ADVANCE SHEET HEADNOTE
June 10, 2024
AS MODIFIED JULY 1, 2024

2024 CO 41M

No. 22SC633, *People v. Garcia*—Criminal Law—Waiver—Disqualification of a Judge.

After a jury convicted him of first degree motor vehicle theft, the defendant argued for the first time on appeal that the judge who presided over his case was statutorily disqualified because, when she was a managing public defender, she had covered for his lawyer in a brief pretrial proceeding. The defendant asserted this amounted to structural error requiring automatic reversal. A split division of the court of appeals agreed and reversed the defendant's conviction.

The supreme court agrees with the division majority that the judge was statutorily disqualified but concludes that when a defendant who is aware of potential grounds to disqualify a judge fails to object, the defendant waives their claim that the judge was statutorily disqualified. The court further determines that the specific facts and circumstances of this case support a reasonable inference that the defendant's attorneys were aware that the judge was statutorily disqualified.

The court, accordingly, concludes that their failure to object amounts to the intentional relinquishment of a known right, and thus, the defendant's claim of judicial disqualification was waived.

Accordingly, the court reverses the judgment of the division below and remands the case back to the division to consider Garcia's arguments that section 13-1-122, C.R.S. (2023), deprived the judge of judicial authority and that her service violated his due process right to an impartial judge.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2024 CO 41M

Supreme Court Case No. 22SC633
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 19CA1629

Petitioner:

The People of the State of Colorado,

v.

Respondent:

Donald L. Garcia.

Judgment Reversed
en banc
June 10, 2024

Opinion modified, and as modified, petition for rehearing DENIED. EN BANC.

July 1, 2024

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JUSTICE BERKENKOTTER delivered the Opinion of the Court, in which **CHIEF JUSTICE BOATRIGHT**, **JUSTICE HOOD**, and **JUSTICE SAMOUR** joined.
JUSTICE MÁRQUEZ, joined by **JUSTICE HART**, dissented.
JUSTICE GABRIEL dissented.

JUSTICE BERKENKOTTER delivered the Opinion of the Court.

¶1 After a jury convicted him of first degree aggravated motor vehicle theft, Donald L. Garcia argued for the first time on appeal that the judge who presided over his case was statutorily disqualified because, when she was the managing defender for the Alamosa Public Defender's Office, she had covered for his lawyer in a brief pretrial proceeding. Garcia asserted that this amounted to structural error requiring automatic reversal. A split division of the court of appeals agreed and reversed Garcia's conviction. We granted certiorari to consider whether a defendant who is aware of potential grounds to disqualify a judge, but fails to object, waives or forfeits their claim that the judge was disqualified under Colorado's judicial disqualification statute, section 16-6-201, C.R.S. (2023). We conclude that a defendant who fails to object under these circumstances waives their objection.

¶2 Applying that rule to the specific facts of this case, we then determine that Garcia waived his claim by failing to object or move for the judge's disqualification. Thus, the division majority erred in concluding that Garcia's conviction must be automatically reversed for structural error. And because the record in this case establishes that Garcia waived his claim under section 16-6-201, we need not decide whether it is structural error for a statutorily disqualified judge to preside over a case under the circumstances presented here.

¶3 Accordingly, we reverse the judgment of the division below and remand the case back to the division to consider Garcia's arguments that section 13-1-122, C.R.S. (2023), deprived the judge of judicial authority and that her service violated his due process right to an impartial judge.

I. Facts and Procedural History

¶4 In April 2017, Garcia stole his employer's truck and drove it off a county road and into a ditch, where the truck broke down. Garcia caused extensive damage to the truck.

¶5 The prosecution charged him in Saguache County District Court with one count of first degree aggravated motor vehicle theft. Kate Mattern, with the Alamosa Regional Office of the State Public Defender's Office, was appointed to represent Garcia. Over the next several months, Mattern filed substantive motions and appeared on Garcia's behalf at several hearings in Saguache County District Court. On April 17, 2018, Amanda Hopkins, then the Managing Public Defender in the Alamosa Public Defender's Office, covered for Mattern, appearing briefly on Garcia's behalf at a pretrial readiness conference one month before his trial was scheduled to take place. But Garcia failed to appear at the hearing, so the trial court vacated the trial date and issued a bench warrant for his arrest. Hopkins uttered a total of thirty-nine words during the hearing.

¶6 Approximately three months later, on July 10, 2018, Hopkins was appointed to the Twelfth Judicial District Court bench.

¶7 Garcia appeared on bond on July 17, 2018. Mattern then appeared for him during his next regularly scheduled court appearance on August 21, 2018, though Garcia again failed to appear. The court gave Mattern the opportunity to contact Garcia and have him appear two days later in Rio Grande County Court. The court scheduled Garcia's next appearance for September 18, 2018, but noted that it would issue a bench warrant for Garcia's arrest if he failed to appear in court in Rio Grande. That turned out to be unnecessary as Garcia appeared as ordered in Rio Grande County Court.

¶8 When Garcia next appeared in Saguache County District Court on September 18, he was represented by John Hoag, another attorney with the Alamosa Public Defender's Office. And this time, presiding over his case was now-Judge Amanda Hopkins.

¶9 Leading up to his trial, Garcia appeared with Hoag before Judge Hopkins eight times. Both Mattern and Hoag represented Garcia during his two-day trial in May 2019. Garcia's counsel never voiced an objection to Judge Hopkins presiding over Garcia's case during any of the eight pretrial appearances, or at any point during the trial or the sentencing hearing.

¶10 A jury convicted Garcia of one count of first degree aggravated motor vehicle theft, and Judge Hopkins subsequently sentenced him to probation.

¶11 Garcia then appealed, and argued for the first time that he was entitled to automatic reversal of his conviction because Judge Hopkins was statutorily disqualified from presiding over his case under section 16-6-201. The People responded that Garcia waived his claim by failing to object or move for Judge Hopkins's disqualification. Alternatively, the People asserted that Garcia's claim should be reviewed for plain error because no evidence in the record demonstrated that Judge Hopkins was actually biased against him.

¶12 In a split, published decision, a division of the court of appeals reversed Garcia's conviction, holding as a matter of first impression that it is structural error for a statutorily disqualified judge to preside over a case. *People v. Garcia*, 2022 COA 83, ¶ 6, 519 P.3d 1064, 1067. The division majority first determined that Judge Hopkins was required to recuse herself under section 16-6-201(1)(c), which provides that "[a] judge of a court of record shall be disqualified to hear or try a case if . . . [sh]e has been of counsel in the case." *Id.* at ¶ 5, 519 P.3d at 1067 (alteration in original) (quoting § 16-6-201(1)(c)). In so concluding, the majority relied on this court's opinion in *People v. Julien*, 47 P.3d 1194 (Colo. 2002), *see Garcia*, ¶ 5, 519 P.3d at 1067, where we explained that "a judge must disqualify . . . herself sua sponte . . . if facts exist tying the judge to personal knowledge of disputed

evidentiary facts concerning the proceeding, some supervisory role over the attorneys who are prosecuting the case, or some role in the investigation and prosecution of the case during the judge's former employment." *Julien*, 47 P.3d at 1198. In the majority's view, Judge Hopkins's appearance for Mattern on Garcia's behalf at the April 17 hearing—brief as it was—meant that she had played some role in his defense and had "been of counsel" in the case, and she therefore erred by not disqualifying herself.[1] *Garcia*, ¶ 5, 519 P.3d at 1067 (quoting § 16-6-201(1)(c)).

