supporting an element that is part of the greater offense, but not the lesser-included, is nonexistent or particularly weak. In those circumstances, trial counsel might wager that the jury would be forced to acquit the defendant of the only offense submitted, or that the trial court would have to grant a motion for judgment notwithstanding the verdict in the event the jury nonetheless chose to convict. It might also make sense to forego an instruction on a lesser-included offense where the defendant believes her case is particularly sympathetic on the facts and wishes to press the jury either to convict of the greater offense or acquit altogether, rather than giving it the easier option of splitting the difference.

But the failure to request an instruction on a lesser-included offense could also reflect trial counsel’s legal or factual mistake, inadvertence, or sloppiness. A trial attorney might, for example, be mistaken about when an instruction on a lesser-included offense is required, or she might erroneously conclude that the evidence presented does not support it, or she might simply forget to make the request. This Court’s dispositions in *Hole*, *Holden*, *Robertson*, and *Boliek* recognize that a trial attorney’s failure to request a supported instruction on a lesser‑included offense for these or similar reasons—rather than as a part of a reasoned trial strategy—would constitute deficient performance. Otherwise, this Court would have simply denied the defendants’ IAC claims rather than dismissing them without prejudice.

1. **Mr. Dixon was entitled to an instruction on misdemeanor breaking and entering, a lesser-included offense of felony breaking and entering.**

“The essential elements of felonious breaking or entering are (1) the breaking or entering (2) of any building (3) with the intent to commit any felony or larceny therein. The felonious intent required to satisfy the third element must be the intent set out in the indictment.” *State v. Gray*, 322 N.C. 457, 460, 368 S.E.2d 627, 629 (1988) (citations omitted). Here, because the State indicted Mr. Dixon on the theory that he broke into Crisis Management with the intent to commit larceny, it was required to prove he had that specific intent at the time he broke or entered. *See* *id.*, 368 S.E.2d at 629 (“[B]ecause the defendant was indicted for breaking or entering with the intent to commit rape, the State was obligated to prove the defendant intended to commit rape at the time he entered the victim’s house.”).

Misdemeanor breaking or entering is a lesser-included offense of felony breaking or entering; the difference between the two is the defendant’s specific intent at the time she breaks or enters. *See* N.C. Gen. Stat. § 14-54(a), (b). “A defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater.” *State v. Tillery*, 186 N.C. App. 447, 450, 651 S.E.2d 291, 294 (2007) (citation and internal quotation marks omitted). Such instructions are particularly important because “[w]here one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction.” *Keeble v. United States*, 412 U.S. 205, 212-13, 36 L. Ed. 2d 844, 850 (1973).

This inquiry “must view the evidence in the light most favorable to defendant.” *State v. Barlowe*, 337 N.C. 371, 378, 446 S.E.2d 352, 357 (1994). Moreover, such an instructional “error is not cured by [a] guilty verdict . . . since it cannot be known whether the jury would have convicted [the] defendant of misdemeanor breaking or entering had it been properly instructed.” *Id.*, 446 S.E.2d at 357 (citation omitted).

Under these well-established principles, the trial court was required to instruct the jury in Mr. Dixon’s case on misdemeanor breaking or entering because the evidence presented at trial, when viewed in the light most favorable to Mr. Dixon, would have permitted a finding that he had broken or entered Crisis Management without the intent to commit larceny, even if he had the intent to commit some other felony.

Late at night on 2 May 2010, Mr. Dixon used a rock to break into the offices of Crisis Management. (T pp 24-28) The offices were left in “general disarray” with tossed “desk drawers [and] opened papers messed up.” (T p 29) Within either a storage closet or a waiting room was “[a] file box containing what look[ed] to be human feces and tissues.” (T p 61) Items determined to be missing from the office, mostly pieces of computer equipment, were never found. (T p 71) The jury ultimately acquitted Mr. Dixon of larceny. (T p 121)

As this Court held on direct appeal, when viewed in the light most favorable to the State, this evidence supported a finding that Mr. Dixon intended to commit larceny at the time he broke or entered. But when viewed in the light most favorable to the defense, it supported an inference that Mr. Dixon intended to commit vandalism or to use the bathroom at the time he broke or entered the office.

