

Home > What Are the Odds of Complete Reversal After Conviction in the Second Circuit?

Font Size:

What Are the Odds of Complete Reversal After Conviction in the Second Circuit?

By Richard Levitt and Peter Schmidt [Contact](#) [All Articles](#)

New York Law Journal June 27, 2013

[Like](#) [Tweet](#) [0](#) [Share](#)

A potential client asks you the odds of completely overturning his federal trial conviction on appeal. If you are experienced in the ways of appellate advocacy and your predilection for candor trumps your predilection for solvency, you might tell him, "Statistically, not great. Beyond that, it depends on how serious the case is, the issues we raise and the judges assigned to hear your appeal."

But you wonder, what really are the odds of winning an appeal after trial in the U.S. Court of Appeals for the Second Circuit? We wondered that, too, so we decided to find out. First we looked at published statistics to see if we could avoid doing the heavy lifting ourselves. The closest we came to an answer was in the [uscourts.gov](#) website, which includes a Table B-5, titled "U.S. Courts of Appeals—Appeals Terminated on the Merits, by Circuit, During the 12-Month Period Ending September 30, 2012."¹

This table reflects an overall nationwide reversal rate in criminal appeals of 7 percent, and a reversal rate in the Second Circuit of 9.2 percent, but it does not distinguish between appeals following trial and appeals following entry of a guilty plea, not to mention appeals from other criminal proceedings such as those involving bail or supervised release. Nor is it clear what is meant by a "reversal" as some appeals from criminal convictions result in reversal of certain counts but not others. So we did our own digging.

We started by reviewing nearly 6,000 decisions (both published and unpublished) involving criminal law issues that were decided by the Second Circuit between Jan. 1, 2000, and May 31, 2013. We then eliminated all cases in which the defendant(s) pleaded guilty; all habeas decisions; all decisions that solely addressed pretrial motions, such as bail and motions to suppress; and all decisions relating to issues such as revocation of supervised release and similar collateral matters. In the end, we came up with a list of 1,985 cases involving direct appeals from trial convictions in the Second Circuit between Jan. 1, 2000, and May 31, 2013.²

It is often said that defendants are entitled to a fair trial, not a perfect trial,³ and so the percentage of

**Reversal Rate Summary Table
Sitting Second Circuit Judges***

January 1, 2000 – May 31, 2013

Judge	Total Panels	Joined Decision Reversing Conviction	Reversal Rate	Authorized Reversals
Cabranes, Jose	311	6	1.93%	1
Calabresi, Guido	286	22	7.69%	3
Chin, Denny	85	4	4.71%	3
Hall, Peter	223	7	3.14%	3
Jacobs, Dennis	274	18	6.57%	9
Katzmann, Robert	295	9	3.05%	1
Kearse, Amalya	197	5	2.54%	1
Leval, Pierre	189	5	2.65%	1
Livingston, Debra Anne	124	1	0.81%	0
Lynch, Gerard	76	0	0%	0
McLaughlin, Joseph	159	10	6.29%	3
Newman, Jon	136	3	2.21%	2
Parker, Barrington, Jr.	239	21	8.79%	7
Pooler, Rosemary	307	14	4.56%	9
Raggi, Reena	251	4	1.59%	0

complete reversals⁴ should reflect the percentage of cases in which appellate judges determine that the defendant did not receive a fundamentally fair trial. If the judges are guided by this rule, then it follows that they collectively believe that more than 96 percent of trials are fundamentally fair; our research reveals that over the 13 years we examined, the rate of complete reversals was approximately 3.78 percent.

Sack, Robert	271	8	2.95%	3
Straub, Chester	242	9	3.72%	0
Walker, John, Jr.	222	4	1.8%	1
Wesley, Richard	257	10	3.89%	1
Winter, Ralph, Jr.	175	7	4%	5

* Only judges who sat on at least 50 panels that reviewed convictions after trial, on direct appeal, are included here.
SOURCE: Compiled by the authors from published and unpublished decisions in the Second Circuit.

Now, that's the average. Year by year the results vary significantly, and range from lows of 1.51 percent and 1.57 percent in 2003 and 2005, to highs of 6.75 percent in 2005 and 2012.

