

PEOPLE V. GARCIA: THE HIGH STAKES OF WAIVING JUSTICE AND FORFEITING FAIRNESS

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ABSTRACT

The Colorado Supreme Court’s decision in *People v. Garcia* raises important questions about the application of waiver doctrine in cases involving constitutional protections. When a former public defender who briefly served as Garcia’s counsel became the judge presiding over his case, neither Garcia nor his counsel objected to her disqualification at trial, presenting the court with the challenging task of determining whether this silence constituted waiver or forfeiture of the judicial disqualification claim. This Note respectfully argues that the court incorrectly found waiver by: (1) drawing inferences that favor rather than presumptively oppose waiver; (2) relying on constructive rather than actual knowledge; and (3) inferring intent from potential strategic motives rather than evidence of conscious relinquishment. The decision contravenes the court’s precedent in *People v. Abu-Nantambu-El* and creates inconsistent treatment of structural errors. While there are meritorious policy concerns underlying this decision, they do not justify modifying the fundamental requirement that the record demonstrates the waiver was knowing and voluntary. Through an analysis informed by contract law—where waiver doctrines are well-developed—this Note demonstrates that Garcia did not waive his right to judicial disqualification and proposes that courts maintain the traditionally high standard for implied waiver to protect defendants’ fundamental rights.

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INTRODUCTION

“Justice should not only be done, but should manifestly and undoubtedly be seen to be done.”¹ This foundational principle underlies the right to a fair trial in the United States, where the impartiality of judges is both a legal mandate and a public expectation.² An impartial judge is indispensable to a fair trial.³ Crucially, a judge’s impartiality must exist both in fact and in appearance, as even the perception of bias can undermine public confidence in the judiciary.⁴ Accordingly, many state legislatures have enshrined the right of impartiality in their constitutions and statutes, codifying the specific circumstances that disqualify a judge.⁵ Under the Colorado Revised Statute section 16-6-201, a judge of a court of record shall be disqualified to hear or try a case if (a) she is related to the parties or counsel, (b) the alleged offense was committed against her, her property, or to someone related to her, (c) she has been of counsel to the case, or (d) she is in any way interested or prejudiced with respect to the case, the parties, or counsel.⁶

Even though the constitutional right to an impartial judge is fundamental, most constitutional rights may still be “waived.”⁷ Waiver results when a party intentionally relinquishes or abandons a known right,⁸ either expressly or impliedly through conduct.⁹ Prior to 2024, Colorado courts found implied waiver only through affirmative conduct and where the record demonstrated knowledge.¹⁰ But in *People v. Garcia*,¹¹ the Su-

1. R v. Sussex Justices; *Ex parte McCarthy*, 1 KB 256, 259 (1923).

2. See John M. Delprete, *Not Holding the Balance Nice, Clear and True: The Right to an Impartial Judge*, 7 CAP. DEF. J. 47, 49–50 (1995).

3. See *Chapman v. California*, 386 U.S. 18, 24 (1967); *Rose v. Clark*, 478 U.S. 570, 577–78 (1986); see also *Tumey v. Ohio*, 273 U.S. 510, 535 (1927).

4. See Delprete, *supra* note 2, at 50.

5. See, e.g., COLO. CONST. art. II, §§ 16, 25; CAL. CONST. art. I, § 7; TEX. CONST. art. I, § 10.

6. COLO. REV. STAT. § 16-6-201(1) (2025).

7. See Simona Grossi, *The Waiver of Constitutional Rights*, 60 HOUS. L. REV. 1021, 1024 (2023).

8. *Id.*

9. Carolyn T.A. Hartwick, Comment, *Losing the Right to Counsel: Exploring and Reforming Waiver by Conduct and Forfeiture in State Courts*, 172 U. PA. L. REV. 1401, 1410–11 (2024).

10. See *Forgette v. People*, 524 P.3d 1, 7 (Colo. 2023); *People v. Curtis*, 681 P.2d 504, 516 (Colo. 1984); *Anderson v. People*, 490 P.2d 47, 48 (Colo. 1971).

11. 550 P.3d 637 (Colo. 2024).

preme Court of Colorado held that the defendant waived his right to object to the statutorily disqualified presiding judge who briefly served as his counsel on his case before taking the bench.¹² However, the record showed no evidence that the defendant or his counsel actually knew of this fact.¹³

This Note argues that by finding waiver without sufficient evidence of the defendant's knowledge, the court lowered the standard of waiver, making it easier for parties to lose their constitutional or statutory rights. Part I begins by discussing the legal landscape of appellate review, the standard for waiver, and the practical implications of waiving rights in the trial court. Part II then surveys the court's decision in *Garcia*. Finally, Part III argues that the court erred by relying on tenuous inferences and assumptions to indulge for waiver—contrary to the applicable standard—and thereby incorrectly decided the case. The court should have instead maintained the traditional, high standard for implied waiver by requiring actual knowledge or presumptively strong constructive knowledge. Both precedent and sound policy support maintaining a high standard for waiver. Lastly, because courts and scholars lack a consistent approach to waiver and forfeiture of structural error, Part III analyzes *Garcia* through an alternative framework informed by contract law, where these doctrines are well established.

I. BACKGROUND

Roscoe Pound, a renowned legal scholar and dean of Harvard Law School, once lamented, “[T]he worst feature of the American procedure is the lavish granting of new trials.”¹⁴ Uttered in 1906, these words rang true.¹⁵ To err is human, yet there was a time in American jurisprudence when “no error was lightly forgiven” and decision reversals were rampant.¹⁶ To address this,¹⁷ Congress passed a law in 1919 instructing appellate courts to disregard technical errors and defects “which do not affect the substantial rights of the parties.”¹⁸ This gave way to the mod-

12. *Id.* at 642.

13. *Id.* at 644; *id.* at 654 (Gabriel, J., dissenting).

14. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 20 J. AM. JUDICATURE SOC'Y 178, 185 (1937).

15. *See id.*

16. ROBERT J. TRAYNOR, *THE RIDDLE OF HARMLESS ERROR* 3 (1970). A striking example of this comes from the 1908 Missouri Supreme Court decision in *State v. Campbell*, in which the court reversed a rape conviction on the ground that the indictment described the charged offense as “against the peace and dignity of state,” rather than “against the peace and dignity of the state,” as the Missouri Constitution required. *State v. Campbell*, 109 S.W. 706, 711–13 (Mo. 1908).

17. Zachary L. Henderson, *A Comprehensive Consideration of the Structural-Error Doctrine*, 85 MO. L. REV. 965, 970 (2020).

18. Act of Feb. 26, 1919, ch. 48, 40 Stat. L. 1181.

ern harmless-error doctrine¹⁹ that eventually trickled down to the states, codified in statutes or rules.²⁰

While the harmless-error doctrine encompassed a wide swath of errors, its boundaries were unclear.²¹ Courts were reticent for decades to apply the doctrine to constitutional errors, which at the time, instead resulted in automatic reversal.²² In *Chapman v. United States*,²³ the Supreme Court finally clarified that appellate courts could apply the harmless-error doctrine to most constitutional errors.²⁴ Still, the Court agreed that some errors remained immune to harmless-error review, including the sacrosanct Sixth Amendment right to an impartial judge.²⁵

In *Arizona v. Fulminante*,²⁶ Chief Justice Rehnquist classified a violation of the right to an impartial judge as per se reversible, even without analyzing its harm.²⁷ Unlike other errors, this “structural defect[]” could not simply be assessed in the context of other evidence because it compromised the “constitution of the trial mechanism.”²⁸ The Court explained that structural defects are so serious that a criminal trial cannot “reliably serve its function as a vehicle for determination of guilt or innocence.”²⁹ As a result, no criminal punishment in the face of these structural defects, including a partial judge presiding over a trial, could be “fundamentally fair.”³⁰

That same year, Justice Scalia coined the phrase “structural error,”³¹ which became the adopted moniker of the *Fulminante*-based structural-error doctrine.³² Biased judges and other structural errors typically entitle a defendant to reversal and a new trial without any showing of prejudice or proven impact on the verdict.³³ Because finding a structural error on direct appeal results in automatic reversal, courts commonly cite gamesmanship as the reason why structural error should be waivable.³⁴ The

19. Henderson, *supra* note 17, at 970; Kotteakos v. United States, 328 U.S. 750, 757 (1946).

20. Henderson, *supra* note 17, at 970.

21. See Harry T. Edwards, *To Err is Human, but Not Always Harmless: When Should Legal Error be Tolerated?*, 70 N.Y.U. L. REV. 1167, 1175 (1995).

22. Henderson, *supra* note 17, at 970–71.

23. 386 U.S. 18 (1967).

24. *Id.* at 22.

25. *Id.* at 23 n.8.

26. 499 U.S. 279 (1991).

27. See *id.* at 309–10.

28. *Id.* at 309.

29. See *id.* at 310 (quoting *Rose v. Clark*, 478 U.S. 570, 577–78 (1986)).

30. See *id.*

31. *Freytag v. C.I.R.*, 501 U.S. 868, 896 (1991) (Scalia, J., concurring).

32. Henderson, *supra* note 17, at 969.

33. Phil Dixon, *Structural Errors*, N.C. CRIM. L. (June 19, 2018), <https://nccriminallaw.sog.unc.edu/structural-errors/>; Gavin R. Tisdale, *A New Look at Constitutional Errors in a Criminal Trial Notes*, 48 CONN. L. REV. 1665, 1670 (2016).