Accordingly, the MAR court’s conclusion that “[t]here was no legal basis for Ms. Coulter to ask for the lesser included instructions” was legally incorrect. (App. p 99) Viewing the evidence in the most favorable possible light, the jury should have been given the option of finding Mr. Dixon guilty of the lesser offense.

1. **Mr. Dixon’s trial attorney did not request an instruction on misdemeanor breaking and entering, and this omission was an inadvertent oversight rather than a matter of trial strategy.**

At the MAR hearing, the MAR court found as fact that Mr. Dixon’s trial counsel had not requested an instruction on the lesser-included offense of misdemeanor breaking or entering. Specifically, it found as fact that:

26. Pursuant to a charge conference, the Court instructed the jury on the substantive offenses of felonious breaking and entering, felonious larceny. Instructions on the lesser included offenses of misdemeanor breaking and entering and misdemeanor larceny were not requested or given.

(App. p 97) This finding was supported by competent evidence, including Ms. Dixon’s testimony at the MAR hearing that Ms. Coulter did not request an instruction on any lesser-included offense, and the court reporter’s affidavit confirming Ms. Dixon’s recollection. (MAR T p 55; App. pp 91-93)

 The evidence at the MAR hearing also confirmed that Ms. Coulter’s failure to request an instruction on misdemeanor breaking or entering was not a strategic choice. Ms. Coulter testified that she *had* asked for such an instruction during the charge conference, and claimed that, as she recalled, Judge Bell’s commentary on her “interesting interpretation of the facts” was in response to her request. (MAR T pp 118-19, 124) Ms. Coulter’s testimony at the MAR hearing, therefore, shows that her failure to request the lesser-included instruction reflected deficient performance rather than a deliberate trial strategy.

1. **On this record, there is a reasonable probability that at least one juror would have voted to convict Mr. Dixon of only the misdemeanor offense.**

The offense of felony breaking or entering has only three elements: “(1) the breaking or entering (2) of any building (3) with the intent to commit any felony or larceny therein.” *Gray*, 322 N.C. at 460, 368 S.E.2d at 629. The State’s trial evidence showing Mr. Dixon’s fingerprints both outside and inside the point of entry, paired with testimony from employees of Crisis Management that they only meet with clients or patients out in the community rather than in the office, was well sufficient to satisfy the first two elements. That left only the question of Mr. Dixon’s intent at the time he broke or entered.

On this point—the difference between the felony offense and the misdemeanor—the record suggests the jury had doubts. The jury sent a question back to Judge Bell, asking for clarification of the meaning of “‘reasonable doubt’” and what the difference might be between “using common sense and being entirely convinced and fully satisfied[.]” (App. p 5) In light of the State’s evidence showing Mr. Dixon’s involvement with the break-in, the jury’s skepticism likely concerned the element of intent.

Then, once the jury was re-instructed on reasonable doubt and sent back to deliberate, it returned split verdicts. Despite the testimony regarding the computer equipment that went missing and was never located, the jury unanimously acquitted Mr. Dixon of larceny.

Where all twelve jurors found that Mr. Dixon had not actually committed larceny, there is “a reasonable probability that . . . at least one juror would have harbored a reasonable doubt” that he broke or entered with the specific intent to commit that offense. *Buck*, \_\_\_ U.S. at \_\_\_, 197 L. Ed. 2d at 19 (citation and internal quotation marks omitted). But as instructed, the jury was left with an all-or-nothing choice regarding the break-in: convict him of the offense as submitted, or acquit him entirely despite the strong evidence that he broke or entered. *Cf. Keeble*, 412 U.S. at 212-13, 36 L. Ed. 2d at 850 (“Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction.”). Had trial counsel requested the supported instruction on the lesser‑included offense, there is a reasonable possibility that one or more jurors would have chosen the middle option of convicting him of only the misdemeanor. A new trial will afford a new jury that option.