These are enlightening statistics, but they don't tell the whole story. Roy Cohn famously said, "Don't tell me what the law is, tell me who the judge is." Cohn, of course, was referring to trial level judges and to a slightly different phenomenon than what is typically encountered at the appellate level, but it is no less—and possibly more—true when it comes to appeals, where a judge's philosophy of appellate review of criminal convictions may trump all other predictors of success when close issues are presented.

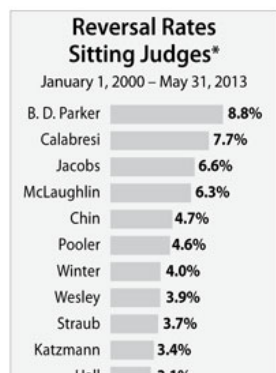
REVERSAL RATES

And so we went beyond a macro review of appellate dispositions and examined the reversal rates of every Second Circuit judge on every panel for all 1,985 cases that fell within the survey period. The results were eye opening. Reversal rates of current Second Circuit judges who sat on at least 50 panels reviewing convictions after trial range from 0 percent, .8 percent and 1.6 percent (Lynch, Livingston and Raggi), to 6.6 percent, 7.7 percent and 8.8 percent (Jacobs, Calabresi and Parker). That's quite a difference. If you draw a panel of the judges with the lowest reversal rates, your odds of prevailing, even with an arguably meritorious issue, are vanishingly small. Draw a panel of the judges with the highest reversal rates and your chances increase almost ten-fold.

When these statistics were further parsed, we found a substantial disparity between judges with respect to who authors the reversals. For example, Judge Guido Calabresi, who has a high reversal rate, has authored only three of the 22 reversals in which he has participated during our survey period. Judge Barrington Parker Jr. has written seven of his 21 reversals. Judge Rosemary Pooler has voted to reverse 14 times and has authored nine of those reversals. Chief Judge Dennis Jacobs authored nine reversals. The late Judge Roger Miner voted to reverse only three times sitting on 158 panels, yet wrote each such opinion. Judge Reena Raggi, by contrast, has voted to reverse four times during our survey period, but has written none of those reversals. Judge Robert Katzmann has voted to reverse nine times, but has authored only one of those decisions. Of the 75 complete reversals during our survey period, 66 were signed decisions, one was a per curiam decision, and eight were summary orders.

Four judges—Winter, Parker, Pooler and Jacobs—account for 30 of the 66 signed reversals during the 13-year survey period.

The varying rates of opinion writing may also have skewed perceptions regarding which judges are most likely to vote to reverse. For example, Pooler has authored eight reversals and Judge Joseph McLaughlin only three, but in fact Pooler's reversal rate is 4.6 percent and McLaughlin's is 6.3 percent. This seeming anomaly is explained by Pooler having authored nine of the 14 reversals in which she has participated out of a total of 307 panels, whereas McLaughlin has authored only three of the 10 reversals in which he has participated out of a total of 159 panels.



The reversal rates for judges who were part of at least 50 panels that reviewed convictions after trial, on direct appeal, between Jan. 1, 2000, and May 31, 2013, are set forth in the tables accompanying this article. Also accompanying this article is a chronological list of every complete reversal by the Second Circuit during the survey period; it identifies the panel members and the principal named author, if any.⁵

Incidentally, U.S. Supreme Court Justice Sonia Sotomayor, during her tenure on the Second Circuit, sat on 236 panels considering appeals from federal criminal convictions during our survey period. On nine occasions, she voted with the majority to reverse—a middling reversal rate of 3.8 percent; she authored two of those opinions.⁶



* Only judges who sat on at least 50 panels that reviewed convictions after trial, on direct appeal, are included here.

And what about judges sitting on the circuit by designation? Of the 74 judges who sat by designation during our survey period, Judge Jed Rakoff of the Southern District stands out. He has sat on 71 panels reviewing convictions, has voted to reverse six times and has authored one of these reversals, resulting in a reversal rate of approximately 8.5 percent, which exceeds that of all active Second Circuit judges except Parker.

JUDGE OR LAW?

