



# Probability of Success on Appeal: Reversal Rates for the Fourth Circuit and the North Carolina Court of Appeals

by Jerry Hartzell

**Jerry Hartzell** graduated from the UNC Law School in 1977, served as law clerk for Justice J. Frank Huskins of the North Carolina Supreme Court in 1977-78, and has practiced civil litigation in Raleigh since 1978. In recent years, much of his practice has been appellate work.

The following article was prompted by a comment attributed to Judge André Davis of the Fourth Circuit, who was quoted as saying his court's reversal rate was in "the low single digits." That seemed low. The published statistics show Judge Davis' comment was correct.

**L**awyers tend to be significantly overconfident when predicting likelihood of success in their own cases.<sup>1</sup> This is not unusual: doctors' assessments of their own judgments likewise reflect significant overconfidence bias,<sup>2</sup> and studies show overconfidence bias with other professionals.<sup>3</sup> Some scholarship suggests that optimism to the extent of overconfidence is positively associated with good outcomes.<sup>4</sup>

However, sometimes things must be considered dispassionately. The following presentation of cold, hard statistics may be surprising.

This summary provides mostly data about the United States Court of Appeals for the Fourth Circuit. The big conclusion is that notwithstanding some well-noted opinions in which the Fourth Circuit reversed district courts in especially challenging "abuse of discretion" appeals,<sup>5</sup> the Fourth Circuit has a low reversal rate, both absolutely and among all circuits, and both for all cases and in civil cases. I calculate the Fourth Circuit's "true" reversal rate for all cases, for the year ended March 31, 2013, as 2.9 percent.

In contrast, reversal rates in the North Carolina Court of Appeals are substantially higher for the year ended June 30, 2013, 13 percent of N.C. App. cases were reversed, and another 17 percent were reversed in part.

The terminology "reversed" used in the following summaries is the terminology used in the official statistical reports published by the two court systems: "reversed" means whatever the two courts' compilers of statistics decided it meant. There is clearly some judgment exercised by those who classified these appellate outcomes.<sup>6</sup>

## Fourth Circuit Court of Appeals

### *All-Circuit Data*

The Administrative Office of the United States Courts ("AOC") compiles and publishes the federal numbers. The most recent data is for the twelve-month period ending March 31, 2013.<sup>7</sup> These statistics reveal that among cases terminated "on the merits," the twelve Circuit Courts of Appeals (Federal Circuit not included) had the published reversal rates as seen in **Figure 1**.

The all-Circuit published "percent reversed" was 6.9 percent; the Fourth Circuit published "percent reversed" was 3.9 percent.

The twelve Circuits' published reversal rates ranged from 3.7 percent (Tenth Circuit) to 16.2 percent (D.C. Circuit), mostly in the range of 5 percent to 8 percent. On the low side the outliers were the Fourth Circuit at 3.9 percent and the Tenth Circuit at 3.7 percent. On the high side, the outliers were the Seventh Circuit at 14.8 percent and the D.C. Circuit at 16.2 percent.

### *Fourth Circuit Data*

As is evident from **Figure 2**, the Fourth Circuit's published all-case reversal rate for the year ended March 31, 2013, was lower than in any prior year since at least 2001.

Since at least 2001, the Fourth Circuit has unfailingly had a lower published all-case reversal rate than the all-Circuit average, as shown in **Figure 3**.

### *Calculating "True" Reversal Rates*

The published federal all-case reversal rates do not truly reflect "all" cases, because a substantial number of appeals are dismissed. The published percentages are for appeals "terminat[ed] on the merits."<sup>8</sup> For all Circuits, 39 percent of all appeals were not terminated on the merits; for the Fourth Circuit, 26 percent of appeals were not terminated on the merits.