**II. It was structural error for Judge Bell not to recuse himself where he had presided at trial and deciding Mr. Dixon’s IAC claim required that he review whether his own prior judicial decisions were correct.**

Mr. Dixon’s primary claim at the MAR hearing was that his trial attorney, Ms. Coulter, provided ineffective assistance of counsel where she failed to request an instruction on a lesser-included offense that was supported by the evidence. However, as the trial judge, Judge Bell had an independent obligation at trial to instruct the jury on any lesser‑included offense.

 For this reason, Judge Bell should not have presided at the MAR hearing after presiding at trial. Because Mr. Dixon could not have been entitled to relief without showing that he was entitled to the instruction on the lesser‑included, Judge Bell could not have ruled in his favor on his IAC claim without finding that he had personally erred during the trial. This was akin to an appellate judge reviewing her own prior legal determination. Because this conflict created at least an appearance that Judge Bell could not be sufficiently impartial, Mr. Dixon is entitled to a new MAR hearing before a different judge.

1. **Preservation.**

N.C. Gen. Stat. § 15A-1223 creates a statutory mandate that requires a trial judge, on the written motion of either party in a criminal case, to “disqualify himself from presiding over a criminal trial or other criminal proceeding if he is . . . [p]rejudiced against the moving party or in favor of the adverse party; or . . . [f]or any other reason unable to perform the duties required of him in an impartial manner.” N.C. Gen. Stat. § 15A-1223(b). “[W]hen a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court’s action is preserved, notwithstanding [the] defendant’s failure to object at trial.” *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985). Moreover, other courts have indicated that the right to an impartial tribunal cannot be waived. *See, e.g.*, *McKernan v. Sci*, 849 F.3d 557, 565 (3d Cir. 2017) (“We therefore hold today that the right to an impartial trial extends to a bench trial, and that such right cannot be waived by a defendant.”).

Mr. Dixon recognizes that his MAR attorney did not specifically claim in the MAR court that Judge Bell should recuse himself because, in reviewing Mr. Dixon’s IAC claim, he would necessarily have to review whether his own prior decision was legally correct. He also recognizes that our Supreme Court has held that even a claim of structural error must be asserted at trial to be preserved for appellate review. *See State v. Garcia*, 358 N.C. 382, 409, 597 S.E.2d 724, 744 (2004). Accordingly, Mr. Dixon asks this Court, in the alternative, to invoke Rule 2 to address his claim of structural error. *See* N.C. R. App. P. 2.

If necessary, this Court should invoke Rule 2 to review his claim for four reasons. The first is the importance of the issue. As the Supreme Court recently reaffirmed, “[s]tructural error affects the framework within which the trial proceeds, as distinguished from a lapse or flaw that is simply an error in the trial process itself.” *McCoy v. Louisiana*, \_\_\_ U.S. \_\_\_, \_\_\_, 200 L. Ed. 2d 821, 833 (2018) (quoting *Arizona v. Fulminante*, 499 U. S. 279, 310, 113 L. Ed. 2d 302, 331 (1991)) (internal quotation marks and brackets omitted). Certain types of errors are deemed structural, and not subject to harmless error review, because “the error will inevitably signal fundamental unfairness . . . .” *Id.* at \_\_\_, 200 L. Ed. 2d at 833 (citations omitted). Potential judicial bias is just that type of error. *See, e.g.*, *Williams v. Pennsylvania*, \_\_\_ U.S. \_\_\_, \_\_\_, 195 L. Ed. 2d 132, 145 (2016) (“The fact that the interested judge’s vote was not dispositive . . . does not lessen the unfairness to the affected party.”). If an error is important enough to qualify as structural, then a claim about that type of error will often be important enough to warrant Rule 2 review.

Second, review is justified in light of the sentence Mr. Dixon received. Breaking and entering is normally punished as a Class 1 misdemeanor, *see* N.C. Gen. Stat. § 14-54(b), which can result in, at most, a 120-day active sentence, *see* N.C. Gen. Stat. § 15A-1340.23(c)(2). Here, however, the offense was raised from a misdemeanor to a Class H felony based on a finding that Mr. Dixon intended to commit larceny. *See* N.C. Gen. Stat. § 14-54(a). From there, based on Mr. Dixon’s plea to attaining habitual felon status, the offense was raised to a Class C felony. *See* N.C. Gen. Stat. §§ 14-7.1 (2010); 14-7.6 (2010). Then, based on Mr. Dixon’s lengthy prior record, he was sentenced as a Level VI offender. (T p 131) And from there, Judge Bell found that the sole aggravating factor—that Mr. Dixon had willfully violated probation in the last decade—outweighed two mitigating factors, and imposed a sentence from the very top of the aggravated range. (T p 135); *see also* N.C. Gen. Stat. §§ 15A‑1340.17(c); (e) (2010). Mr. Dixon ultimately received a sentence of 182 to 228 months active imprisonment, the harshest sentence available for an unarmed breaking or entering in North Carolina.