34. See *Puckett v. United States*, 556 U.S. 129, 134 (2009) (discussing how timely raising claims and objections prevents “sandbagging” the court, described as “remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor.”); Hender-

Supreme Court has implicitly concluded that structural error can be forfeited.³⁵ However, it has yet to clearly decide the extent to which structural errors can be waived,³⁶ though several circuit courts have weighed in.³⁷

The differences between waiver of a right and forfeiture are more than semantic. The Colorado Supreme Court defines waiver as the “*intentional* relinquishment of a *known* right.”³⁸ A waiver may be either expressly relinquished or implied through conduct that either manifests an intent to relinquish a right or is inconsistent with the exercise of that right.³⁹ Because waiver results in the loss of a party’s right, the court “indulge[s] every reasonable presumption against waiver.”⁴⁰ By contrast, the court defines forfeiture as “the failure to make the timely assertion of a right.”⁴¹ While waiver requires both knowledge and intent, forfeiture typically results from neglect.⁴² Although the two terms are frequently used interchangeably,⁴³ the terms bear a critical distinction.⁴⁴ An appellate court is precluded from reviewing waived error, but it may review a forfeited error under the plain-error standard.⁴⁵ Thus, while waiver extinguishes error, forfeiture does not.⁴⁶

A defendant’s unrepresented or untimely claim of error—amounting to an unpreserved error—can result in either waiver or forfeiture.⁴⁷ The court begins a typical waiver–forfeiture analysis by examining the circumstances of how the defendant failed to preserve the claim of error.⁴⁸ This step in the analysis is crucial because it indicates whether the defendant knew of their rights and whether their conduct demonstrates intent or neglect in relinquishing those rights.⁴⁹ In Colorado, a defendant’s silence regarding an error is typically construed as neglect supporting

son, *supra* note 17, at 1008–10 (explaining that strategic objectives are the reasoning provided by the circuit courts who have weighed in on this issue).

35. See *Neder v. United States*, 527 U.S. 1, 7 (1999).

36. Henderson, *supra* note 17, at 1008; Justin Murray, *A Contextual Approach to Harmless Error Review*, 130 HARV. L. REV. 1791, 1806 n.80 (2017) (“The Court has yet to decide whether the exemptions from harmless error review it has developed with respect to preserved claims also apply to unpreserved claims.”); Tisdale, *supra* note 33, at 1670–71 (illustrating the Supreme Court’s confusing history regarding whether structural error can be waived or forfeited).

37. Henderson, *supra* note 17, at 1008.

38. *Forgette v. People*, 524 P.3d 1, 7 (Colo. 2023) (quoting *People v. Rediger*, 416 P.3d 893, 902 (Colo. 2018)) (emphasis in original).

39. *Id.*

40. *Id.* (quoting *Rediger*, 416 P.3d at 902).

41. *People v. Garcia*, 550 P.3d 637, 643 (Colo. 2024) (quoting *Rediger*, 416 P.3d at 902).

42. *Forgette*, 524 P.3d at 7.

43. Tisdale, *supra* note 33, at 1669 n.8; *Hamer v. Neighborhood Hous. Servs. of Chi.*, 583 U.S. 17, 20 n.1 (2017).

44. *Forgette*, 524 P.3d at 7; see Tisdale, *supra* note 33, at 1669 n.8.

45. *Forgette*, 524 P.3d at 7.

46. *Id.*

47. See *id.* at 8.

48. See *id.* at 5; *Phillips v. People*, 443 P.3d 1016, 1021–22 (Colo. 2019).

49. See *Forgette*, 524 P.3d at 6–7.

forfeiture.⁵⁰ However, the court has found intent sufficient for waiver when the defendant knew of the grounds for objection and failed to object.⁵¹ In *Richardson v. People*,⁵² the court found that the defendant waived his right to challenge a juror who disclosed being married to the trial judge after failing to do so during jury selection.⁵³ Because the defendant did not object to the allegedly biased juror's participation, and because the trial judge had no duty to sua sponte excuse the juror (his wife), the court held that the defendant waived his claim of error.⁵⁴

The court is more likely to interpret unpreserved error as waiver rather than forfeiture when a defendant has a clear strategic motive for failing to object to a known right,⁵⁵ commonly referred to as gamesmanship.⁵⁶ In *Stackhouse v. People*,⁵⁷ the court held that the defendant waived his right to a public trial by not objecting to the obvious closure of voir dire.⁵⁸ The court found that the right to a public trial fell into the class of rights that defense counsel can waive through strategic decisions.⁵⁹ The court's decision was motivated by the apprehension that intentionally failing to object could provide attorneys "a strategic parachute to preserve an avenue of attack on appeal."⁶⁰ In contrast, the court in *Phillips v. People*⁶¹ held that the defendant merely forfeited his unpreserved claim to suppress inadmissible incriminating information when it could discern no clear "strategic reasons for failing to raise [his] unpreserved claims in the trial court."⁶²

This discussion of waiver and forfeiture provides the framework against which the Colorado Supreme Court's decision in *Garcia* must be understood. The following Part examines how the court applied—and, in key respects, departed from—these principles when it concluded that *Garcia* had waived his judicial disqualification claim.

II. *PEOPLE V. GARCIA*

In a four-to-three majority, the Colorado Supreme Court held that *Garcia* had waived his right to disqualify Judge Hopkins—who had briefly acted as his counsel—when he failed to object at trial.⁶³ This Part dis-

50. See *Phillips*, 443 P.3d at 1023.

51. *Stackhouse v. People*, 386 P.3d 440, 446 (Colo. 2015); see also *Richardson v. People*, 481 P.3d 1, 5–6 (Colo. 2020).

52. 481 P.3d 1 (Colo. 2020).

53. *Id.* at 6–7.

54. *Id.* at 2, 8.

55. *Phillips*, 443 P.3d at 1023 n.4.

56. See *id.* at 1025; *Stackhouse*, 386 P.3d at 445.

57. 386 P.3d 440 (Colo. 2015).

58. *Id.* at 446.

59. *Id.* at 445.

60. *Id.* at 446.

61. 443 P.3d 1016 (Colo. 2019).

62. *Id.* at 1021, 1025.

63. *People v. Garcia*, 550 P.3d 637, 639–40 (Colo. 2024).

cusses the court's decision in *Garcia*. Section II.A begins by describing the facts and procedural history of the case. Section II.B summarizes the majority opinion, while section II.C and section II.D explain both dissenting opinions' arguments and how they disagree with the majority.

A. Facts and Procedural History

In April 2017, Donald L. Garcia was charged with first-degree aggravated motor vehicle theft after crashing his employer's stolen car into a ditch.⁶⁴ Kate Mattern, an Alamosa Public Defender, was appointed to represent Garcia.⁶⁵ On April 17, 2018, Amanda Hopkins, Mattern's Managing Public Defender, covered for Mattern as Garcia's counsel at a pretrial readiness conference.⁶⁶ Garcia failed to appear at the hearing, and the trial court issued a bench warrant for his arrest.⁶⁷ During this brief conference, Hopkins did not file an entry of appearance on Garcia's behalf and the minute order did not reflect her appearance.⁶⁸ Less than three months later, Hopkins was appointed to the Twelfth District Judicial Court bench, a jurisdiction which includes both Alamosa and Saguache counties.⁶⁹

When Garcia appeared in Saguache County District Court on September 18, he was represented by John Hoag, another attorney with the Alamosa Public Defender's Office.⁷⁰ And this time, now-Judge Hopkins presided over his case, five months after appearing on Garcia's behalf at his pretrial readiness conference.⁷¹ Garcia appeared with Hoag before Judge Hopkins eight times before his two-day trial in May 2019 where he was represented by both Mattern and Hoag.⁷² Judge Hopkins sentenced Garcia to probation after a jury found him guilty of first-degree aggravated motor vehicle theft,⁷³ a class 3 felony.⁷⁴

On appeal, Garcia argued for the first time that Judge Hopkins was statutorily disqualified from presiding over his case under Colorado Revised Statute section 16-6-201 and was thus entitled to automatic reversal and a new trial before a different judge.⁷⁵ Section 16-6-201(1)(c) provides, "A judge of a court of record shall be disqualified to hear or try the case if . . . [s]he has been of counsel in the case."⁷⁶ A split division of the court of appeals reversed Garcia's conviction and remanded the matter

64. *Id.* at 640.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 641 n.1.

69. *People v. Garcia*, 550 P.3d 637, 640 (Colo. 2024).

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. COLO. REV. STAT. § 18-4-409(6)(a) (2025).

75. *Garcia*, 550 P.3d at 640.