Presumably, any form of reversal would be categorized as a termination on the merits;

Figure 1

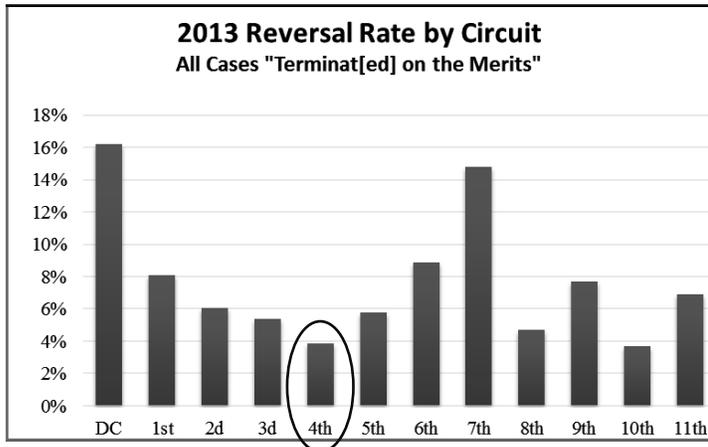


Figure 2

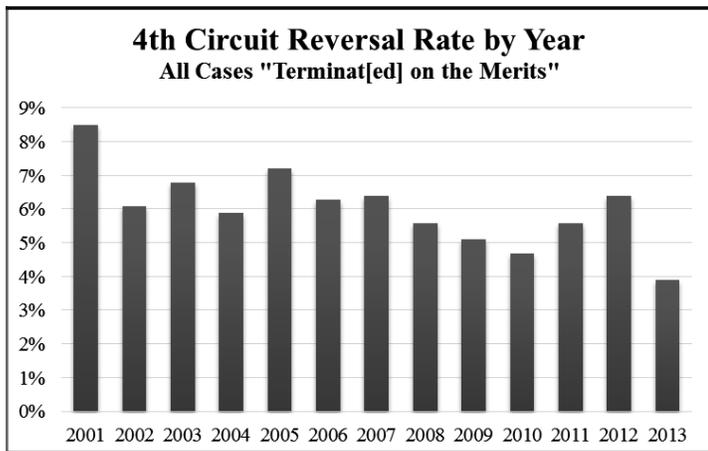
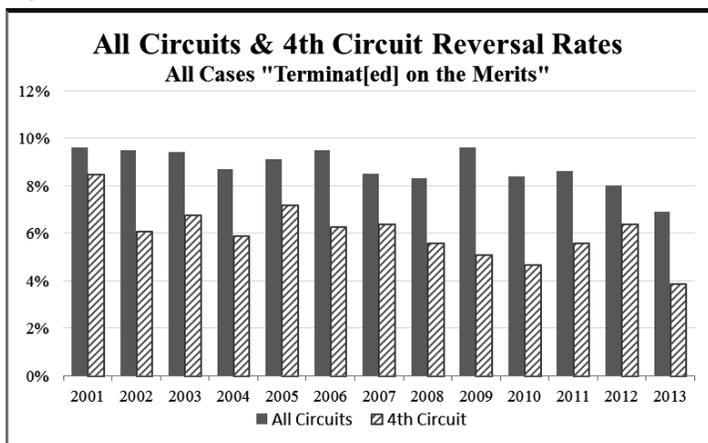


Figure 3



presumably, therefore, all of the terminated-but-not-on-the-merits cases can be treated as not reversed.

Accordingly, it seems reasonable to conclude that actually 4.1 percent of the appellate cases terminated by the twelve Circuit Courts of Appeals were reversed (as opposed to 6.9 percent of the cases “terminated on the merits”), and that actually 2.9 percent of the cases terminated by the Fourth Circuit were reversed (as opposed to 3.9 percent of the cases “terminated on the merits”).