Third, review is warranted in light of the limited nature of Mr. Dixon’s claim, and the limited remedy he would receive should this Court agree. Mr. Dixon does not claim that it will always be structural error for a judge to review and resolve an MAR where she also presided at trial, or even that a judge who presides at a trial should later recuse herself from all IAC claims stemming from that trial. Rather, Mr. Dixon claims only that a judge cannot be and appear sufficiently impartial where she is asked to review whether her own prior judicial decision was legally correct. Should this Court agree, the remedy would not be reversal of the conviction or even a new trial, but only vacatur of the MAR order and remand for a new MAR hearing before a different judge.

And fourth, Mr. Dixon’s MAR counsel did request that Judge Bell recuse himself, though on the separate basis that he could be a material witness in the case. (App. pp 63-66) Accordingly, Judge Bell was still fully aware that Mr. Dixon had asked that his MAR be assigned to a different judge, and so the issue is *nearly* preserved. For that additional reason, this Court should review Mr. Dixon’s claim.

1. **Standard of review.**

“The standard of review for alleged violations of constitutional rights is *de novo*.” *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009) (citation omitted). Likewise, “[w]hether the trial court has violated a statutory mandate is reviewed *de novo*.” *State v. Mumma*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 811 S.E.2d 215, 220 (2018) (citing *Ashe*, 314 N.C. at 39, 331 S.E.2d at 659), *aff’d in part, modified in part* 827 S.E.2d 288 (2019). “Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.” *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (citation and quotation marks omitted).

1. **Structural error occurs where a hearing is overseen by a judge who is not impartial.**

“A fair trial in a fair tribunal is a basic requirement of due process” under the Fifth and Fourteenth Amendments. *In re Murchison*, 349 U.S. 133, 136, 99 L. Ed. 942, 946 (1955). Accordingly, since at least the 1920s, the United States Supreme Court has recognized that the involvement of a judicial official who is not impartial amounts to structural error because it affects the very framework in which the proceeding occurs. *See, e.g.*, *Fulminante*, 499 U. S. at 309-10, 113 L. Ed. 2d at 331 (1991) (noting that the involvement in *Tumey v. Ohio*, 273 U.S. 510, 71 L. Ed. 749 (1927) of a judge who was not impartial was a “structural defect[ ]” which “obviously affected” the “entire conduct of the trial from beginning to end”). This overriding interest in judicial impartiality stems from not just the need for basic fairness to the parties in particular cases, but the need to demonstrate publicly the legitimacy of judicial decision-making. *See* *Williams*, \_\_\_ U.S. at \_\_\_, 195 L. Ed. 2d at 145 (“Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself.”); *Mayberry v. Pennsylvania*, 400 U.S. 455, 465, 27 L. Ed. 2d 532, 540 (1971) (“[J]ustice must satisfy the appearance of justice.” (citation omitted)).

Thus, the Supreme Court has long maintained that “every procedure which would offer a possible temptation to the average man as a judge not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.” *Murchison*, 349 U.S. at 136, 99 L. Ed. at 946 (quoting *Tumey*, 273 U.S. at 532, 71 L. Ed. At 758) (ellipsis omitted). Such influences threaten the neutrality of the proceedings where the judge has a pecuniary interest in the outcome*, see, e.g.*, *Tumey*, 273 U.S. at 532, 71 L. Ed. at 758; *Ward v. Monroeville*, 409 U.S. 57, 60, 34 L. Ed. 2d 267, 271 (1972), where the judge had suffered “highly personal aspersions” and “slanderous remarks” from a party, *Mayberry*, 400 U.S. at 466, 27 L. Ed. 2d at 540, or where the judge had previously served as a prosecutor or accuser in the case at hand, *see, e.g.*, *Williams* \_\_\_ U.S. at \_\_\_, 195 L. Ed. 2d at 146; *Murchison*, 349 U.S. at 139, 99 L. Ed. at 948.

