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COMMENTS

MANDAMUS AS A WEAPON OF “CLASS WARFARE” IN SIXTH AMENDMENT JURISPRUDENCE:

A CASE COMMENT ON *UNITED STATES V. SANTOS*

JOHN F. COSTELLO, JR.*

*“There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.”*¹

The Sixth Amendment to the United States Constitution grants criminal defendants, *inter alia*, the right to a speedy trial by a fair and impartial jury, the right to be informed of the charges brought against them, the right to confront witnesses and the power to obtain his own witnesses, and the assistance of counsel.² These rights guaranteed by the Sixth Amendment should apply with equal force to both indigent and wealthy criminal defendants.³

* J.D. Candidate, 2003. The author wishes to thank his wife, Danielle, for her encouragement and understanding throughout the challenges and rewards that accompany and define the study of law. The author also wishes to thank the Honorable Charles R. Norgle, Sr. and his staff for the opportunity to learn from them, work with them, and aspire to what they have achieved and continue to achieve by their contributions to the law.

1. *Griffin v. Illinois*, 351 U.S. 12, 19 (1956).

2. U.S. CONST. amend. VI. The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Id.

3. See WAYNE R. LAFAYE, JEROLD H. ISRAEL & NANCY J. KING, *CRIMINAL PROCEDURE* 556 (3d ed. 2000) [hereinafter LAFAYE] (interpreting *Gideon v. Wainwright*, 372 U.S. 335 (1963) and *Johnson v. Zerbst*, 304 U.S. 458 (1938))

In *United States v. Santos*,⁴ the United States Court of Appeals for the Seventh Circuit indulged in the creation of a new remedy, unsupported by precedent, whereby wealthy criminal defendants can use the extraordinary writ of mandamus to assure that they will be represented by their counsel of choice.⁵ This new remedy has the potential for abuses because a wealthy criminal defendant may now effectively hold the criminal justice system hostage by pursuing this intermediate appeal. The availability of this remedy has the potential to increase the caseloads for federal courts of appeals and thwart the effective administration of criminal justice at the district court level.⁶ The availability of this extraordinary writ, seemingly at the ready disposal of wealthy criminal defendants to assure their choice of counsel—a choice not available to indigent defendants represented by appointed counsel⁷—has the effect of perpetuating a type of judicially sanctioned “class warfare,” which Judge Posner indicated that he was trying to avoid.⁸

This Comment examines the propriety of using the writ of mandamus as a remedy when the court deprives a criminal defendant of their counsel of choice. Part I provides relevant

as holding that no distinction should exist in the Sixth Amendment between the indigent and the affluent defendant as to the right to a fair trial and the right to the assistance of counsel).

4. 201 F.3d 953 (7th Cir. 2000), *reh'g and reh'g en banc denied*, (April 7, 2000). *Santos* was decided by a three-judge panel of the Seventh Circuit and authored by Judge Richard A. Posner. *Id.*

5. *Id.* at 960-61.

6. The words of Justice Frankfurter are instructive on this point: “the delays and disruptions attendant upon intermediate appeal are especially inimical to the effective and fair administration of the criminal law.” *DiBella v. United States*, 369 U.S. 121, 126 (1962).

7. See LAFAYE, *supra* note 3, at 582 (stating “[t]he indigent defendant has no right to counsel of his choice even though that attorney is available and his appointment would not be more costly . . . than the appointment of the attorney that the trial court would otherwise select.”); Rhea Kemble Brecher, *Limitations on the Effectiveness of Criminal Defense Counsel: Legitimate Means or “Chilling Wedges?” The Sixth Amendment and the Right to Counsel*, 136 U. PA. L. REV. 1957, 1958 (1988) (indicating “[w]hen an indigent defendant needs counsel, this counsel is appointed and not selected. The defendant cannot choose.”); Peter W. Tague, *An Indigent’s Right to the Attorney of His Choice*, 27 STAN. L. REV. 73, 87 (1974) (stating “by requiring an indigent to accept an attorney appointed by the court while allowing the nonindigent to choose his own attorney, the court draws a sharp distinction between indigent and nonindigent. No Court has comprehensively discussed the equal protection ramifications of this distinction.”).

8. See *Santos*, 201 F.3d at 959 (stating “if the fact that [a defendant] might be able to hire a good lawyer to replace [his counsel of choice] was a good reason for denying [a] continuance, the right to counsel of one’s choice would be eviscerated for any person with a high salary, which seems to us to take class warfare too far.”).

background from the *Santos* decision, as well as a brief introduction to the issues of counsel of choice under the Sixth Amendment and the writ of mandamus analyzed herein. Part II outlines the role of a criminal defendant's counsel of choice in Sixth Amendment jurisprudence. Part III traces the development of the extraordinary writ of mandamus, emphasizing its role and proper purpose, including its applicability as a remedy for the denial of a criminal defendant's counsel of choice. Part IV examines why mandamus is not an appropriate remedy for the denial of a criminal defendant's counsel of choice and considers the effect that proliferation of this remedy will have on the judicial system. This Comment then concludes that the decision in *Santos* is an aberration, unsupported by precedent, and strongly cautions against its precedential value.

I. BACKGROUND

A. AN OVERVIEW OF A CRIMINAL DEFENDANT'S COUNSEL OF CHOICE

The Sixth Amendment is of considerable breadth in modern Sixth Amendment jurisprudence. The Sixth Amendment guarantees an indigent defendant the right to appointed counsel in felony prosecutions,⁹ the right to effective assistance of counsel,¹⁰ and the right to self-representation.¹¹ It also provides to a limited and uncertain extent¹² (to be analyzed more fully later)¹³ the right

9. See generally *Gideon v. Wainwright*, 372 U.S. 335, 348 (1963) (holding "Sixth Amendment requires appointment of counsel in all criminal prosecutions").

10. See generally *Strickland v. Washington*, 466 U.S. 668 (1984) (holding that the right to counsel is the right to effective assistance of counsel under the Sixth Amendment).

11. See generally *Faretta v. California*, 422 U.S. 806, 807 (1975) (holding that a criminal defendant has a right to self-representation).

12. Numerous legal scholars have sought to define the exact status of a criminal defendant's right to counsel of choice. Jeffrey M. Rosenfeld & Sherry Klintworth, *Right to Counsel*, 89 GEO. L.J. 1485, 1490-92 (2001), indicate:

Although a defendant has the right to retain an attorney of her choice, the right is not absolute. A court is entitled to balance the right to retain or substitute counsel of choice against the interests of judicial integrity and efficiency. Thus, a court may restrict the defendant's right to retain an attorney of her choice if the defendant insists on an attorney she cannot afford, the attorney is not a member of the bar, the attorney declines to represent the defendant, or the court disqualifies the defendant's chosen counsel. Similarly, a court may decline to accept a defendant's waiver of conflict of interest and disqualify his or her attorney of choice.

See also Brecher, *supra* note 7, at 1957-58 (finding that "[n]o language in the [S]ixth [A]mendment refers to the defendant's right to counsel of choice," and

to counsel of choice.¹⁴

Recognition of a criminal defendant's right to counsel of choice stems from the seminal decision of *Powell v. Alabama*.¹⁵ The concept itself can be seen as rising directly from the words used by Justice Sutherland: "a defendant should be afforded a fair opportunity to secure counsel of his own choice."¹⁶

Powell's counsel of choice language received rote application in subsequent cases.¹⁷ The cases in the wake of *Powell* indicate that the Sixth Amendment's main focus is on assuring the fairness of an adversarial criminal proceeding, rather than an unfettered right to counsel of choice.¹⁸

In recent years, the Supreme Court has specifically indicated that a criminal defendant's counsel of choice is not a fundamental

while "[s]ome courts of appeal, however, have found some kind of qualified right, or limited right, to counsel of choice . . . The Supreme Court has said little on this subject, but what it has said arguably limits the concept of counsel of choice"; Thomas C. Canfield, *The Criminal Defendant's Right to Retain Counsel Pro Hac Vice*, 57 *FORDHAM L. REV.* 785, 786-88 (1988) (finding that a criminal defendant's right to counsel of his choice is one of the rights granted implicitly by the Sixth Amendment, because the right is personal to the defendant and one of the most important decision made in a criminal case; however, recognizing that the right to counsel of choice is qualified and may be denied entirely).

13. See discussion *infra* Part II (discussing the Sixth Amendment right to counsel).

14. *Powell v. Alabama*, 287 U.S. 45, 72 (1932); *Morris v. Slappy*, 461 U.S. 1, 11 (1983); *Wheat v. United States*, 486 U.S. 153, 160 (1988).

15. *Powell*, 287 at 72.

16. *Id.* at 53. The Court in *Powell*, concerned itself with due process concerns, and found that due process requires that a criminal defendant have the assistance of counsel, finding the basis for this fundamental right echoed in the constitutions of the American colonies and the Sixth Amendment's assistance of counsel language. *Id.* at 57-65. The Court found the defendants were not afforded an opportunity to secure counsel prior to trial, and that the defendants received "pro forma rather than zealous and active," *id.* at 58, assistance of counsel, appointed the day of trial. *Id.* at 57. Thus, the "defendants were not accorded the right of counsel in any substantial sense." *Id.* at 58.

17. See cases cited *infra* note 18.

18. See, e.g., *Avery v. Alabama*, 308 U.S. 444, 450-53 (1940) (finding that defendant was adequately represented by counsel, despite denial of motion for continuance, and therefore defendant was not deprived of his right to assistance of counsel); *White v. Ragen*, 324 U.S. 760, 764 (1944) (*per curiam*) (reaffirming *Powell*, and finding "that it is a denial of the accused's constitutional right to a fair trial to force him to trial with such expedition as to deprive him of the effective aid and assistance of counsel."); *Chandler v. Fretag*, 348 U.S. 3, 9 (1954) (reaffirming *Powell*, and finding that "[r]egardless of whether [the defendant] would have been entitled to appointment of counsel, his right to be heard through his own counsel was unqualified."). See *infra* notes 71-78 and accompanying text for fuller analysis and discussion of these cases.

right guaranteed by the Sixth Amendment, but rather is a limited right – a “presumption”¹⁹ – that may be overcome by considerations of ensuring the fairness of an adversarial criminal proceeding or the proper functioning of the judicial process.²⁰ These considerations include the constraints that a criminal defendant cannot be represented by an attorney that is not a member of the bar,²¹ an attorney that the defendant cannot afford,²² an attorney that declines the proffered employment,²³ or an attorney that is faced with an actual or potential conflict of interest,²⁴ including a scheduling conflict.²⁵

B. An Overview of the Writ of Mandamus

Appellate review of district court rulings is generally limited to final judgments.²⁶ However, a number of exceptions have been made to this final judgment rule. The collateral order doctrine is a well-known exception.²⁷ In essence, the collateral order doctrine

19. *Wheat*, 486 U.S. at 164. “[Courts] must recognize a presumption of [a criminal defendant’s] counsel of choice, but that presumption may be overcome not only by a demonstration of actual conflict but by a showing of a serious potential for conflict.” *Id.*

20. See *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964) (holding that only a “myopic insistence on expeditiousness in the face of a justifiable request” for continuance violates a criminal defendant’s Sixth Amendment right to retain counsel of choice); *Morris*, 461 U.S. at 14 (holding that a criminal defendant has no Sixth Amendment right to have a “meaningful relationship” with counsel); *Wheat*, 486 U.S. at 164 (holding that a criminal defendant has no Sixth Amendment right to retain counsel of choice with a conflict of interest); *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 625 (1989) (holding that a criminal defendant has no Sixth Amendment right to retain counsel of choice with assets subject to forfeiture). See *infra* text accompanying notes 79–104 for further analysis and discussion of these cases.

21. *Wheat*, 486 U.S. at 159.

22. *Id.*

23. *Id.*

24. *Id.* at 164.

25. LAFAVE, *supra* note 3, at 584.

26. 28 U.S.C. § 1291 (2003), provides in pertinent part: “[t]he courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, . . . except where a direct review may be had in the Supreme Court.” “The final judgment rule reflects a determination that, on balance, postponing an appeal until a final judgment is reached best protects the interests of the litigants in a fair and accessible process while conserving judicial resources.” LAFAVE, *supra* note 3, at 1257.

27. The collateral order doctrine can be traced to the decision of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). In *Cohen*, the Court noted that the final judgment rule should be given a “practical rather than a technical construction,” and thus would encompass certain orders collateral to the litigation itself. *Id.* at 546. The Court described these as “that small class [of orders] which finally determine claims of right separable from, and

allows appeal from an interlocutory order that has the effect of conclusively determining an issue entirely separate from the merits of the action and which is effectively unreviewable on appeal from the final judgment of the action.²⁸ Another such exception is the writ of mandamus.²⁹

The writ of mandamus has been defined as “[a] writ issued by a superior court to compel a lower court or a government officer to perform mandatory or purely ministerial duties correctly.”³⁰ Traditionally, the writ of mandamus was available “only to control jurisdictional excesses.”³¹ In such situations, a superior court would issue writ of mandamus either to compel a lower court to

collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.” *Id.* In *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978), the Court reiterated its collateral order doctrine in *Cohen*, stating that, “[t]o come within the ‘small class’ of decisions excepted from the final-judgment rule by *Cohen*, the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment.”

28. BLACK’S LAW DICTIONARY 256 (7th ed. 1999).

29. The All Writs Act, codified at 28 U.S.C. § 1651 (2001), provides in pertinent part: “[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” One commentator has indicated that mandamus “is potentially a far broader means of obtaining interlocutory appellate review.” Robert S. Berger, *The Mandamus Power of the United States Courts of Appeals: A Complex and Confused Means of Appellate Control*, 31 BUFF. L. REV. 37, 38 (1982).

30. BLACK’S LAW DICTIONARY 973 (7th ed. 1999). See also Berger, *supra* note 29, at 39 (stating that “mandamus has traditionally been viewed as a proceeding directly against the judge”).