76. COLO. REV. STAT. § 16-6-201(1)(c) (2025).

back to the trial court,⁷⁷ holding as a matter of first impression that it is a structural error for a statutorily disqualified judge to preside over a case.⁷⁸ The majority rejected the People's argument that Garcia waived his judicial disqualification claim because nothing in the record made Judge Hopkins's prior involvement obvious to Garcia or his attorneys.⁷⁹

Upon remand, Garcia agreed to waive his objection to Judge Hopkins continuing to preside over his case.⁸⁰ Nonetheless, Judge Hopkins recused herself from the case.⁸¹ The People appealed to the Colorado Supreme Court.⁸² The court granted certiorari to address whether Garcia's failure to preserve the issue for appeal constituted a waiver or a forfeiture of his claim.⁸³

B. Opinion of the Court

Justice Berkenkotter authored the majority opinion, joined by Chief Justice Boatright, Justice Hood, and Justice Samour.⁸⁴ The court reversed the division's judgment and reinstated Garcia's conviction and sentence after holding that while Judge Hopkins was statutorily disqualified, Garcia had waived his claim of error.⁸⁵

Outlining the principles that support disqualifying a biased judge, Justice Berkenkotter began by distinguishing between disqualifying a judge due to actual bias versus the appearance of impropriety.⁸⁶ An actually biased judge is prohibited from presiding over a case to protect litigants' right to a fair trial.⁸⁷ An actually biased presiding judge would amount to structural error because their impact on the impartiality of the trial is difficult to assess.⁸⁸ In contrast, disqualification based on the appearance of impropriety is intended to protect the judiciary by maintaining public confidence.⁸⁹ Justice Berkenkotter noted that although both actual bias and an appearance of impropriety are grounds for a judge's disqualification from a case, the court only questions the reliability of the proceeding's result in the case of actual bias.⁹⁰

Justice Berkenkotter then defined the three distinct provisions of Colorado law that set forth the standard for judges disqualifying themselves: Colorado Revised Statute section 16-6-201, Colorado Rules of

77. *Garcia*, 550 P.3d at 640.

78. *Id.*

79. *Id.* at 641.

80. *Id.* at 647.

81. *Id.*

82. *Id.* at 639–40.

83. *People v. Garcia*, 550 P.3d 637, 639 (Colo. 2024).

84. *Id.*

85. *Id.* at 647–48.

86. *Id.* at 642.

87. *Id.*

88. *Id.*

89. *People v. Garcia*, 550 P.3d 637, 642 (Colo. 2024).

90. *Id.*

Criminal Procedure 21(b), and Colorado Code of Judicial Conduct 2.11(A).⁹¹ Concluding that Judge Hopkins was statutorily disqualified under these provisions because she briefly acted as Garcia's defense counsel, the majority then examined whether Garcia waived or forfeited this claim by failing to preserve the issue at trial.⁹²

Justice Berkenkotter began this section by observing that Garcia never claimed Judge Hopkins was actually biased but instead only argued that she was statutorily disqualified.⁹³ Disqualifications based on actual bias may not be waived, whereas disqualifications for other reasons, such as the "appearance of impropriety," may be.⁹⁴ Justice Berkenkotter went on to define and distinguish waiver from forfeiture according to both Colorado and federal case law.⁹⁵

Because waiver results in the loss of a defendant's rights, the court "indulge[s] every reasonable presumption against waiver."⁹⁶ Waiver need not be express but can be implied if the party's conduct demonstrates the intent to relinquish the right.⁹⁷ Waiver of any kind, including in the context of judicial disqualification, is fact-dependent and requires the court to examine the totality of the circumstances.⁹⁸

Analyzing the totality of the circumstances, Justice Berkenkotter began with whether Garcia knew that Judge Hopkins was statutorily disqualified.⁹⁹ The majority agreed with the People that the only reasonable inference to be drawn from the record was that both Mattern and Hoag knew that Judge Hopkins appeared for Garcia at the April 17 hearing.¹⁰⁰ Justice Berkenkotter supported this conclusion with seven circumstantial reasons discussed below.¹⁰¹

First, attorneys typically know who appears at court on their behalf, which would be especially true in the vast jurisdiction of the Alamosa Public Defender's Office, which sees few felony cases per year.¹⁰² Sec-

91. *Id.* at 643 ("Section 16-6-201(1)(c) states, in relevant part, that '[a] judge of a court of record shall be disqualified to hear or try a case if . . . [s]he has been of counsel in the case.' Crim. P. (21)(b) lays out essentially the same rule, providing that a judge 'shall immediately enter an order disqualifying . . . herself' if a party moves for substitution of the judge on the same grounds—that '[t]he judge has been of counsel in the case'—so long as the motion is substantiated. Crim. P. 21(b)(1)(III), (b)(3). Similarly, C.J.C. 2.11(A)(5)(a) instructs that '[a] judge shall disqualify . . . herself in any proceeding in which the judge's impartiality might reasonably be questioned,' including when the judge has 'served as a lawyer in the matter in controversy, or was associated with the lawyer who participated substantially as a lawyer in the matter during such association.'").

92. *Id.*

93. *Id.*

94. *Id.* at 642–43.

95. *People v. Garcia*, 550 P.3d 637, 643–44 (Colo. 2024).

96. *Id.* at 644 (quoting *People v. Rediger*, 416 P.3d 893, 902 (Colo. 2018)).

97. *Id.*

98. *Id.*

99. *Id.*

100. *People v. Garcia*, 550 P.3d 637, 644 (Colo. 2024).

101. *Id.* at 644–46.

102. *Id.* at 644.

ond, at the April 17 hearing for which Hopkins appeared, the trial court vacated Garcia's jury trial and, third, issued a bench warrant for his arrest.¹⁰³ These were significant developments in the case, which Hopkins would have very likely shared with Mattern.¹⁰⁴

Fourth, the Alamosa's Public Defender's Office employed only eight full-time attorneys at the time, including both Hopkins and Mattern, and was located fifty-three miles from the Saguache District Court where the case was filed.¹⁰⁵ Because of the small size of the office and the distance from the court, as well as Saguache's small criminal docket size, the majority thought it reasonable to infer that coverage would not happen on the fly.¹⁰⁶ Additionally, Justice Berkenkotter reasoned that communication between Hopkins and Mattern about a jury trial, which was a rarity in the area, would have been especially notable to Mattern.¹⁰⁷

Fifth, Justice Berkenkotter then turned to Hoag, Mattern's co-counsel, to discuss the reasons why he likely knew of Hopkins's appearance.¹⁰⁸ Hoag filed a motion to dismiss the charge against Garcia for an alleged violation of Garcia's right to a speedy trial in November 2018, which would have required him to carefully review the defendant's case file and court record.¹⁰⁹ Justice Berkenkotter conceded that although the minute order did not list Hopkins's appearance, Hoag would have had to review Garcia's file, which supports the inference that he was also aware of her appearance.¹¹⁰

Sixth, Garcia's case file would have likely included notes with some "indicia of authorship" from Judge Hopkins's appearance at the April 17 hearing.¹¹¹ Moreover, these notes would have included that Hopkins had covered for Mattern, which both Mattern and Hoag would have seen while preparing for subsequent proceedings.¹¹² Seventh, Justice Berkenkotter reasoned that in the eight times that Garcia's attorneys appeared before Judge Hopkins, their former colleague and boss in a very small jurisdiction, they would have had reason to ascertain if Judge Hopkins had been involved with the case.¹¹³ Justice Berkenkotter then concluded this section by stating that the court "need not indulge unreasonable presumptions."¹¹⁴

103. *Id.* at 644–45.

104. *Id.*

105. *Id.* at 645.

106. *People v. Garcia*, 550 P.3d 637, 645 (Colo. 2024).

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *People v. Garcia*, 550 P.3d 637, 645 (Colo. 2024).

113. *Id.* at 645–46.

114. *Id.* at 646.

Justice Berkenkotter then turned to whether Garcia's failure to move for Judge Hopkins's disqualification amounted to waiver or forfeiture.¹¹⁵ She noted that silence, while typically indicative of forfeiture, can support an inference of intent when the record demonstrates that the counsel was aware of the grounds for an objection but failed to raise it.¹¹⁶ Additionally, the court is more willing to find an implied waiver in the context of silence when it can identify a potential strategic motive for a party's failure to object.¹¹⁷

After examining Colorado case law, the majority accepted the People's argument that Garcia's counsel may well have been motivated to remain silent because Judge Hopkins might have favored Garcia or was preferable to other judges in the district.¹¹⁸ Weighing Garcia's argument, Justice Berkenkotter found that automatic reversal for a defendant who withholds their objection could create a perverse incentive for gamesmanship.¹¹⁹ A defendant who believes the statutorily disqualified judge might be favorable to their case may be tempted to withhold their objection, hoping for a favorable outcome.¹²⁰ Then, if convicted, the defendant could argue for disqualification for the first time on appeal and obtain automatic reversal of their conviction.¹²¹ Justice Berkenkotter further supported the reasonable inference of gamesmanship by pointing to Garcia explicitly waiving his right to disqualify Judge Hopkins after the division remanded the matter back to the trial court.¹²² The court held that Garcia waived any such objections for appellate review by intentionally relinquishing his known right to object to Judge Hopkins presiding over his case.¹²³ Because of Garcia's waiver and because even fundamental rights can be waived, the court declined to reach the question of whether a statutorily disqualified judge presiding over a former client's case requires automatic reversal.¹²⁴

C. Justice Márquez's Dissenting Opinion

Justice Márquez, joined by Justice Hart, authored the first dissent.¹²⁵ Finding that neither the record nor Colorado case law supported a conclusion of waiver, she concluded that Garcia had forfeited his unreserved statutory disqualification claim.¹²⁶ She reasoned that under section 16-6-201(1)(c) and based on the court's precedent in *People v. Abu-*

115. *Id.*

116. *Id.*

117. *Id.*

118. *People v. Garcia*, 550 P.3d 637, 647 (Colo. 2024).