A principal impetus for the U.S. Sentencing Guidelines was concern over sentencing disparity at the district court level. But what of disparity in the determination of appeals brought in the circuit courts? The results of our survey strongly suggest that an appellant's odds of winning a complete reversal in a close case brought in the Second Circuit are largely determined by which three-judge panel hears the appeal. By any yardstick this seems random and unfair. Perhaps this disparity could be mitigated through liberal use of en banc review, but the Second Circuit rarely convenes en banc to consider criminal appeals.

And so the next time a potential appellate client asks you whether he has a shot at winning a complete reversal of his conviction in the Second Circuit, you can say, "I'll let you know when the panel assignments are published."

Richard Levitt is a partner at Levitt & Kaizer. Peter Schmidt is the publisher of Punch and Jurists, a biweekly online survey of federal criminal law decisions.

ENDNOTES:

- <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2012/appendices/Bo5Sep12.pdf>.
- These 1,985 cases generated 2,041 decisions because in 56 cases the court issued both published and unpublished decisions.
- E.g., *United States v. Gonzalez*, 488 F.2d 833, 836 (2d Cir. 1973) ("Of course, appellant is entitled only to a fair trial, not to a perfect trial.")
- Although we have not fully distilled our data, our preliminary review suggests that the percentage of cases in which a partial reversal results in meaningful relief, e.g., a sentence reduction, was quite small.
- It is possible we've missed one or more reversals; if you are aware of any omissions please let us know, so we can give the panel due credit.
- United States v. Samaria*, 239 F.3d 228 (2d Cir. 2001), and *United States v. Cote*, 544 F.3d 88 (2d Cir. 2008).

Chronological List of Complete Defense Reversals, Jan. 1, 2000, through May 31, 2013 (Authors of signed opinions are in bold.)

- U.S. v. Rogers*, 209 F.3d 139 (2d Cir. 2000) (**Jacobs**, Calabresi, Straub)
- U.S. v. Dauray*, 215 F.3d 257 (2d Cir. 2000) (Winter, **Jacobs**, Katzmann) (Katzmann dissents)
- U.S. v. Bronx Reptiles*, 217 F.3d 82 (2d Cir. 2000) (**Sack**, Cabranes, Oakes) (Oakes dissents)
- U.S. v. Pierce*, 224 F.3d 158 (2d Cir. 2000) (Jacobs, Leval, **Sack**)
- U.S. v. Samaria*, 239 F.3d 228 (2d Cir. 2001) (Straub, **Sotomayor**, Spatt)
- U.S. v. McDermott*, 245 F.3d 133 (2d Cir. 2001) (**Oakes**, Straub, Pooler)
- U.S. v. Colon*, 250 F.3d 130 (2d Cir. 2001) (Jacobs, Calabresi, **Arterton**)
- U.S. v. Nelson*, 277 F.3d 164 (2d Cir. 2002) (**Calabresi**, F.I. Parker, Straub)
- U.S. v. Schwarz*, 283 F.3d 76 (2d Cir. 2002) (**Walker**, Cabranes, Straub)