Calculating reversal rates in this way yields a percentage that reflects the actual fraction of filed appeals that succeed. Calculating a “true” reversal rate in this manner makes the federal data more comparable to the data presentation for the North Carolina Court of Appeals.<sup>9</sup>

*Effect of Prisoner Petitions*

Some part of the reason for the low all-case reversal rates is that these figures include appeals that, as a type, have a particularly low chance of success. Twenty-nine percent (29 percent) of the appellate decision in all Circuits, and 30 percent of the appellate decisions in the Fourth Circuit, were decisions on prisoner petitions.<sup>10</sup> The “terminated on the merits” reversal rate for prisoner petitions for all Circuits was 3.4 percent. This percentage is lower than the all-Circuit, all-case reversal rate of 6.9 percent, so prisoner petitions had a downward impact on the all-Circuit, all-case reversal rate.

In the Fourth Circuit, the impact of prisoner petitions was also substantial. The 30 percent share of Fourth Circuit “terminated on the merits” appeals that were classified as prisoner petitions had a reversal rate of 2 percent. So for the Fourth Circuit, prisoner petitions had an impact in lowering the all-case reversal rate.<sup>11</sup> But the prisoner-petition effect is only part of the explanation.

*Fourth Circuit Rate by Type of Case*

The federal courts classify appellate cases into eight categories, and provide a reversal rate for each. The following numbers are, again, for the twelve months ending March 31, 2013. The Fourth Circuit’s rates are set out below in Figure 4. The “percent reversed” numbers presented by the AOC are calculated after eliminating “original proceedings” from consideration.<sup>12</sup>

Figure 4

	No. of Cases	No. Reversed	% Reversed
<b>Total</b>	<b>3,849</b>	<b>135</b>	<b>3.9%</b>
<b>Criminal</b>	<b>1,459</b>	<b>63</b>	<b>4.3%</b>
<b>U.S. Prisoner Petitions</b>	<b>533</b>	<b>12</b>	<b>2.3%</b>
<b>Other U.S. Civil</b>	<b>140</b>	<b>10</b>	<b>7.1%</b>
<b>Priv. Prisoner Petitions</b>	<b>530</b>	<b>8</b>	<b>1.5%</b>
<b>Other Private Civil</b>	<b>533</b>	<b>40</b>	<b>7.5%</b>
<b>Bankruptcy</b>	<b>37</b>	<b>--</b>	<b>--</b>
<b>Administrative Appeals</b>	<b>167</b>	<b>1</b>	<b>0.6%</b>
<b>Original Proceedings</b>	<b>317</b>	<b>1</b>	<b>--</b>

Again, this is the data as reported by the AOC and includes only cases terminated “on the merits”: a total of 5,207 appeals were terminated by the Fourth Circuit during this twelve-month period, but only 3,849 were terminated “on the merits.”

**Reversal Rates for “Other Private Civil” Cases**

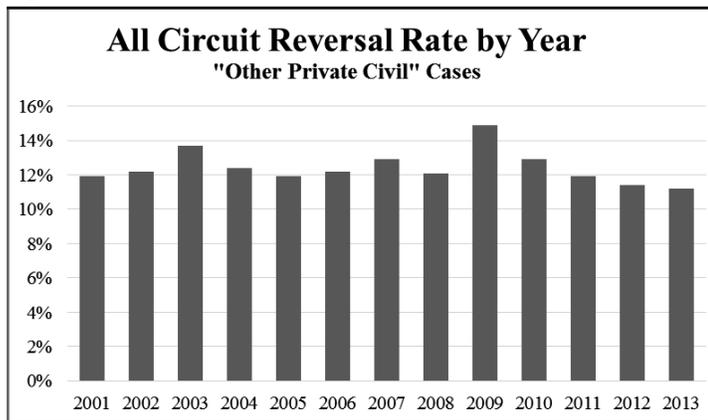
Many lawyers in private practice are particularly interested in civil cases. Focusing on civil cases is one way to avoid the skewing effect on all-case statistics resulting from inclusion of low-success prisoner petitions.