¶13 Next, drawing on this court's opinion in *People v. Abu-Nantambu-El*, 2019 CO 106, 454 P.3d 1044, the majority determined that Judge Hopkins's failure to disqualify herself constituted structural error requiring reversal. *Garcia*, ¶¶ 7–9, 519 P.3d at 1067. In *Abu-Nantambu-El*, we held that it is structural error for a juror who is statutorily disqualified pursuant to section 16-10-103(1), C.R.S. (2023), to nonetheless serve on a jury because such jurors "are conclusively presumed by law to be biased." ¶ 32, 454 P.3d at 1051. Extending *Abu-Nantambu-El*'s reasoning

[1] The majority noted it "intend[ed] no condemnation" of Judge Hopkins, emphasizing that she was not Garcia's assigned counsel and had not filed an entry of appearance on his behalf; that she appeared at only one court date, a pretrial readiness conference a month before trial at which Garcia failed to appear; and that the minute order from the conference did not reflect Judge Hopkins's appearance. On this record, the division concluded that it was not surprising that Judge Hopkins would not have realized her prior involvement in the case. *Garcia*, ¶ 5 n.1, 519 P.3d at 1067 n.1.

to the judicial disqualification context, the majority explained that section 16-6-201 similarly "conclusively presumes that a judge who previously served in the case as counsel is biased." *Garcia*, ¶ 8, 519 P.3d at 1067. Perceiving "no logical distinction . . . between a statutorily disqualified juror and a statutorily disqualified judge," *id.*, the majority concluded that structural error occurred because Garcia stood trial "before a biased judge." *Id.* at ¶ 9, 519 P.3d at 1067 (quoting *Hagos v. People*, 2012 CO 63, ¶ 10, 288 P.3d 116, 119).

¶14 The majority rejected the People's argument that Garcia waived his judicial disqualification claim. Noting that waiver is "the *intentional* relinquishment of a *known* right or privilege," *id.* at ¶ 11, 519 P.3d at 1067 (quoting *People v. Rediger*, 2018 CO 32, ¶ 39, 416 P.3d 893, 902), the majority found that nothing in the record made Judge Hopkins's prior involvement in the case "obvious to Garcia or his attorneys." *Id.* And the majority dismissed the People's concern that a rule requiring automatic reversal would lead to unfair gamesmanship, reasoning that "[t]he prosecutor had the same opportunity to raise the issue as did Garcia." *Id.* at ¶ 12, 519 P.3d at 1068. Consequently, the majority reversed Garcia's conviction. *Id.* at ¶ 13, 519 P.3d at 1068.

¶15 Judge Dailey dissented in relevant part and concluded that Garcia's failure to raise his judicial disqualification claim constituted a waiver. *Id.* at ¶ 23, 519 P.3d at 1069 (Dailey, J., concurring in part and dissenting in part). In reaching this

conclusion, he first assumed, without deciding, that it is structural error for a statutorily disqualified judge to preside over a trial. *Id.* at ¶ 24, 519 P.3d at 1069–70. But, he explained, "even fundamental rights can be waived, regardless of whether the deprivation thereof would otherwise constitute structural error." *Id.* at ¶ 25, 519 P.3d at 1070 (quoting *Stackhouse v. People*, 2015 CO 48, ¶ 8, 386 P.3d 440, 443). And "[u]nless the basis for disqualification is actual bias," he continued, "failure to timely request a substitution of judge waives any claim that the judge should have recused herself." *Id.* at ¶ 26, 519 P.3d at 1070 (citing *People v. Dobler*, 2015 COA 25, ¶ 7, 369 P.3d 686, 688). He emphasized, as well, that while the statutory scheme "deems Judge Hopkins to be *impliedly* biased," it does not declare that she is *actually* biased. *Id.* at ¶ 27, 519 P.3d at 1070.

¶16 Next, Judge Dailey considered whether Garcia waived his objection to Judge Hopkins presiding over his case. In his view, there was no real question that Garcia waived his objection because "it defies logic to suggest that the deputy state public defenders representing Garcia at trial would not have known that Judge Hopkins had appeared at the April hearing." *Id.* at ¶ 28, 519 P.3d at 1070. Judge Dailey also expressed concern about gamesmanship. "It does not," he observed, "take a significant leap to imagine the possible strategic value of not seeking the disqualification of a judge whom, in light of her prior position, defense counsel may consider preferable to other judges in the district." *Id.* at ¶ 28 n.1, 519 P.3d at

1070 n.1. Consequently, the fact that Judge Hopkins presided over Garcia's case despite being statutorily disqualified was not, in Judge Dailey's view, grounds for automatically reversing his conviction. *Id.* at ¶ 30, 519 P.3d at 1070.

¶17 The People petitioned for certiorari review, and we granted that petition. [2]

II. Analysis

¶18 We begin by outlining the relevant standard of review and principles of law. We then address Garcia's contention that Judge Hopkins was statutorily disqualified from presiding over his case under section 16-6-201 and conclude that she was. But because Garcia's counsel never moved for Judge Hopkins's disqualification, we are left with a critical question: Did Garcia's failure to preserve the issue for appeal constitute a waiver or a forfeiture of his claim? After discussing the concepts of waiver and forfeiture, we agree with the People that Garcia waived his claim. Accordingly, we reverse the division's judgment.

¶19 Given our conclusion that Garcia waived his objection, we need not decide whether it is structural error requiring automatic reversal for a statutorily

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[2] We granted certiorari to review the following issue:

> Whether a defendant waives or forfeits a claim that the trial judge was statutorily disqualified under section 16-6-201, C.R.S. (2022), when the record shows the defense knew of the grounds for potential disqualification but failed to object, move for disqualification, or move for recusal.

disqualified judge, who is not actually biased, to preside over a former client's case.

A. Standard of Review

¶20 Whether a trial judge's disqualification was required is a question of law that we review de novo. *Richardson v. People*, 2020 CO 46, ¶ 22, 481 P.3d 1, 5; *Julien*, 47 P.3d at 1197.

B. Section 16-6-201(1)(c), Crim. P. 21(b), and C.J.C. 2.11(A)

¶21 This court has long embraced the most basic principle of our justice system that judges "must be free of all taint of bias and partiality." *Julien*, 47 P.3d at 1197. A judge who is actually biased is prohibited from presiding over a case "to ensure that litigants receive a fair, impartial trial." *People in Int. of A.G.*, 262 P.3d 646, 651 (Colo. 2011). An actually biased judge presiding over a trial is a structural error. *See United States v. Marcus*, 560 U.S. 258, 263 (2010) (explaining that structural errors are those errors that so impact a case that it is difficult to assess their effect, including standing trial before a biased judge). Disqualification based on the appearance of impropriety, on the other hand, is "intended to protect public confidence in the judiciary rather than to protect the individual rights of litigants." *A.G.*, 262 P.3d at 650. As we have noted in other disqualification contexts, "[o]nly when a judge was actually biased will we question the reliability of the proceeding's result. In other words, while both an appearance of impropriety and

actual bias are grounds for *recusal* from a case, only when the judge was actually biased will we question the *result*." *Sanders v. People*, 2024 CO 33, ¶ 50, ___ P.3d ___ (quoting *People in Int. of A.P.*, 2022 CO 24, ¶ 29, 526 P.3d 177, 183).

¶22 Three distinct provisions of Colorado law work in service of these principles, as pertinent here: section 16-6-201, Crim. P. 21(b), and Colorado Code of Judicial Conduct ("C.J.C.") 2.11(A). Each "set[s] forth Colorado standards by which a judge determines . . . whether to disqualify . . . herself from [a] case." *Julien*, 47 P.3d at 1197.[3] 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 . . . [sh]e has been of counsel in the case."

¶23 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).

¶24 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

[3] We note that, while the *Julien* court relied on an older version of the Code of Judicial Conduct, the relevant portion of the version we review now is substantially similar.

reasonably be questioned," including when the judge has "served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association." In interpreting the former version of the Code of Judicial Conduct, we have previously explained that a judge who has "personally participated in the prosecution of [a] case *in any way*" is disqualified from presiding over that case. *Julien*, 47 P.3d at 1200 (emphasis added).

¶25 We see no principled reason that the same rule would not apply to a judge who participated in the *defense* of a case in any way. So, where a judge has formerly served as a prosecutor or defense attorney, "if facts exist tying the judge to . . . *some role* in . . . the case during the judge's former employment," the judge should disqualify herself. *Id.* at 1198 (emphasis added).

¶26 Here, there is no question—and the parties do not dispute—that Judge Hopkins acted as Garcia's defense counsel when she appeared on his behalf at the April 17 hearing, regardless of the brevity of her appearance. Thus, as an initial matter, we agree with the division majority that Judge Hopkins was statutorily disqualified from presiding over Garcia's case because she had "been of counsel" in the case and played "some role" in his defense. *Garcia*, ¶ 5, 519 P.3d at 1067 (first quoting § 16-6-201(1)(c); and then quoting *Julien*, 47 P.3d at 1198).