The Supreme Court has noted that such influences also exist where there is “a risk that the judge would be so psychologically wedded to his or her previous position . . . that the judge would consciously or unconsciously avoid the appearance of having erred or changed position.” *Williams* \_\_\_ U.S. at \_\_\_, 195 L. Ed. 2d at 141-42 (citation and internal quotation marks omitted). Essentially, the Supreme Court has recognized the all-too-human reluctance to admit a prior mistake.

On this point, the United States Supreme Court’s recent opinion in *Williams v. Pennsylvania*, \_\_\_ U.S. \_\_\_, 195 L. Ed. 2d 132 (2016) is instructive. In that case, the defendant was convicted in the mid-1980s of first-degree murder and sentenced to death. *Id.* at \_\_\_, 195 L. Ed. 2d at 138-39. Following several layers of direct appeal and post-conviction review over almost three decades, the case ended up back before the Supreme Court of Pennsylvania in 2014. At that court, one of the seven justices who denied his claim for post-conviction relief was the former District Attorney who had approved his office’s decision to seek the death penalty almost thirty years earlier. *Id.* at \_\_\_, \_\_\_, 195 L. Ed. 2d at 138, 140. The seven-justice panel was unanimous as to the outcome. *See id.* at \_\_\_, 195 L. Ed. 2d at 140.

Under these circumstances, the Supreme Court concluded that the Pennsylvania justice had committed structural error by denying the defendant’s motion to recuse himself. It held that “under the Due Process Clause [of the Fourteenth Amendment] there is an impermissible risk of actual bias when a judge had earlier and significant, personal involvement as a prosecutor in a critical decision regarding the defendant’s case.” *Id.* at \_\_\_, 195 L. Ed. 2d at 141. Later in the opinion, it also held that this error was structural, and therefore reversible without any showing of prejudice. *Id.* at \_\_\_, 195 L. Ed. 2d at 145.

In reaching this conclusion, the Court reviewed four degrees of separation that should have ameliorated the risk of judicial bias. First, the justice at issue was but one of several prosecutors and state actors who had worked on the case throughout the multi-layered proceedings. *Id.* at \_\_\_, 195 L. Ed. 2d at 142. Second, almost three decades had passed since the justice had approved the decision, in his capacity as District Attorney, to proceed capitally at trial. Third, the justice had previously advertised in campaign ads that he’d “sent 45 people to death rows,” so the status of the petitioner’s case as capital was not unique. *Id.* at \_\_\_, 195 L. Ed. 2d at 143. And fourth, on the Pennsylvania Supreme Court, the justice was just one member of a seven-member panel which was unanimous as to the outcome. *Id.* at \_\_\_, 195 L. Ed. 2d at 140, 142, 145. All of these factors should have favored the conclusion that, applying “an objective standard,” the circumstances did not rise to the level of creating “an unconstitutional potential for bias” in an “average judge in his position . . . .” *Williams* \_\_\_ U.S. at \_\_\_, 195 L. Ed. 2d at 141 (citations and internal quotation marks omitted).

Despite the passage of time, the participation of other prosecutors, and the fact that the justice possessed but one vote of seven on the Pennsylvania Supreme Court, the United States Supreme Court opined there was still a “serious risk that [he] would be influenced by an improper, if inadvertent, motive to validate and preserve the result obtained through the adversary process.” *Id.* at \_\_\_, 195 L. Ed. 2d at 142. It deemed constitutionally unbearable the “risk that [he] would be so psychologically wedded to his . . . previous position . . . that [he] would consciously or unconsciously avoid the appearance of having erred or changed position.” *Id.* at \_\_\_, 195 L. Ed. 2d at 141-42 (citation and internal quotation marks omitted). In the end, his involvement “so endangered the appearance of neutrality that his participation in the case must be forbidden if the guarantee of due process is to be adequately implemented.” *Id.* at \_\_\_, 195 L. Ed. 2d at 144 (citations and internal quotation marks omitted).