The case category “Other Private Civil” refers to civil cases in which the United States is not a party, and which do not fall into any of the other seven categories. For the year ending March 31, the “Other Private Civil” category represented 22 percent of all “terminated on the merits” appellate decisions in all Circuits; for the Fourth Circuit, this category represented 17 percent of all appellate merits terminations.

**All-Circuit Data**

Over the years 2001–2013, the all-Circuit reversal rate for “Other Private Civil” cases has generally ranged between 12 percent and 14 percent (Figure 5).

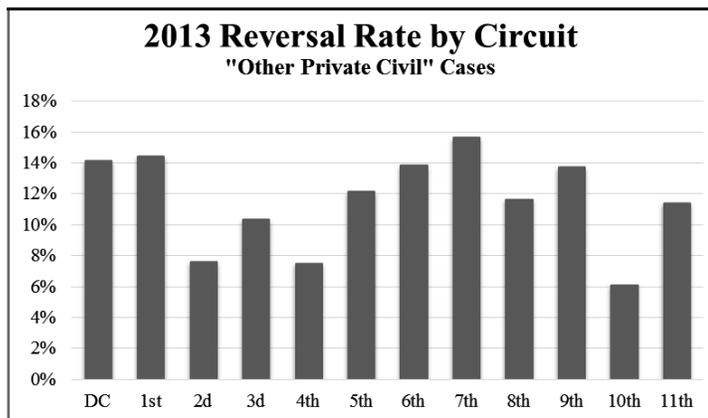
Figure 5



The reversal rate has shown a downward trend during the years 2009–2013. The all-Circuit “other private civil” reversal rate for the year ending March 31, 2013, was 11.2 percent, which is the lowest this rate had been at any time since 2001.

Comparing the 2013 Fourth Circuit “other private civil” reversal rates with the all-Circuit rates shows the Fourth Circuit to be something of an outlier, but not unique (Figure 6).

Figure 6

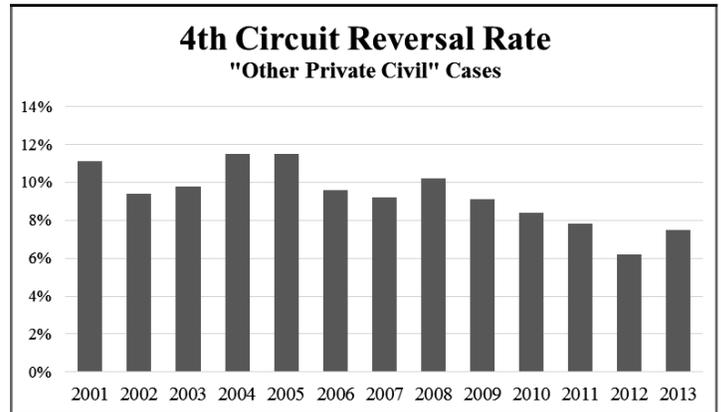


Three of the Circuits were substantially lower than the others: the Tenth at 6.1 percent, the Fourth at 7.5 percent, and the Second at 7.6 percent. All of the other Circuits had “other private civil” reversal rates in excess of 10 percent. Four of the Circuits had rates of approximately 14 percent; the Seventh Circuit had the highest at 15.6 percent.