C. Waiver and Forfeiture

¶27 But Garcia never objected to Judge Hopkins presiding over his case, never moved to disqualify her under section 16-6-201(3), and never moved for her substitution under Crim. P. 21(b)(1). Critically, Garcia has also never asserted that Judge Hopkins was actually biased against him; rather, he contends only that she was statutorily disqualified. And this court has recognized that "litigants may waive disqualification when the disqualification is not for reasons of actual bias or prejudice." *A.G.*, 262 P.3d at 650. Thus, we next turn to consider whether Garcia waived or forfeited his claim that Judge Hopkins was statutorily disqualified from presiding over his case. *See Forgette v. People*, 2023 CO 4, ¶ 30, 524 P.3d 1, 7 (explaining that appellate courts may review forfeited errors under the plain error standard but may not review waived errors).

¶28 "Waiver is 'the *intentional* relinquishment of a *known* right or privilege.'" *Id.* at ¶ 28, 524 P.3d at 7 (quoting *Rediger*, ¶ 39, 416 P.3d at 902). Forfeiture, on the other hand, is "the failure to make the timely assertion of a right." *Rediger*, ¶ 40, 416 P.3d at 902 (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993)). Thus, while a waiver requires intent, forfeiture generally comes about through neglect. *Forgette*, ¶ 29, 524 P.3d at 7. "The distinction between a waiver and a forfeiture is significant because 'a waiver extinguishes error, and therefore appellate review, but a forfeiture does not.'" *Id.* at ¶ 30, 524 P.3d at 7 (quoting *Rediger*, ¶ 40, 416 P.3d

at 902). In other words, while an appellate court may not review a waived error, a forfeited error may still be reviewed under the plain error standard. *Id.*

¶29 We review de novo whether a claim is waived or forfeited. *Id.* at ¶ 15, 524 P.3d at 5. We "do not presume acquiescence in the loss of" a defendant's rights and therefore "indulge every reasonable presumption against waiver." *Rediger*, ¶ 39, 416 P.3d at 902 (quoting *People v. Curtis*, 681 P.2d 504, 514 (Colo. 1984)). At the same time, however, we have long recognized that a party's waiver need not be express; an implied waiver occurs when a party's conduct demonstrates the intent to relinquish the right or when the party acts inconsistently with the asserted right. *Forgette*, ¶ 28, 524 P.3d at 7. Importantly, we have acknowledged that even in the judicial disqualification context, the existence and validity of a waiver is fact-dependent, ultimately requiring consideration of "the totality of the circumstances." *People v. Janis*, 2018 CO 89, ¶ 22, 429 P.3d 1198, 1203; *see also A.G.*, 262 P.3d at 652 ("If grounds for disqualification are known and not promptly raised, it may constitute waiver, *depending on the facts and circumstances of the case*." (emphasis added)).

D. The Record Supports a Reasonable Inference that Defense Counsel Were Aware of the Grounds for Judge Hopkins's Disqualification

¶30 The People contend that the only reasonable inference to be drawn from the record is that Mattern and Hoag knew that Judge Hopkins—their former

boss—appeared for Garcia at the April 17 hearing. Garcia counters that the record lacks any evidence that he or his defense counsel knew that Judge Hopkins was statutorily disqualified. The division majority sided with Garcia, finding that nothing in the record made Judge Hopkins's prior involvement in the case obvious to Garcia or his attorneys. Given the particular facts of this case, we agree with the People.

¶31 To begin, we observe that there is no evidence that Garcia, who failed to appear in court on April 17, knew that Judge Hopkins appeared on his behalf.[4] We further acknowledge that there's no direct evidence in the record regarding what Garcia's attorneys knew as to this point. But that is hardly surprising given that counsel never raised an objection with the court. So the record's silence doesn't—in and of itself—answer the question before us because it could mean many different things. While it 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 to her presiding over his case for any number of reasons.

[4] And, like the division, we don't fault Judge Hopkins for not recalling her brief appearance on Garcia's behalf and note that the minute order does not reflect her appearance.

¶32 What's more, the majority was not limited to looking for an "obvious" indication of waiver. Waiver may be shown by obviousness, but it's certainly not required. This is why we turn next to look to the "totality of the circumstances" to determine if counsel waived this objection. *Janis*, ¶ 22, 429 P.3d at 1203. In examining the specific circumstances, we are mindful that a party can prove waiver based on circumstantial evidence. *Id.* at ¶ 26, 429 P.3d at 1203.

¶33 Here, we consider several different events and circumstances that shed light on whether Garcia's attorneys were aware of Judge Hopkins's previous appearance in his case. First, in our view, it's reasonable to infer that an attorney usually knows who appears on their behalf when they cannot attend a hearing themself. That is particularly so in this case, as we discuss in more detail below, given the size of the Alamosa Public Defender's Office, the size and location of the Saguache County District Court, and the very small number of felony cases filed there during this time period. Second, when Garcia failed to appear at the April 17 hearing, the trial court vacated the date set for Garcia's jury trial and issued a bench warrant for his arrest. We are hard pressed to view the court's issuance of a bench warrant as a development that Hopkins would not have shared with Mattern. Mattern, we would expect, would want to try to contact Garcia to alert him to the issuance of the warrant and determine how best to clear it.

¶34 We are just as disinclined, third, to think that Hopkins would not have alerted Mattern to the court's decision to vacate Garcia's jury trial, which was set to begin just a month later. Garcia would, of course, need to know his trial date was continued. So, too, would Mattern. And while we don't know if Mattern had witnesses to notify or subpoenas to continue, we do think it's reasonable to infer that Hopkins would have informed her of the court's decision in case she did and also so Mattern could manage her own calendar.

¶35 Fourth, the location of Garcia's prosecution is significant here as well. Garcia was charged in the Twelfth Judicial District, a sparsely populated jurisdiction spread across six very large counties. When the district attorney's office filed this case in 2017, the Alamosa Public Defender's Office, which covered the entire district, employed only eight full-time public defenders—including Hopkins, who supervised the other seven attorneys.

¶36 The specific court in which Garcia's case was filed is worth considering too. The Saguache County District Court—located in Saguache, Colorado, a town of roughly 539 residents—is fifty-three miles from Alamosa. In fiscal year 2017, there were only fifty-nine criminal cases filed in the district court. Based on its small dockets and its distance from Alamosa, it's reasonable to infer that coverage would not happen on the fly in Saguache. Plus, a case getting ready to go to a jury trial in Saguache County District Court was a notable event during this time frame.

With only four district court cases going to jury trial there in fiscal year 2017 and another four going to jury trial in fiscal year 2018, we are inclined to conclude not only that Hopkins would have told Mattern about the continuance, but also that the communication to Mattern would have stood out in a way that it might not have elsewhere.

¶37 We note, fifth, that Hoag, too, had his own reasons to know about Hopkins's appearance. In November 2018, he filed a motion to dismiss the charge against Garcia for an alleged violation of Garcia's right to a speedy trial. Preparation of a speedy trial motion requires defense counsel to review the defendant's case file and court records to correctly calculate the speedy trial date. Indeed, Hoag specifically noted in the motion that Garcia failed to appear at the April 17 hearing, which tolled the speedy trial clock. While the minute order did not list Hopkins's appearance, in our view, the fact that Hoag would have needed to thoroughly review the notes in Garcia's file lends additional support to the inference that defense counsel would have been aware of Judge Hopkins's appearance at this pivotal moment in the case.

¶38 We look, sixth, to the practical realities around how attorneys prepare to go to court. One would reasonably expect that when Mattern appeared on behalf of Garcia on August 21, 2018, the first regularly scheduled court date immediately following his April 17 failure to appear, she would have reviewed the notes in

Garcia's case file. One would further expect that those notes would have some indicia of authorship, even if it was simply in the form of familiar handwriting or hastily signed or typed initials.

¶39 Critically, because Garcia again failed to appear on August 21, Mattern would have needed those notes during the August 21 court date to determine when Garcia last failed to appear. From these, she would have seen that last happened on April 17, when Hopkins appeared on Garcia's behalf. We decline to infer that Mattern would have addressed the court on August 21 regarding Garcia's failure to appear without first looking at his file to remind herself how often and when he last failed to appear. And realizing that she wasn't in court on April 17, we think it's reasonable to infer that Mattern would have noticed, also, who did appear that day on Garcia's behalf.