10. *U.S. v. Zillgitt*, 286 F.3d 128 (2d Cir. 2002) (**Miner**, McLaughlin, Straub)
11. *U.S. v. Garcia*, 291 F.3d 127 (2d Cir. 2002) (**Pooler**, Katzmann, Hurd)
12. *U.S. v. Meredith*, 40 Fed. Appx. 638 (2d Cir. 2002) (Jacobs, Leval, Katzmann)
13. *U.S. v. Gil*, 297 F.3d 93 (2d Cir. 2002) (Oakes, **Jacobs**, Calabresi)
14. *U.S. v. Glenn*, 312 F.3d 58 (2d Cir. 2002) (Calabresi, Sack, **B.D. Parker**)
15. *U.S. v. Perrotta*, 313 F.3d 33 (2d Cir. 2002) (Winter, F.I. Parker, **Pooler**)
16. *U.S. v. Thomas*, 320 F.3d 315 (2d Cir. 2003) (Kearse, **Jacobs**, Keith)
17. *U.S. v. Scott*, 75 Fed. Appx. 30 (2d Cir. 2003) (Calabresi, Katzmann, Pollack)
18. *U.S. v. Maslin*, 356 F.3d 191 (2d Cir. 2004) (Cabrane, F.I. Parker, **Rakoff**)
19. *U.S. v. Mejia*, 356 F.3d 470 (2d Cir. 2004) (Cardamone, **Miner**, Calabresi)
20. *U.S. v. Cruz*, 363 F.3d 187 (2d Cir. 2004) (Oakes, **Meskill**, B.D. Parker)
21. *U.S. v. Jackson*, 368 F.3d 59 (2d Cir. 2004) (**Leval**, Cabrane, Amon)
22. *U.S. v. Chin*, 371 F.3d 31 (2d Cir. 2004) (**McLaughlin**, Sack, Sotomayor)
23. *U.S. v. Rivas*, 377 F.3d 195 (2d Cir. 2004) (**Newman**, Calabresi, Sotomayor)
24. *U.S. v. Bruno*, 383 F.3d 65 (2d Cir. 2004) (**Miner**, Katzmann, Tsoucalas)
25. *U.S. v. Sosa*, 387 F.3d 131 (2d Cir. 2004) (Oakes, **Winter**, Calabresi)
26. *U.S. v. Grinage*, 390 F.3d 746 (2d Cir. 2004) (**Gershon**, McLaughlin, Sack)
27. *U.S. v. Rodriguez*, 392 F.3d 539 (2d Cir. 2004) (**Meskill**, McLaughlin, B.D. Parker)
28. *U.S. v. Jones*, 393 F.3d 107 (2d Cir. 2004) (**Jacobs**, B.D. Parker, Hall)
29. *U.S. v. Scott*, 394 F.3d 111 (2d Cir. 2005) (Kearse, **McLaughlin**, Calabresi)
30. *U.S. v. Yacobowicz*, 427 F.3d 144 (2d Cir. 2005) (**Winter**, Sotomayor, B.D. Parker)
31. *U.S. v. Ford*, 435 F.3d 204 (2d Cir. 2006) (**Winter**, Katzmann, Raggi)
32. *U.S. v. Quattrone*, 441 F.3d 153 (2d Cir. 2006) (**Wesley**, Hall, Scullin)
33. *U.S. v. Santos*, 449 F.3d 93 (2d Cir. 2006) (Calabresi, **Pooler**, B.D. Parker)
34. *U.S. v. Gaines*, 457 F.3d 238 (2d Cir. 2006) (Jacobs, B.D. Parker, **Gleeson**)
35. *U.S. v. Friemann*, 197 Fed. Appx. 37 (2d Cir. 2006) (Cabrane, Raggi, Sand)
36. *U.S. v. Rangolan*, 464 F.3d 321 (2d Cir. 2006) (Calabresi, **B.D. Parker**, Wesley)
37. *U.S. v. Amico*, 486 F.3d 764 (2d Cir. 2007) (Sotomayor, **B.D. Parker**, Kravitz)
38. *U.S. v. Shellef*, 507 F.3d 82 (2d Cir. 2007) (Pooler, **Sack**, Wesley)
39. *U.S. v. Hardwick*, 523 F.3d 94 (2008) (**Winter**, Walker, Sotomayor)
40. *U.S. v. Crauford*, 533 F.3d 133 (2d Cir. 2008) (Sotomayor, Wesley, **Wallace**)
41. *U.S. v. Lorenzo*, 534 F.3d 153 (2d Cir. 2008) (Jacobs, Straub, **Jones**)