**Fourth Circuit Data**

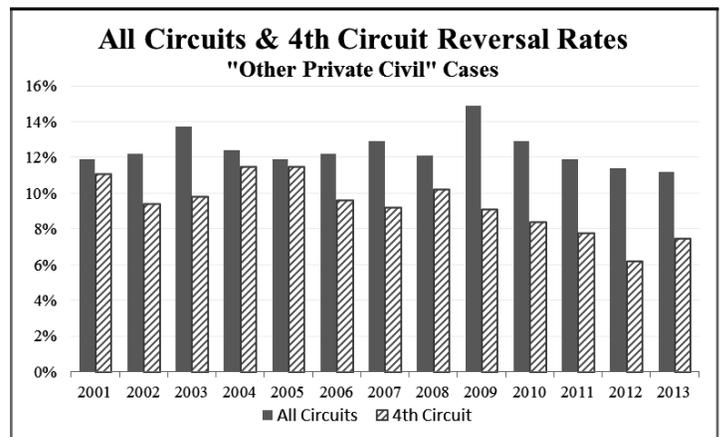
In 2012, the Fourth Circuit’s published reversal rate for other private civil cases was 6.2 percent, the lowest it had been since at least 2001, and the years 2008–2012 showed a significant downward trend.<sup>13</sup> The 2013 published rate of 7.5 percent was closer to, but still below, the Fourth Circuit’s long-term average (Figure 7).

Figure 7



Comparison between the Fourth Circuit and all-Circuit “other civil case” published reversal rate shows that since 2001 the Fourth Circuit has consistently reversed fewer “other civil cases” than the all-Circuit average (Figure 8).

Figure 8



**Calculating “True” Reversal Rates**

A perhaps truer reversal rate for “other private civil” cases may be calculated by comparing the number of reversed cases with the total number of other private civil cases disposed of, rather than just to those cases terminated “on the merits.” By using such a calculation for the year ending March 31, 2013, the all-Circuit reversal rate for “other private civil cases” would be 5.6 percent (712 appeals reversed out of 12,615 appeals terminated) and the Fourth Circuit reversal rate would be 4.6 percent (40 out of 878).

**The North Carolina Court of Appeals**

The Administrative Office of the North Carolina Courts publishes information concerning cases decided by the North Carolina Court of Appeals and the North Carolina Supreme Court.<sup>14</sup>

The published North Carolina Court of Appeals data does not break cases into categories, not even into criminal and civil cases; only aggregate (all cases) data is published. The data for the North Carolina Court of Appeals is, however, categorized by outcome, including categories for “reversed” and “reversed in part.” For the twelve months ending June 30, 2013, the published numbers are shown in Figure 9.

Figure 9

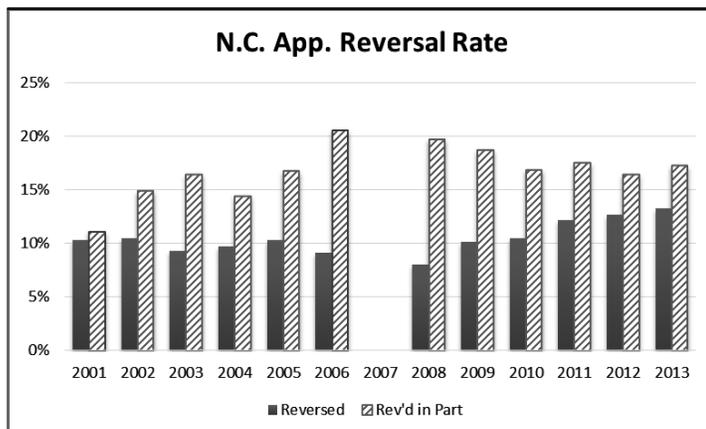
2012-2013 N.C. App. Cases		
Affirmed*	886	56%
Reversed*	210	13%
Affirmed in part, reversed in part*	273	17%
Other cases disposed	213	13%
Total cases disposed	1,582	

\*Cases Disposed by Written Opinion

In 2013, the North Carolina Court of Appeals reversed the lower court in whole or in part 30.5 percent of the time (483 out of 1,582 cases).

Over the past five years, the Court of Appeals’ reversal rate calculated in this way has ranged between 10 percent and 13 percent, and its “reversed in part” rate has ranged from 16 percent to 18 percent.