For these reasons, the Supreme Court remanded for a new hearing at the Pennsylvania Supreme Court “unburdened by any ‘possible temptation not to hold the balance nice, clear and true between the State and the accused.’ ” *Id.* at \_\_\_, 195 L. Ed. 2d at 146 (quoting *Tumey*, 273 U.S. at 532, 71 L. Ed. at 758) (ellipsis omitted).

*Williams* provides four key insights regarding structural error. The first is procedural—that a defendant can raise a claim of structural error regarding judicial partiality even in a post-conviction proceeding. Claims of structural error are not limited to errors that occur at trial.

Second, the risk of judicial bias can be unacceptable even when that risk is lessened by other factors, such as the passage of time, the involvement of others, the inclusion in deliberations of other judicial officials with equal voting power, and even the judge’s best efforts to remain impartial. The importance of judicial impartiality is so central, and the risk of being “psychologically wedded” to a prior decision so high, that ameliorating influences cannot always fix the problem.

Third, the concern is not just with judicial impartiality, but with the appearance of impartiality. Our courts must not only mete out impartial justice, they must be seen doing so. Public legitimacy suffers when it appears as if a judicial official has pre-judged the case.

Fourth, and perhaps most importantly, *Williams* instructs that judicial bias need not be based on antipathy toward the defendant herself, or the result of improper motives. Rather, *Williams* recognizes that a judge can become “psychologically wedded” to her prior position, and thus reluctant to admit that she had either changed her mind or made an earlier mistake. Like an impermissible pecuniary motive or personal animosity, that type of influence can improperly sway a judge to decide for or against a particular party, or for or against a particular claim.

1. **Judge Bell could not be and seem impartial because reviewing Mr. Dixon’s IAC claim required that he review his own prior judicial decision.**

Judge Bell presided over both Mr. Dixon’s trial and his MAR hearing. At the MAR hearing, Mr. Dixon’s central argument was that his trial counsel was ineffective because she failed to request an instruction on misdemeanor breaking and entering, a lesser-included offense of felony breaking and entering. Mr. Dixon could have prevailed on this claim only if he could show that the evidence presented at trial supported such an instruction; otherwise, his counsel could not have been ineffective by failing to request it. Critically, however, Judge Bell was already required to make the exact same determination regarding the instruction on the lesser-included offense when he presided at trial. *See, e.g.*, *State v. Montgomery*, 341 N.C. 553, 567, 461 S.E.2d 732, 739 (1995) (“[A] trial judge must instruct the jury on all lesser included offenses that are supported by the evidence, even in the absence of a special request for such an instruction . . . .” (citation omitted)).

This means that Judge Bell could not possibly have resolved Mr. Dixon’s IAC claim in Mr. Dixon’s favor without concluding that he, personally, had erred in his earlier capacity as the trial judge. By ruling on Mr. Dixon’s IAC claim rather than recusing himself, Judge Bell essentially had to review whether the jury instructions he had previously given were legally correct. In that context, there was too great a risk that he would be “psychologically wedded” to his previous position and would seek “consciously or unconsciously to avoid the appearance of having erred or changed position.” *Williams*, \_\_\_ U.S. at \_\_\_, 195 L. Ed. 2d at 141-42 (citation and internal quotation marks omitted). Just as “no man can be a judge in his own case,” *id.* at \_\_\_, 195 L. Ed. 2d at 141, no judge should sit in review of her own prior judicial determinations.