¶40 One would expect the same of Hoag when he first appeared for Garcia on September 18, 2018, in order to familiarize himself with the case and its history. And the same is true as Hoag and Mattern prepared for Garcia's trial, when they would again have needed to review the notes in the case file regarding its procedural history.

¶41 Seventh, one would reasonably expect that when Garcia's attorneys appeared for eight different pretrial proceedings and then trial and saw Judge Hopkins—their former colleague who had also been their boss in a very small

office—on the bench in this very small jurisdiction, they would time and time again have had reason, on top of all the other reasons, to consider if Judge Hopkins had ever touched this case.

¶42 Some of these reasons alone would not necessarily lead us to infer that Garcia's attorneys were aware of Judge Hopkins's role in this case. But the number and significance of these events and circumstances—including the importance of the trial court's rulings at the April 17 hearing, the fact that Mattern would need to know about the warrant and the vacation of the jury trial date, the close proximity in time between Hopkins's appearance and her appointment to the bench, the small size of the Alamosa Public Defender's Office, and the very few criminal cases that went to jury trial in Saguache County District Court during the same year—lead us to conclude that Garcia's attorneys were aware that Judge Hopkins was disqualified under section 16-6-201(1)(c).

¶43 Like Judge Dailey, we too think "it defies logic" to conclude that Garcia's defense counsel "would not have known that Judge Hopkins had appeared at the April hearing." *Garcia*, ¶ 28, 519 P.3d at 1070 (Dailey, J., concurring in part and dissenting in part). True, we indulge every reasonable presumption against waiver, but we need not indulge unreasonable presumptions. *See Janis*, ¶ 33, 429 P.3d at 1204–05 ("Although we indulge every reasonable presumption against waiver, we do not find it reasonable to presume that defense counsel failed to

adequately represent [the defendant's] interests."). On the specific facts of this case, we find it unreasonable to presume that Garcia's attorneys were unaware that Judge Hopkins "ha[d] been of counsel" in Garcia's case and was therefore disqualified. *See* § 16-6-201(1)(c).

¶44 As a result, we turn next to determine whether Garcia's failure to move for disqualification or otherwise raise an objection amounts to a waiver or, instead, a forfeiture.

E. Garcia's Failure to Raise the Issue of Disqualification Amounts to Intentional Relinquishment

¶45 Recall that whether a particular claim is waived "depend[s] on the facts and circumstances of the case," *A.G.*, 262 P.3d at 652, and that a waiver may be implied, "as when a party engages in conduct that manifests an intent to relinquish a right or privilege or acts inconsistently with its assertion." *Forgette*, ¶ 28, 524 P.3d at 7. In other words, while counsel's silence as to an issue typically indicates neglect supporting forfeiture, *Phillips v. People*, 2019 CO 72, ¶ 22, 443 P.3d 1016, 1023, in certain circumstances, counsel's silence looks more like an intentional choice than a negligent oversight.

¶46 We have previously been willing to infer an intent to waive when the record demonstrates that counsel was aware of the grounds for an objection but failed to raise it. *See, e.g.*, *Richardson*, ¶ 26, 481 P.3d at 5–6 (defendant waived his right to challenge a juror where defense counsel knew the juror was the trial judge's wife

but nevertheless declined to challenge the juror during jury selection); *Stackhouse*, ¶ 17, 386 P.3d at 446 (discerning a waiver of public trial claim where defense counsel was aware of the courtroom's closure and the reasons for the closure but did not object). Indeed, in the context of judicial disqualification specifically, we have explained that "when a party knows of grounds for disqualification but waits to file a motion until after an adverse judgment has been issued, the motion is barred by waiver." *A.G.*, 262 P.3d at 652; *see also Aaberg v. Dist. Ct.*, 319 P.2d 491, 494 (Colo. 1957) ("Failure to promptly assert known grounds of disqualification . . . may well constitute a waiver thereof.").

¶47 Our willingness to find an implied waiver in certain cases is animated in part by a concern that a defendant could intentionally forego objecting to an error "as a strategic parachute to preserve an avenue of attack on appeal." *Stackhouse*, ¶ 16, 386 P.3d at 446. Thus, where we can identify a potential strategic motive for a party's failure to object, we are more inclined to interpret silence as an intentional choice rather than a negligent oversight. *See Phillips*, ¶ 22 n.4, 443 P.3d at 1023 n.4 ("If there is evidence in the record that defense counsel made a conscious decision to forego raising a claim for strategic or other reasons, we will not hesitate to find an implied waiver.").

¶48 In *Stackhouse*, for example, our waiver analysis turned in part on our acknowledgment that under some circumstances there are "sound strategic

reasons to waive the right to a public trial." ¶ 15, 386 P.3d at 445. And in *Richardson*, our conclusion that the defendant waived his right to challenge a potentially biased juror was likewise supported by our observation that "[d]efense counsel could have had sound strategic reasons" for not challenging the juror. ¶ 26 n.2, 481 P.3d at 6 n.2; *see also People v. Forgette*, 2021 COA 21, ¶ 31, 491 P.3d 457, 464 ("[Defense] counsel may have determined that the sleeping juror was favorable to the defense or that his effective absence from hearing eyewitness cross-examination was beneficial."), *vacated in part on other grounds by Forgette*, ¶ 37, 524 P.3d at 8.

¶49 In *Phillips*, however, we perceived no implied waiver. ¶ 22, 443 P.3d at 1023. There, the defendant maintained that the trial court erred in admitting certain evidence against him but switched horses on appeal, asserting different grounds for inadmissibility than he had in the trial court. *Id.* at ¶¶ 13–14, 443 P.3d at 1021–22. We concluded that the defendant forfeited, rather than waived, his claims, reasoning in part that "we [we]re hard pressed to think of strategic reasons for failing to raise [the defendant's] unpreserved claims in the trial court." *Id.* at ¶ 28, 443 P.3d at 1025. Distinguishing that case from *Stackhouse*, we reiterated that strategic reasons to waive a right provided a "basis for inferring a waiver" but noted that we couldn't discern any "benefit or advantage" to be gained from counsel's failure to contest the admissibility of evidence. *Id.* at ¶¶ 27, 28, 443 P.3d

at 1025. We relied on similar reasoning in *Cardman v. People*, 2019 CO 73, ¶ 11, 445 P.3d 1071, 1077–78, to conclude that the defendant had not waived his claim that his confession was involuntary:

> Given that Cardman's counsel clearly (and understandably) wanted the confession excluded from the trial, what benefit could he have obtained from his failure to present an *additional* ground to contest its admissibility? None comes to mind. We are equally hard pressed to think of any strategic advantage he could have gained by refraining to raise an argument that should have convinced the trial court to suppress [the confession].

¶50 The People argue that Garcia's counsel may well have been motivated to stand silent for strategic reasons—namely, that Judge Hopkins might "actually favor [Garcia], . . . [be] preferable to other[judges] in the district, or . . . [be] a known quantity while [her] potential successor" may not be. Thus, in their view, the division's opinion encourages unfair gamesmanship.

¶51 We agree with the People that, in this regard, this case is more akin to *Stackhouse* and *Richardson* than it is to *Phillips* and *Cardman*. The rule that Garcia argues for, one that would require automatic reversal even where a defendant knows of the grounds for a judge's statutory disqualification but fails to raise the issue, could create a perverse incentive: A defendant who believes a statutorily disqualified judge might be favorable to their case may be tempted to keep their objection to themself, hoping for a favorable outcome. Then, if convicted, the defendant could assert the disqualification objection on appeal, arguing that it

entitles them to automatic reversal of their conviction and a new trial with a new judge. *See A.G.*, 262 P.3d at 653 ("[W]ere we to require a new termination hearing . . . , we might encourage an untimely motion to recuse as a means to a second chance with a different judge.").

¶52 Interestingly, we note that after the division reversed his conviction and remanded the matter back to the trial court, Garcia appeared at a hearing and agreed to waive his objection to Judge Hopkins continuing to preside over his case. Judge Hopkins nonetheless recused herself from the case and arranged through her chief judge to have a different judge assigned to preside over the matter. Even so, Garcia's offer to waive his objection to her statutory disqualification further supports a reasonable inference that Garcia was not concerned about Judge Hopkins presiding over his case after all.

¶53 Given the particular facts of this case, we conclude that Garcia intentionally relinquished his known right to object to Judge Hopkins presiding over his case and therefore waived any such objection for appellate review.