Figure 10



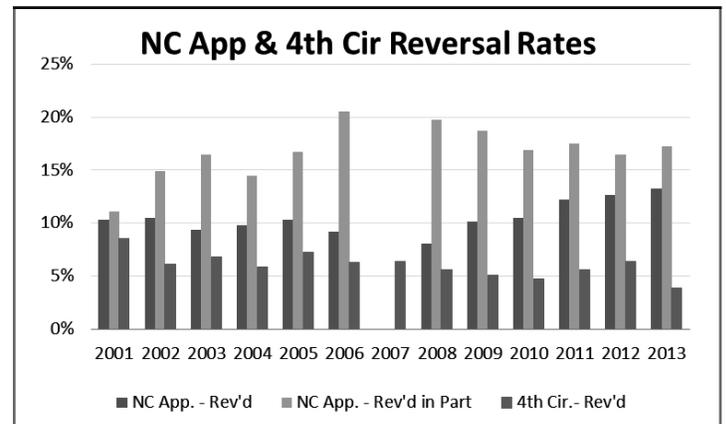
(Data for 2007 was not available at the time of writing.)

### Comparison to Fourth Circuit Data

These numbers show the “reversed” percentage for the North Carolina Court of Appeals to be 13 percent, roughly three times the Fourth Circuit’s published 3.9 percent reversal rate for “all cases.” If the 13 percent rate is compared to the “true” Fourth Circuit all-case reversal rate of 2.9 percent, it is over four times larger.

If the “affirmed in part, reversed in part” percentage (17 percent) for the North Carolina Court of Appeals is added to the “reversed” percentage, this yields a total reversal rate (in whole or in part) of 30 percent. This was over four-and-a-half times larger than the Fourth Circuit’s 2012 all-case published reversal rate of 6.4 percent, and over seven times larger than the Fourth Circuit’s 2013 all-case published reversal rate of 3.9 percent (Figure 11).

Figure 11



The federal data includes a “remanded” category. If the Fourth Circuit’s remanded cases were included in the foregoing graph, it would not change the general conclusion: the most recent AOC data shows the Fourth Circuit “remanded” only 55 (1.4 percent) of its all-case terminations.<sup>15</sup>

### Conclusion

In the year ending March 31, 2013, the Fourth Circuit had a published reversal rate (reversed cases divided by terminations on the merits, but not including original proceedings) of 3.9 percent, and a true reversal rate (reversed cases divided by total dispositions, not including original proceedings) of 2.9 percent. For “other private civil” cases, the Fourth Circuit had a published reversal rate of 7.5 percent and a true reversal rate of 4.6 percent. The Fourth Circuit’s reversal rate is atypically low, but not unique, when compared with other Circuits’ rates, both in terms of all-case and for “other private civil” cases.

The 2013 all-case reversal rate in the North Carolina Court of Appeals appears to be in line with the all-case reversal rates of the more appellant-friendly Circuits, with a reversal rate of 13 percent.

If the Court of Appeals “reversed in part” outcomes are combined with the “reversed” outcomes, the aggregate of the two reversal rates (30.5 percent) is substantially higher than the aggregate of the Fourth Circuit’s published all-case reversal rate plus its all-case remand rate (aggregate of 5.6 percent). If the N.C. App. 30.5 percent is compared to the “true” reversal rate of 2.9 percent rather than the published reversal rate, the North Carolina Court of Appeals reversal rate (in whole or in part) exceeded the Fourth Circuit’s reversal rate by a factor of ten.

Some of the disparity between federal and North Carolina is due to the differences in how these court systems categorize the data they publish. Some of the disparity is because the 2013 Fourth Circuit rate was atypically low. ♦

1. See Jane Goodman-Delahunty et al., *Insightful or Wishful: Lawyers’ Ability to Predict Case Outcomes*, 16 *Psychol. Pub. Pol’y & L.* 133, 149-50 (2010) (publication of American Psychological Association).

2. See, e.g., Ashley N. D. Meyer, et al., *Physicians’ Diagnostic Accuracy, Confidence, and Resource Requests*, 173 *JAMA Int. Med.* 1952 (2013), available at <http://archinte.jamanetwork.com/article.aspx?articleid=1731967>.