31. LAFAVE, *supra* note 3, at 1269. For an example of the United States Supreme Court cases which are typically found to exemplify this traditional view of the writ of mandamus, which may be termed the jurisdictional view, see, *Ex Parte Republic of Peru*, 318 U.S. 578, 589 (1943) (holding that mandamus is appropriate where a district court fails to recognize a defense to suit of sovereign immunity); *Roche v. Evaporated Milk Assn.*, 319 U.S. 21, 26 (1943) (holding that the writ of mandamus has been, and should only be used, in situations where a lower court does not have jurisdiction to hear an action or has jurisdiction to hear an action but refuses to exercise that jurisdiction); *DeBeers Consol. Mines v. United States*, 325 U.S. 212, 217 (1945) (holding that mandamus is an appropriate remedy “when a court has no judicial power to do what it purports to do – when its action is not mere error but usurpation of power”); *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 382 (1953) (holding that “jurisdiction need not run the gauntlet of reversible errors,” and confining the use of mandamus to situations like those in *Roche*, where lower court does not have jurisdiction to hear an action or has jurisdiction to hear an action but refuses to exercise that jurisdiction, and *DeBeers*, where a lower court purports to take action where it has no authority to do so by statute or case law). See discussion *infra* Part III.A for fuller analysis and discussion of these cases.

recognize that it had no jurisdiction to entertain the action it sought to adjudicate or to compel a lower court to exercise the jurisdiction that it possessed but refused to exercise.³² For example, the writ of mandamus was an appropriate remedy "when a district judge . . . took some definable action he was not empowered to take—or refused to take some definable action which under the circumstances was clearly required of him."³³

The writ of mandamus was not a substitute for appeal,³⁴ and thus, where remedy could be had by appeal after final judgment, the writ of mandamus was inappropriate.³⁵ This was so regardless of the hardship or inconvenience imposed on the party while awaiting final judgment.³⁶ Additionally, the writ of mandamus was said to issue only when the party seeking the writ had shown that "its right to the writ [was] 'clear and indisputable.'"³⁷ The term, clear and indisputable right, can be interpreted as meaning that the right sought to be vindicated through the issuance of a writ of mandamus is either expressly granted by statute or recognized by precedent, and thus a judge has no discretion regarding that right.³⁸ Given this situation, the writ of mandamus has come to be referred to as an extraordinary writ.³⁹

Some legal scholars opine that in more recent times, the writ of mandamus has expanded from the traditional view.⁴⁰ These

32. See cases cited *supra* note 31 and accompanying text (exemplifying the writ of mandamus as being used to compel lower courts to recognize a lack of jurisdiction, or to compel lower courts to exercise jurisdiction).

33. Note, *Supervisory and Advisory Mandamus Under the All Writs Act*, 86 HARV. L. REV. 595, 599 (1973).

34. *E.g.*, *Roche*, 319 U.S. at 26; *Bankers Life*, 346 U.S. at 383.

35. See, *e.g.*, *Bankers Life*, 346 U.S. at 382–83 (stating that if the writ of mandamus was available where an appeal was also available, "then every interlocutory order which is wrong might be reviewed under the All Writs Act"). In such a case, the writ of mandamus would not quite live up to the term "extraordinary" so often associated with it. *Id.* at 382.

36. *E.g.*, *Roche*, 319 U.S. at 30.

37. *Bankers Life*, 346 U.S. at 384 (citing *United States ex rel. Bernadin v. Duell*, 172 U.S. 576, 582 (1899)).

38. See discussion *infra* Part III for more thorough analysis and discussion of the cases upon which this conclusion is based.

39. See Note, *supra* note 33, at 595-96 (stating "[w]rits of mandamus . . . have traditionally been available only in unusual circumstances, sometimes said to be those where a lower court's action can be called a 'usurpation of power.' As extraordinary remedies, they are reserved for really extraordinary causes."); see Berger, *supra* note 29, at 37 (stating that mandamus "is said to be 'extraordinary'"); LAFAVE, *supra* note 3, at 1269 (describing appellate review through the writ of mandamus as extraordinary).

40. See Note, *supra* note 33, at 596 (finding that "the Supreme Court has gradually, in highly uncertain ways, liberalized the standards governing the circumstances in which the issuance of mandamus by the federal courts of appeals is proper").

scholars indicate that the writ of mandamus has surpassed the jurisdictional limits set by cases under the traditional view, to allow appellate courts to exercise both supervisory control⁴¹ and advisory control over district courts.⁴² Supervisory mandamus is best understood as an appellate court seeking to control what it perceives to be consistent abuses or incorrect rulings of a district court,⁴³ whereas advisory mandamus is best understood as an appellate court providing guidance to a district court on a matter of first impression.⁴⁴ However, a deeper analysis of the cases dealing with mandamus indicate that it has not expanded from the traditional view as much as some legal scholars believe.⁴⁵

C. A Synopsis of *United States v. Santos*

At the district court level, Santos was found guilty on one count of extortion and five counts of mail fraud, arising out of circumstances surrounding campaign contributions sought from banks and securities firms that held or invested funds for the City of Chicago.⁴⁶ Santos appealed the district court's ruling, and the

41. *Id.*

42. See Berger, *supra* note 29, at 48, 50 (finding that the cases of *LaBuy v. Howes Leather Co.*, 352 U.S. 249 (1957) and *Schlagenhauf v. Holder*, 379 U.S. 104 (1964) have "greatly expanded the scope of mandamus by allowing its use for supervisory and advisory purposes").

43. See *LaBuy*, 352 U.S. at 259-60 (stating that using the writ of mandamus was permissible to prevent what the appellate court perceived to be the too frequent practice of the district court referring cases to special masters, though the practice was permitted, at the district judge's discretion, by Federal Rule of Civil Procedure 53(b)).

44. See *Schlagenhauf*, 379 U.S. at 111 (using the writ of mandamus to address an issue of first impression, regarding a court's power to order a mental and physical examination under Federal Rule of Civil Procedure 35).

45. See discussion *infra* Part III.B, D for fuller analysis upon which this conclusion is based.

46. *United States v. Santos*, 65 F. Supp.2d 802, 806 (N.D. Ill. 1999), *rev'd*, 201 F.3d 953 (7th Cir. 2000). The Treasurer of the City of Chicago, Miriam Santos, was indicted on a twelve-count indictment for mail fraud, wire fraud and extortion arising out of her seeking campaign contributions from banks and securities firms that held or invested funds for the City of Chicago. *Id.* Santos was arraigned on February 3, 1999, and the district court set a trial date for April 14, 1999. *Id.* At the arraignment, attorneys David Stetler and his associate Corey Rubenstein represented Santos. *Id.* at 838. Santos' attorney Stetler objected to the trial date set, indicating that he was scheduled to begin another trial on February 15, 1999 that would run into the date set for Santos' trial. *Id.* The government responded that Stetler was not lead counsel in the other case, and the district court overruled Stetler's objection. *Id.* The district court, in denying the motion for continuance, reasoned that the case was not complicated, but rather a single defendant case in which no novel questions of law or fact would be raised, and the government had complied with the court's order to turn over all discoverable material at the pretrial conference. *Id.* at 840. The court also found that Stetler should have

Seventh Circuit Court of Appeals reversed her conviction.⁴⁷ The Seventh Circuit addressed Santos' contentions that the district court judge made numerous evidentiary errors⁴⁸ and that she was deprived of her constitutional right to the assistance of counsel through the district court's denial of a motion for continuance, which would have permitted Santos to be represented by the counsel of her choice.⁴⁹ The Seventh Circuit's decision to reverse the district court was based on erroneous evidentiary rulings.⁵⁰

However, before addressing the evidentiary rulings, Judge Posner addressed Santos' contention that the district court's denial of her motion for continuance had the effect of denying her right to the counsel of her choice in violation of the Sixth Amendment.⁵¹

advised Santos of his obligation in the other case, and that Santos had a right to a speedy trial. *Id.* at 839. The court also indicated that the public had an interest in having the case resolved expeditiously, since Santos was in a position of public trust. *Id.* at 840. Lastly, the court found that because two attorneys had filed appearances, one could represent Santos until the other case was concluded; or Santos could seek other counsel, as she had substantial means given the fact that the salary received by the Treasurer of the City of Chicago was \$104,000 per year. *Id.* at 840-41.

On February 10, 1999, Santos filed a formal motion for a continuance, seeking to delay the trial until July 1999, which the district court denied. *Id.* at 839. On February 23, 1999, a new attorney, Chris Gair, moved to file an appearance on behalf of Santos, which the court granted. *Id.* at 841. Gair indicated to the district court that he had no intention of seeking a continuance, yet on April 13, 1999, the day before trial, a motion for continuance was made, which the district court denied. *Id.* The trial proceeded on April 14, 1999, and the jury returned a verdict on May 3, 1999, finding Santos guilty on one count of extortion and five counts of mail fraud. *Id.* at 807. The district court sentenced Santos to a prison term of forty months. *Id.*

47. *Santos*, 201 F.3d at 966.

48. *Id.* at 961-66.

49. *Id.* at 957-61.

50. *Id.* at 961-65. The following quote may shed light on the reasoning for the Seventh Circuit's decision in *Santos*:

It must be remembered in reading evidence cases that the evidence point is often but a peg to hang a reversal on where the court, for some articulated or unexpressed reason, feels an injustice has been done. Predicting reversals or affirmances on errors in evidence is therefore difficult and the precedential value of most such decisions is weak. Since almost no trial is completely error free, the process increases appellate discretion to prevent what the bench may conceive to be a miscarriage of justice though it may lack such undifferentiated power.

JACK B. WEINSTEIN ET AL., *EVIDENCE: CASES AND MATERIALS*, 86-87 (9th ed. 1997).

51. *Santos*, 201 F.3d at 957-61. In addressing Santos' contention, Judge Posner conceded that a criminal defendant's right to counsel of choice is not a fundamental right guaranteed by the Sixth Amendment. *Id.* at 958. Since a criminal defendant's right to counsel of choice is not a fundamental right, Judge Posner described it as "one of constitutional dignity, in being

Judge Posner could have exercised judicial restraint and addressed this issue as moot, since the grounds for reversal were found on evidentiary rulings, but the opinion went further.⁵² Judge Posner, while conceding that a criminal defendant's right to counsel of choice is "not so fundamental as the rights protected by the rule of automatic reversal,"⁵³ indicated that the writ of mandamus would be an appropriate remedy where a district court judge abuses his discretion by refusing to grant a continuance.⁵⁴

In analyzing the *Santos* decision, the role of a criminal defendant's right to counsel of choice in Sixth Amendment jurisprudence must first be considered. Furthermore, consideration must be given to how the courts have sought to redress deprivations of a criminal defendant's choice of counsel. An understanding of the role and purpose of the writ of mandamus must also be analyzed in order to determine whether this remedy is appropriate and whether the courts have ever used this remedy in such a situation.

II. OVERVIEW OF THE RIGHT TO COUNSEL OF CHOICE IN THE SIXTH AMENDMENT

The plain meaning of the Sixth Amendment provides a defendant in a criminal prosecution with the "Assistance of Counsel for his defense."⁵⁵ Beyond the plain meaning of those words, it must be determined to what extent a criminal defendant

represented by the lawyer of [one's] choice." *Id.* at 959.

52. For Judge Posner's views on judicial restraint, see RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM*, 304-34 (1996).

53. *Santos*, 201 F.3d at 960.

54. *Id.* at 961. In order to reach this new determination that the writ of mandamus is an appropriate remedy as applied to the denial of a criminal defendant's counsel of choice, Judge Posner engaged in what could be perceived as a move of legal legerdemain. This was accomplished by intimating that a criminal defendant's counsel of choice "resembles a part at least of the rationale for the first class of 'structural' errors," those where prejudice to the defendant cannot be proven. *Id.* at 960. Judge Posner then, retreating to his earlier concession that a criminal defendant's counsel of choice was not so fundamental as the structural errors protected by the rule of automatic reversal, made the leap to indicate that since this right cannot be effectively remedied by appealing the final judgment, the writ of mandamus is therefore appropriate. *Id.* Judge Posner made this conclusion without citing any authority directly on this point or more specifically explaining why this remedy would be appropriate.

55. U.S. CONST. amend. VI. Exactly what the words of the Sixth Amendment were intended to mean is not readily discernible by historical materials, and here the words of Justice Jackson have never been more true: "[j]ust what our forefathers did envision, or would have envisioned had they seen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh." *Youngstown Steel & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

has a right to counsel of choice.

In *Powell v. Alabama*, the Supreme Court stated: "It is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice."⁵⁶ A thorough analysis of *Powell* is appropriate to determine the context in which this often quoted language arose and its impact on Sixth Amendment jurisprudence.⁵⁷

A. *The Counsel of Choice Language in Powell v. Alabama Interpreted*

The defendants in *Powell*, a group of black male youths, were charged with the rape of two female white youths.⁵⁸ During their detainment, serious threats of mob violence were made against the defendants that required the sheriff to enlist aid from the militia to protect the defendants.⁵⁹ The defendants were strangers in a strange and hostile land, as they were "ignorant and illiterate . . . [and] residents of other states, where alone members of their families resided."⁶⁰ The record of the defendants' arraignment, where they pled not guilty, failed to specifically indicate whether they had counsel or were given the opportunity to obtain counsel.⁶¹ The record at trial did note, however, that no counsel appeared on behalf of the defendants when the judge attempted to proceed.⁶² As a result, the court appointed the defendants counsel that same day.⁶³ Despite having counsel at trial, the defendants were found

56. 287 U.S. 45, 53 (1932).

57. The language in *Powell* has been interpreted by some as the Court's explicit statement of a constitutional right to counsel of choice. See Canfield, *supra* note 12, at 786 (stating that "[a] criminal defendant's right to the counsel of his choice, explicitly acknowledged in *Powell v. Alabama*, is one of a cluster of rights identified as incident to the [S]ixth [A]mendment's right to counsel clause."). However, others have found that no right to counsel of choice exists, either in the Constitution or the Supreme Court's statement in *Powell*. See Brecher, *supra* note 7, at 1957 (finding that "[n]o language in the [S]ixth [A]mendment refers to the defendant's right to counsel of choice.").

58. *Powell*, 287 U.S. at 49. The case arose out of allegations that a group of male black youths, including the seven defendants at trial, were on a freight train in Alabama along with a group of seven male white youths and two female white youths. *Id.* at 50. A fight erupted, where all but three of the white youths, one male and the two females, were thrown from the train. *Id.* at 50-51. The youths that were thrown from the train sent message of the fight to the authorities and the seven defendants were arrested based on allegations that the two female white youths were raped by six male black youths. *Id.* at 51.

59. *Id.*

60. *Id.* at 52.

61. *Id.*

62. *Id.* at 53.

63. *Id.* at 56. After it initially appeared that no counsel had been appointed, an attorney, not a member of the local bar, indicated to the judge

guilty and sentenced to death.⁶⁴

The Supreme Court found that under the hostile conditions in the community and the “*pro forma* rather than zealous and active”⁶⁵ assistance of counsel, the “defendants were not accorded the right of counsel in any substantial sense,”⁶⁶ in violation of their Fourteenth Amendment due process rights.⁶⁷ This manner of appointment effectively denied the defendants any opportunity to investigate or adequately prepare a defense.⁶⁸ The Supreme Court went on to emphasize the fundamental importance of the assistance of counsel, stating that “[e]ven the intelligent and educated layman have small and sometimes no skill in the science of law . . . [and] [i]f that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.”⁶⁹

What *Powell* instructs is simply the fundamental nature of the assistance of counsel in assuring a fair trial, and not the constitutional guarantee of the right to counsel of choice. The Supreme Court’s opinion does not grant the right to counsel of choice, but rather it grants a defendant “a *fair* opportunity to secure counsel of his own choice.”⁷⁰

B. Sixth Amendment Right to Counsel of Choice in the Wake of *Powell v. Alabama*

Numerous cases in the immediate wake of *Powell* indicated the importance of a defendant being accorded the right to a

that he was present on behalf of interested persons to see that defendants were represented. *Id.* at 53. A disorganized exchange took place between this attorney, the judge and members of the local bar. *Id.* at 53–56. The record indicated that the judge “had ‘appointed all the members of the bar’ for the limited ‘purpose of arraigning the defendants,’” but representation for trial had yet to be determined. *Id.* at 56. The disorganized exchange coming to some semblance of an appointment of counsel allowed the trial to continue that day. *Id.*

64. *Id.* at 50.