¶54 Garcia nonetheless contends that we should affirm the division majority because section "16-6-201(1)(c) conclusively presumes bias as a matter of law for judges who have been of counsel in the case," such that trial before a statutorily disqualified judge results in fundamental unfairness and necessarily constitutes structural error. Even fundamental rights, however, "can be waived, regardless

of whether the deprivation thereof would otherwise constitute structural error." *Stackhouse*, ¶ 8, 386 P.3d at 443. And because we conclude that Garcia's counsel waived his objection, we need not reach the question of whether automatic reversal is required when a statutorily disqualified judge presides over a former client's case.

III. Conclusion

¶55 For all these reasons, we reverse the division's judgment and remand the case back to the division to consider Garcia's arguments that section 13-1-122 deprived the judge of judicial authority and that her service violated his due process right to an impartial judge.

JUSTICE MÁRQUEZ, joined by **JUSTICE HART**, dissented.

JUSTICE GABRIEL dissented.

JUSTICE MÁRQUEZ, joined by JUSTICE HART, dissenting.

¶56 Like Justice Gabriel, I agree with the court of appeals that (1) Donald L. Garcia did not waive his claim, (2) the resulting error was structural, and (3) Garcia's conviction should be reversed. I therefore respectfully dissent. But I write separately because, as I stated in *Stackhouse v. People*, 2015 CO 48, 386 P.3d 440, "I see no principled justification not to review an unpreserved alleged error of this nature for plain error." ¶ 32, 386 P.3d at 449 (Márquez, J., dissenting). Accordingly, I would review Garcia's forfeited claim for plain error. Under the circumstances of this case, I conclude that reversal is warranted.

I. Forfeiture

¶57 Whereas waiver is the "intentional relinquishment of a known right or privilege," forfeiture is "the failure to make the timely assertion of a right." *People v. Rediger*, 2018 CO 32, ¶¶ 39–40, 416 P.3d 893, 902 (first quoting *Dep't of Health v. Donahue*, 690 P.2d 243, 247 (Colo. 1984); and then quoting *United States v. Olano*, 507 U.S. 725, 733 (1993)). The majority correctly notes that the distinction between waiver and forfeiture is "significant because 'a waiver extinguishes error, and therefore appellate review, but a forfeiture does not.'" Maj. op. ¶ 28 (quoting *Forgette v. People*, 2023 CO 4, ¶ 30, 524 P.3d 1, 7). In other words, if a legal rule is violated during trial court proceedings and the defendant merely fails to object,

the error is not extinguished; the defendant's claim is instead forfeited and subject to plain error review on appeal. *See Olano*, 507 U.S. at 733–734.

¶58 Here, the record does not support the conclusion that "Garcia or any of his counsel knew of and intentionally relinquished their statutory disqualification argument," Dis. op. ¶ 94, particularly given that we "indulge every reasonable presumption against waiver," *Rediger*, ¶ 39, 416 P.3d at 902 (quoting *People v. Curtis*, 681 P.2d 504, 514 (Colo. 1984)). Accordingly, I agree with Justice Gabriel that Garcia did not waive his claim. Dis. op. ¶ 97. But in my view, Garcia's failure to timely assert an objection instead means we should treat the unpreserved claim as forfeited. The question then becomes: What standard of review should govern Garcia's claim on appeal?

II. Plain Error Review of Forfeited Structural Error Claims

¶59 I agree with Justice Gabriel and the division majority that the error here is structural. *See* Dis. op. ¶¶ 101–08. As Justice Gabriel suggests, *see* Dis. op. ¶ 103, this conclusion flows from our decision in *People v. Abu-Nantambu-El*, 2019 CO 106, 454 P.3d 1044. In that case, we explained that "a juror who is presumed by law to be biased is legally indistinguishable from an actually biased juror." *Abu-Nantambu-El*, ¶ 2, 454 P.3d at 1045. Accordingly, we held that it was structural error to seat a juror "who was presumed by law to be biased under section 16-10-103(1)(k), C.R.S. (2019) (requiring the court to sustain a challenge to

a potential juror who is 'a compensated employee of a public law enforcement agency or a public defender's office')"—regardless of whether the juror was actually biased. *Id.*

¶60 The same principle applies here. Section 16-6-201(1), C.R.S. (2023), sets forth the bases for disqualifying a judge, listing various circumstances and relationships that give rise to a presumption of bias. As relevant here, section 16-6-201(1)(c) mandates the disqualification of any judge who has been "of counsel" in the case before them. For purposes of judicial disqualification, this statutory presumption of bias is indistinguishable from actual bias. And a trial conducted before a biased judge not only violates a defendant's Sixth Amendment right to an impartial adjudicator, *Abu-Nantambu-El*, ¶ 27, 454 P.3d at 1050 (citing *Gray v. Mississippi*, 481 U.S. 648, 668 (1987)), it also constitutes structural error, *Hagos v. People*, 2012 CO 63, ¶ 10, 288 P.3d 116, 119.

¶61 While I agree with our case law to the extent it requires automatic reversal for *preserved* claims of structural error, "I see no principled justification not to review an *unpreserved* alleged error of this nature for plain error." *Stackhouse*, ¶ 32, 386 P.3d at 449 (Márquez, J., dissenting) (emphasis added). As I stated in *Stackhouse*, such an approach not only comports with our treatment of all other unpreserved claims of constitutional error, but also offers an alternative to the perceived binary choice appellate courts face between finding waiver, even on

questionable grounds, or reluctantly requiring automatic reversal. *Id.* at ¶¶ 31–34, 386 P.3d at 449–50. Moreover, I believe that our precedent requiring automatic reversal of even unpreserved structural error claims rests on a misunderstanding of Supreme Court case law, which instead appears to endorse plain error review for such claims.

A. Colorado Case Law Purports to Rely on Supreme Court Precedent for Its Rule Requiring Automatic Reversal of Even Unpreserved Structural Errors

¶62 This court has previously concluded that our precedent "prohibits plain (or harmless) error review of alleged structural errors." *Stackhouse*, ¶ 10 n.3, 386 P.3d at 443 n.3 (addressing an unpreserved claim); *see also People v. Hassen*, 2015 CO 49, ¶ 7, 351 P.3d 418, 420 ("Structural errors 'are not amenable to either a harmless error or a plain error analysis because such errors affect the framework within which the trial proceeds, and are not errors in the trial process itself.'" (quoting *Griego v. People*, 19 P.3d 1, 7 (Colo. 2001))); *Hagos*, ¶ 10, 288 P.3d at 119 ("[C]ertain errors are structural errors, which require automatic reversal without individualized analysis of how the error impairs the reliability of the judgment of conviction."). But this rule (forbidding plain error review of an unpreserved claim of structural error) is grounded in case law that traces back to *Arizona v. Fulminante*, 499 U.S. 279, 309–10 (1991), a Supreme Court case involving a *preserved* claim of structural error. In other words, *Fulminante* does not support our rule;

indeed, a line of Supreme Court cases interpreting and expanding on *Fulminante* rejects it.

B. Supreme Court Precedent Suggests that Unpreserved Claims of Structural Error May Be Reviewed for Plain Error

¶63 The Supreme Court has addressed appellate review of unpreserved structural error claims in several cases. This line of cases has repeatedly declined to answer whether a structural error automatically satisfies federal plain error review under Fed. R. Crim. P. 52(b), which (among other things) requires that an error affect a defendant's substantial rights, usually through a showing of prejudice. But the Court's cases appear to assume that unpreserved structural error claims may be reviewed for plain error.

¶64 This line of case law begins with *Fulminante*, a case concerning the erroneous admission of a defendant's involuntary confession. There, the Court explained that while some preserved constitutional errors are subject to harmless error review, *structural* errors "defy analysis by 'harmless-error' standards." 499 U.S. at 309. Notably, harmless error is the standard codified in Fed. R. Crim. P. 52(a), which governs review of preserved claims. Understood in this context, the comments in *Fulminante* about defying harmless-error standards make sense. The defendant in that case had preserved his claim. *Fulminante*, 499 U.S. at 283. The

Court therefore had no reason to discuss *unpreserved* claims of structural error, or Fed. R. Crim. P. 52(b), which imposes plain error review for unpreserved claims.