A hypothetical can bring the problem into focus. Suppose a North Carolina trial judge had given jury instructions in a particular case that resulted in a guilty verdict, and the defendant appealed the resulting judgment. Suppose further that this judge had, in the meantime, been elected or appointed to serve on this Court or on our Supreme Court. And suppose that, on direct appeal, the defendant challenged the jury instructions as either preserved error or plain error. Under those circumstances, there would be no question that the judge would have to recuse from any panel later assigned to review the direct appeal because it would be improper for her to sit in review of her own prior decision. That case is this case in every way that matters.[[6]](#footnote-6)

It is worth noting the limits of Mr. Dixon’s claim. Mr. Dixon does not claim that a judge who presides at trial should always be precluded from reviewing a later MAR. Where, for example, an MAR claim turns on newly discovered evidence, the judge could presumably review the MAR and even revisit her prior legal conclusions in light of the newly discovered evidence. In that scenario, resolving the claim in the defendant’s favor would not require a concession of error; she could forthrightly maintain that when the facts change, her conclusions change. So too where an MAR is based on a change to the background law based on which she made her previous determinations. In that situation, she could maintain that her previous conclusion was correct when made, but must be revised in light of shifting legal authority.

Nor does Mr. Dixon assert that a judge who presides at trial should later recuse herself from all later IAC claims. Such claims often turn on questions of fact, such as whether the action or inaction constituting potentially deficient performance resulted from a tactical choice versus an unintentional mistake. In these sorts of cases, the MAR judge would not be put in the position of having to decide whether she had personally erred at trial, and there would be less risk she would be biased in favor of affirming her previous judicial decisions.

But the case at hand is different from these scenarios. To resolve Mr. Dixon’s IAC claim in his favor, Judge Bell would have had to conclude that the instructions he gave were erroneous at the time he gave them. There was no escape hatch. No new set of facts, or change in the law, could have allowed Judge Bell to rule in Mr. Dixon’s favor on this particular IAC claim without concluding that he had personally erred at trial. Few judges could be truly impartial under these circumstances. None would appear so.

Accordingly, this Court should hold that structural error occurred when Judge Bell ruled on Mr. Dixon’s MAR and resolved his IAC claim against him. Judge Bell should have recused himself and another judge should have reviewed Mr. Dixon’s IAC claim.

1. **The remedy is a new MAR hearing before a different judge.**

Though the error is structural, the remedy is limited. Mr. Dixon is not entitled, based on this error, to reversal of his conviction or even to a new trial. Rather, because the structural error occurred during the resolution of his MAR, he is entitled only to a new MAR hearing before a different judge. *See* *Williams*, \_\_\_ U.S. at \_\_\_, 195 L. Ed. 2d at 146 (where the structural error occurred at a post-conviction hearing before the Pennsylvania Supreme Court, the remedy was remand for a new hearing before that court). At that hearing, Mr. Dixon will be able to pursue his IAC claim before a judge unburdened by the risk of appearing insufficiently impartial.

**ATTACHMENTS**

1. Trial Transcript
2. MAR Transcript
3. Appendix
	1. Indictments
	2. Jury question
	3. Judgments
	4. *State v. Dixon*, 220 N.C. App. 524, 725 S.E.2d 674, 2012 N.C. App. LEXIS 640 (2012) (unpublished)
	5. Amended Motion for Appropriate Relief with Defense MAR Exhibits 1, 2, 5, and 6
	6. Supplemental to Amended Motion for Appropriate Relief with Defense MAR Exhibits 7, 8, and 10
	7. Amended Motion to Recuse with Defense Recusal Exhibits 1 and 2
	8. Order Denying Amended Motion for Appropriate Relief
	9. Notice of Appeal from MAR Order
	10. Order Assigning PWC Counsel
	11. Reassignment of PWC Counsel
	12. *State v. Holden*, 252 N.C. App. 265, 796 S.E.2d 838, 2017 N.C. App. LEXIS 147, \*1 (2017) (unpublished)
	13. *State v. Robertson*, 241 N.C. App. 174, 772 S.E.2d 875, 2015 N.C. App. LEXIS 347, \*12-14 (2015) (unpublished)
	14. *State v. Boliek*, 222 N.C. App. 782, 731 S.E.2d 720, 2012 N.C. App. LEXIS 1076, \*4-5 (2012) (unpublished)

**CONCLUSION**

Mr. Dixon was denied the effective assistance of counsel where his trial attorney failed to request an instruction on a lesser-included offense that was supported by the evidence. For that reason, he should receive a new trial with the effective assistance of counsel and proper jury instructions.

In addition, structural error occurred where Judge Bell presided over both the trial and the MAR hearing because he could not resolve Mr. Dixon’s IAC claim in his favor without concluding that he had personally erred at trial. For that reason, Mr. Dixon should receive a new MAR hearing before a different judge.