65. *Id.* at 58.

66. *Id.* The Supreme Court’s opinion included a detailed account of the genesis of the fundamental right to the assistance of counsel, tracing the constitutions and laws of the American colonies and the Constitution of the United States. *Id.* at 60–64. The Court concluded that the circumstances surrounding the trials of defendants amounted to a violation of the defendants’ due process rights to a fair trial. *Id.* at 68.

67. It is noteworthy that *Powell* was not a Sixth Amendment case, but rather a state prosecution which the Court analyzed under the Fourteenth Amendment’s due process guarantee. LAFAVE, *supra* note 3, at 553. “Nonetheless, it has had continuing significance in the interpretation of the Sixth Amendment.” *Id.*

68. *Powell*, 287 U.S. at 58.

69. *Id.* at 69.

70. *Id.* at 53 (emphasis added).

reasonable opportunity to have the assistance of counsel for one's defense.⁷¹ In that regard, *Chandler v. Freitag*⁷² is instructive.

In *Chandler*, the defendant was indicted for housebreaking and larceny.⁷³ On the date of trial, defendant intended to represent himself, believing that "an attorney could do him no good."⁷⁴ However, just before the trial began, defendant was informed that he would also be tried as a habitual criminal, at which point he requested a continuance to obtain counsel.⁷⁵ The court denied his request and so the defendant proceeded to trial, entering a plea of guilty to the housebreaking and larceny charges, while the court entered a jury verdict finding defendant guilty of being a habitual criminal.⁷⁶ The Supreme Court reversed a denial of habeas corpus relief and held that "[r]egardless of whether [defendant] would have been entitled to the appointment of counsel, his right to be heard through his own counsel was unqualified."⁷⁷

In *Chandler*, the defendant was completely denied the opportunity to secure the assistance of counsel in order to defend a charge presented to defendant on the day of his trial. Again, what *Chandler*, and other cases of the period⁷⁸ instruct is simply the fundamental nature of the assistance of counsel in assuring a fair trial, and not the constitutional guarantee of the right to counsel of choice.

The cases concerning the Sixth Amendment right to counsel of choice beyond the immediate wake of *Powell* are also quite instructive. In *Ungar v. Sarafite*,⁷⁹ the United States Supreme Court granted certiorari to consider whether the denial of a continuance deprived defendant of due process in his "constitutional right to engage counsel and to defend against the charge."⁸⁰ The Court found that while the matter of a continuance

71. See cases cited *supra* note 18 (explaining the theory of reasonable assistance of counsel).

72. 348 U.S. 3 (1954).

73. *Chandler*, 348 U.S. at 4.

74. *Id.*

75. *Id.* at 5.

76. *Id.* From the Supreme Court opinion it seems that defendant entered a plea of guilty only as to the housebreaking and robbery charges. After defendant entered his plea, the judge then instructed the jury "to raise their right hands . . . if they found [defendant] to be an habitual criminal." *Id.* All jurors raised their right hands. *Id.* In state habeas corpus relief proceedings, there existed some question as to whether defendant had also pled guilty to the habitual criminal charge. *Id.* at 6.

77. *Id.* at 9.

78. See cases cited *supra* note 18 (detailing other cases from the 1940s).

79. 376 U.S. 575 (1964).

80. *Id.* at 589. The defendant was served with a showcause order charging that defendant's remarks during another trial, presided at by the judge

is within the trial judge's discretion, "a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality."⁸¹ However, in *Ungar*, the Court found no violation of defendant's right to due process of law because defendant had adequate notice of the hearing in which to prepare a defense.⁸² While *Ungar* does not specifically address the right to counsel of choice directly, it is instructive on the issue because the case, while citing *Chandler*,⁸³ serves to define the terms of "reasonable opportunity to employ and consult with counsel."⁸⁴ In *Ungar*, it is clear that the term "reasonable" is just that. While a court cannot display a "myopic insistence upon expeditiousness,"⁸⁵ by the same logic, a defendant cannot display a "myopic insistence" upon counsel of choice.

Subsequent cases support the *Ungar* point of view. The next Supreme Court case directly addressing the right to counsel of choice issue was *Morris v. Slappy*.⁸⁶ In *Morris*, the Supreme Court addressed whether a defendant's Sixth Amendment right to counsel is violated where a defendant is denied a motion for continuance until the attorney initially appointed is available and instead the defendant is defended by substitute appointed counsel.⁸⁷ After exhausting his state appeals, defendant petitioned

issuing the showcause order, amounted to contempt of court. *Id.* at 581. The judge denied several motions for a continuance, which resulted in defendant's attorney being forced to withdraw. *Id.* The hearing proceeded without counsel for defendant, himself an attorney, and defendant again sought another motion for continuance and to hold the hearing before another judge, which the judge denied and found defendant guilty of contempt. *Id.* Specifically, defendant argued that he needed time to "present medical proof and expert testimony showing no contempt was intended" and that inclement weather in the days prior to trial prevented his preparation. *Id.* at 590-91.

81. *Id.* at 589.

82. *Id.* at 591.

83. *Id.* at 589.

84. *Chandler*, 348 U.S. at 10.

85. *Ungar*, 376 U.S. at 589.

86. 461 U.S. 1 (1983).

87. *Id.* at 3. Defendant was charged with five counts including, *inter alia*, rape, robbery, and false imprisonment. *Id.* at 5. Counsel was appointed and a trial date set, however, six days before trial the attorney appointed to represent defendant was hospitalized and another attorney was appointed to represent defendant. *Id.* The original attorney had done extensive investigation, which was reviewed by the substituted attorney, and the substitute attorney also met with defendant prior to trial. *Id.* At trial, defendant addressed the court and made comments regarding a lack of adequate preparation, which the court construed as a motion for continuance and denied. *Id.* at 6. Substitute counsel assured the trial court that he was prepared for trial. *Id.* On the second and third day of trial, defendant again addressed the court and made comments to the effect that the original attorney appointed to him was his attorney and not the substitute counsel before the court. *Id.* at 7-8. The court again construed defendant's comments

the United States District Court for the Northern District of California for a writ of habeas corpus, which the district court denied.⁸⁸ However, the Ninth Circuit Court of Appeals directed that the writ be issued unless defendant received a new trial.⁸⁹ The court of appeals recognized that "an indigent defendant does not have an unqualified right to the appointment of counsel of his own choosing,"⁹⁰ but found that the defendant was merely seeking a continuance so that his appointed attorney could represent him.⁹¹ The court of appeals went on to hold that the Sixth Amendment right to counsel would "be without substance if it did not include the right to a meaningful attorney-client relationship."⁹² The Supreme Court reversed the decision of the Ninth Circuit Court of Appeals.⁹³ The Court reiterated the language of *Ungar* that in the context of a continuance, "only an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay' violates the right to assistance of counsel."⁹⁴ However, the Court found that the denial of the continuance motion was reasonable based on the timing of the motions and what could have been perceived by the trial court as defendant's lack of good faith in seeking to delay the trial through bringing the motions.⁹⁵ The Court also rejected the notion that "the Sixth Amendment guarantees a 'meaningful relationship' between an accused and his counsel,"⁹⁶ finding that "the state courts provided [the defendant] a fair trial and the United States District Judge properly denied relief."⁹⁷

Morris, as the first case in the wake of *Powell* to directly address the issue of the right to counsel of choice, instructs that the Sixth Amendment is concerned with assuring a criminal defendant the right to a fair trial and the assistance of counsel; beyond that, the Sixth Amendment guarantees no right to counsel of choice. This emphasis on a fair trial, rather than counsel of

as a renewed motion for continuance and denied the renewed motion. *Id.* at 8. At this point, defendant refused to take the stand, against the advice of counsel. *Id.* at 9. The jury convicted defendant on three counts, but failed to reach a verdict on the two remaining counts. *Id.* A second trial was held a week later on the two remaining counts which the jury failed to reach a verdict on, ultimately finding defendant guilty on these two counts. *Id.*

88. *Id.* at 9.

89. *Id.* at 11.

90. *Id.* at 10.

91. *Id.*

92. *Id.*

93. *Id.* at 15.

94. *Id.* at 11-12 (citing *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964)).

95. *Id.* at 13.

96. *Id.* at 14.

97. *Id.* at 15.

choice, was reiterated in *Wheat v. United States*.⁹⁸

In *Wheat*, the Court was called on to balance the right to counsel of choice with the right to conflict-free representation, in the context of one attorney representing multiple criminal defendants on related charges of a criminal conspiracy.⁹⁹ The Supreme Court began its analysis by reinforcing the fact that the Sixth Amendment right to counsel, “was designed to assure fairness in the adversary criminal process.”¹⁰⁰ The Court proceeded, reiterating that, “the appropriate inquiry focuses on the adversarial process, not on the accused’s relationship with his lawyer as such.”¹⁰¹ Relying on the *Morris* decision, the Court clarified the right to counsel of choice issue, stating that:

[W]hile the right to select and be represented by one’s preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers.¹⁰²

The Court’s holding recognized a “presumption” in favor of a defendant’s counsel of choice, but stated that this “presumption” could be overcome by either showing an actual or potential conflict.¹⁰³

As the clearest Supreme Court pronouncement on the right to counsel of choice, *Wheat* instructs that the Sixth Amendment guarantees a criminal defendant the right to a fair trial and the right to the assistance of counsel.¹⁰⁴ The *Wheat* Court recognized a presumption of being defended by one’s counsel of choice, but that representation is not a fundamental Sixth Amendment right.¹⁰⁵ Thus, in *Wheat*, the Court clarified that the words “fair

98. 486 U.S. 153 (1988).

99. *Wheat*, 486 U.S. at 154-55. The defendant was charged with participating in a narcotics distribution conspiracy. *Id.* at 154. The same attorney represented two other co-conspirators, the first co-conspirator had offered to plead guilty while the second co-conspirator had already entered a guilty plea. *Id.* at 155. The defendant then sought to be represented by this same attorney. *Id.* The government objected, stating that this attorney’s representation of defendant would create a conflict of interest. *Id.* at 155-56. The defendant replied that he waived the right to have conflict-free counsel and asserted his right to have his counsel of choice. *Id.* at 156. The district court found that a conflict of interest existed and denied defendant’s request to substitute his attorney. *Id.* at 157. Defendant proceeded to trial without his counsel of choice and was convicted. *Id.*

100. *Id.* at 158 (quoting *United States v. Morrison*, 449 U.S. 361, 364 (1981)).

101. *Id.* at 159 (quoting *United States v. Cronin*, 466 U.S. 648, 657 n.21 (1984)).

102. *Id.*

103. *Id.* at 164.

104. *Id.*

105. *Id.*

opportunity to secure counsel of his own choice"¹⁰⁶ from *Powell* do not recognize a fundamental constitutional right to counsel of choice.¹⁰⁷

C. *The Seventh Circuit Court of Appeals Precedent Regarding the Sixth Amendment Right to Counsel of Choice*

Having traced the development of the counsel of choice issue through Sixth Amendment jurisprudence, reflected in Supreme Court opinions, it is established that there is no fundamental constitutional right to a criminal defendant's counsel of choice.¹⁰⁸ As required under the principle of *stare decisis*,¹⁰⁹ the decisions of the United States Court of Appeals for the Seventh Circuit reiterate this position.¹¹⁰ In fact, the position taken by the trial court in *Santos* appears contradictory to other Seventh Circuit

106. *Powell*, 287 U.S. at 53.

107. *Wheat*, 486 U.S. at 164.

108. See discussion *supra* Part II. A-B (discussing the right to counsel located in the Sixth Amendment).

109. The term *stare decisis* is Latin for "to stand by things decided," and instructs that "it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation." BLACK'S LAW DICTIONARY 1414 (7th ed. 1999).

110. See *United States v. Orey*, 263 F.3d 669, 673 (7th Cir. 2001) (holding that an indigent defendant has a right to competent counsel but not a right to counsel of his choice); *United States v. Carrera*, 259 F.3d 818, 824 (7th Cir. 2001) (holding that the right to counsel of choice is not absolute); *United States v. Combs*, 222 F.3d 353, 360-61 (7th Cir. 2000) (holding that the right to counsel of choice is not absolute); *United States v. Messino*, 181 F.3d 826, 831 (7th Cir. 1999) (holding that a defendant's right to retain counsel of choice does not extend to an attorney the defendant cannot afford); *United States v. Robinson*, 20 F.3d 270, 275 (7th Cir. 1994) (holding that the right to counsel of choice is not absolute); *United States v. Vasquez*, 966 F.2d 254, 261 (7th Cir. 1992) (recognizing a defendant's right to counsel of choice is not absolute, but is to be balanced against broader interests of judicial integrity); *United States v. Defazio*, 899 F.2d 626, 629 (7th Cir. 1990) (reaffirming *Wheat*, 461 U.S. 153 (1988), holding that there is not an absolute right to counsel of choice); *United States v. Rasmussen*, 881 F.2d 395, 401 (7th Cir. 1989) (recognizing a defendant's right to counsel of choice is not absolute, but is to be balanced against fair and proper administration of justice); *United States v. Micky*, 859 F.2d 473, 480 (7th Cir. 1988) (holding that a criminal defendant's right to retained counsel of choice "is not absolute, but qualified, and must be balanced against the requirements of the fair and proper administration of justice"); *United States ex rel. Kleba v. McGinnis*, 796 F.2d 947, 952 (7th Cir. 1986) (stating that "where the inability of retained counsel to serve gives promise of unreasonable delay or inconvenience in completing the trial, the court may require the defendant to secure other counsel"); *United States v. O'Malley*, 786 F.2d 786, 789 (7th Cir. 1986) (holding that the right to counsel of choice is not absolute); *Ford v. Israel*, 701 F.2d 689, 692 (7th Cir. 1983) (recognizing that the Sixth Amendment does not guarantee an indigent criminal defendant the appointment of counsel of choice).

cases, both before and after the *Santos* decision.¹¹¹ Assuming *arguendo* that Santos' limited Sixth Amendment right to counsel of choice was violated, it must next be determined how the deprivation of this limited right to counsel of choice is treated by the courts.

111. Of particular importance is *United States v. Oreye*, 263 F.3d 669 (7th Cir. 2001), another decision authored by Judge Posner, where Judge Posner appears to be perpetuating this "class warfare," which he was so quick to defend in *Santos*. See generally *Santos*, 201 F.3d at 959.