¶65 However, two years after its decision in *Fulminante*, the Court in *Olano* alluded to plain error review of unpreserved structural error claims. 507 U.S. at 735. *Olano* dealt with the improper presence of alternate jurors during deliberations. *Id.* at 730. The defendants' unpreserved claims were evaluated under the plain error standard in Fed. R. Crim. P. 52(b). *Olano*, 507 U.S. at 730–31. Under that standard, (1) there must be error, (2) the error must be plain, and (3) the defendant must show that the plain error "affect[ed] substantial rights." *Id.* at 733–34 (quoting Fed. R. Crim. P. 52(b)). The Court noted that in "most cases," that third requirement means the error must have been prejudicial. *Id.* at 734. But it left open the possibility of a special category of forfeited errors exempt from that requirement, and cited to *Fulminante*'s discussion of structural error as a potential example. *Id.* at 735 (citing *Fulminante*, 499 U.S. at 310). The Court's analysis nevertheless appeared to accept plain error review of forfeited structural error claims.

¶66 The Court soon revisited structural error and Fed. R. Crim. P. 52(b) in *Johnson v. United States*, 520 U.S. 461 (1997). In *Johnson*, the petitioner failed to object when a trial court (rather than the jury) decided the issue of materiality in a perjury prosecution. *Id.* at 463. The court of appeals reviewed Johnson's

unpreserved claim for plain error under Fed. R. Crim. P. 52(b). *Johnson*, 520 U.S. at 464.

¶67 Johnson argued to the Supreme Court that his claim involved structural error and therefore should not have been reviewed for plain error. *Id.* at 466. The Court rejected Johnson's contention and reviewed for plain error, observing that "the seriousness of the error claimed does not remove consideration of it from the ambit of the Federal Rules of Criminal Procedure." *Id.*

¶68 The Court acknowledged that whether the error was structural "bec[ame] relevant" for determining whether the error affected substantial rights, as required by the third prong of the Fed. R. Crim. P. 52(b) analysis. *Johnson*, 520 U.S. at 468. Johnson argued that if an error is structural (and therefore not susceptible to harmless-error review), it necessarily must affect substantial rights. *Id.* As in *Olano*, the Court deflected that question, because "even assuming that the failure to submit materiality to the jury 'affec[ted] substantial rights,'" it did not "'seriously affect[] the fairness, integrity or public reputation of judicial proceedings.'" *Id.* at 469 (first alteration in original) (quoting *Olano*, 507 U.S. at 736).[1]

[1] Whether an error seriously affected the fairness, integrity, or public reputation of judicial proceedings—*Olano*'s fourth prong—is not part of plain error review under Crim. P. 52. *People v. Crabtree*, 2024 CO 40, ¶ 50, __ P.3d __. Instead, in considering whether an error affects substantial rights, we look to whether the error "so undermined the fundamental fairness of the trial as to cast serious doubt

¶69 Since *Johnson*, the Court has twice declined to decide whether structural errors necessarily affect substantial rights as required by plain error review. *United States. v. Cotton*, 535 U.S. 625, 632–33 (2002); *Puckett v. United States*, 556 U.S. 129, 140 (2009) ("This Court has several times declined to resolve whether 'structural' errors—those that affect 'the framework within which the trial proceeds,' [*Fulminante*, 499 U.S. at 310]—automatically satisfy the third prong of the plain-error test.") But as relevant here, the Court's analysis in all of these cases assumes that forfeited claims of structural error *can* be subjected to plain error review.

¶70 More recently, in *Weaver v. Massachusetts*, 582 U.S. 286 (2017), the Court considered the proper standard of review where a claim of structural error (the alleged violation of the right to a public trial) was not raised at trial or on direct appeal, but instead collaterally through a postconviction ineffective assistance of counsel claim. *Id.* at 290. The Court began its discussion by recognizing that the defining feature of a structural error is that it "affect[s] the framework within which the trial proceeds," rather than being merely an error in the trial process itself. *Id.* at 295 (alteration in original) (quoting *Fulminante*, 499 U.S. at 310). It then

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on the reliability of the judgment of conviction." *Scott v. People*, 2017 CO 16, ¶ 15, 390 P.3d 832, 835, *abrogated on other grounds by Whiteaker v. People*, 2024 CO 25, ¶ 25, 547 P.3d 1122, 1127–28.

explained that there are at least three broad rationales for deeming some errors structural and not amenable to a harmless-error analysis. *Id.* These include situations where (1) "the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest," (2) "the effects of the error are simply too hard to measure," and (3) "the error always results in fundamental unfairness." *Id.* at 295–96. The Court then clarified that the erroneous deprivation of the right to a public trial is structural—not because it always results in fundamental unfairness, but "because of the 'difficulty of assessing the effect of the error.'" *Id.* at 298 (quoting *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 n.4 (2006)).

¶71 Next, the Court held that, while a defendant is generally entitled to automatic reversal for preserved claims of structural error, there is no such automatic remedy for public trial violation claims raised for the first time through a claim of ineffective assistance of counsel. *Id.* at 299, 303. Under the *Strickland v. Washington*, 466 U.S. 668 (1984), standard, an ineffective assistance of counsel claim must allege that an attorney's error prejudiced the defense. *Weaver*, 582 U.S. at 300 (citing *Strickland*, 466 U.S. at 687). For analytical purposes, the *Weaver* Court assumed that a defendant could satisfy the *Strickland* standard by showing that "attorney errors rendered the trial fundamentally unfair." *Id.* But because the Court had already concluded that public trial violations do not *always* result in

fundamental unfairness, *id.* at 295, it held that a public trial violation raised through an ineffective assistance of counsel claim does not automatically establish *Strickland* prejudice, *id.* at 301.

¶72 While much of the *Weaver* Court's analysis turned on the specific prejudice requirement of an ineffective assistance of counsel claim, the case is nevertheless relevant here for two reasons. First, *Weaver* reaffirmed that the Court does not require automatic reversal for every unpreserved claim of structural error. Second, *Weaver* reiterated that errors are deemed structural for different reasons, and not every such error necessarily renders a trial fundamentally unfair—demonstrating that plain error review of unpreserved structural errors would not necessarily always result in reversal, since our plain error review standard requires that an error have "so undermined the fundamental fairness of the trial as to cast serious doubt on the reliability of the judgment of conviction." *Scott v. People*, 2017 CO 16, ¶ 15, 390 P.3d 832, 835, *abrogated on other grounds by Whiteaker v. People*, 2024 CO 25, ¶ 25, 547 P.3d 1122, 1127–28.

¶73 In summary, Supreme Court precedent spanning from *Fulminante* to *Weaver* appears to reject the notion that automatic reversal is required for unpreserved claims of structural error. Of course, we are free to develop and interpret our own

rules of criminal procedure independently from federal law.[2] But to the extent our rule requiring automatic reversal of unpreserved structural error claims appears to rest on a misunderstanding of federal law, I maintain that there is no "principled justification not to review an unpreserved alleged error of this nature for plain error." *Stackhouse*, ¶ 32, 386 P.3d at 449 (Márquez, J., dissenting). Accordingly, I would review Garcia's forfeited claim for plain error.

C. The Error in This Case Constituted Reversible Plain Error

¶74 Pursuant to Crim. P. 52(b), an appellate court must correct even unpreserved claims of error if it determines that such errors were plain and affected a defendant's substantial rights. *People v. Crabtree*, 2024 CO 40, ¶ 50, __ P.3d at __ ("[I]f a Colorado appellate court concludes that an error was obvious or clear-cut and that it affected the defendant's substantial rights, it *must* grant relief under Crim. P. 52(b)."). Stated differently, Rule 52(b)'s plain-error standard requires that an error be obvious and substantial. *People v. Miller*, 113 P.3d 743, 750 (Colo. 2005). To be plain, or obvious, the error generally must violate (1) a clear statutory command, (2) a well-settled legal principle, or (3) Colorado precedent.

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[2] We do so today in a separate case, *Crabtree*, where we decline to adopt the time-of-appeal rule followed by federal courts interpreting Fed. R. Crim. P. 52(b), and instead uphold our time-of-trial approach to Crim. P. 52(b) review. ¶¶ 68–71. But *Crabtree* expressly declines to address the question I raise here—whether forfeited claims of structural error should be subject to plain error review. *Id.* at ¶ 25 n.7.