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 648.

124. *People v. Garcia*, 550 P.3d 637, 648 (Colo. 2024).

125. *Id.* (Márquez, J., dissenting).

126. *Id.*

Nantambu-El,¹²⁷ a judge who is statutorily presumed by law to be biased for having been “of counsel” in the case before them is legally indistinguishable from an actually biased judge.¹²⁸ A trial conducted before a biased judge not only violates a defendant’s Sixth Amendment right to an impartial adjudicator but also constitutes structural error.¹²⁹ Unlike well-preserved structural-error claims, unpreserved structural claims should be subjected to a plain-error standard of review.¹³⁰ She reasoned that the court’s precedent requiring automatic reversal of unpreserved structural-error claims rested on a misunderstanding of Supreme Court case law, which instead appeared to endorse plain-error review for such claims.¹³¹ Applying the plain-error standard of review, Justice Márquez found that Judge Hopkins’s statutory disqualification amounted to reversible error and should result in the reversal of Garcia’s conviction.¹³²

D. Justice Gabriel’s Dissenting Opinion

Justice Gabriel also dissented.¹³³ He concluded that Garcia did not waive his statutory disqualification claim¹³⁴ and that possible strategic motives and gamesmanship do not establish the intent necessary for waiver.¹³⁵ Moreover, Justice Gabriel reasoned that because nothing in the record made Judge Hopkins’s prior involvement in the case obvious to her, similarly, nothing made it obvious to Garcia or his attorneys.¹³⁶ While the majority stated that it did not fault Judge Hopkins for not recalling her appearance, nor mentioned any fault of the prosecution, Justice Gabriel emphasized that the majority instead faulted only Garcia’s counsel with no basis for such inconsistent treatment.¹³⁷ Yet in faulting Garcia’s counsel, the majority relies merely on “stacked inferences and assumptions” and cited no evidence that either Garcia or his counsel knew of Judge Hopkins’s appearance at Garcia’s hearing.¹³⁸ He rebuked the majority for derogating from the long-settled principles of waiver by changing from a standard requiring intentional relinquishment of a known right or privilege to one based on what a party could and should have known and done.¹³⁹

Justice Gabriel, like in Justice Márquez’s dissent, extended *Abu-Nantambu-El*’s reasoning to assert that a judge who is statutorily

127. 454 P.3d 1044 (Colo. 2019).

128. *Garcia*, 550 P.3d at 649 (Márquez, J., dissenting).

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 653.

133. *Id.* (Gabriel, J., dissenting).

134. *People v. Garcia*, 550 P.3d 637, 653 (Colo. 2024) (Gabriel, J., dissenting).

135. *Id.* at 655.

136. *Id.* at 654.

137. *Id.* at 655.

138. *Id.* at 654.

139. *Id.* at 653.

disqualified is presumed by law to be biased and is legally indistinguishable from an actually biased judge.¹⁴⁰ Similarly, he found that a judge who is presumed by law to be biased but continues to preside over a trial amounts to structural error.¹⁴¹ However, in breaking from Justice Márquez's dissent, he concluded that reversal was required for this type of structural error per the court's established precedent.¹⁴²

III. ANALYSIS

The court incorrectly decided *Garcia* for three reasons. First, the majority erred by indulging every reasonable inference—and a less-than-reasonable inference—in favor of waiver. Second, the majority conclusively asserts a finding of Garcia's mental state without sufficient support in the record. Third, the majority fails to address the lower court's reliance on *Abu-Nantambu-El* and arguably contravenes its own precedent. Section III.A analyzes these reasons and demonstrates how the majority derogates from its standard of waiver: *intent* to relinquish a *known* right. Section III.B argues that although the decision advances important policy goals—such as emphasizing finality, promoting judicial efficiency, encouraging due diligence, and placing responsibility on advocates to timely assert issues—these advantages are ultimately outweighed by the drawbacks. By lowering the standard for waiver, imposing obligations on public defenders beyond the statute's plain meaning, and increasing the risk that individuals will lose fundamental protections, the decision creates negative consequences that far surpass its benefits. Section III.C concludes by examining this case using the well-defined doctrines of waiver under contract law to find that Garcia did not waive his claim of error and is entitled to a reversed conviction and remanded trial.

A. The Court Incorrectly Decided Garcia

This Section examines the three reasons that the court incorrectly decided *Garcia*. A reviewing court must resolve all reasonable presumptions against waiver.¹⁴³ To begin, the court departs from this well-established principle by instead scouring the record for inferences in favor of waiver. Next, the majority finds no actual knowledge by Garcia, instead relying only on a finding of constructive knowledge and presumed intent through a nontraditional analysis. Last, the majority fails to state why it does not naturally extend the reasoning of *Abu-Nantambu-El* relied on by the lower court and arguably contravenes its precedent.

140. *People v. Garcia*, 550 P.3d 637, 648–49, 652, 655–56 (Colo. 2024) (Gabriel, J., dissenting).

141. *Id.* at 655–56.

142. *Id.* at 656.

143. *Id.* at 644 (majority opinion).

1. Indulging for Waiver

The majority commences its analysis by stating the strong presumption *against* waiver indulges every reasonable presumption against it but quickly intimates its intent to indulge presumptions *for* waiver.¹⁴⁴ The very first heading after beginning the waiver–forfeiture analysis indicates the majority uses a much lower standard, one supported merely by “a reasonable inference.”¹⁴⁵ Perhaps unwilling to show its hand yet, the majority then balances this possibility with a stronger tone of certitude. It states that the *only* reasonable inference to be drawn from the record is that Garcia’s counsel knew of Judge Hopkins’s appearance.¹⁴⁶ Yet in the next paragraph the majority acknowledges that while the lack of direct evidence of Mattern and Hoag’s knowledge “*could suggest* that counsel were unaware of Hopkins’s appearance on Garcia’s behalf, *it could just as easily* mean that counsel knew but had no objection.”¹⁴⁷ In the majority’s own words, the record could support either alternative, knowledge or unawareness. This review of the record stands in stark contrast to the firm conviction the majority had taken just five sentences before—that knowledge is the “only” reasonable inference.¹⁴⁸ If the court were actually indulging every reasonable presumption against waiver, the fact that the record “could just as easily” support both alternatives indicates that the court erred in finding waiver.¹⁴⁹

The majority’s analysis focuses on whether it is reasonable to infer that the defense knew of the grounds for disqualifying Judge Hopkins—thus waiving the claim of error—rather than whether it is reasonable to infer that they did not know—resulting in forfeiture instead—as the majority indicated as their standard.¹⁵⁰ Six of the seven reasons the majority provides include some version of being “reasonable to infer” Garcia’s counsel’s knowledge.¹⁵¹ But as the court alluded to, it would be just as reasonable to infer that Garcia’s counsel did not know or did not remember for each of these reasons.¹⁵² For example, while it is reasonable to infer that Mattern knew Judge Hopkins filled in for her during the brief April 17 hearing, it is also reasonable to infer that she did not, in good faith, recall this fact as a busy public defender by the time the trial took place thirteen months later.¹⁵³ Hopkins’s appearance was not entered on the record and may reasonably not have been documented in the case

144. *See id.*

145. *Id.* (“D. The Record Supports a Reasonable Inference that Defense Counsel Were Aware of the Grounds for Judge Hopkins’s Disqualification.”).

146. *People v. Garcia*, 550 P.3d 637, 644 (Colo. 2024).

147. *Id.* (emphasis added).

148. *Id.*

149. *See, e.g., id.*; *People v. Rediger*, 416 P.3d 893, 902 (Colo. 2018); *Forgette v. People*, 524 P.3d 1, 7 (Colo. 2023) (indulging “every reasonable presumption against waiver”).

150. *See Rediger*, 416 P.3d at 902; *Forgette*, 524 P.3d at 7.

151. *Garcia*, 550 P.3d at 644–46.

152. *Id.* at 644.

153. *See id.* at 640.

file, instead prioritizing the documentation of information pertinent to the trial.¹⁵⁴

The majority further departs from the standard it purports to apply by moving from reasonable to less-than-reasonable inferences in support of waiver. The majority states that it was reasonable to infer that Hopkins's notes about that hearing contained some sort of "indicia of authorship," including "in the form of familiar handwriting or hastily signed or typed initials."¹⁵⁵ But the majority rests its reasoning on one assumption that there was any indicia of authorship, and then on the even more flawed and anachronistic assumption that if there was, Hopkins's employees would recognize her handwriting.¹⁵⁶ The majority assumed, without support in the record, that Hopkins provided Mattern with either handwritten notes or typed notes that were uniquely or identifiably signed.¹⁵⁷ Even still, had Hopkins included hastily typed initials or a sign-off on the email conveying these notes, it is just as reasonable to infer that Mattern would have only copied the information to her case file, leaving no obvious indication of Hopkins's involvement.¹⁵⁸ Without this case file inclusion, it is more reasonable to infer Hoag did not know. The record did not reflect Judge Hopkins's appearance, and that event predated Hoag's first appearance on behalf of Garcia by five months.¹⁵⁹

After stating several reasonable inferences, and some less-than-reasonable inferences, of why Garcia's counsel could have known, the majority resolutely concludes it was "unreasonable to presume" that Garcia's counsel was unaware.¹⁶⁰ This analysis ends without meaningfully engaging with reasonable presumptions against waiver.¹⁶¹

2. Unconventional Finding of Knowledge and Intent

The standard for waiver includes two mental states: a defendant must know of the right, and the defendant must then intend to relinquish that right, either through their words or conduct.¹⁶² Here, the majority presents tenuous analyses for both requisite mental states: first, by finding constructive knowledge by Garcia and his counsel, and second, by

154. *Id.* at 641 n.1.