Oreye, an indigent criminal defendant, was appointed counsel. *Oreye*, 263 F.3d at 670. Oreye became dissatisfied with his appointed counsel and so the court appointed substitute counsel. *Id.* Six business days before trial, the substitute counsel filed a motion to withdraw on the basis that Oreye refused to cooperate with him. *Id.* The district court judge gave Oreye a choice between continuing to be represented by substitute counsel, retaining his own counsel, or proceeding pro se. *Id.* Oreye "never said he wanted to proceed pro se," but he did proceed pro se and substitute counsel was appointed to serve as standby counsel. *Id.* Oreye's substitute counsel was quite active in the trial, having "examined and cross-examined a number of witnesses, participated actively in the instructions conference, raised issues and objections, and even gave a closing argument." *Id.* at 671. Ultimately, Oreye was found guilty on the charges. *Id.*

On appeal, Oreye argued that the district court judge failed to adequately explain the ramifications of proceeding pro se, which prevented Oreye from making an intelligent waiver of his right to counsel. *Id.* Judge Posner's subsequent ruling seems to emanate from his statement that "[t]he evidence of [Oreye's] guilt . . . was overwhelming; a baker's dozen of lawyers could not have gotten him an acquittal on these counts." *Id.*

A criminal defendant may waive the right to the assistance of counsel and proceed pro se, if that waiver is based on an informed choice. See, e.g., *Faretta v. California*, 422 U.S. 806, 835 (1975) (holding that an accused has a constitutional right to self-representation, but that choice must be made "knowingly and intelligently"). Judge Posner found an informed choice in *Oreye* based on the logic that "[i]f you're given several options, and turn down all but one, you've selected the one you didn't turn down." *Oreye*, 263 F.3d at 670. Judge Posner then proceeded by assuming that if this was not an informed waiver, "we would doubt whether there had been a denial of counsel here, because [substitute counsel], while labeled standby counsel, was functionally counsel, period." *Id.* at 672. "If the defendant's counsel provides all the assistance required by the Sixth Amendment, the fact that he is called 'standby counsel' would not violate the amendment." *Id.* Judge Posner found that Oreye "had more representation than criminal defendants are entitled to," and affirmed the conviction. *Id.* at 673.

Oreye is seemingly irreconcilable with *Santos*, without finding a perpetuation of the "class warfare" Judge Posner was concerned to avoid in *Santos*. See generally *Santos*, 201 F.3d at 959. Santos had competent counsel, and had access to the issuance of a writ of mandamus on remand; whereas Oreye had neither full zealous advocacy by appointed counsel or the ability to have fully uninhibited self-representation, and had his conviction affirmed.

D. In United States v. Santos the Deprivation of the Criminal Defendant's Counsel of Choice Constituted Harmless Error

It is established that the Sixth Amendment is concerned with assuring fairness in an adversarial criminal proceeding.¹¹² This is best exemplified in the case of *United States v. Morrison*,¹¹³ which addressed whether a Sixth Amendment violation requires some showing of actual prejudice to the defendant before relief is granted.¹¹⁴ The *Morrison* Court began its analysis by stating that the right to assistance of counsel granted by the Sixth Amendment is "meant to assure fairness in the adversary criminal process."¹¹⁵ The Court defined those words when it stated:

At the same time and without detracting from the fundamental importance of the right to counsel in criminal cases, we have implicitly recognized the necessity for preserving society's interest in the administration of criminal justice. Cases involving Sixth

112. See discussion *supra* Parts II.A–C; see also *Engle v. Isaac*, 456 U.S. 107, 134 (1982) (stating that the Constitution guarantees a criminal defendant the right to a fair trial and a competent attorney); *Polk County v. Dodson*, 454 U.S. 312, 318 (1981) (stating that "[t]he system assumes that adversarial testing will ultimately advance the public interest in truth and fairness."); *United States v. Morrison*, 449 U.S. 361, 364 (1981) (stating that the Sixth Amendment "is meant to assure fairness in the adversary criminal process."); *United States v. Ash*, 413 U.S. 300, 309 (1973) (stating that "the core purpose of the counsel guarantee was to assure '[a]ssistance' at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor.").

113. 449 U.S. 361 (1981). In *Morrison*, the defendant was indicted on two counts of distributing heroin, and retained counsel to represent her. *Id.* at 362. Two agents of the Drug Enforcement Agency (DEA), with knowledge that defendant was represented by counsel, spoke with defendant in order to obtain her cooperation in a related investigation. *Id.* The DEA agents "indicated that [defendant] would gain various benefits if she cooperated but would face a stiff jail term if she did not," however, defendant did not cooperate and notified her attorney of the conversation. *Id.* The DEA agents again approached defendant, in the absence of counsel, and again defendant refused to cooperate. *Id.* at 362-63. Defendant then filed a motion to dismiss the indictment with prejudice, alleging that the conduct of the agents had violated her Sixth Amendment right to counsel, though defendant made no allegations that the conduct of the agents affected her representation. *Id.* at 363. The district court denied defendant's motion, and defendant "entered a conditional plea of guilty to one count of the indictment." *Id.* On appeal, the court of appeals reversed the judgment of the district court on the grounds that "[defendant's] Sixth Amendment right to counsel had been violated . . . whether or not any tangible effect upon [defendant's] representation had been demonstrated." *Id.* The Supreme Court reversed, holding that "the solution provided by the Court of Appeals is inappropriate where the violation, which we assume has occurred, has had no adverse impact upon the criminal proceedings." *Id.* at 367.

114. *Id.* at 363–64.

115. *Id.* at 364.

Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests.¹¹⁶

The Court held that a criminal defendant must be assured "effective assistance of counsel and a fair trial,"¹¹⁷ but that a Sixth Amendment violation that does not deprive a defendant of those fundamental protections "is no basis for imposing a remedy in that proceeding, which can go forward with full recognition of the defendant's right to counsel and to a fair trial."¹¹⁸ Therefore, "[a]bsent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated."¹¹⁹ The *Morrison* court also affirmed the fact that "certain violations of the right to counsel may be disregarded as harmless error."¹²⁰

The harmless error doctrine,¹²¹ codified in 28 U.S.C. § 2111¹²²

116. *Id.*

117. *Id.* at 365.

118. *Id.*

119. *United States v. Cronin*, 466 U.S. 648, 658 (1984) (holding that defendant's allegations that his counsel provided ineffective representation, because counsel was young and inexperienced in criminal matters, did not provide a basis for a finding of ineffective assistance of counsel in the absence of a specific showing of actual ineffectiveness). Examples of such challenged conduct having an effect on the reliability of the trial process include the complete denial of counsel and where counsel completely fails to "subject the prosecution's case to meaningful adversarial testing." *Id.* at 659.

120. *Morrison*, 449 U.S. at 365.

121. The genesis of the harmless error doctrine came about in reaction to the adoption, by American courts, of the Exchequer Rule, which in essence provided that a trial error regarding "the admission of evidence was presumed to have caused prejudice and therefore required a new trial." LAFAVE, *supra* note 3, at 1278-79. Appellate courts were criticized for granting new trials based on seemingly insignificant errors, *id.* at 1279, and were viewed as "impregnable citadels of technicality." *Kotteakos v. United States*, 328 U.S. 750, 759 (1946) (citation omitted). In response, section 269 of the Judicial Code was adopted by Congress by the Act of February 26, 1919 requiring federal appellate courts to "give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties." LAFAVE, *supra* note 3, at 1279. That statute is essentially identical to the modern codification of the harmless error doctrine in 28 U.S.C. § 2111 and Federal Rule of Criminal Procedure 52(a). See *infra* note 122-23. In *Kotteakos*, the Court sought to provide guidance to courts on the proper method of applying this harmless error analysis, when it stated:

If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the

and Rule 52(a) of the Federal Rules of Criminal Procedure,¹²³ instructs a reviewing court to disregard errors that do not affect the substantial rights of the litigants.¹²⁴ *Chapman v. California*¹²⁵ resolved the issue of whether the harmless error doctrine is applicable to constitutional violations.¹²⁶ Numerous decisions after *Chapman* have affirmed its holding.¹²⁷ *Chapman* held that an error is harmless if it is determined "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."¹²⁸ The standard applied to determine whether an error is harmless has arguably changed,¹²⁹ however, the Supreme Court's most recent pronouncement finds an error harmless if it "is

judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

Kotteakos, 328 U.S. at 764-65 (citations omitted).

122. 28 U.S.C. § 2111 (2001), provides: "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

123. FED. R. CRIM. P. 52(a) provides: "Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights must be disregarded."

124. See sources cited and accompanying text *supra* note 121-23 (noting that courts will only address errors that infringe on substantial rights).

125. 386 U.S. 18 (1967).

126. 3A CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 855, 326 (2d ed. 1983) [hereinafter WRIGHT, CRIMINAL].

127. See *generally* *Neder v. United States*, 527 U.S. 1 (1999) (concluding that omission of element of crime in jury instructions in violation of Sixth Amendment was subject to harmless error analysis); *Arizona v. Fulminante*, 499 U.S. 279 (1991) (deciding that evidence of coerced confession in violation of Fifth Amendment was subject to harmless error analysis); *Delaware v. Van Arsdall*, 475 U.S. 673 (1986) (noting that denial of defense counsel's right to cross-examine witness to show bias was subject to harmless error analysis); *Rose v. Clark*, 478 U.S. 570 (1986) (holding that erroneous jury instruction was subject to harmless error analysis); *Moore v. Illinois*, 434 U.S. 220 (1977) (concluding that evidence of pretrial identification made in violation of defendant's right to counsel was subject to harmless error analysis); *Schneble v. Florida*, 405 U.S. 427 (1972) (finding evidence of the confession of a non-testifying codefendant in violation of the Sixth Amendment was subject to harmless error analysis); *Bumper v. North Carolina*, 391 U.S. 543 (1968) (holding that evidence seized in violation of the Fourth Amendment was subject to harmless error analysis).

128. *Chapman*, 386 U.S. at 24.

129. See Jason S. Marks, *Harmless Constitutional Error: Fundamental Fairness and Constitutional Integrity*, 8 CRIM. JUST. 2, 4 (1993) (arguing that "successive modifications of the test for harmless error . . . have lowered the degree of certainty to which a reviewing court must be satisfied that an error was indeed harmless").

clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.”¹³⁰ The Supreme Court’s most recent statement of harmless error differentiates between structural errors, which are not subject to harmless error analysis, and all other errors, which are subject to harmless error analysis.¹³¹ Structural errors are those which “deprive defendants of ‘basic protections’ without which ‘a criminal trial cannot reasonably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair.’”¹³²

It is well established that the harmless error doctrine applies to constitutional violations; however, “[i]n which category other constitutional violations fall cannot be definitely known until the Supreme Court has spoken about them.”¹³³ The Supreme Court indicated that a criminal defendant’s right to counsel is subject to harmless error analysis.¹³⁴ However, the Supreme Court has not specifically addressed whether the denial of a criminal defendant’s right to counsel of choice is subject to harmless error analysis. Presumably, the Supreme Court has not addressed this issue because the answer is apparent that the denial of a criminal defendant’s right to counsel of choice is subject to harmless error analysis. The Supreme Court has repeatedly indicated that where “the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis.”¹³⁵ If fundamental rights are subject to the harmless error doctrine, *a fortiori*, a non-fundamental right such as counsel of choice is also subject to the harmless error doctrine. Thus, only the complete denial of a criminal defendant’s right to counsel is not subject to harmless error analysis.¹³⁶

130. *Neder*, 527 U.S. at 18.

131. *Id.* The *Neder* Court noted that structural errors are found “only in a very limited class of cases.” *Id.* at 8.

132. *Id.* at 8–9 (quoting *Rose*, 478 U.S. at 577–78).

133. WRIGHT, CRIMINAL *supra* note 126, at 330.

134. *E.g.*, *United States v. Wade*, 388 U.S. 218, 242 (1967) (finding that evidence obtained in violation of defendant’s right to counsel was subject to harmless error analysis); *Milton v. Wainwright*, 407 U.S. 371, 377-78 (1972) (same); *Moore v. Illinois*, 434 U.S. 220, 232 (1977) (same); *Rushen v. Spain*, 464 U.S. 114, 117 (1983) (holding that Sixth Amendment right to counsel violations can be subject to harmless error analysis, “unless the deprivation, by its very nature, cannot be harmless,” such as the complete denial of right to counsel in *Gideon*, 372 U.S. at 338); *Satterwhite v. Texas*, 486 U.S. 249, 258 (1988) (deciding that admission of evidence at sentencing in violation defendant’s right to counsel was subject to harmless error analysis).

135. *Neder*, 527 U.S. at 8 (citing *Rose*, 478 U.S. at 579).

136. *See, e.g.*, *Johnson v. United States*, 520 U.S. 461, 468-69 (1997) (categorizing a total deprivation of the right to counsel as a structural error

Applying the harmless error analysis to the decision in *Santos*, Santos was not completely denied the right to counsel; rather she had to obtain another lawyer.¹³⁷ There was no allegation that this second retained lawyer was ineffective,¹³⁸ however, even if this second retained lawyer was ineffective, the remedy for this would lie under the ineffective assistance of counsel analysis of *Strickland v. Washington*¹³⁹ and not under the harmless error analysis. Since the defendant in *Santos* "had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis."¹⁴⁰ Thus, the deprivation of a criminal defendant's counsel of choice cannot be viewed as a structural error, if that defendant is able to obtain alternative effective representation. Furthermore, there is no evidence that the verdict rendered would have been any different if Santos had been represented by her counsel of choice.¹⁴¹ Therefore, the denial of defendant's counsel of choice in *Santos* constituted harmless error.

not subject to harmless error analysis); *Rushen*, 464 U.S. at 117 (holding that Sixth Amendment right to counsel can be subject to harmless error analysis, "unless the deprivation, by its very nature, cannot be harmless," such as the complete denial of right to counsel in *Gideon*, 372 U.S. at 338); *Chapman*, 386 U.S. at 23–24 n.8 (stating "that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error," including *Gideon*, 372 U.S. at 338 (demonstrating a complete denial of right to counsel)).

137. See *Santos*, 201 F.3d at 958 (noting that Santos' original lawyer withdrew and a lawyer with another firm filed his appearance on her behalf on February 26, several weeks before the trial commenced on April 14).

138. *Id.* at 959. Judge Posner specifically indicated:

A more difficult question is the consequence of an improper denial of the right to counsel of one's own choice in a case in which the defendant is able to hire a highly competent substitute lawyer as a replacement and there is no contention – for there is none here – that the defendant would have had a better chance of winning with her original lawyer.

Id.

139. 466 U.S. 668, 687 (1984) (holding that in order to obtain reversal on a claim of ineffective assistance of counsel a "defendant must show that counsel's performance was deficient . . . [and] that the deficient performance prejudiced the defense").

140. *Neder*, 527 U.S. at 8 (citing *Rose*, 478 U.S. at 579).

141. See *supra* note 137 and accompanying text (noting that there was no contention that the original lawyer would have obtained a different verdict). The following quote is instructive on this point: "Reversal for error, regardless of its effect of the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." ROGER TRAYNOR, *THE RIDDLE OF HARMLESS ERROR* 50 (1970).

