

Though convincing on its face, this reasoning relies on the false premise that there are no good reasons to waive a structural error. That is simply untrue. Imagine that you are a criminal defendant with plenty of money in the bank – enough money to hire whoever you want to defend you. You have a lawyer as a family friend, and you really trust him: he always says smart-sounding things when he comes over for dinner, and he brags constantly about all the cases that he has won. After you are indicted, you try to retain him – but for some erroneous reason, the judge prevents him from representing you. (Let's stipulate that it was structural error to prevent you from hiring this attorney; he is in good standing and has defended criminal cases before in this court, but the judge just thinks he is obnoxious.)

When your newly court-appointed public defender stops by your jail cell, you are obviously upset. You tell her, "I don't even want you to represent me, you know – the court wouldn't let me use *my* lawyer, and he's the only one I want. Now I'm stuck with you." To your surprise, she tells you that it sounds like what the judge did was wrong, and that so long as there really is no good reason why your friend cannot practice before the court, you have a right to be represented by him. She then explains that the court committed what is called a *structural error*. She goes on to explain that, so long as you object to the denial and the court denies your objection, you can appeal, and the reviewing court will be forced to reverse the case no matter the result.

You are obviously relieved; *what a great attorney*, you think! You and she plan to raise that objection at the next hearing. In the meanwhile, you decide to look up some of your friend's cases to see for yourself how he handles his cases. You are horrified. His written work product is full of incomplete sentences and is impossible to read. Worse, you discover that despite all his bragging, in fact he has not won a single criminal case. In a panic, you look up your public defender and, to your great relief, discover that she has won multiple awards for outstanding advocacy. You are even more shocked and impressed to learn that she has the highest acquittal rate of any attorney in the city.

Needless to say, you tell her not to raise the objection. She represents you through trial and sentencing and does an amazing job, but you still ended up losing your case; a jury convicts you, and you are sentenced to twelve months' imprisonment. Remembering what your attorney told you about structural error (and recalling that she said something about automatic reversal), you decide to appeal. On appeal you invoke your right to self-representation and explain in your brief that you know all about structural error, that the district court committed one, and that you know that you have the right to a new trial.

What result? The answer is obvious: *by not objecting*, you waived your structural-error argument. In fact, you had an excellent strategic reason not to object: you got lucky, and your court-appointed attorney was far superior to the attorney the court erroneously prevented you from hiring. Sure, if you had objected you could have gotten a new trial with your counsel of choice – but the structural error you experienced ended up being a windfall; it would have

Wish I
knew

I did

structural error, it has concluded that it so-alters the constitutional framework of the trial that the fairness of the proceedings are destroyed – and it undeniably is a substantial right of a defendant to have a fair trial. Whether the ultimate *outcome* would be the same is certainly one kind of prejudice, but structural errors focus on more fundamental substantial rights than mere outcome determinacy. The Court will likely conclude on this basis that all structural errors satisfy the third prong.

In sum, it is likely the Supreme Court will rule that structural error automatically satisfies the third prong, and this Article argues that it has already ruled that a structural error does not automatically satisfy the fourth prong.

C. Structural Error and Waiver

The last question this Article addresses is whether structural error can ever be waived. The Supreme Court has not yet answered this question, though several circuits have weighed in. Before going to the circuits, it is worth pausing to think through the logic of why structural error should, or should not, be susceptible to waiver.

We know already that a structural error can be forfeited – so why couldn't one be waived? There is no technical or legal reason why structural errors cannot be waived, but there is a line of thinking that might lead us to conclude that they are not waivable in practice. Though that reasoning is incorrect, it is worth our time to walk through it.

Whatever else is true of structural error, one thing is certain: raising an objected-to structural error on direct appeal results in automatic reversal.²⁹⁷ Put slightly differently, if properly objected to, a party is guaranteed to have the error remedied. Add to this what must be true of all waiver: it is the *intentional* relinquishment of a *known* right.²⁹⁸ (The *unintentional* relinquishment of a known or unknown right is forfeited, as we discussed earlier.²⁹⁹) So to waive a structural error, one must *intentionally* relinquish the right to raise it. But let's expand this out a bit: waiving a structural error means intentionally giving up the right to raise an error that will *guarantee* you a new trial. On its face, it might seem like an absurd decision – one that, in practice, no party or counsel would ever make. As a result, one might argue that any accusation (by the government, for example) that a party waived a structural error must fail, because no party would ever intentionally give up the right to raise such an error.

297. *United States v. Davila*, 569 U.S. 597, 611 (2013) (quoting *United States v. Marcus*, 130 S. Ct. 2159, 2164 (2010)) (“We have characterized as ‘structural’ ‘a very limited class of errors’ that trigger automatic reversal because they undermine the fairness of a criminal proceeding as a whole.”).

298. *Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13, 13 (2017).

299. *Id.*