155. *Id.* at 645.

156. *See id.*

157. *People v. Garcia*, 550 P.3d 637, 645 (Colo. 2024).

158. While copying text may still contain some form of metadata, indicia of authorship more apt in today's age, our judicial system cannot expect public defenders to survey the metadata of what may be hundreds or thousands of pages of notes in order to prevent the loss of a client's fundamental right.

159. *See Garcia*, 550 P.3d at 640.

160. *Id.* at 646.

161. *See id.* at 643–45.

162. *Forgette v. People*, 524 P.3d 1, 7 (Colo. 2023); *People v. Rediger*, 416 P.3d 893, 902–03 (Colo. 2018).

finding intent with evidence unrelated to the specific mental state of the parties.¹⁶³

Beginning with the knowledge requirement, the majority acknowledges that there is no direct evidence that Garcia or his counsel (or any other party) knew of Judge Hopkins's involvement at the time of the trial.¹⁶⁴ But even more troubling, the majority presents no circumstantial evidence that they knew either.¹⁶⁵ The court previously established "that mere acquiescence . . . does not constitute a waiver without some record evidence that the defendant intentionally relinquished a known right."¹⁶⁶ Yet without any evidence of knowledge of Garcia's right to disqualify Judge Hopkins, the court concludes that Garcia deservedly lost his essential right to an impartial judge¹⁶⁷ by instead relying on constructive knowledge.¹⁶⁸

Constructive knowledge is defined as "[t]he assumption that a person should have been aware of a particular fact or circumstance due to their responsible behavior or level of attention."¹⁶⁹ Actual knowledge, on the other hand, is defined as "understanding a fact as true that would lead to further investigation."¹⁷⁰ Thus, constructive knowledge means that a person should or could have been aware but was not actually aware, whereas actual knowledge means that a person subjectively was aware.

To find waiver, Colorado case law generally requires actual knowledge or strong evidence of constructive knowledge. Notably, in the two cases to which the *Garcia* majority analogizes, *Stackhouse*¹⁷¹ and *Richardson*,¹⁷² the defendants had actual knowledge before the court found implied waiver.¹⁷³ Upon deeper analysis of relevant implied waiver case law, this trend continues. The Supreme Court of Colorado has consistently found implied waiver where the defendant had either actual knowledge¹⁷⁴ or such strong constructive knowledge that the defendant

163. See *Richardson v. People*, 481 P.3d 1, 5–6 n.2 (Colo. 2020) (concluding that the court is willing to infer intent when the defendant is knowledgeable and may have a strategic motive).

164. *Garcia*, 550 P.3d at 644.

165. *Id.* at 654 (Gabriel, J., dissenting).

166. *Phillips v. People*, 443 P.3d 1016, 1023 (Colo. 2019) (quoting *Rediger*, 416 P.3d at 897).

167. See *People v. Abu-Nantambu-El*, 454 P.3d 1044, 1050 (Colo. 2019) (quoting *Gray v. Mississippi*, 481 U.S. 648, 668 (1987)) ("Certain constitutional rights are so basic to a fair trial that their violation can never be harmless. Among these is a defendant's Sixth Amendment right to 'an impartial adjudicator, be it judge or jury.'").

168. See *Garcia*, 550 P.3d at 655 (Gabriel, J., dissenting) (discussing the majority's decision to waive an important constitutional right "based on nothing more than speculation as to what Garcia or his counsel could or should have known").

169. *Constructive Knowledge*, JUSTIA LEGAL DICTIONARY, <https://dictionary.justia.com/constructive-knowledge> (last visited Mar. 14, 2026).

170. *Actual Knowledge*, BLACK'S LAW DICTIONARY (2d ed. 1910).

171. *Stackhouse v. People*, 386 P.3d 440 (Colo. 2015).

172. *Richardson v. People*, 481 P.3d 1 (Colo. 2020).

173. *Id.* at 5–6; *Stackhouse*, 386 P.3d at 446.

174. See *Forgette v. People*, 524 P.3d 1, 8 (Colo. 2023) (explaining that the defendant's comments to the judge about a sleeping juror were insufficient to preserve his claim and thus waived);

could only have actually known of the grounds for objection.¹⁷⁵ Illustrating the strength of constructive knowledge required for waiver, the court in *Anderson v. People*¹⁷⁶ found that given the physical dimensions of the room, it was “virtually impossible” for the defendant not to notice the bailiff closing voir dire to the public.¹⁷⁷ By failing to object to the small room’s closure, the defendant waived his right to a public trial.¹⁷⁸ Contrastingly, where the court found only constructive knowledge that was not conclusive of actual knowledge, the court held the defendants had merely forfeited their rights and allowed a review of the error.¹⁷⁹ By breaking from this precedent, the *Garcia* majority lowers the bar for courts to find waiver.

In addition to the issue of actual versus constructive knowledge, Mattern and Hoag’s knowledge presents a double-edged sword. The more likely that Garcia’s counsel knew and failed to raise the issue, the more likely that Judge Hopkins also knew and failed to disqualify herself, violating section 16-6-201(1)(c).¹⁸⁰ A judge who has a duty to disqualify herself, knows of grounds for which she must, yet does not, creates reversible error.¹⁸¹ The fact that she did not disqualify herself when the statutory onus fell on her to find out¹⁸² only strengthens the likelihood that Garcia’s counsel did not know of the grounds for her disqualification and could not easily ascertain them. Moreover, the prosecutors also did not know because, as the party with the greatest desire to disqualify Hopkins—given her prior representation of Garcia could suggest bias in his favor—they would have acted had they been aware of the grounds.¹⁸³ Given the circumstances and the other participants’ behavior, it is only reasonable that no one else knew, making it all the more reasonable that Mattern and Hoag also did not know.¹⁸⁴

Regarding the intent requirement, the court’s dubious conclusion that Garcia’s counsel knew of Hopkins’s appearance provides an equally dubious basis for the circumstantial evidence of intent. Knowledge provides a basis for intent.¹⁸⁵ The court is “willing to infer an intent to waive

People v. Curtis, 681 P.2d 504, 516 (Colo. 1984) (finding waiver after using counsel’s sworn testimony that he informed defendant Jones of his right to testify as evidence of knowledge).

175. See *Anderson v. People*, 490 P.2d 47, 48 (Colo. 1971).

176. 490 P.2d 47 (Colo. 1971).

177. *Id.* at 48.

178. *Id.*

179. See e.g., *People v. Rediger*, 416 P.3d 893, 903 (Colo. 2018) (perceiving no evidence “that Rediger knew of the discrepancy between the People’s tendered jury instruction and the charging document”).

180. COLO. REV. STAT. § 16-6-201(1)(c) (2025).

181. See *Richardson v. People*, 481 P.3d 1, 2 (Colo. 2020).

182. See § 16-6-201(1)(c).

183. *Id.* § 16-6-201(3) (allowing any party to motion for a change of judge).

184. See *id.*

185. See *Intent*, BLACK’S LAW DICTIONARY (2d ed. 1910) (including the example that intent is “the exercise of intelligent will, the mind being fully aware of the nature and consequences of the act which is about [t]o be done”).

when the record demonstrates that counsel was aware of the grounds for an objection but failed to raise it.”¹⁸⁶ Yet, as discussed, the record here does not demonstrate that Garcia’s counsel was aware,¹⁸⁷ and so the court should have been unwilling to infer intent.¹⁸⁸ What defense counsel “ought to have known” and “unintentionally relinquished” are not mutually exclusive and can go hand in hand. Constructive knowledge is more compatible with negligence and the concept of forfeiture, than intent required for the concept of waiver.¹⁸⁹ Rather, the only circumstantial evidence that the majority puts forth for intent rests on Mattern and Hoag actually knowing and remembering Hopkins’s involvement in the case.¹⁹⁰ The majority notes that Garcia and his counsel never raised the objection in any of their eight pre-trial appearances in front of Judge Hopkins or during their two-day trial.¹⁹¹ However, without knowledge, their silence could be nothing but innocent. Thus, without any evidence of knowledge, the court’s conclusion that counsels’ failure to object amounts to a conscious object to waive this claim is unreasonable.¹⁹²

Instead of determining intent by examining the defense’s conduct, the majority relies on concerns about gamesmanship to do most of the heavy lifting.¹⁹³ The majority explains that automatic reversal when a defendant knows of grounds for a judge’s statutory disqualification but chooses to remain silent would create “a perverse incentive.”¹⁹⁴ Rather, the court opts for a route where potential for gamesmanship suffices to prove intent if the defendant could have known of grounds for a challenge.¹⁹⁵ The court was willing to relax the standard for knowledge and intent by relying on weak evidence of constructive knowledge due to their concerns about gamesmanship. But proving intent requires at least some evidence indicating actual knowledge. Without a sufficient showing of the requisite knowledge, this decision creates a perverse rule. Without requiring a minimum of conclusively strong constructive

186. *People v. Garcia*, 550 P.3d 637, 646 (Colo. 2024).