E. Summary – The Limited Nature of the Right to Counsel of Choice

It is established that there is no fundamental guarantee in the Sixth Amendment ensuring that a criminal defendant will be represented by the counsel of their choice.¹⁴² It is further concluded that the denial of a criminal defendant's right to counsel of choice is subject to harmless error analysis.¹⁴³ It must also be remembered that a Sixth Amendment violation "should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests."¹⁴⁴ With these considerations in mind, it must next be determined whether the writ of mandamus is an appropriate remedy where a criminal defendant is denied their counsel of choice.

III. OVERVIEW OF THE EXTRAORDINARY WRIT OF MANDAMUS

Courts and those seeking redress in the courts by the writ of mandamus¹⁴⁵ must understand its proper role and purpose; otherwise this potentially broad exception¹⁴⁶ could become the rule—in effect eviscerating the final judgment rule.¹⁴⁷

Upon understanding its proper role and purpose, it must then be determined whether the writ of mandamus was intended to provide a remedy, or would be an appropriate remedy, for the denial of a criminal defendant's counsel of choice.

The All Writs Act, codified in 28 U.S.C. § 1651,¹⁴⁸ provides no answer to the proper role and purpose of the writ of mandamus. Therefore, in order to determine the proper role and purpose of the writ of mandamus, as well as its applicability as providing a remedy for the denial of a criminal defendant's counsel of choice, one must look to United States Supreme Court precedent. However, the proper role and purpose of the writ of mandamus

142. See discussion *supra* Parts II.A–C (demonstrating that the Sixth Amendment is concerned with guaranteeing a criminal defendant the right to a fair trial and to the assistance of counsel).

143. See discussion *supra* Part II.D (showing that the Sixth Amendment right to assistance of counsel is subject to harmless error analysis). A violation of the Sixth Amendment right to counsel must be demonstrated by a showing of actual prejudice. *Id.*

144. *Morrison*, 449 U.S. at 364.

145. 28 U.S.C. § 1651 (2000) provides in pertinent part: "(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

146. See *Berger*, *supra* note 29, at 37-38 (describing mandamus as "potentially a far broader means of obtaining interlocutory appellate review").

147. For a brief explanation of the final judgment rule see *supra* note 26 and accompanying text.

148. 28 U.S.C. § 1651 (2000).

have been the source of much confusion.¹⁴⁹ In order to clarify this confusion, careful attention must be paid to the terms that the Court has used, often interchangeably, and most importantly the circumstances behind the decisions from which these terms developed.

A. *The Traditional View of Mandamus*¹⁵⁰

1. *Abuse of Judicial Power Test*

In *Roche v. Evaporated Milk Ass'n*,¹⁵¹ the defendants filed pleas in abatement seeking to quash an indictment for want of jurisdiction based on allegations that the grand jury had been improperly impaneled.¹⁵² The prosecution responded with a demurrer to the defendants' pleas and a motion to strike the pleas, stating that the pleas in abatement were insufficient as a matter of law, which the district court granted.¹⁵³ The defendants then sought a writ of mandamus from the court of appeals, to reinstate

149. See Berger, *supra* note 29, at 41 (stating that "[t]he current sources of the 'standards' for using mandamus petitions, and the basis for much of the confusion in this area, are the oft-quoted phrases from various Supreme Court opinions."); John C. Nagel, *Replacing the Crazy Quilt of Interlocutory Appeals Jurisprudence with Discretionary Review*, 44 DUKE L.J. 200, 200 (1994) (indicating that "the courts and Congress have created a patchwork of exceptions to the final judgment rule" creating much confusion).

150. The writ of mandamus has been historically viewed as an extraordinary remedy. It has also been historically viewed that mandamus is not appropriate "to control the discretion of the court." HALSEY H. MOSES, *THE LAW OF MANDAMUS* 54 (Fred B. Rothman & Co. 1981) (1878) (citing *Ex Parte Roberts* and *Ex Parte Adshead*, 6 Pet. Rep. 216, 217 (1832) (Marshall, C.J.)). Justice Story indicated this in a clearer fashion when he stated "mandamus is not the appropriate remedy for any orders which may be made in a cause by a judge in the exercise of his authority; although they may seem to bear harshly or oppressively upon the party. The remedy in such cases must be sought in some other form." *Id.* at 48 (citing *Ex Parte Whitney*, 13 Pet. Rep. 404, 407-08 (1839)). This last sentence indicates that where appeal after final judgment can provide the relief requested mandamus is not appropriate. These general principles have gone largely unchanged and are reiterated in modern cases in which the writ of mandamus has been sought. See discussion *infra* parts III.A-E (discussing United States Supreme Court decisions involving the proper role and purpose of the writ of mandamus).

151. 319 U.S. 21 (1943).

152. *Id.* at 23. The defendants were indicted by a grand jury with violations of the Sherman Act, regarding a conspiracy to fix prices. *Id.* at 22. Defendants contended that the grand jury had impermissibly sat during more than one term, and that the investigation resulting in their indictment had not begun during the first term, within the meaning of 28 U.S.C. § 421. 28 U.S.C. § 421 stated that a district judge may permit a grand jury to sit for more than one term in order to finish an investigation previously begun but not finished. *Id.* at 23 n.1.

153. *Id.* at 24.

the pleas in abatement, which the court of appeals granted and affirmed upon rehearing en banc.¹⁵⁴ The Supreme Court, ultimately reversing the court of appeals grant of mandamus,¹⁵⁵ addressed whether the writ of mandamus was an appropriate remedy in this case by “look[ing] to those principles which should guide judicial discretion in the use of an extraordinary remedy.”¹⁵⁶

The Court began by tracing the traditional use of the writ of mandamus as used to “confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.”¹⁵⁷ The cases cited by the Court for the above definition of mandamus dealt with situations where a court decided a matter which it did not have jurisdiction to decide or where a court failed to exercise its jurisdiction to decide a case.¹⁵⁸ The Court found that the error alleged in defendants’ pleas to abate the indictment did not affect the jurisdiction of the district court to hear the case, and thus the case was properly before that court.¹⁵⁹ The Court went on from this point to plant the seed from which numerous other cases grew.¹⁶⁰ The Court stated that the decision of the district court, assuming *arguendo* that it was erroneous, “involved no abuse of judicial power,”¹⁶¹ and could be reviewed on appeal. Therefore mandamus was not an appropriate remedy.¹⁶² Mandamus does not lie where a

154. *Id.*

155. *Id.* at 32. The Court reversed the court of appeals issuance of the writ of mandamus, agreeing with the petitioner’s contention that the decision of the district court judge is reviewable only on appeal. *Id.* at 25. The Court found that the district court judge acted within his discretion, and the decision of the district court judge did not thwart appellate review of that decision. *Id.* at 26.

156. *Id.*

157. *Id.*

158. See, e.g., *Ex Parte Republic of Peru*, 318 U.S. 578, 586-87 (1943) (holding that mandamus is appropriate where a lower court improperly exercises its jurisdiction by refusing to recognize a defense to suit of sovereign immunity).

159. *Roche*, 319 U.S. at 23. The Court distinguished the case of *Ex Parte Bain*, 121 U.S. 1, 7 (1887), because in that case an indictment had been amended after it was returned by the grand jury and thus in effect was “no indictment of the grand jury.” *Roche*, 319 U.S. at 26-27. However, in the present case, the indictment was that given by the grand jury, with the contention being that the grand jury had been impaneled for an impermissible amount of time. *Id.* at 22-23. The Court found this did not affect the substance of the indictment itself, and therefore gave the district court the jurisdiction to hear the case. *Id.* at 26.

160. See *Berger*, *supra* note 29, at 44 (noting that “[t]he Court has also provided other terms to use in determining when the district court has acted in a manner justifying the invocation of the writ of mandamus. One of these phrases, ‘abuse of judicial power,’ was presented in *Roche*.”).

161. *Roche*, 319 U.S. at 27.

162. *Id.* at 30 (holding “[w]here the appeal statutes establish the conditions

lower court decision was erroneous, even though proceeding to final judgment is inconvenient and costly.¹⁶³ To hold otherwise, the Court stated, would "thwart the Congressional policy against piecemeal appeals in criminal cases."¹⁶⁴ However, the Court did not elucidate how it defined an abuse of judicial power, and how that term was distinct from a merely erroneous decision.

2. Usurpation¹⁶⁵ of Power Test

The next case to shed light on the proper role and purpose of the writ of mandamus was *DeBeers Consol. Mines, Ltd. v. United States*.¹⁶⁶ The defendants argued the injunction granted against them was beyond the power of the district court.¹⁶⁷ The Court held a writ of mandamus was an appropriate remedy in that case, because the district court was "not authorized either by statute or by the usages of equity"¹⁶⁸ to grant the injunction.¹⁶⁹ The *DeBeers* Court opined that writs of mandamus are appropriate "when a court has no judicial power to do what it purports to do – when its action is not mere error but usurpation of power – the situation falls precisely within the allowable use of [the All Writs Act]."¹⁷⁰

The opinion in *DeBeers* shed light on what the *Roche* Court

of appellate review an appellate court cannot rightly exercise its discretion to issue a writ whose only effect would be to avoid those conditions and thwart the Congressional policy against piecemeal appeals in criminal cases.").

163. *Id.*

164. *Id.* (citing *Cobbledick v. United States*, 309 U.S. 323, 325 (1940)).

165. The definition of the term usurpation is instructive in order to understand when mandamus will issue, and what prompted the Court to use this term. The term usurpation is defined as "to use without authority or right," RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY 1438 (1999), and as "[t]he unlawful seizure and assumption of another's position, office, or authority." BLACK'S LAW DICTIONARY 1543 (7th ed. 1999).

166. 325 U.S. 212 (1945).

167. *Id.* at 216. *DeBeers* involved an alleged conspiracy to "restrain and monopolize the commerce of the United States with foreign nations in gem and industrial diamonds, in violation . . . of the Sherman Act . . . [as well as] the Wilson Tariff Act. *Id.* at 215. The government sought equitable relief, and was granted a preliminary injunction restraining the defendants from "withdrawing . . . selling, transferring or disposing of any property in the United States 'until such time as this Court shall have determined the issues of this case and defendant corporations shall have complied with its orders.'" *Id.* The government contended that the injunction issued was within the district court's power based on section 4 of the Sherman Act, which granted jurisdiction to prevent and restrain violation of the Act, and the All Writs Act, which allowed courts to grant writs necessary to the exercise of the court's jurisdiction. *Id.* at 218–19.

168. *Id.* at 223.

169. *Id.*

170. *Id.* at 217. At the time of the decision in *DeBeers*, the All Writs Act was codified at 28 U.S.C. § 377.

meant by the term of “abuse of judicial power” by recasting that concept into the term of “usurpation of power.”¹⁷¹ *DeBeers* instructs that mandamus will be available as a remedy where a court acts manifestly beyond the scope of its power, or jurisdiction, a power determined by statutory law as well as *stare decisis* effect given to case law.¹⁷² In *DeBeers* this was exemplified by the fact that the district court granted an injunction “not authorized either by statute or by the usages of equity.”¹⁷³

3. Clear Abuse of Discretion Test

The next case to expand upon the proper role and purpose of the writ of mandamus was *Bankers Life & Cas. Co. v. Holland*,¹⁷⁴ which specifically helped to address the terms “abuse of judicial power” and “usurpation of power,” by recasting them into a new term – “clear abuse of discretion.”¹⁷⁵ In *Bankers Life*, the Court stated, “jurisdiction need not run the gauntlet of reversible errors.”¹⁷⁶ This language indicated that not every erroneous decision made by a district court is the proper case for the issuance of the writ of mandamus. Rather, the writ of mandamus “is meant to be used only in the exceptional case where there is clear abuse of discretion or ‘usurpation of judicial power’ of the sort held to justify the writ in *DeBeers Consol. Mines v. United States*.”¹⁷⁷ Again in *DeBeers*, the district court granted an injunction “not authorized either by statute or by the usages of equity.”¹⁷⁸ Thus, mandamus is to be used to rectify the damage inflicted by the unprincipled decision of a rogue judge, and not a merely erroneous

171. *Id.*

172. *Id.* at 220-23.

173. *Id.* at 223.

174. 346 U.S. 379 (1953).

175. *Id.* at 383. See also Berger, *supra* note 29, at 46 (indicating that the terms “abuse of judicial power,” “usurpation of power,” and “clear abuse of discretion” are used by courts interchangeably and convey the same meaning). The issue addressed in *Bankers Life*, was “whether mandamus is an appropriate remedy to vacate a severance and transfer order entered by a district judge on the ground of improper venue.” *Bankers Life*, 346 U.S. at 379. The defendant sought a writ of mandamus in the court of appeals, but the court denied the writ. *Id.* at 381. The Supreme Court affirmed its decisions in *Roche* and *DeBeers*, while at the same time clarifying those decisions, in light of the traditional formula for determining whether the remedy of mandamus was appropriate. *Id.* at 381-82. This traditional formula was stated in *Roche*, where the Court cited its former decision in *Ex parte Peru*, that “[t]he traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.” *Id.* at 382.

176. *Id.*

177. *Id.* at 383.

178. *DeBeers*, 325 U.S. at 223.

ruling or misinterpretation of facts or law.

Of further interest in *Bankers Life*, is the creation of another term that has gained increasing importance in subsequent mandamus cases.¹⁷⁹ The Court noted that a party seeking a writ of mandamus must "show that its right to issuance of the writ is 'clear and indisputable.'"¹⁸⁰ The "clear and indisputable right" language serves to highlight the fact that the writ of mandamus will issue where the right sought to be vindicated is either granted by statute or recognized by precedent, and thus, a district court judge has no discretion to do anything but recognize that right.

4. *A Synthesis of the Abuse of Judicial Power, Usurpation of Power, and Clear Abuse of Discretion Tests – A Matter of Semantics*

Roche, *DeBeers*, and *Bankers Life* illustrate that the different terms given do not signify differing tests or standards as to when mandamus is appropriate. Rather, these varying terms are simply a matter of semantics.¹⁸¹ All of these tests serve to accomplish the same task, which is to define when mandamus is an appropriate remedy. Thus, viewing these cases together, it is apparent that mandamus is appropriate where a judge takes action without authority to do so, or fails to take action when there is a duty to do so. This authority, also termed "jurisdiction" in the case law, comes either from statutory law or precedent. Therefore, under the traditional view of mandamus, the writ is to be used to rectify the damage inflicted by the unprincipled decision of a rogue judge, and not merely an erroneous ruling or misinterpretation of facts or law. In other words, the action taken by the judge can be said to

179. See Berger, *supra* note 29, at 46 n.43 (referencing the decisions of *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655 (1978) and *Allied Chemicals Corp. v. Daiflon, Inc.*, 449 U.S. 33 (1980) as decisions stressing the importance of the finding of a clear and indisputable right in order for mandamus to issue). For a fuller discussion of these cases see *infra* notes 209–15 and accompanying text.