This Court should allow certiorari review to remedy one or both of these constitutional problems.

**PRAYER FOR RELIEF**

For the foregoing reasons, Mr. Dixon respectfully prays that this Court issue its writ of certiorari and:

1. Reverse the superior court order denying his motion for appropriate relief; vacate the judgment of conviction; and remand for a new trial; or
2. Vacate the superior court order denying his motion for appropriate relief and remand for a new MAR hearing before a different judge; or
3. Grant any other relief it deems proper.

**VERFICATION**

Aaron Thomas Johnson, being first duly sworn, deposes and says that he has read the foregoing Petition for Writ of Certiorari and that the same is true to his own knowledge except as to matters alleged upon information and belief, and as to these matters, he believes them to be true.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Aaron Thomas Johnson

Sworn to and subscribed before me,

this 1st day of July, 2019.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

NOTARY PUBLIC

My commission expires: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that the foregoing Petition for Writ of Certiorari has been filed, pursuant to Rule 26 of the North Carolina Rules of Appellate Procedure, by electronic means with the Clerk of the North Carolina Court of Appeals.

I further certify that a copy of the above and foregoing Petition for Writ of Certiorari has been duly served upon Mr. Daniel O’Brien, Special Deputy Attorney General, North Carolina Department of Justice, by electronic means by emailing it to dobrien@ncdoj.gov.

This the 1st day of July, 2019.

By Electronic Submission:

 Aaron Thomas Johnson

 Assistant Appellate Defender

North Carolina State Bar Number 46157

1. The underlying facts are also summarized in this Court’s opinion from the direct appeal. *See generally* *State v. Dixon*, 220 N.C. App. 524, 725 S.E.2d 674, 2012 N.C. App. LEXIS 640 (2012) (unpublished). [↑](#footnote-ref-1)
2. For clarity, the transcript of the trial will be cited as “(T p XXX)” and the transcript of the MAR hearing will be cited as “(MAR T p XXX).” Both transcripts are attached to this petition. Other relevant documents are included within the appendix and will be cited as “(App. p XXX).” [↑](#footnote-ref-2)
3. The cover of the trial transcript mistakenly names Judge Eric Levinson rather than Judge Bell, and it lists the wrong court session. (T p 1) Mr. Dixon’s attorney for his direct appeal also mistakenly named Judge Levinson in the record on appeal for the direct appeal. However, Judge Bell’s introductory remarks to the potential jurors confirm that he presided at trial. (T p 8) [↑](#footnote-ref-3)
4. Mr. Dixon’s MAR counsel also moved for a continuance on the basis that the hearing lacked a court reporter, which she feared might result in the creation of an incomplete record. The MAR court denied the motion to continue. (MAR T pp 6-8)

The transcript of the MAR hearing opens with a “Note” from the transcriptionist that explains “This recording was very inaudible throughout the whole recording. Near the end of the trial, it sounded like it was underwater.” (MAR T p 5) (all caps omitted) Despite the deficiencies in the transcript of the MAR hearing, Mr. Dixon believes that the existing transcript is sufficient for consideration of the claims asserted in this petition. [↑](#footnote-ref-4)
5. In addition, it appears that two other witnesses who were present at the trial may have testified that Ms. Coulter did not request an instruction on misdemeanor breaking or entering. The condition of the MAR transcript makes this difficult to know with certainty. (MAR T pp 62, 64-65) [↑](#footnote-ref-5)
6. Save perhaps one. On either this Court or our Supreme Court, this judge would be a member of a multi-member panel. The effect of any bias or partiality would therefore be lessened by the involvement of the other judicial officials reviewing the case. Presiding over the MAR hearing, however, Judge Bell was the sole finder of fact and the sole judge making conclusions of law. *Cf.* *McKernan*, 849 F.3d at 565 (“Considering the myriad procedural safeguards in place to avoid the seating of even one biased juror, out of twelve, it is inconceivable that, during a bench trial when the judge is the sole factfinder, a trial may proceed when that judge is biased.”). [↑](#footnote-ref-6)