-
42. *U.S. v. Riggi*, 541 F.3d 94 (2d Cir. 2008) (**Jacobs**, Calabresi, Sack)
43. *U.S. v. Joseph*, 542 F.3d 13 (2d Cir. 2008) (**Newman**, Walker, Sotomayor) (Walker dissents)
44. *U.S. v. Al-Moayad*, 545 F.3d 139 (2d Cir. 2008) (McLaughlin, **B.D. Parker**, Wesley)
45. *U.S. v. Mejia*, 545 F.3d 179 (2d Cir. 2008) (Jacobs, B.D. Parker, **Hall**)
46. *U.S. v. Marcucilli*, 287 Fed. Appx. 126 (2d Cir. 2008) (Calabresi, Straub, B.D. Parker)
47. *U.S. v. Ogando*, 547 F.3d 102 (2d Cir. 2008) (Kearse, **Calabresi**, Sack)
48. *U.S. v. Kapelioumyj*, 547 F.3d 149 (2d Cir. 2008) (Newman, Calabresi, **B.D. Parker**)
49. *U.S. v. Hayward*, 284 Fed. Appx. 857 (2d Cir. 2008) (Wesley, Hall, Koeltl)
50. *U.S. v. Hassan*, 578 F.3d 108 (2d Cir. 2008) (Calabresi, **Pooler**)
51. *U.S. v. Ness*, 565 F.3d 73 (2d Cir. 2009) (**Winter**, Calabresi, Pooler)
52. *U.S. v. Shim*, 584 F.3d 394 (2d Cir. 2009) (B.D. Parker, Wesley, Murtha) (per curiam)
53. *U.S. v. Bah*, 574 F.3d 106 (2d Cir. 2009) (**Jacobs**, Walker, Calabresi)
54. *U.S. v. Kim*, 347 Fed. Appx. 687 (2d Cir. 2009) (B.D. Parker, Wesley, Murtha)
55. *U.S. v. Williams*, 585 F.3d 703 (2d Cir. 2009) (**McLaughlin**, Katzmann, Korman)
56. *U.S. v. Rubi-Gonzalez*, 311 Fed. Appx. 483 (2d Cir. 2009) (Jacobs, Sotomayor, Katzmann)
57. *U.S. v. Cerna*, 603 F.3d 32 (2d Cir. 2010) (**Katzmann**, Hall, Rakoff)
58. *U.S. v. Torres*, 604 F.3d 58 (2d Cir. 2010) (**Kearse**, Hall, Rakoff)
59. *U.S. v. Oluwanisola*, 605 F.3d 124 (2d Cir. 2010) (Leval, **Pooler**, F.I. Parker)
60. *U.S. v. Kaiser*, 609 F.3d 556 (2d Cir. 2010) (Jacobs, Calabresi, **Pooler**)
61. *U.S. v. Gomez*, 617 F.3d 88 (2d Cir. 2010) (Leval, **Pooler**, B.D. Parker)
62. *U.S. v. Curley*, 639 F.3d 50 (2d Cir. 2011) (Jacobs, Wesley, **Chin**)
63. *U.S. v. Bruno*, 661 F.3d 773 (2d Cir. 2011) (**B.D. Parker**, Chin, Korman)
64. *U.S. v. Ferguson*, 676 F.3d 260 (2d Cir. 2011) (**Jacobs**, Kearse, Straub)
65. *U.S. v. Collins*, 665 F.3d 454 (2d Cir. 2012) (**Chin**, Calabresi, Carney)
66. *U.S. v. Aleynikov*, 676 F.3d 71 (2d Cir. 2012) (**Jacobs**, Calabresi, Pooler)
67. *U.S. v. Scott*, 677 F.3d 72 (2d Cir. 2012) (**Pooler**, B.D. Parker)
68. *U.S. v. Litwok*, 678 F.3d 208 (2d Cir. 2012) (**Lohier**, Livingston, Koeltl)
69. *U.S. v. Voustianiouk*, 685 F.3d 206 (2d Cir. 2012) (McLaughlin, **Pooler**, B.D. Parker)
70. *U.S. v. White*, 692 F.3d 235 (2d Cir. 2012) (Jacobs, **Calabresi**, Pooler) (Jacobs dissents)
71. *U.S. v. Mahaffy*, 693 F.3d 113 (2d Cir. 2012) (McLaughlin, **B.D. Parker**, Wesley)
72. *U.S. v. Gupta*, 699 F.3d 682 (2d Cir. 2012) (Walker, B.D. Parker, **Hall**)
73. *U.S. v. Coplan*, 703 F.3d 46 (2d Cir. 2012) (Kearse, McLaughlin, **Cabranes**) (Kearse dissents)
-

74. *U.S. v. Pryor*, 474 Fed.Appx. 831 (2d Cir. 2012) (Katzmann, Raggi, Rakoff)

75. *U.S. v. Caronia*, 703 F.3d 149 (2d Cir. 2012) (Raggi, Livingston, **Chin**) (Livingston dissents)