180. *Bankers Life*, 346 U.S. at 384 (citing *United States ex rel. Bernardin v. Duell*, 172 U.S. 576, 582 (1899)). Of particular interest is what Berger indicates is the fact that the "clear and indisputable right" language in *Bankers Life* is taken out of context as to its original use in *Duell*, where the language was used in the context of the issuance of the writ of mandamus against an administrative officer. See Berger, *supra* note 29, at 47. Berger is skeptical of the applicability of the language, because the Court "simply transfers this test to the context of mandamus within the judicial system without even discussing the differences between mandamus as an internal judicial control and mandamus as employed by the judicial branch against an officer of the administrative branch." *Id.*

181. See Berger, *supra* note 29, at 46 (indicating that the terms "abuse of judicial power," "usurpation of power," and "clear abuse of discretion" are used by courts interchangeably and convey the same meaning).

be manifestly beyond the scope of his power. The language in *Banker's Life* indicating that mandamus is appropriate only where the party seeking mandamus relief has "met the burden of showing that its right to issuance of the writ is 'clear and indisputable'"¹⁸² reinforces this interpretation, for where a judge has to exercise discretion it can hardly be said that the right is clear and indisputable.

B. Supervisory Mandamus

The genesis of what legal scholars have termed supervisory mandamus is found in the decision of *LaBuy v. Howes Leather Co.*¹⁸³ In *LaBuy*, two consolidated cases were brought before the Supreme Court.¹⁸⁴ The district court judge in both cases had referred the cases to a master, pursuant to Rule 53 of the Federal Rules of Civil Procedure, against the wishes of the parties.¹⁸⁵ The parties then successfully sought writs of mandamus from the court of appeals.¹⁸⁶ The Supreme Court affirmed the issuance of the writs, finding that while the district court judge had discretion under Rule 53(b), under the facts of these cases the references "amounted to little less than an abdication of the judicial function depriving the parties of a trial before the court on the basic issues involved in the litigation."¹⁸⁷ The Court again reiterated the term "clear abuse of discretion" when referring to the actions taken by the district court judge.¹⁸⁸ The Court also again recognized that "mandamus should be resorted to only in extreme cases,"¹⁸⁹ but found such an extreme case because "the Court of Appeals ha[d] for years admonished the trial judges of the Seventh Circuit that the practice of making references 'does not commend itself' and . . . 'should seldom be made, and if at all only when unusual

182. *Bankers Life*, 346 U.S. at 384 (citing *Duell*, 172 U.S. at 582).

183. 352 U.S. 249 (1957).

184. *Id.* at 250.

185. *Id.* at 252-53. The parties objected and filed motions to vacate the references, which the district court judge denied. *Id.* at 254.

186. *Id.* In response to show causes orders from the court of appeals, the district court judge contended that the references were made because the cases were very complicated and complex, that they would take considerable time to try, and that his 'calendar was congested.' *Id.* at 254 (internal quotations omitted).

187. *Id.* at 256. In finding that the issuance of the writs of mandamus were proper the Court gave considerable weight to the fact that the district court judge's "knowledge of the cases at the time of the references, together with his long experience in the antitrust field, points to the conclusion that he could dispose of the litigation with greater dispatch and less effort than anyone else." *Id.* at 255-56.

188. *Id.* at 257.

189. *Id.* at 257-58.

circumstances exist."¹⁹⁰

The Court indicated "that supervisory control of the District Courts . . . is necessary to proper judicial administration in the federal system."¹⁹¹ The Court cautioned that this supervisory mandamus power should be used only in extreme cases, such as those found in *LaBuy*.¹⁹²

In reality, the decision in *LaBuy* was not as radical as some commentators indicated,¹⁹³ because the Court merely authorized the issuance of mandamus to correct a defect where the district court judge had, on numerous occasions, declined to perform his duty to hear a case that he had jurisdiction to adjudicate. Thus, while the district court judge had discretion in determining whether to refer a case to a master, the all too frequent occurrence of utilizing this rare procedural tool indicated an abdication of the mandatory duty to hear cases imposed on that judge by virtue of his office.

C. Advisory Mandamus

The genesis of advisory mandamus can be found in the decision of *Schlagenhauf v. Holder*.¹⁹⁴ In *Schlagenhauf*, the district court granted a petition requiring Schlagenhauf to submit to physical and mental examinations pursuant to Rule 35 of the Federal Rules of Civil Procedure, without any hearing, and despite the fact that Schlagenhauf contended that his mental and physical condition were not in controversy and that good cause had not been shown sufficient to require him to submit to the examinations.¹⁹⁵ Schlagenhauf sought a writ of mandamus in the court of appeals seeking to have the order requiring him to submit

190. *Id.* at 258 (citing *In re Irving-Austin Bldg. Corp.*, 100 F.2d 574, 577 (7th Cir. 1938)).

191. *Id.* at 259-60.

192. *See id.* at 255 (stating "[t]his is not to say that the conclusion we reach on the facts of this case is intended, or can be used, to authorize the indiscriminate use of prerogative writs as a means of reviewing interlocutory orders.>").

193. *See Note, supra* note 33, at 596 (finding that "the Supreme Court has gradually, in highly uncertain ways, liberalized the standards governing the circumstances in which the issuance of mandamus by the federal courts of appeals is proper").

194. 379 U.S. 104 (1964).

195. *Id.* at 107-09. *Schlagenhauf* involved a suit for personal injuries arising out of a automobile accident where a passenger bus, driven by Schlagenhauf, collided with a tractor-trailer. *Id.* at 106-07. The owner of the bus cross-claimed against the owners of the tractor and trailer alleging that the collision was due solely to their negligence. *Id.* at 107. The owners of the tractor and trailer responded that the collision was caused solely by the negligence of Schlagenhauf, in that he was "not mentally or physically capable" of driving a bus at the time of the accident." *Id.*

to the examinations vacated, but the court of appeals denied mandamus relief.¹⁹⁶ Certiorari was granted, and the Supreme Court found that the issuance of the writ was appropriate because, “the petition was properly before the court on a substantial allegation of usurpation of power in ordering any examination of a defendant, an issue of first impression that called for the construction and application of Rule 35 in a new context.”¹⁹⁷ The Court limited its decision to the unique facts before the Court¹⁹⁸ and reiterated the traditional views regarding the propriety of issuing a writ of mandamus, holding that “mandamus is not to be used when ‘the most that could be claimed is that the district courts have erred in ruling on matters within their jurisdiction.’”¹⁹⁹

This advisory mandamus power is unique from traditional views of mandamus, in that it seeks to preemptively avoid a split of authority in lower courts on an issue of first impression. However, this is an extraordinary situation, and the Supreme Court has not exercised this advisory mandamus power since *Schlagenhauf*.

D. Recent Supreme Court Cases – A Reiteration of the Traditional View of Mandamus

Subsequent cases reiterate this truly extraordinary nature of the writ of mandamus. In *Will v. United States*,²⁰⁰ the Court

196. *Id.* at 109.

197. *Id.* at 111.

198. *Id.* at 112 (stating that “[t]his is not to say, however, that, following the setting of guidelines in this opinion, any future allegation that the District Court was in error in applying these guidelines to a particular case makes mandamus an appropriate remedy.”).

199. *Id.* at 112 (quoting *Parr v. United States*, 351 U.S. 513, 520 (1956)).

200. 389 U.S. 90 (1967). In *Will*, the defendant was charged on counts of criminal tax evasion. *Id.* at 91. Defendant filed a motion for a bill of particulars, specifically requesting:

information concerning any oral statements of the defendant relied upon by the government to support the charge in the indictment, . . . [including] names and addresses of the persons to whom such statements were made, the times and places at which they were made, whether the witnesses to the statements were government agents and whether any transcripts or memoranda of the statements had been prepared by the witnesses and given to the government.

Id. at 92.

The district court ordered the government to produce the requested information, but the government refused. *Id.* The district court indicated that it would dismiss the indictment unless the order was complied with. *Id.* at 93. The government then sought a stay of the proceedings from the court of appeals, which was granted, and sought a writ of mandamus compelling the district court judge to vacate the request. *Id.* The court of appeals initially denied the writ, finding that the order “[was] not an appealable order, and a review of it would offend the policy against piecemeal appeals in criminal

outlined the traditional view of mandamus, as proper "only to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so,"²⁰¹ as in only "exceptional circumstances amounting to a judicial 'usurpation of power'"²⁰² and where "the party seeking mandamus has . . . [shown] . . . that its right to issuance of the writ is 'clear and indisputable.'"²⁰³ The Court further stressed the importance that the case was a criminal prosecution, and therefore, the "general policy against piecemeal appeals takes on added weight in criminal cases,"²⁰⁴ especially where the party seeking the writ is the prosecution.²⁰⁵ The *Will* court specifically noted *LaBuy* and *Schlagenhauf*, stating that while mandamus "serves a vital corrective and didactic function"²⁰⁶ the writ must be "reserved for really extraordinary causes."²⁰⁷

cases." *Id.* at 95 n.2. Further, the court of appeals reiterated that mandamus is used "for the traditional purpose of confining a district court to a lawful exercise of its jurisdiction or to compel it to exercise its proper jurisdiction," and that while the order may have been erroneous, "the ruling was within the court's discretion" and therefore not the proper subject of the issuance of mandamus. *Id.* However, on reconsideration the court of appeals granted the writ of mandamus. *Id.* at 93. The court of appeals did not explain the reasons for its reversal of its earlier ruling, except to note that "in the circumstances of this particular case the court should consider the merits of the ruling of the district court challenged by the government, rather than to remit the government to a radical alternative appealable judgment available to the trial judge upon the government's persistent refusal to comply." *Id.* at 95 n.3. The court of appeals appeared to assume that the government would not comply with the order of the district court and would have allowed a contempt charge to be brought against it, in order to obtain appellate review. In effect, the court of appeals sought to expedite the process through mandamus review.

Certiorari was granted, and the Supreme Court vacated the issuance of the writ and remanded to the court of appeals. *Id.* at 107. The Court found that "the most that can be claimed on this record is that petitioner may have erred in ruling on matters within his jurisdiction." *Id.* at 103-04. Therefore mandamus was not appropriate, as mandamus "is not to control the decision of the trial court, but rather merely to confine the lower court to the sphere of its discretionary power." *Id.*

Of interest in *Will* is that counsel for the district court judge was Richard A. Posner, later the Seventh Circuit Court of Appeals judge who authored the *Santos* decision. This fact indicates the difficulty in criticizing a decision of such a learned legal practitioner, whose background has been inextricably linked with the development of the law of mandamus in modern times.

201. *Id.* at 95 (quoting *Roche*, 319 U.S. at 26).

202. *Id.* (citing *DeBeers*, 325 U.S. at 217).

203. *Id.* at 96 (citing *Bankers*, 346 U.S. at 384).

204. *Id.* at 96 (citing *DiBella*, 369 U.S. at 126).

205. *Id.*

206. *Id.* at 107.

207. *Id.* (quoting *Ex parte Fahey*, 332 U.S. 258, 260 (1947)). The Court found *LaBuy* inapplicable because "[t]here [was] no evidence in the record concerning [the district court judge's] practice in other cases," therefore, no

In *Kerr v. United States District Court for the Northern District of California*,²⁰⁸ the Supreme Court reiterated the traditional view of mandamus, indicating that it will issue only upon a showing that "the party seeking issuance of the writ have [sic.] no other adequate means to attain the relief he desires . . . and that he satisfy the burden of showing that [his] right to issuance of the writ is clear and indisputable."²⁰⁹

*Will v. Calvert Fire Ins. Co.*²¹⁰ reiterated the traditional view of mandamus specifically stating that mandamus is not appropriate where the most that can be said is that a district court committed a mere abuse of discretion.²¹¹ In *Allied Chemical Corp. v. Daiflon, Inc.*,²¹² the Court addressed the issue of whether

need to correct any alleged usurpation of power by the district court judge. *Id.* at 105.

Some commentators have expressed the belief that *Will v. United States* "has been viewed as restricting the role of supervisory and advisory mandamus." Berger, *supra* note 29, at 52 (citing 9 J. MOORE & B. WARD, MOORE'S FEDERAL PRACTICE § 110.28 (2d ed. 1980)).

208. 426 U.S. 394 (1976).

209. *Id.* at 403 (citations omitted). In *Kerr*, inmates of a prison filed a class action suit alleging "substantial constitutional violations in the manner in which the California Adult Authority carries out its function of determining the length and conditions of punishment of convicted criminal offenders." *Id.* at 396. The prisoners submitted requests for the production of documents. *Id.* However, the petitioners objected to the request on the grounds "that the files were irrelevant, confidential, and privileged, and suggesting that they should not be required to turn over the files . . . without prior [i]n camera review by the District Court to evaluate the claims of privilege." *Id.* at 398. The prisoners filed a motion to compel discovery, which the district court granted, subject to a protective order limiting the persons who may access the documents. *Id.* Petitioners then sought a writ of mandamus from the Court of Appeals, which the court denied, on the grounds that there was no absolute privilege concerning the requested documents. *Id.* at 399. Upon certiorari, the Supreme Court affirmed the denial of mandamus relief on the grounds that the petitioners had not demonstrated that their right to the issuance of the writ was clear and indisputable, since the Court of Appeals apparently left open the opportunity for petitioners to return to the district court and obtain in camera inspection of the documents to determine if the documents were privileged. *Id.* at 404. Thus, the Court of Appeals provided "petitioners an avenue far short of mandamus to achieve precisely the relief they seek," and therefore mandamus relief was inappropriate. *Id.* at 405.

210. 437 U.S. 655 (1978). The Court reversed the mandamus relief granted by the Court of Appeals, holding that "[a]lthough the District Court's exercise of its discretion may be subject to review and modification in a proper interlocutory appeal, we are convinced that it ought not to be overridden by a writ of mandamus." *Id.* at 665.

211. *Id.* at 666 n.7. The Court indicated that, "[a]lthough in at least one instance we approved the issuance of the writ [of mandamus] upon a mere showing of abuse of discretion [in *LaBuy v. Howes Leather Co.*], we warned soon thereafter [in *Will v. United States*] against the dangers of such a practice." *Id.*

212. 449 U.S. 33 (1980) (*per curiam*).

mandamus is an appropriate remedy to obtain review of an interlocutory order of the grant of a new trial.²¹³ The Court contrasted review by appeal and review by mandamus, and indicated that "[a]lthough a simple showing of error may suffice to obtain a reversal on direct appeal, to issue a writ of mandamus under such circumstances 'would undermine the settled limitations upon the power of an appellate court to review interlocutory orders.'"²¹⁴ The Court reiterated the traditional view of mandamus and stated that in order to obtain relief by mandamus, a party must prove that there exists no other adequate means to attain the relief desired and that the party's right to issuance of the writ is clear and indisputable.²¹⁵ The Court, in this *per curiam* decision, gave guidance to lower courts when it indicated how extraordinary mandamus relief is by stating: "In short, our cases have answered the question as to the availability of mandamus in situations such as this with the refrain: 'What never? Well, hardly ever!'"²¹⁶

E. Summary – A Workable Definition of Mandamus: The Proper Role and Purpose

What a synthesis of these cases indicates is that relief by the

213. *Id.* at 34. *Allied Chemical* involved an antitrust suit, alleging a conspiracy by petitioners to drive respondent, Daiflon, Inc., out of business. *Id.* at 33. After trial, the jury returned a verdict in favor of respondent and awarded \$2.5 million in damages. *Id.* A motion for judgment notwithstanding the verdict was denied, but a motion for a new trial was granted. *Id.* Respondent sought a writ of mandamus to compel the district court to reinstate the jury verdict. *Id.* at 34. The court of appeals directed the district court to restore the jury verdict as to the liability, but directing that a new trial on damages be had. *Id.* Petitioners then sought review, and certiorari was granted. *Id.*

214. *Id.* at 35 (quoting *Will v. United States*, 398 U.S. 90, 98 n.6 (1967)).