Scott, ¶ 16, 390 P.3d at 835. Additionally, the error must have been substantial; to that end, we have said we reverse "only if the error 'so undermined the fundamental fairness of the trial itself so as to cast serious doubt on the reliability of the judgment of conviction.'" *Hagos*, ¶ 14, 288 P.3d at 120 (quoting *Miller*, 113 P.3d at 750). The error in Garcia's trial was both obvious and substantial, and I would therefore reverse his conviction.

¶75 First, section 16-6-201(1)(c) disqualified Judge Hopkins from presiding over Garcia's case. Although it appears that no one in the courthouse recalled her brief participation, as a legal matter, Judge Hopkins was plainly, or obviously, disqualified by a clear statutory command. That is all that is required to satisfy the first prong of plain error review. *Crabtree*, ¶ 42 (citing *Scott*, ¶ 16, 390 P.3d at 835).

¶76 Next, I conclude that the error was also substantial. Following the Supreme Court's lead, I do not presume that the error—although structural—*necessarily* so affected Garcia's substantial rights as to undermine the trial's fundamental fairness and cast serious doubt on the judgment of conviction. Instead, I look first to the nature of the structural error in this case. Judge Hopkins presided over Garcia's trial despite being disqualified under section 16-6-201(1)(c) on grounds of statutorily implied bias. In *People in Int. of A.G.*, 262 P.3d 646, 650 (Colo. 2011), we explained that judicial canons requiring judicial recusal for the *appearance* of bias

are "intended to protect public confidence in the judiciary rather than to protect the individual rights of litigants." By contrast, our "laws requiring disqualification of a biased or prejudiced judge are designed to ensure that litigants receive a fair, impartial trial." *Id.* at 651. These laws protect against actual bias, or bias "that in all probability will prevent [a judge] from dealing fairly with a party." *Id.* at 650 (alteration in original) (quoting *People v. Julien*, 47 P.3d 1194, 1197 (Colo. 2002)).

¶77 As I explained earlier, I perceive no principled distinction between a judge who is actually biased and one who is statutorily presumed to be biased. *Accord Abu-Nantambu-El*, ¶ 2, 454 P.3d at 1045 (finding no distinction between actual bias and a statutory presumption of bias in a juror). Section 16-6-201(1)(c) expressly states that a judge who has served as counsel in a case "shall be disqualified" to hear or try that case. And "[w]here the General Assembly has exercised its legislative authority to determine that certain relationships render a [judge] impliedly biased as a matter of law, we are bound by that legislative determination." *Abu-Nantambu-El*, ¶ 36, 454 P.3d at 1051.

¶78 Given the legislative presumption in section 16-6-201(1)(c), I view the error here to be the kind affecting an individual litigant's right to a fair trial, rather than one merely affecting public confidence in the judiciary. And *that* kind of error—stemming from the involvement of a biased judge and affecting a litigant's individual rights—appears to be the kind that *always* renders a trial fundamentally

unfair. *Weaver*, 582 U.S. at 301 (including a biased judge in the list of errors that always render a trial fundamentally unfair). Accordingly, I conclude that when a judge who is statutorily disqualified for implied bias presides over a case, that trial is always rendered fundamentally unfair, and such an error satisfies the "substantial" prong of plain error review.

¶79 Having concluded that the error here was both obvious and substantial, I conclude that it constituted reversible plain error. I would accordingly affirm the division's opinion reversing the trial court's conviction.

JUSTICE GABRIEL, dissenting.

¶80 The majority concludes that Donald L. Garcia waived his objection to having a statutorily disqualified judge preside over his trial. Maj. op. ¶¶ 2, 18, 53. In so concluding, the majority substantially transforms long-settled principles of waiver, changing the governing standard from one requiring an intentional relinquishment of a known right or privilege to one based on what a party could and should have known and done. Consequently, although long-settled law has required us to indulge every reasonable presumption against a waiver, the majority now appears to embrace a rule that would allow appellate courts to discern a waiver based on nothing more than inferences and assumptions as to what a party could have known.

¶81 Because (1) I do not agree with this dramatic change to our previously settled principles of waiver; (2) I perceive no evidence of an intentional relinquishment of a known right or privilege in this case; and (3) I believe that it was structural error to allow a statutorily disqualified judge to preside over Garcia's trial, I would affirm the judgment of the division below.

¶82 Accordingly, I respectfully dissent.

I. Factual Background

¶83 The facts that are pertinent to my analysis are undisputed.

¶84 On July 24, 2017, Garcia was charged with first degree aggravated motor vehicle theft, and Kate Mattern of the state public defender's office was appointed to represent him. Garcia pleaded not guilty, and a trial was set for May 2018.

¶85 On April 17, 2018, now-Judge Amanda Hopkins, who was then a deputy state public defender, appeared on Garcia's behalf at a pretrial readiness conference. Garcia failed to appear at this conference, and Judge Hopkins stated that she did not know his whereabouts. The trial court thus vacated the trial date and reinstated Garcia's bond. This conference was brief, Judge Hopkins's name does not appear on the minute order documenting the conference, and Judge Hopkins did not appear as Garcia's counsel at any other proceeding in this case.

¶86 Several months after the April 2018 conference, Judge Hopkins was appointed to the bench, and Garcia's case was transferred to her. In addition, another deputy public defender, John Hoag, took over Garcia's defense.

¶87 Hoag subsequently filed a motion to dismiss the charges against Garcia on speedy trial grounds. Notably, this motion mentioned, among other things, Garcia's failure to appear at the April 2018 conference, although, again, it does not appear that anyone realized that Judge Hopkins had represented Garcia at that conference. Judge Hopkins subsequently denied the motion.

¶88 The case proceeded to trial with Judge Hopkins presiding and Hoag and Mattern then jointly representing Garcia. The jury ultimately convicted Garcia, and he appealed.

¶89 As pertinent here, in his appeal, Garcia argued, for the first time, that Judge Hopkins was statutorily disqualified from presiding over his case because she had previously served as his counsel. In a split, published decision, a division of our court of appeals reversed the judgment of conviction, concluding that Judge Hopkins's statutory disqualification amounted to structural error. *People v. Garcia*, 2022 COA 83, ¶¶ 1, 21, 519 P.3d 1064, 1066, 1069. In so ruling, the majority rejected the People's contention that Garcia had waived his statutory disqualification claim. *Id.* at ¶¶ 10–13, 519 P.3d at 1067–68. On this point, the majority stated, "Just as nothing in the record made Judge Hopkins's prior involvement in the case obvious to her, nothing made it obvious to Garcia or his attorneys." *Id.* at ¶ 11, 519 P.3d at 1067. The majority further observed that (1) the minute order in the court file did not reflect Judge Hopkins's appearance at the April 2018 conference; (2) there was no reason to believe that anyone had a transcript of that conference prior to trial; and (3) the "brief and nonsubstantive hearing" at which Judge Hopkins had appeared occurred three months before her appointment to the bench, Garcia did not appear in court for five months after Judge Hopkins's appearance, and Hoag, not Mattern, handled the case between the date of Judge

Hopkins's appearance and Garcia's trial, which commenced over one year later. *Id.* at ¶ 11, 519 P.3d at 1067–68. On these facts, the majority determined that "nothing in the record suggests that Mattern, Hoag, or Garcia was aware of Judge Hopkins's prior involvement in the case, either at the time of the judge's assignment to the case or at the time of trial." *Id.* at ¶ 13, 519 P.3d at 1068. Accordingly, the majority discerned no waiver. *Id.*

¶90 Judge Dailey dissented in part, concluding, contrary to the majority, that Garcia *had* waived his statutory disqualification argument. *Id.* at ¶¶ 27–28, 519 P.3d at 1070 (Dailey, J., concurring in part and dissenting in part). In Judge Dailey's view, "[I]t defies logic to suggest that the deputy state public defenders representing Garcia at trial would not have known that Judge Hopkins had appeared at the April hearing." *Id.* at ¶ 28, 519 P.3d at 1070. He added that to suggest that Mattern, who was the attorney of record both at the time of Judge Hopkins's single appearance and at trial, did not know who had appeared on her behalf "assumes a level of disregard for her cases that I am simply not willing to believe a competent defense attorney would display." *Id.* Thus, in Judge Dailey's view, not raising the disqualification issue once Judge Hopkins was appointed constituted an intentional relinquishment of a known right. *Id.*

¶91 We then granted the People's petition for certiorari.