187. *Id.* at 654 (Gabriel, J., dissenting).

188. *Id.* at 646 (majority opinion) (“[The court has] previously been willing to infer an intent to waive when the records demonstrates that counsel was aware”); *see, e.g.*, *Richardson v. People*, 481 P.3d 1, 5–6 (Colo. 2020) (inferring intent to waive where the defense counsel knew the juror was the trial judge’s wife yet did not challenge her during jury selection).

189. *Phillips v. People*, 443 P.3d 1016, 1022 (Colo. 2019) (quoting *United States v. Carrasco-Salazar*, 494 F.3d 1270, 1272 (10th Cir. 2007)) (“[W]hereas waiver requires ‘intent,’ forfeiture occurs ‘through neglect.’”).

190. *Garcia*, 550 P.3d at 640, 644.

191. *Id.* at 640.

192. *See The Mental State Requirement in Criminal Law Cases*, JUSTIA, <https://www.justia.com/criminal/mental-state-requirement/#:~:text=The%20U.S.%20Supreme%20Court%20has,between%20these%20forms%20of%20intent> (last visited Dec. 26, 2024) (explaining that purpose includes a defendant’s conscious desire for a certain result to happen).

193. *See Garcia*, 550 P.3d at 646–47 (agreeing with the People that Garcia’s counsel may well have been motivated to stand silent for strategic reasons); Henderson, *supra* note 17, at 1008–10.

194. *Garcia*, 550 P.3d at 647.

195. *See id.* at 655 (Gabriel, J., dissenting) (disagreeing with the majority that waiver can be established by possible gamesmanship without showing any additional evidence of intent).

knowledge and a record that supports that knowledge,¹⁹⁶ the majority effectively removes intent from the standard and reduces a finding of waiver to whether there was a potential for gamesmanship. The analysis becomes if potential gamesmanship, then waiver; if not, then forfeiture. This would result in a whole category of errors that could never be forfeited and, therefore, could never be reviewed on appeal. A defendant who knows of the error could raise the issue, but a defendant who does not actually know but could have known would lose their fundamental right by no fault of their own and be left remediless.

3. Deviating from the Natural Precedent of *Abu-Nantambu-El*

The majority chose not to extend *Abu-Nantambu-El*'s reasoning to *Garcia*.¹⁹⁷ In *Abu-Nantambu-El*, the court held that it is structural error for a statutorily disqualified juror to serve on a jury because a juror who is "presumed by law to be biased is legally indistinguishable from an actually biased juror."¹⁹⁸ Unpersuaded that this would encourage gamesmanship, the court found that seating this impliedly biased juror violated the defendant's right to a fair trial and required reversal.¹⁹⁹ It reasoned that certain constitutional rights are so fundamental to a fair trial that their violation can never be harmless.²⁰⁰ "Among these," the court explained, "is a defendant's Sixth Amendment right to 'an impartial adjudicator, be it judge or jury.'"²⁰¹ The court concluded it was not free to alter the General Assembly's legislative judgment about which jurors significantly risk "actual bias or the appearance of bias" nor was it free to "read a distinction into the statute that does not exist."²⁰²

Here, the same principle should apply: a statutorily disqualified judge is legally indistinguishable from an actually biased judge.²⁰³ The court has determined that the disqualification of an actually biased judge cannot be waived.²⁰⁴ So it naturally follows that a statutorily disqualified judge—who is legally indistinguishable from an actually biased judge—can also not be waived. The plain language of section 16-6-201(1)(c) makes no distinction between potential judges who evince actual bias and those judges who are conclusively presumed by law to be biased.²⁰⁵

196. See *id.* at 654–55 ("[T]he majority cites . . . no evidence to show that either Garcia or his counsel knew of (or recalled) Judge Hopkins's one appearance in this case.").

197. See *id.* at 641 (majority opinion) (reversing the judgment of the court of appeals relying on *Abu-Nantambu-El*).

198. *People v. Abu-Nantambu-El*, 454 P.3d 1044, 1045 (Colo. 2019).

199. See *id.* at 1047, 1050, 1052.

200. *Id.* at 1050.

201. *Id.*

202. *Id.* at 1051.

203. Cf. *id.* at 1045 (noting that a statutorily disqualified juror is "presumed by law to be biased").

204. *People ex rel. A.G.*, 262 P.3d 646, 651 (Colo. 2011).

205. See COLO. REV. STAT. § 16-6-201(1)(c) (2025); cf. *Abu-Nantambu-El*, 454 P.3d at 1045.

By reading a distinction into the statute that does not exist, the majority alters the General Assembly's legislative judgment.

The court instead finds that Judge Hopkins is legally distinguishable from an actual biased judge and reasons that her disqualification was sought to prevent the appearance of impropriety.²⁰⁶ This is true of her disqualification under the applicable Code of Judicial Conduct 2.11(A)(5)(a),²⁰⁷ which is designed to protect the public's confidence in the judiciary.²⁰⁸ However, unlike judicial canons of ethics designed to prevent the appearance of impropriety, laws requiring disqualification of a biased judge, like section 16-6-201(1)(c), are designed to ensure that litigants receive a fair and impartial trial.²⁰⁹ But the court's decision failed to protect either; it undermined Garcia's fundamental right and hurt the public's confidence in the judiciary by allowing Garcia's former advocate to preside over his trial.

The Supreme Court has deemed the violation of the right to an impartial judge as a structural error that is per se reversible regardless of its actual harm.²¹⁰ Thus, after applying the *Abu-Nantambu-El* principle and finding that the error was rendered unwaivable, the court should have automatically reversed the conviction and remanded for a new trial.²¹¹

B. The Policy Implications of Lowering the Standard of Waiver

Although the decision seems informed by concerns about gamesmanship rather than a strict reading of the record, the outcome has its advantages. First, the decision emphasizes finality.²¹² It established that Garcia and others similarly situated did not have the right to review this kind of error and reinstated Garcia's final judgment for a crime committed over seven years before.²¹³ Second, the decision promotes judicial

206. *People v. Garcia*, 550 P.3d 637, 642 (Colo. 2024). In cases where factual guilt is clear but a structural error has occurred, judges have been inclined to narrowly construe the right to avoid finding automatic reversal. *See generally* Steven M. Shepard, *The Case Against Automatic Reversal of Structural Errors*, 117 YALE L.J. 1180, 1186–1201 (2008).

207. *See Garcia*, 550 P.3d at 642–43.

208. *A.G.*, 262 P.3d at 650; *see* COLO. CODE OF JUD. CONDUCT R. 1.2 (2024) (“A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary . . .”).

209. *See A.G.*, 262 P.3d at 651 (“In contrast to judicial canons seeking to prevent the appearance of impropriety, laws requiring disqualification of a biased or prejudiced judge are designed to ensure that litigants receive a fair, impartial trial.”).

210. *Arizona v. Fulminante*, 499 U.S. 279, 309–10 (1991); David McCord, *The “Trial”/“Structural” Error Dichotomy: Erroneous, and Not Harmless*, 45 U. KAN. L. REV. 1401, 1401 (1997); *see Henderson, supra* note 16, at 972.

211. *See Fulminante*, 499 U.S. at 309–310.

212. Jeffrey G. Ho, *Finality, Comity, and Retroactivity in Criminal Procedure: Reimagining the Teague Doctrine After Edwards v. Vannoy*, 73 STAN. L. REV. 1551, 1551 (2021) (“The Court has justified this approach to retroactivity by emphasizing *comity*, respect for the judicial process of the state courts, and *finality*, the closure a judgment of conviction is supposed to bring.”).

213. *People v. Garcia*, 550 P.3d 637, 640 (Colo. 2024).

efficiency.²¹⁴ Unpreserved claims resulting in reversible error and a new trial would place some undue strain on the judicial system. Third, the decision encourages due diligence.²¹⁵ It encourages defense counsel to avoid willful blindness and to investigate any chance of statutory disqualification from the beginning. Fourth, the decision places the burden on advocates to timely assert issues.²¹⁶ By removing any chance of remedy for this kind of unpreserved claim, it communicates to attorneys, “Use it or lose it.”

While the decision has advantageous policy reasons, the negative policy implications far outweigh and far outreach the benefits. Most significantly, the decision lowers the standard for waiver in two ways.²¹⁷ First, it lowers the bar for what satisfies evidence of knowledge. By requiring only a possibility of knowledge, this attenuated conclusion stands in stark contrast to indulging every reasonable presumption against waiver.²¹⁸ Second, it makes intent too elastic.²¹⁹ Intent requires actual knowledge.²²⁰ By finding intent through circumstances such as constructive knowledge or a potential for gamesmanship, intent takes on a new meaning unsupported by legal tradition.²²¹

By lowering the standard for waiver, this decision blurs the line between waiver and forfeiture,²²² makes it harder to bring these structural-error claims, and ultimately makes it easier for people to lose their fundamental rights without the opportunity for review.²²³ Rights are a way of stopping the government from encroaching on people’s lives.²²⁴

214. *Judicial Efficiency*, LLOYD WINTER L. (Aug. 12, 2024), <https://lloydwinterlaw.com/blog/judicial-efficiency/#:~:text=%E2%80%9CJudicial%20efficiency%E2%80%9D%20is%20a%20term,the%20proper%20course%20of%20action> (“[W]here justice can be served in a manner that does not waste the court’s time and resources, that is the proper course of action.”).