215. *Id.* at 36.

216. *Id.* One case exemplifying the "hardly ever" situation is *Mallard v. U.S. Dist. Ct. for S. Dist. of Iowa*, 490 U.S. 296 (1989). In *Mallard*, the petitioner was appointed to represent an in forma pauperis litigant, pursuant to 28 U.S.C. § 1915(d). *Mallard*, 490 U.S. at 299. Mallard, an attorney specializing in securities and bankruptcy law, filed a motion to withdraw indicating that he would be violating his ethical obligations since he felt unable to provide competent representation in a § 1983 case. *Id.* at 299–300. The district court denied petitioner's motion, and held that 28 U.S.C. § 1915(d) empowered federal courts to make compulsory appointments in civil actions. *Id.* at 300. Petitioner sought a writ of mandamus from the court of appeals, which was denied. *Id.* Upon certiorari, the Court held that 28 U.S.C. § 1915(d) did not empower federal courts to make compulsory appointments in civil actions. *Id.* at 298. Therefore, mandamus relief was proper because the district court, in holding that 28 U.S.C. § 1915(d) empowered federal courts to make compulsory appointments in civil actions, acted beyond its jurisdiction and petitioner had no alternative remedy available to him. *Id.* at 309.

writ of mandamus is truly extraordinary. It is established that relief by mandamus is appropriate only when a court has acted beyond its jurisdiction or authority, or failed to act where it possessed jurisdiction or authority. Therefore, the action taken can be said to have been manifestly beyond the scope of the court's power.²¹⁷ Thus, one must look beyond the potentially misleading labels of "abuse of judicial power," "usurpation of power," and "clear abuse of discretion," because mandamus is not appropriate to control the discretion of lower courts.²¹⁸ "Courts faced with petitions for the peremptory writs must be careful lest they suffer themselves to be misled by labels such as 'abuse of discretion' and 'want of power' into interlocutory review of nonappealable orders on the mere ground that they may be erroneous."²¹⁹ The labels of "abuse of judicial power," "usurpation of power," and "clear abuse of discretion" attempt to signify an action beyond the traditional abuse of discretion standard of review used in other situations of appellate review. This terminology creates a pitfall into which those who do not have a full understanding of the proper role and purpose of mandamus fall.²²⁰

It bears repeating that mandamus is appropriate to correct the unprincipled decision of a rogue judge, acting without authority or manifestly contrary to that authority granted by statute or precedent. Mandamus will not issue upon a showing of mere error.²²¹ Mandamus is appropriate only where the right to

217. See discussion *supra* Parts III.A-D (discussing the standard for granting a writ of mandamus).

218. See Berger *supra* note 29, at 80 (noting "[h]owever vague terms such as 'usurpation of power' are, they surely are meant to invoke some type of standard stricter than that implied by the traditional abuse of discretion standard."). See, e.g., *Will v. United States*, 389 U.S. 90, 104 (1967) (stating that the purpose of mandamus "is not to control the decision of the trial court, but rather merely to confine the lower court to the sphere of its discretionary power").

219. *Will*, 389 U.S. at 98 n.6.

220. For an excellent work outlining the proper role and purpose of mandamus, and a suggestion for making the writ more understandable in application, see Berger, *supra* note 29, at 40.

221. See, e.g., *DeBeers*, 325 U.S. at 217 (holding that "when a court has no judicial power to do what it purports to do—when its action is not mere error but usurpation of power—the situation falls precisely within the allowable use of [the All Writs Act]"); *Schlagenhauf*, 379 U.S. at 112 (holding that "mandamus is not to be used when 'the most that could be claimed is that the district courts have erred in ruling on matters within their jurisdiction'" (citing *Parr*, 351 U.S. at 520); *Will*, 437 U.S. at 666 (stating that "[a]lthough the District Court's exercise of its discretion may be subject to review and modification in a proper interlocutory appeal, we are convinced that it ought not to be overridden by a writ of mandamus" (citation omitted)); *Allied Chemical*, 449 U.S. at 35 (per curiam) (holding that "[a]lthough a simple showing of error may suffice to obtain a reversal on direct appeal, to issue a

the relief sought is clear and indisputable,²²² which in essence means that the judge adjudicating the case in effect has no discretion and can rule only one way.²²³

Next, mandamus is appropriate only where relief sought cannot be obtained on appeal.²²⁴ Thus, where the relief sought can be obtained on appeal, mandamus is inappropriate. This is true regardless of the inconvenience and cost imposed by awaiting final judgment on the party seeking relief.²²⁵

F. Mandamus as a Remedy for Deprivation of the Right to Counsel of Choice

In *Firestone Tire & Rubber Co. v. Risjord*,²²⁶ the Supreme

writ of mandamus under such circumstances 'would undermine the settled limitations upon the power of an appellate court to review interlocutory orders'" (citing *Will v. United States*, 398 U.S. 90, 98 n.6 (1967)).

222. See *Bankers Life*, 346 U.S. at 384 (citing *United States ex rel. Bernadin v. Duell*, 172 U.S. 576, 582 (1899)).

223. See *Allied Chemical*, 449 U.S. at 36 (per curiam) (holding that "[w]here a matter is committed to discretion, it cannot be said that a litigant's right to a particular result is 'clear and indisputable.'")

224. The following quote explains why mandamus is appropriate only where relief sought cannot be obtained on appeal:

Apart from the fundamental fear that the extraordinary writs might develop into a method of review that routinely circumvents the final judgment rule, the rule that writs may not be used to substitute for appeal is at times rested on another ground as well. It has been said that the writs, although legal remedies, are controlled by the equitable principle that an alternative adequate remedy is to be preferred.

Appeal, when available, is an adequate remedy to be preferred to a writ.

16 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS § 3932.1 509 (2d ed. 1996) [hereinafter WRIGHT]. See, e.g., *Roche*, 319 U.S. at 30 (finding that "[w]here the appeal statutes establish the conditions of appellate review, an appellate court cannot rightly exercise its discretion to issue a writ whose only effect would be to avoid those conditions and thwart the Congressional policy against piecemeal appeals in criminal cases."); *Bankers Life*, 346 U.S. at 383 (finding that "it is established that the extraordinary writs cannot be used as substitutes for appeals").

225. *Roche*, 319 U.S. at 30.

226. 449 U.S. 368 (1981). In *Firestone*, the Court addressed the issue of whether a party may appeal, pursuant to 28 U.S.C. § 1291, an order denying a motion to disqualify opposing counsel for a conflict of interest in a civil case. *Id.* at 369. The Court held that orders denying motions to disqualify counsel are not appealable final decisions under 28 U.S.C. § 1291. *Id.* The Court based its reasoning on the fact that such an order did not "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Id.* at 375 (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)). In *Firestone*, the petitioner was unable to demonstrate that the order was effectively unreviewable on appeal from a final judgment, because "[t]he propriety of the district court's denial of a

Court held that the denial of a pretrial motion to disqualify counsel in a civil case is not appealable under 28 U.S.C. § 1291 as a collateral order.²²⁷ However, the Court intimated that, "in the exceptional circumstances for which it was designed, a writ of mandamus . . . might be available" to obtain review of an order denying a motion to disqualify counsel.²²⁸ *Firestone* was a civil matter, and therefore left unresolved the question of whether the denial of a pretrial motion to disqualify counsel in a criminal case was appealable under 28 U.S.C. § 1291 as a collateral order, or whether mandamus might be available as an appropriate remedy.

In *Flanagan v. United States*,²²⁹ the Court held that a disqualification order in a criminal matter is not immediately appealable under 28 U.S.C. § 1291 as a collateral order,²³⁰ thereby adopting the holding of *Firestone* as applied to criminal matters. However, the Court did not address the mandamus issue. Instead, the Court stressed the importance of the final judgment rule in criminal matters,²³¹ and stated that:

disqualification motion will often be difficult to assess until its impact on the underlying litigation may be evaluated." *Id.* at 377. Therefore, the collateral order exception was inapplicable. *Id.* at 376.

227. *Id.* at 379.

228. *Id.* at 378 n.13.

229. 465 U.S. 259 (1984). In *Flanagan*, four police officers were charged with civil rights violations arising out of alleged unlawful arrests and police brutality claims. *Id.* at 261. The four police officers jointly retained one law firm to represent them. *Id.* The three other police officers sought to sever their case from *Flanagan*, because the evidence against *Flanagan* was substantial and could have prejudiced their defenses. *Id.* The government sought to disqualify the firm from representing all four police officers. *Id.* The district court judge found that no actual conflict existed, but the potential for conflict was substantial, and therefore disqualified the law firm based on the ruling that it was authorized to do so pursuant to Federal Rule of Criminal Procedure 44(c). *Id.* at 262. The court of appeals affirmed. *Id.* The court of appeals did not inquire into its jurisdiction, and "noted that it had jurisdiction under 28 U.S.C. § 1291 because the disqualification order was appealable prior to trial as a collateral order within the meaning of *Cohen v. Beneficial Indust. Loan Corp.*, 337 U.S. 541 (1949)." *Id.* Certiorari was granted, and the parties briefed and argued both the merits and the jurisdiction issues. *Id.* at 263.

230. *Id.* at 270. In reaching the holding that a disqualification order in a criminal matter is not immediately appealable under 28 U.S.C. § 1291 as a collateral order, the Court reasoned that if a criminal defendant's right to counsel of choice is analogous to the right to self-representation, and no prejudice is required in order to obtain reversal, then it is reviewable on appeal. *Id.* at 267-68. If however, a criminal defendant's right to counsel of choice requires a showing of prejudice to the defendant, a disqualification order does not resolve an issue completely separate from the merits of the action. *Id.* at 268. In either situation, an order disqualifying counsel fails to meet a requisite condition of the collateral order exception to the final judgment rule.

231. *Id.* at 270.

Nothing about a disqualification order distinguishes it from the run of pretrial judicial decisions that affect the rights of criminal defendants yet must await completion of trial court proceedings for review The exceptions to the final judgment rule in criminal cases are rare. An order disqualifying counsel is not one.²³²

This sweeping statement seems to resolve the issue of whether relief by mandamus is an appropriate remedy. As applied to a disqualification order in a criminal case, the answer is a resounding no. In fact, no case has ever found that the extraordinary writ of mandamus is an appropriate remedy for the deprivation of a criminal defendant's right to counsel of choice.²³³

VI. THE DECISION IN *UNITED STATES V. SANTOS* MISAPPLIED MANDAMUS AS A REMEDY TO REDRESS THE DEPRIVATION OF A CRIMINAL DEFENDANT'S COUNSEL OF CHOICE

A. *Firmly Established Precedent Militates Against the Use of Mandamus as a Remedy to Redress the Deprivation of a Criminal Defendant's Counsel of Choice in United States v. Santos*

Mandamus relief is best understood by resort to visual terminology, in what can be called the bell curve theory of mandamus.²³⁴ Under this bell curve theory of mandamus, the

232. *Id.*

233. Only a handful of cases have specifically addressed the applicability of mandamus to obtain relief for the deprivation of a criminal defendant's right to counsel of choice. *See, e.g., In re Grand Jury Investigation*, 182 F.3d 668, 671 (9th Cir. 1999) (holding that mandamus is not an appropriate remedy to redress deprivation of criminal defendant's counsel of choice during grand jury investigation because the Sixth Amendment right to counsel does not attach until the defendant becomes "the accused" as opposed to merely the target of an investigation); *United States v. Diozzi*, 807 F.2d 10, 11 (1st Cir. 1986) (indicating that mandamus relief sought prior to appeal, but after final judgment, was not an appropriate remedy to redress deprivation of criminal defendant's counsel of choice; erroneous pretrial order disqualifying defendant's counsel of choice remedied on appeal after final judgment); *United States v. Panzardi-Alvarez*, 678 F.Supp. 353, 356, 358 (D. P.R. 1988) (denying habeas corpus relief and referencing earlier unpublished court order, *In re Jose E. Panzardi-Alvarez*, 782 F.2d 1025 (1st Cir. 1985), denying mandamus relief for deprivation of criminal defendant's counsel of choice because no extraordinary circumstances shown to warrant issuance of mandamus); *United States v. Greger*, 657 F.2d 1109, 1114-15 (9th Cir. 1981) (finding that mandamus was not an appropriate remedy to redress a disqualification order resulting in denial of criminal defendant's counsel of choice because the requested relief could possibly be obtained on appeal after final judgment).

234. The bell curve is "a frequency distribution in statistics that resembles the outline of a bell when plotted on a graph." *RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY* 122 (1999). The bell curve is a visual representation of a frequency distribution of a given grouping of data into what are termed confidence intervals. "A confidence interval is a range of numbers believed to

terminology used in case law to refer to mandamus as an extraordinary remedy²³⁵ is given graphical representation. Imagining the theory of mandamus as represented on a bell curve, mandamus is appropriate to control decisions that lie at the outer most points on the bell curve, or those rare cases where the decision of the lower court can be termed an "abuse of judicial power,"²³⁶ "usurpation of power,"²³⁷ or "clear abuse of discretion."²³⁸

Returning to the *Santos* decision, it must be explained why Judge Posner's intimation, that mandamus would be an appropriate remedy where a district court judge abuses his discretion by refusing to grant a continuance,²³⁹ is erroneous. First, an erroneous ruling, amounting to an abuse of discretion, resulting in the denial of a criminal defendant's right to counsel of choice can be remedied on appeal. In ruling on a motion for continuance, "a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality."²⁴⁰ Thus, where it can be shown that a district court judge displayed "a myopic insistence upon expeditiousness in the face of a justifiable request for delay,"²⁴¹ a criminal defendant can obtain a reversal. Even if it cannot be said

include an unknown population parameter." AMIR D. ACZEL, COMPLETE BUSINESS STATISTICS 232 (Irwin, McGraw – Hill 4th ed. 1999). From the center of the bell curve, extending outward to near the end of the bell curve is what is termed the ninety five percent confidence interval, where ninety five percent of this range of a given grouping of data will be located. The range of a given grouping of data which fall outside of the ninety five percent confidence interval account for the remaining five percent of this range of a given grouping of data. This five percent of the range of a given grouping of data are termed the outliers.