II. Analysis

¶92 I begin by addressing the waiver issue. I then proceed to explain why I believe that it is structural error for a statutorily disqualified judge to preside over a former client's trial.

A. Waiver

¶93 Waiver is "the *intentional* relinquishment of a *known* right or privilege." *People v. Rediger*, 2018 CO 32, ¶ 39, 416 P.3d 893, 902 (quoting *Dep't of Health v. Donahue*, 690 P.2d 243, 247 (Colo. 1984)). In addition, we have long held that we "do not presume acquiescence in the loss of fundamental constitutional rights, and therefore indulge every reasonable presumption against waiver." *Id.* (quoting *People v. Curtis*, 681 P.2d 504, 514 (Colo. 1984)).

¶94 Here, like the division majority below, I perceive nothing in the record to support a conclusion that Garcia or any of his counsel knew of and intentionally relinquished their statutory disqualification argument. Neither Garcia himself nor his counsel who ultimately tried his case (over a year after Judge Hopkins's one brief appearance) attended the April 2018 conference, and it is undisputed that Judge Hopkins's name did not appear on the minute order reflecting what had occurred at that conference. In addition, it seems undisputed that Judge Hopkins herself did not recall having appeared at that conference. Nor did the prosecutors in this case recall it.

¶95 Tellingly, the majority cites no evidence to the contrary and, specifically, no evidence to show that either Garcia or his counsel knew of (or recalled) Judge Hopkins's one appearance in this case. Instead, the majority relies on a series of stacked inferences and assumptions. For example, the majority (1) infers that an attorney usually knows who covers for them, presumably including at every short, nonsubstantive conference in a case over a lengthy period of time; (2) assumes Judge Hopkins would have spoken to her colleagues regarding what had occurred at the conference that she attended; (3) infers from the size of the local public defender's office, of its docket, and of Saguache itself that "coverage would not happen on the fly in Saguache"; (4) "would . . . expect" that although Judge Hopkins's appearance was not noted on the minute order reflecting the proceedings on the date she appeared, Judge Hopkins would have taken notes at that conference and these notes would have some indicia of authorship; (5) assumes that the file and case history would somehow have reflected Judge Hopkins's brief appearance; and (6) speculates that because Garcia's counsel attended a number of hearings and saw Judge Hopkins on the bench, they "would . . . have had reason . . . to consider if Judge Hopkins had ever touched this case." Maj. op. ¶¶ 33–42.

¶96 No evidence in the record, however, supports any of these inferences and assumptions, and I know of no definition of waiver (nor does the majority cite one)

that would support a conclusion that important constitutional rights were waived based on nothing more than speculation as to what Garcia or his counsel could or should have known or done.

¶97 For these reasons, I would conclude that Garcia did not waive his objection to having a statutorily disqualified judge preside over his case.

¶98 In reaching this conclusion, I respectfully reject the contention that it defies logic to say that Garcia's counsel would not have known that Judge Hopkins had appeared at the April 2018 conference. *Id.* at ¶ 43. Aside from the facts that (1) such a contention is merely an assumption and not evidence of what counsel actually knew and (2) the conference at issue was brief and nonsubstantive, I perceive no illogic in concluding that counsel did not know or recall that Judge Hopkins had appeared at the one conference. This is particularly true given that neither Judge Hopkins herself nor the prosecutors in this case appear to have been aware of or recalled Judge Hopkins's appearance. In the circumstances presented, I am not surprised that neither Judge Hopkins, any of the attorneys involved in this case, nor Garcia knew about or recalled Judge Hopkins's one brief appearance. And I cannot agree that it defies logic to conclude that Garcia's counsel did not know or recall this fact when no one else did either, including Judge Hopkins herself, who was the one person involved in this case who had attended the April 2018 conference. (On this point, I note that the majority states that it does not fault

Judge Hopkins for not recalling her appearance, *id.* at ¶ 31 n.4, and presumably, the majority does not fault the prosecutors either. Yet, the majority faults Garcia's counsel, and Garcia's counsel alone. With respect, I perceive no basis for this inconsistent treatment.) The more logical explanation for what occurred here is that, acting in good faith, none of the exceptionally busy public servants involved in this case recalled Judge Hopkins's one-time appearance at a brief, nonsubstantive conference.

¶99 I likewise disagree that a waiver can be established by broad allegations of possible strategic motives and gamesmanship. The People's speculation as to such motives and conduct, which I believe unnecessarily impugns the integrity of defense counsel, does not establish an intentional relinquishment of a known right. Moreover, as we have said before, "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." *Bondsteel v. People*, 2019 CO 26, ¶ 28, 439 P.3d 847, 852.

¶100 Accordingly, I would conclude that Garcia did not waive his objection to Judge Hopkins's statutory disqualification.

B. Structural Error

¶101 Because I do not believe that Garcia waived his statutory disqualification argument, I must proceed to decide whether reversal is required.

¶102 Section 16-6-201(1)(c), C.R.S. (2023), provides, "A judge of a court of record shall be disqualified to hear or try a case if . . . [she] has been of counsel in the case."

¶103 This statutory language, which is clear and unambiguous, presumes, as a matter of law, that a judge who has been of counsel in a case is a biased judge. *Cf. People v. Abu-Nantambu-El*, 2019 CO 106, ¶ 2, 454 P.3d 1044, 1045 (noting that a statutorily disqualified juror is "presumed by law to be biased"). Moreover, for the same reasons that led us to conclude that "a juror who is presumed by law to be biased is legally indistinguishable from an actually biased juror," *id.*, I would conclude that a judge who is presumed by law to be biased is likewise legally indistinguishable from an actually biased judge.

¶104 The question thus becomes whether it is structural error for a statutorily disqualified judge to preside over a former client's case. I believe that it is.

¶105 For the reasons just noted, Judge Hopkins was presumed by law to be biased, and we treat a judge in this position the same as if the judge were actually biased. *See id.* In turn, it is well settled that a trial before a biased judge falls within the narrow group of errors that we have deemed to be structural. *See Hagos v. People*, 2012 CO 63, ¶ 10, 288 P.3d 116, 119. Accordingly, the error here was structural, and like the division majority below, I would reverse and remand for a new trial before a different judge.

¶106 The cases on which the People rely in arguing against structural error are inapposite. Those cases did not involve statutorily disqualified judges but rather concerned allegations of appearances of impropriety or partiality. *See, e.g.*, *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 858–61 (1988) (involving the appearance-of-partiality provision of the federal disqualification statute); *People in Int. of A.P.*, 2022 CO 24, ¶¶ 25–39, 526 P.3d 177, 183–85 (distinguishing a claim based on an allegation that the judge's impartiality can reasonably be questioned from a claim alleging actual bias); *People in Int. of A.G.*, 262 P.3d 646, 650–51 (Colo. 2011) (same); *People v. Gallegos*, 251 P.3d 1056, 1065 (Colo. 2011) (noting that the possible appearance of impropriety at issue was based on the fact that the judge's son worked for the district attorney's office, a circumstance that did not give rise to a statutory disqualification).

¶107 Structural error does not apply in these situations because, as we observed in *A.G.*, 262 P.3d at 650, "A judge who is disqualified based on an appearance of impropriety may be able to act impartially . . . ." This case, in contrast, involves a judge whom the legislature has determined, as a matter of law, to be actually biased. By definition, such a judge cannot act impartially.

¶108 Nor am I persuaded by the People's contention that even if the error here were structural, we can review it for plain error. Our case law has consistently held otherwise. *See, e.g.*, *Hagos*, ¶ 10, 288 P.3d at 119 (noting that structural errors

"require automatic reversal without individualized analysis of how the error impairs the reliability of the judgment of conviction"); *Blecha v. People*, 962 P.2d 931, 942 (Colo. 1998) (noting that structural error "requires automatic reversal"). Moreover, we did not grant certiorari to consider whether to overturn decades of Colorado law providing that structural error requires automatic reversal, and thus, that issue is not properly before us.

III. Conclusion

¶109 For these reasons, I would conclude that (1) Garcia did not waive his statutory disqualification argument and (2) the fact that a statutorily disqualified judge presided over Garcia's case was structural error requiring reversal.

¶110 Accordingly, I would affirm the judgment of the division below, and I therefore respectfully dissent.