215. MODEL RULES OF PRO. CONDUCT r. 1.3 cmt. (A.B.A. 2024) (“A lawyer should pursue a matter on behalf of a client despite . . . inconvenience to the lawyer . . .”).

216. See Henderson, *supra* note 16, at 1004.

217. See Garcia, 550 P.3d at 653 (Gabriel, J., dissenting) (concluding that the majority substantially transforms long-settled principles of waiver and changes the governing standard).

218. See *id.* at 643–44 (majority opinion).

219. See *id.* at 655 (Gabriel, J., dissenting).

220. See *Intent*, LAW DICTIONARY, <https://thelawdictionary.org/intent/> (last visited Mar. 15, 2026) (emphasis added) (defining intent as “the exercise of intelligent will, the mind being *fully aware* of the nature and consequences of the act”).

221. A possibility to benefit from a choice does not show a conscious objective to make that choice.

222. Phillips v. People, 443 P.3d 1016, 1022 (Colo. 2019) (explaining that waiver requires knowledge and intent; forfeiture occurs through neglect).

223. See Forgette v. People, 524 P.3d 1, 7 (Colo. 2023) (noting that appellate courts may review forfeited errors under the plain-error standard but may not review waived errors); People v. Rediger, 416 P.3d 893, 902 (Colo. 2018) (explaining that the court “do[es] not presume acquiescence in the loss of” a defendant’s rights).

224. See Grossi, *supra* note 7, at 1025; *Rights*, LEGAL INFO. INST. - WEX, <https://www.law.cornell.edu/wex/rights> (last visited Dec. 30, 2024) (“Rights are the privileges or protections a person is entitled to by law.”). The definition lists examples of well-known freedoms such as, “freedom of speech, freedom of press, freedom of religion, freedom of assembly, and freedom of expression.” *Id.*

This decision sweeps too many people into waiver who may have no intention to waive their rights and gives the court too much discretion to scour the record to find implied waiver. Implied waiver should continue to demand a high standard to prevent the unintentional loss of rights.

Additionally, the decision is not supported by the plain language of the statute. The statute places the onus on Judge Hopkins to disqualify herself, yet the analysis focuses on what the defense counsel failed to do.²²⁵ Undermining legislative intent,²²⁶ it places more responsibility on defense attorneys than demanded by the law. By increasing an attorney's burden, this decision will likely disproportionately affect indigent clients and public defenders with large caseloads.²²⁷ It is undisputed that Garcia himself did not know, yet it was he who lost his rights.²²⁸ A hired attorney, on the other hand, can spend more time and has more resources to avoid similar causes of waiver, resulting in fewer lost rights for the haves than the have-nots.²²⁹

Beyond the impacts of tomorrow's public servants, the decision casts a negative light on these public servants in finding what Garcia's counsel should have known, instead of what Garcia's counsel actually knew or could have known.²³⁰ The majority goes to great lengths to avoid impugning Judge Hopkins's integrity, but in doing so, implicitly impugns the defense counsel's integrity and ability. The court has stated that the "assumption that any competent attorney would withhold a meritorious argument at trial in the hope of having something to argue on appeal if the trial goes badly belies reality."²³¹ Yet the majority implies this was the reality here, thus implying that Garcia's counsel were not competent attorneys. By communicating how Garcia's counsel should have performed, the majority steps out of the role as a neutral umpire and picks up the bat to demonstrate how it would have swung.

C. An Alternative Approach to Judicial Disqualification and Structural Error Informed by Contract Law

Despite the high stakes associated with structural error, courts and scholars have struggled to articulate a consistent framework for how to treat waiver or forfeiture of structural error.²³² *Garcia* illustrates the

225. See COLO. REV. STAT. §§ 16-6-201(1)-(2) (2025).

226. See *People v. Abu-Nantambu-El*, 454 P.3d 1044, 1051 (Colo. 2019).

227. See Marco Poggio, *Public Defenders Are 'Dangerously' Overworked, Report Finds*, LAW360 (Sept. 12, 2023), <https://www.law360.com/pulse/articles/1719991/public-defenders-are-dangerously-overworked-report-finds>.

228. *People v. Garcia*, 550 P.3d 637, 644 (Colo. 2024).

229. See Poggio, *supra* note 227.

230. See *Garcia*, 550 P.3d at 655 (Gabriel, J., dissenting).

231. *Bondsteel v. People*, 439 P.3d 847, 852 (Colo. 2019).

232. See Tisdale, *supra* note 33, at 1671 ("[S]cholars have mixed views as to whether the Court has definitively ruled on whether structural error can be forfeited. Likewise, lower courts are in disagreement about the effect of forfeiture on structural error."); Henderson, *supra* note 17, at 1008 (regarding the question of "whether structural error can ever be waived. The Supreme Court has not

quagmire that many courts face: a potential for automatic reversal forces the court's hand.

In the absence of a settled doctrinal standard, this section offers an alternative analysis: applying principles from contract law—where doctrines of waiver, conditions, and remedies are well-developed. Because both the United States Constitution and statutes can be interpreted as social contracts,²³³ this section uses the social contract as a bridge to analyze the majority's decision in *Garcia* from a lens of contract law. It begins by briefly explaining how both the Constitution and statutes—and specifically Colorado Revised Statute section 16-6-201—are social contracts. It then explains and applies some of the basic principles of contract law to determine if the contract was breached or if performance was excused. Finally, this section will conclude with appropriate remedies for the social contract at issue.

The Constitution is often cited as an explicit form of America's social contract.²³⁴ It provides what the government can and cannot do and the correlative rights to which citizens are entitled in exchange for citizens surrendering certain freedoms as consideration.²³⁵ Statutes too are social contracts, expanding and narrowing rights of both the government and people.²³⁶ Under contract law, a right is the benefit of a covenant and is considered the inverse of that covenant.²³⁷ A covenant is a promise, or “a manifestation of intention to act or refrain from acting in a specified way.”²³⁸ To amount to a legally enforceable contract, a covenant requires consideration,²³⁹ either a benefit conferred or prejudice suffered by a person to induce a promise.²⁴⁰

The Constitution promises citizens a fair trial, which in turn provides the right to an impartial judge.²⁴¹ Colorado's General Assembly has reflected that same right in Colorado's statutes by providing certain circumstances under section 16-6-201 in which a trial is considered unfair

yet answered this question, though several circuits have weighed in”); Murray, *supra* note 36, at 1806 n.80 (“The Court has yet to decide whether the exemptions from harmless error review it has developed with respect to preserved claims also apply to [forfeited or waived] claims.”).

233. See Louis Henkin, *The United States Constitution as Social Compact*, 131 PROC. OF THE AM. PHIL. SOC'Y 261, 263 (1987); Caroline Pearson, *The U.S. Constitution as an Active Social Contract*, at 1 (Feb. 1, 2016) (Reading Brief for POLS 4140) (on file with author); *Ethics Defined – Social Contract Theory*, UNIV. OF TEX. MCCOMBS SCH. OF BUS., <https://ethicsunwrapped.utexas.edu/glossary/social-contract-theory#:~:text=The%20U.S.%20Constitution%20is%20often,in%20the%20Constitution's%20social%20contract> (last visited Mar. 16, 2025).

234. Henkin, *supra* note 233, at 263; Pearson, *supra* note 233, at 1.

235. See *Ethics Defined*, *supra* note 233.

236. *Id.*

237. DAVID G. EPSTEIN, BRUCE A. MARKELL, LAWRENCE PONOROFF, *CASES AND MATERIALS ON CONTRACTS: MAKING AND DOING DEALS* 684 (6th ed. 2022).

238. RESTATEMENT (SECOND) OF CONTS. ch. 1, § 2(1) (A.L.I. 1981).

239. *Id.* at ch. 3, § 17(1).

240. *Consideration*, BLACK'S LAW DICTIONARY (2d ed. 1910).

241. See U.S. CONST. amend. VI; Chapman v. California, 386 U.S. 18, 23 (1967).

and must result in the judge's disqualification.²⁴² As consideration for this right, citizens assent to be bound by judicial decisions resulting from that trial, along with providing the government the right to summon them for jury duty and the agreement to relinquish any right to administer private justice.²⁴³ Thus, with the promise of a fair trial induced by the previously mentioned benefits conferred, the Constitution and section 16-6-20 manifestly act as legally enforceable contracts.

Fundamental to American contract jurisprudence is *pacta sunt servanda*, or “contracts are to be kept,” and those who breach contracts are liable for their damages.²⁴⁴ E. Allan Farnsworth, one of the country's foremost legal scholars of contracts once said, “[C]ontract law is, in its essential design, a law of strict liability, and the accompanying system of remedies operates without regard to fault.”²⁴⁵ If performance is promised, then there is no excuse for failing to perform²⁴⁶ unless that performance is conditional.²⁴⁷ A condition does not affect the existence of a contract, but merely the duty owed.²⁴⁸ If the condition is met, then the duty is owed; however, if the condition is unmet, then the duty is excused without breach of contract.²⁴⁹ While courts require strict compliance with express conditions—even if the results are harsh—courts hold a strong presumption against interpreting language in favor of implied conditions.²⁵⁰

Generally, a contract's analysis typically begins with determining the terms of a contract, both through its plain language and context, and then comparing those terms to the conduct of the parties.²⁵¹ To interpret a contract as containing a condition, courts look for clear language indicating contingency, such as “if” and “only if.”²⁵² However, even where a court would interpret a condition, a party may choose to waive it.²⁵³ Waiver can be either express or implied by conduct demonstrating an

242. See COLO. REV. STAT. § 16-6-201 (2025).

243. 28 U.S.C. § 1861.