As used under this bell curve theory of mandamus, mandamus is appropriate in situations that fall within the five percent of this range of numbers, or the outliers. This corresponds with the language used in mandamus jurisprudence indicating that mandamus is an extraordinary remedy. See cases cited *supra* note 31 and accompanying text (stating that review based on a writ of mandamus is reserved for extraordinary circumstances). This gives graphical representation to the language in *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33 (1980) (*per curiam*), where the Court gave guidance to the courts when it indicated how extraordinary mandamus relief is, by stating: "In short, our cases have answered the question as to the availability of mandamus in situations such as this with the refrain: 'What never? Well, *hardly* ever!'" *Id.* at 36.

235. See cases cited *supra* note 31 and accompanying text (standing for the proposition that review based on a writ of mandamus is rare and reserved for extraordinary circumstances).

236. *Roche*, 319 U.S. at 27.

237. *DeBeers*, 325 U.S. at 217.

238. *Bankers Life*, 346 U.S. at 383.

239. *Santos*, 201 F.3d at 960-61.

240. *Ungar*, 376 U.S. at 589.

241. *Id.*

that a district court judge has shown a "myopic insistence upon expeditiousness in the face of a justifiable request for delay"²⁴² and the criminal defendant must procure alternative representation, if the defendant's subsequent attorney fails to provide effective representation, a reversal could be obtained.²⁴³ Thus, the denial of a criminal defendant's counsel of choice can be remedied on appeal after final judgment.

Second, the denial of a criminal defendant's counsel of choice is likely to be viewed as harmless error.²⁴⁴ Since the denial of counsel of choice is likely to be viewed as harmless error, mandamus is not appropriate because this right cannot be argued to be "clear and indisputable."²⁴⁵ Judge Posner argues that this is precisely the reason why mandamus is appropriate.²⁴⁶ Essentially, the argument states that since the denial of a criminal defendant's counsel of choice will not likely be redressed on appeal, the defendant should have access to the extraordinary writ of mandamus.

However, this argument overlooks the proper role and purpose of mandamus, and unknowingly finds itself in the pitfall.²⁴⁷ In seeking to provide redress for Santos, Judge Posner leapt too quickly to this conclusion, disregarding the basic tenet of Sixth Amendment jurisprudence that "[c]ases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests."²⁴⁸ There is no absolute right to a criminal defendant's counsel of choice.²⁴⁹ The Sixth Amendment at its core is concerned with assuring fairness in the adversarial process, not

242. *Id.*

243. *See, e.g., Strickland*, 466 U.S. at 687 (holding that in order to obtain reversal on a claim of ineffective assistance of counsel a defendant must show that two elements have been met: 1) that "counsel's performance was deficient" and 2) that the "deficient performance prejudiced the defense.").

244. *See* discussion *supra* Part II.D (concluding that denial of a criminal defendant's counsel of choice would likely be viewed as harmless error where the defendant can obtain alternative competent representation).

245. *See, e.g., Bankers Life*, 346 U.S. at 384 (citing *Duell*, 172 U.S. 576, 582 (1899)); *see also* 55 C.J.S. *Mandamus* § 408 (1998) (stating that "[o]n appeal in mandamus proceedings, the appellate court will disregard harmless errors.").

246. *Santos*, 201 F.3d at 960 (holding that "mandamus is an available remedy when an abuse of discretion by the trial judge cannot be effectively remedied by appealing the final decision").

247. *See* discussion *supra* note 220 and accompanying text (discussing the need for careful analysis of the terminology used in mandamus cases).

248. *Morrison*, 449 U.S. at 364.

249. *See* discussion *supra* Part II (discussing how courts have interpreted the Sixth Amendment to insure a defendant's right to a fair trial and assistance of counsel).

favoring one side.²⁵⁰ The trial received by Santos complied with this assurance.²⁵¹ Thus, the denial of a criminal defendant's counsel of choice cannot be said to infringe on a clear and indisputable right, as there is no clear and indisputable right for a criminal defendant to representation by their counsel of choice.

Third, even assuming that the district court judge's ruling, denying the motion for continuance was an abuse of discretion, it does not justify invoking the writ of mandamus. "Courts faced with petitions for the peremptory writs must be careful lest they suffer themselves to be misled by labels such as 'abuse of discretion' and 'want of power' into interlocutory review of nonappealable orders on the mere ground that they may be erroneous."²⁵² Mandamus relief would only have been appropriate in *Santos* if the district court judge acted manifestly beyond his authority. In ruling on a motion for continuance, a district court judge exercises wide discretion.²⁵³ It cannot be plausibly argued that the decision of the district court judge was manifestly beyond his authority to the degree required to invoke the issue of a writ of mandamus.²⁵⁴

250. See *supra* note 112 and accompanying text (analyzing a defendant's constitutional guarantee of a fair trial and assistance of counsel).

251. See *Santos*, 201 F.3d at 959 (noting Judge Posner's specific indication to the question of right of counsel).

252. *Will*, 389 U.S. at 98 n.6.

253. See, e.g., *Morris*, 461 U.S. at 11 (stating that "broad discretion must be granted trial courts on matters of continuances"). The *Morris* court specifically indicated:

Trial judges necessarily require a great deal of latitude in scheduling trials. Not the least of their problems is that of assembling the witnesses, lawyers, and jurors at the same place at the same time, and this burden counsels against continuances except for compelling reasons. Consequently, broad discretion must be granted trial courts on matters of continuances; only an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay' violates the right to the assistance of counsel.

Id. at 11-12 (citing *Ungar*, 376 U.S. at 589).

254. See *Santos*, 65 F. Supp. 2d at 839-41 (finding various reasons for denying Santos' motion for continuance). First, the district court judge found that the case was not complicated. *Id.* at 839. The case involved a single defendant, did not raise "any novel issues of law or fact," and in addition, the government complied with the district court's order to release all discoverable material to the defense. *Id.* at 840. Second, the court found that the date set was "consistent with the Speedy Trial Act," which requires trials to commence "within seventy days of arraignment." *Id.* at 839-41. Third, the district court judge stated that "[t]he Court's agenda must control the setting of the trial date, not the agenda of busy lawyers." *Id.* at 839. The district court found that Santos was represented by two lawyers, and that one could handle the case until both were able to do so. *Id.* at 841. If Santos was not satisfied with this option, she could obtain alternative representation, as the district court judge noted that "[i]t is public knowledge that the occupant of the office [of the

Lastly, another reason against allowing mandamus as a remedy to redress the deprivation of a criminal defendant's counsel of choice is that the issue might be mooted by allowing the

Treasurer of the City of Chicago] earns \$104,000 a year." *Id.* at 840-41. Lastly, the district court judge noted that because Santos occupied a position of public trust, "there is a substantial public interest in this case to move it to a conclusion on the merits . . . [and] [t]he public has a tremendous issue in knowing whether the government can prove these allegations beyond a reasonable doubt." *Id.* at 840.

Judge Posner, writing for the Seventh Circuit Court of Appeals, found that the reasons for denying the continuance "do not hold water." *Santos*, 201 F.3d at 959. First, Judge Posner noted that "[t]he appearance by an inexperienced associate of [Santos' counsel of choice] was an irrelevancy." *Id.* Second, Judge Posner noted that it was the defendant's personal right to a speedy trial, and that the Speedy Trial Act "is intended to assure not that federal criminal trials start in 70 days . . . but that the unexcused delay in bringing a case to trial not exceed that period." *Id.* Furthermore, there was no suggestion that Santos engaged her counsel of choice for the purpose of delaying the trial, and that "[i]f the fact that [Santos] might be able to hire a good lawyer to replace [her counsel of choice] was a good reason for denying the continuance, the right to counsel of one's choice would be eviscerated for any person with a high salary, which seems to us to take class warfare too far." *Id.* Lastly, Judge Posner noted that "[w]e are also perplexed by the district judge's belief that it is the duty of a federal judge to rush public officials to trial lest they continue to abuse their office." *Id.*

Based on the court of appeals' reasoning, it cannot be argued that the district court judge acted manifestly beyond his authority, so as to warrant mandamus relief. As regards the reasoning of the court of appeals, "[w]ith all due respect, they do not hold water." *Id.* First, "the appearance by an inexperienced associate" of Santos' counsel of choice was not an irrelevancy. *Id.* As an admitted member of the bar, this associate presumably would have been capable of effectively representing Santos. There is no evidence in the record that this associate felt that he would not be able to provide competent representation and assure Santos a fair trial, as guaranteed by the Sixth Amendment. Here, Judge Posner seems to be fixated on the label associate. *Cf. Oreye*, 263 F.3d at 673 (finding that the court is "disinclined to fixate on the label 'standby counsel' and reverse a judgment that not only was amply supported by the evidence and . . . capped a trial in which the defendant who complains about denial of counsel had more representation than criminal defendants are entitled to."). Furthermore, contrasting the reasoning in *Santos* with the reasoning in *Oreye* seems to lead the conclusion that Judge Posner did in fact "take class warfare too far." *Santos*, 201 F.3d at 959. Second, as Santos was in a position of public trust, there was in fact a strong public interest in this case. Thus, the right to a speedy trial was not solely personal to Santos. The following quote is instructive on this point:

[W]hen a crime is committed against a community, the community has a strong collective psychological and moral interest in swiftly bringing the person responsible to justice. Prompt acquittal of a person wrongly accused, which forces prosecutorial investigation to continue, is as important as prompt conviction and sentence of a person rightly accused. Crime inflicts a wound on the community, and that wound may not begin to heal until criminal proceedings have come to an end.

Flanagan v. United States, 465 U.S. 259, 264 (1984).

trial court proceeding to advance uninterrupted. A criminal defendant might be denied his counsel of choice and proceed to trial with alternative representation, only to be found not guilty, thus rendering the issue of the deprivation of counsel of choice moot.²⁵⁵

In short, Judge Posner misinterpreted established United States Supreme Court precedent concerning the criteria required for a writ of mandamus to be issued. His honor neglected established precedent indicating that mandamus is not as a substitute for appeal, that mandamus is not to remedy a merely erroneous decision of a lower court, and that the right sought to be remedied by issuance of a writ of mandamus must be clear and indisputable.²⁵⁶

B. Policy Considerations Militate Against the Use of Mandamus as a Remedy to Redress the Deprivation of a Criminal Defendant's Counsel of Choice

Arguably, there is a caseload crisis in the federal courts of appeal.²⁵⁷ The caseloads of the courts of appeal have increased dramatically in recent years.²⁵⁸ In addition, the composition of cases has also changed, with an increasing percentage of federal court of appeals cases involving criminal matters.²⁵⁹ This is an

255. Cf. Comment, *The Appealability of Orders Denying Motions for Disqualification of Counsel in the Federal Courts*, 45 U. CHI. L. REV. 450, 458 n.39 (1978) (stating that “[i]f, after [a] disqualification [of counsel], the party wins the case, the disqualification becomes moot despite the cost that disqualification imposed on that party”).

256. See discussion *supra* Part III (discussing mandamus as the remedy for extraordinary cases).

257. See Michael C. Gizzi, *Examining the Crisis of Volume in the United States Courts of Appeals*, 77 JUDICATURE 96, 96 (1993) (finding that “[h]owever people may view other aspects of the federal judiciary, few deny that its appellate courts are in a ‘crisis of volume’ that has transformed them from the institutions they were even a generation ago.”). But see RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 85 (Harvard Univ. Press 1996) [hereinafter *THE FEDERAL COURTS*] (concluding that “[t]here are serious problems . . . but there is no crisis”).

258. See *THE FEDERAL COURTS*, *supra* note 257, at 59 (discussing that “[t]he increase in cases filed in the district courts, however dramatic, was dwarfed by the increase in cases filed in the courts of appeals – from 3,765 in 1960 . . . to 29, 580 in 1983 – an increase of 686 percent . . .”).

259. *Id.* at 59–62 (indicating that criminal appeals in the federal courts of appeal have increased “tenfold” from 1960 to 1983). In 1983, the number of criminal appeals in the federal courts of appeal were 4,790. *Id.* at 64 table 3.2. In 1995, the latest year for which statistics were available prior to the publishing of his book, the number of criminal appeals in the federal courts of appeal were 10,171. *Id.* In 2000, the number of criminal appeals in the federal courts of appeal were 10,707. United States Court of Appeals – Judicial Caseload Profile, available at <http://www.uscourts.gov/cgi->

alarming trend, since "[c]riminal cases, while fewer in number than civil cases, are generally more time consuming for the courts."²⁶⁰ Given this alarming trend, it would seem that opening access to the federal courts of appeal prior to final judgment, by way of liberalizing issuance of writs of mandamus would only exacerbate the problem.²⁶¹

Any judicial acceptance of this new and incorrectly applied remedy has the potential for abuses because a wealthy criminal defendant would be able to effectively hold the criminal justice system hostage by pursuing this intermediate appeal. Justice Frankfurter warned the bench and bar of just such a problem almost half a century ago, when he indicated "the delays and disruptions attendant upon intermediate appeal are especially inimical to the effective and fair administration of the criminal law."²⁶²

V. CONCLUSION

It must not be forgotten that what is sought in every criminal proceeding is a fair trial,²⁶³ for both the accused and the prosecution, as representative of our system of laws and the public whose voices are represented therein. The remedy espoused by Judge Posner in *United States v. Santos*, intimating that mandamus relief is appropriate to remedy the deprivation of a criminal defendant's counsel of choice, tips the balance of this fairness in favor of a wealthy criminal defendant,²⁶⁴ in effect

bin/csma2000.pl (last visited April 28, 2003). From 1983 through 2000, the number of criminal appeals filed in the federal courts of appeals have increased approximately forty-five percent.

260. ROBERT A. CARP & RONALD STIDHAM, *JUDICIAL PROCESS IN AMERICA* 57 (4th ed. 1998).

261. *Cf. Kerr v. U.S. Dist. Ct. for N. Dist. of California*, 426 U.S. 394, 403 (1976) (holding that "[a] judicial readiness to issue the writ of mandamus in anything less than an extraordinary situation would run the real risk of defeating the very policies sought to be furthered by that judgment of Congress," reflected in the final judgment rule.)

262. *DiBella*, 369 U.S. at 126 (1962).

263. *Oreye*, 263 F.3d at 671-73.

264. The following quote of Judge Learned Hand highlights the problem:

Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.

WRIGHT, *CRIMINAL supra* note 126, at § 853, 298 (citing *United States v*

perpetuating a type of judicially-sanctioned "class warfare," which Judge Posner indicated that he was trying to avoid.²⁶⁵ Judge Posner's intimation that mandamus is an appropriate remedy to redress the deprivation of a criminal defendant's counsel of choice is unsupported by precedent, and a misapplication of the theory of mandamus. The decision in *United States v. Santos*, indicating that mandamus would be an appropriate remedy for the deprivation of a criminal defendant's counsel of choice, should not be followed.

Garsson, 291 F. 646, 649 (S.D.N.Y. 1923)).

265. *Santos*, 201 F.3d at 959. See Tague, *supra* note 7, at 87 (indicating that no court has "comprehensively discussed the equal protection ramifications" of the distinction drawn in the law between indigent and nonindigent criminal defendants).