3. See, e.g., Goodman-Delahunty et al., *supra* note 1, at 149.

4. E.g., Simon Gervais et al., *The Positive Role of Overconfidence and Optimism in Investment Policy* (Rodney L. White Ctr. for Fin. Research, Working Paper No. 15-02, 2002), available at <http://finance.wharton.upenn.edu/~rlwctr/papers/0215.pdf> (last visited Dec. 16, 2013).

5. See *Scott v. Family Dollar Stores, Inc.*, 733 F.3d 105, 119 (4th Cir. 2013) (holding that the “district court abused its discretion in denying Appellants’ request for leave to amend their complaint”); *In re Abrams & Abrams, P.A.*, 605 F.3d 238, 240 (4th Cir. 2010) (“hold[ing] that the [district] court . . . abused [its] discretion by improperly applying the standards [the Fourth Circuit has] established for determining whether an attorney’s fee is reasonable”). Note that both of these cases were both reversed and remanded, so it is not clear how they would be classified by the AOC for outcome reporting purposes.

6. The clearest evidence that classification involves the exercise of judgment is the difference in reversal categories between the state and federal reports. The North Carolina Court of Appeals provides data not only for cases that are “reversed,” but also for cases that are “reversed in part.” There is no “reversed in part” category among

the federal outcomes, so the federal statistics reflect a judgmental allocation of what would be “reversed in part” type cases between the two federal categories “affirmed” and “reversed.” Compare N.C. Administrative Office of the Courts, 2011–2012 Statistical and Operational Report 9, [http://www.nccourts.org/Citizens/SRPlanning/Documents/2011-12\\_SOR-AppellateCourts.pdf](http://www.nccourts.org/Citizens/SRPlanning/Documents/2011-12_SOR-AppellateCourts.pdf) (last visited Dec. 15, 2013), with Administrative Office of the U.S. Courts, Caseload Statistics 2013, Table B-5, <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2013/tables/B05Mar13.pdf> (last visited Dec. 15, 2013). Also see last sentence of note 5, *supra*.

7. See Caseload Statistics 2013, Table B-5, *supra* note 6.

8. See Caseload Statistics 2013, Table B-5, *supra* note 6, footnote 3 (“Percentages of cases reversed have not been computed for original proceedings because of their difference from appeals, nor are they included in the percentage of total appeals reversed.”)

9. See text at n. 14, below.

10. There are two categories of prisoner petitions in the data: “U.S. Prisoner Petitions” and “Priv. Prisoner Petitions.” Figures in these two categories

have been combined; reversal rates are the weighted averages of the reversal rates for the two categories.

11. Prisoner petitions actually have a lower success rate than 2%. The 2% figure is for prisoner petitions decided “on the merits.” Twenty-six percent (26%) of prisoner petitions are not decided “on the merits.” See Caseload Statistics 2013, Table B-5, *supra* note 6. The Fourth Circuit reversal rate for all prisoner petitions (including petitions not “terminated on the merits”) was 1.4%.

12. *Id.*, note 1. Note the seeming anomaly in classifying one “original proceeding” as having been “reversed.”

13. Administrative Office of the U.S. Courts, Caseload Statistics 2012, Table B-5, <http://www.uscourts.gov/uscourts/Statistics/FederalJudicialCaseloadStatistics/2012/tables/B05Mar12.pdf> (last visited Dec. 16, 2013).

14. See 2011–2012 Statistical and Operational Report 3–9, *supra* note 6 (compiling data for cases disposed of between July 1, 2011, and June 30, 2012).

15. See Caseload Statistics 2013, Table B-5, *supra* note 6. For “other private civil” cases terminated on the merits, the Fourth Circuit remanded six of 533 cases, or 1.1%. The all-Circuit data shows an all-case remand rate of 1.4%, and a remand rate of 1.4% for “other private civil” cases.

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