244. See RESTATEMENT (SECOND) OF CONTS. ch. 11, intro. note (A.L.I. 1981).

245. 3 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS 195–96 (3d ed. 2004).

246. See RESTATEMENT (SECOND) OF CONTS. ch. 10, § 235(2) (A.L.I. 1981) (“When performance of a duty under a contract is due any non-performance is a breach.”).

247. *Excuses for Nonperformance: Conditions Following Contract Formation*, LEXISNEXIS PRAC. GUIDANCE, <https://www.lexisnexis.com/supp/largelaw/no-index/coronavirus/commercial-transactions/commercial-transactions-excuses-for-nonperformance.pdf> (last visited Mar. 16, 2026).

248. EPSTEIN et al., *supra* note 237, at 686.

249. *Id.* at 686–87; see RESTATEMENT (SECOND) OF CONTS. ch. 9, §§ 224–25 (A.L.I. 1981).

250. See *Oppenheim & Co., Inc. v. Oppenheim, Appel, Dixon & Co.*, 660 N.E.2d 415, 418–19 (N.Y. 1995); *Luttinger v. Rosen*, 316 A.2d 757, 758 (Conn. 1972).

251. See EPSTEIN et al., *supra* note 237, at 683.

252. Ken Adams, *How a Court Determines Whether Something Is an Obligation or a Condition*, ADAMS ON CONT. DRAFTING (Jan. 4, 2007), <https://www.adamsdrafting.com/how-a-court-determines-whether-something-is-an-obligation-or-a-condition/>.

253. *Excuses for Nonperformance*, *supra* note 247; *Litigation, Overview - Waiver: Contract Defense*, BLOOMBERG L. PRAC. GUIDANCE, <https://www.bloomberglaw.com/document/X59ABIIS000000> (last visited Mar. 15, 2026) [hereinafter *Waiver Overview*].

intent to relinquish a known right, the conduct must be clear and unequivocal, or “intentionally inconsistent with claiming the right.”²⁵⁴

Here, beginning first with plain language of the social contract term at issue—section 16-6-201(1)(c)—it states that “(1) A judge . . . shall be disqualified to hear or try a case if . . . [s]he has been of counsel in the case.”²⁵⁵ With the presence of “if” to indicate contingency, this clause is a covenant containing a condition: a judge is disqualified on the explicit condition that she served as counsel in the case.²⁵⁶ This follows that when a judge has served as counsel in a case then the condition is met, and the duty to disqualify is owed and may not be excused.²⁵⁷

Next examining the context of section 16-6-201(1)(c), the following provision, section 16-6-201(2), states that “[a]ny judge who knows of circumstances which disqualify him in a case shall, on his own motion, disqualify himself.”²⁵⁸ This provision clarifies that the duty to disqualify if the judge has served as counsel on the case is not conditioned on either party’s knowledge but on the judge’s knowledge. Because knowledge is accounted for in section 16-6-201(2) but has been omitted from section 16-6-201(1), a court would be unlikely to interpret it as an implied condition.²⁵⁹ Additionally, subsection (2) refers to knowledge as relating to the process of disqualification, and not the state of being disqualified as subsection (1) refers.²⁶⁰ Without any language indicating that knowledge was a condition of disqualification under subsection (1), a court would be unlikely to presume it as an implied waiver and would likely read the clause as a separate covenant.²⁶¹

Taken altogether, the plain language and context of section 16-6-201(1)’s covenant establish that a judge who had been counsel in the case and presides, regardless of the knowledge of their involvement, violates the covenant and breaches the contract.

Next, applying the terms of section 16-6-201(1)(c) to the circumstances in *Garcia*, a court would find that Judge Hopkins violated the covenant because Judge Hopkins met the condition by serving as counsel, rendering the duty to disqualify inexcusable.²⁶² Judge Hopkins failed to perform and thus breached the covenant. Additionally, *Garcia*’s counsel did not waive the right to receive an impartial judge. Their conduct

254. *Waiver Overview*, *supra* note 253.

255. *See* COLO. REV. STAT. § 16-6-201(1)(c) (2025).

256. *See Excuses for Nonperformance*, *supra* note 247.

257. *See* RESTATEMENT (SECOND) OF CONTS. § 225 (A.L.I. 1981).

258. *See* COLO. REV. STAT. § 16-6-201(2) (2025).

259. CONG. RSCH. SERV., R45153, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS 23 (2018).

260. *See* COLO. REV. STAT. §§ 16-6-201(1)-(2) (2025).

261. *See* *Oppenheimer & Co., Inc. v. Oppenheim, Appel, Dixon & Co.*, 660 N.E.2d 415, 418–19 (N.Y. 1995); *Luttinger v. Rosen*, 316 A.2d 757, 758 (Conn. 1972).

262. *See* *Oppenheimer*, 660 N.E.2d at 419; *see* *Luttinger*, 316 A.2d at 758.

was neither clear nor unequivocal in indicating intentional relinquishment of a known right because their conduct was consistent with a lack of awareness.²⁶³ Thus, the failure to provide Garcia with an impartial judge entitles him to remedy.²⁶⁴

Within contract law, contracting parties may include remedy clauses to control what remedies are available to injured parties.²⁶⁵ Within the context of social contracts of statutes, we often see “remedy clauses” provided, for example, in the form of sentencing requirements for criminal laws and fine ranges for civil laws bargained for through the democratic system.²⁶⁶ When no contractual remedy is included and damages are inadequate to compensate for an injured party’s expectations, a court may opt for an equitable remedy.²⁶⁷ The goal of equitable remedy is “to produce the same result, or to put parties in the same position, as if the contract had been performed as the parties intended.”²⁶⁸ Equitable remedies may include an injunction or specific performance.²⁶⁹

Here, a court should find that the breach of a statutorily disqualified judge presiding over a trial deserves an equitable remedy. No contractual remedy has been included in this statute²⁷⁰ and adequate compensation for Garcia’s expectation is extremely difficult to quantify.²⁷¹ The appropriate equitable remedy in this case would be to reverse his conviction under Judge Hopkins and remand for a new trial with an impartial judge.²⁷² Providing this remedy would “produce the same result” and put the parties in the same position “as if the contract had been performed as the parties intended.”²⁷³

263. See *Waiver Overview*, *supra* note 253; *supra* Sections III.A.1–2.

264. See RESTATEMENT (SECOND) OF CONTS. ch. 10, § 235(2) (A.L.I. 1981).

265. See *Commercial, Clause Description - Miscellaneous: Remedies*, BLOOMBERG L. PRAC. GUIDANCE, <https://www.bloomberglaw.com/document/XERT620C000000> (last visited Mar. 16, 2026) [hereinafter *Clause Description*].

266. By voting for a politician who “is tough on crime,” citizens participate in the bargaining and contract formation process of future covenants or modifications to existing covenants within the social contract of statutes.

267. See RESTATEMENT (SECOND) OF CONTS. ch. 16, § 357 (A.L.I. 1981); *Clause Description*, *supra* note 265.

268. *Litigation, Overview - Specific Performance*, BLOOMBERG L. PRAC. GUIDANCE, <https://www.bloomberglaw.com/document/X6AL5KSO000000> (last visited Mar. 16, 2026) [hereinafter *Specific Performance*].

269. *Equitable Relief*, LEGAL INFO. INST. - WEX, https://www.law.cornell.edu/wex/equitable_relief (last visited Dec. 31, 2024).

270. See COLO. REV. STAT. § 16-6-201 (2025).

271. See *Sullivan v. Louisiana*, 508 U.S. 275, 282 (1993) (explaining that the effects of structural errors on a party’s fundamental rights “are necessarily unquantifiable and indeterminate”). The Supreme Court has held “hav[ing] an impartial judge” as prototypical structural error. See, e.g., *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991); *Chapman v. California*, 386 U.S. 18, 22 (1967); *Tumey v. Ohio*, 273 U.S. 510, 535 (1927).

272. *Henderson*, *supra* note 17, at 972 (quoting *Fulminante*, 499 U.S. at 308)) (“[C]onstitutional errors that remained *per se* reversible without a finding of harmlessness—such as . . . one’s right to be tried before an impartial judge—those errors cannot simply be ‘assessed in the context of other evidence.’”).

273. *Specific Performance*, *supra* note 268.

CONCLUSION

With the *Garcia* decision, the Supreme Court of Colorado effectively lowered the standard for finding waiver by holding that Garcia had waived his right to object to Judge Hopkins's disqualification without finding sufficient evidence of knowledge. While the court stated its intent to apply the originally high standard, the analysis quickly proved to deviate from the standard it articulated. The resulting decision contravened precedent without acknowledgment and, more significantly, made it easier for individuals to lose their rights.