

ESSAYS

A DECADE OF REVERSAL: THE NINTH CIRCUIT'S RECORD IN THE SUPREME COURT SINCE OCTOBER TERM 2000

by
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Based on a comprehensive review of a decade of cases, this Essay concludes that the Ninth Circuit's record in the Supreme Court has been strikingly poor. Not only has the Ninth Circuit been reversed more often than its sister circuits, but it has also been a regular subject of unanimous and even summary reversals. This Essay further notes that many of the Supreme Court's reversals of the Ninth Circuit have come in cases involving review of state-court decisions under the Antiterrorism and Effective Death Penalty Act.

As another Supreme Court Term begins, I thought I would take this opportunity to reflect on how cases from my own court have fared in the Supreme Court over the past decade.

I. THE 2000 TO 2009 DECADE

The Ninth Circuit's record, I am afraid to say, has been strikingly poor. From October Term 2000 to October Term 2009 (the last completed Term of the Court), the Supreme Court rendered full opinions on the merits in 182 cases from the Ninth Circuit. In 148 of those cases, the Supreme Court reversed or vacated the decision of the

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Ninth Circuit. In other words, the Ninth Circuit got it wrong in 81% of its cases that the Supreme Court agreed to hear. Compare that to the *affirmance* rate of over 80% in all appeals from lower courts and federal agencies decided by the Ninth Circuit.

Of course, to evaluate the Ninth Circuit's record, one might need some points of reference. After all, one might say, the Supreme Court does not typically agree to hear a case unless it believes the lower court was wrong. Perhaps the Ninth Circuit's rate of being reversed or vacated—to which I'll refer throughout this Essay as simply the reversal rate¹—is no anomaly. Consider, then, that during the same ten Terms of the Supreme Court, the other twelve circuits (including the Federal Circuit) had a combined reversal rate of only 71%–10% lower than that of the Ninth Circuit. Consider, as well, that over the same period, the Supreme Court's reversal rate of state-court decisions was only about 76%.² Measured against these benchmarks, the Ninth Circuit's record *has been* strikingly poor.

Even more telling than the reversal rate itself, however, is the number of *unanimous* reversals. Seventy-two of the 148 Ninth Circuit cases reversed during the period in question were at the hands of a unanimous Supreme Court. Put differently, in about one-half of all the cases in which the Ninth Circuit was reversed, not a single Justice agreed with the Ninth Circuit's decision. In the words of the eminent constitutional law scholar Akhil Amar: “When you're not picking up votes of *anyone* on the Court, something is screwy.”³

To add insult to injury, the Supreme Court handed down 15 of the 72 unanimous reversals in summary dispositions—that is, in unsigned, per curiam opinions, without the benefit of briefs on the merits or oral argument. Summary reversals are, in the words of Chief Justice Roberts, “bitter medicine,” because they are reserved for cases in which the lower court's error is so “apparent” that neither briefing nor argument is

¹ For the sake of simplicity, I use the terms “reversed” and “reversal” throughout the remainder of these remarks to refer not only to cases in which the Supreme Court reversed the judgment of the Ninth Circuit but also to cases in which the Court vacated the judgment of the Ninth Circuit.

² I calculated the Supreme Court's reversal rate of the other twelve circuits and of state-court decisions based on the *Harvard Law Review's* annual statistics for the 2000–2008 Terms, see, for example, *The Supreme Court, 2000 Term—The Statistics*, 115 HARV. L. REV. 539, 546–47 tbl.II(D), (E) (2001), and my own data for the 2009 Term. I should also mention that the overall reversal rate at the Supreme Court in the last decade was around 74%. This rate is skewed upward because it includes the disproportionately high Ninth Circuit reversal rate. Accordingly, I have not highlighted this statistic because it obscures the extent to which the Ninth Circuit's reversal rate is an outlier.

³ Akhil Reed Amar & Vikram David Amar, *Does the Supreme Court Hate the Ninth Circuit? A Dialogue on Why That Appeals Court Fares So Poorly*, FINDLAW (Apr. 19, 2002), <http://writ.news.findlaw.com/amar/20020419.html>.

necessary.⁴ Unfortunately, approximately one in ten Ninth Circuit cases reviewed by the Supreme Court results in a summary reversal.⁵

While about half of the cases reversing the Ninth Circuit were decided by a unanimous Court, a mere 14% were decided by a five-to-four vote along traditional “conservative-liberal” lines.⁶ Thus, though it is true that there have been five so-called “conservatives” on the Court since the beginning of my study, the fact remains that in the vast majority of cases, it is not just the conservatives who are voting against the Ninth Circuit. In the 2002 Term, for example, the Supreme Court reversed the Ninth Circuit 18 times. Justice Breyer voted to reverse the Ninth Circuit 11 of those times, including once in a case in which Justices Scalia and Thomas dissented,⁷ and twice in cases in which Justice Breyer himself authored the majority opinion.⁸ Given the number of unanimous reversals, as well as the general frequency with which even “liberal” Justices vote to reverse, it is safe to say that reversing the Ninth Circuit is much more than just a matter of ideology.

Let me provide some specific examples that I believe are typical of the cases in which the Supreme Court has reversed the Ninth Circuit. Much of constitutional adjudication in the courts of appeals takes place in habeas proceedings, in which federal judges are called upon to review the constitutionality of state prisoners’ convictions and sentences. It seems that at least once every Term, the Supreme Court has to remind us about the proper standard of review in habeas proceedings under the Antiterrorism and Effective Death Penalty Act (affectionately called “AEDPA”).⁹ For those unfamiliar with the statute, AEDPA prohibits federal courts from granting habeas relief to state prisoners on constitutional claims adjudicated in state court, unless the state-court decision “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court,” or “was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.”¹⁰ Review of state-court decisions under AEDPA is thus highly deferential; for habeas relief to be warranted, the state-court decision “must be shown to be not only erroneous, but objectively unreasonable.”¹¹

⁴ *Spears v. United States*, 129 S. Ct. 840, 845 (2009) (Roberts, C.J., dissenting).

⁵ In addition to the fifteen summary reversals by a *unanimous* Supreme Court during the 2000–2009 Terms, there were three summary reversals by a *non-unanimous* Court during the same period.

⁶ Twenty-one of the Ninth Circuit’s 148 reversals were at the hands of a five-to-four vote along traditional “conservative-liberal” lines.

⁷ *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396 (2003).

⁸ *Meyer v. Holley*, 537 U.S. 280 (2003); *United States v. Jimenez Recio*, 537 U.S. 270 (2003).

⁹ Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 104, 110 Stat. 1214, 1219 (codified at 28 U.S.C. § 2254(d) (2006)).

¹⁰ 28 U.S.C. § 2254(d).

¹¹ *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (per curiam).

The Supreme Court regularly reverses the Ninth Circuit for failing to heed the plain text of AEDPA. For instance, in *Woodford v. Visciotti*, a case decided in 2002, the Supreme Court summarily reversed the Ninth Circuit's conclusion that Visciotti had "been prejudiced by ineffective assistance of counsel at trial," in violation of the Sixth Amendment.¹² The Court reiterated that "[a]n 'unreasonable application of federal law is different from an incorrect application of federal law.'"¹³ According to the Supreme Court, "[t]he Ninth Circuit did not observe this distinction, but ultimately substituted its own judgment for that of the state court, in contravention of [AEDPA]."¹⁴

A few Terms later, in a case called *Uttecht v. Brown*,¹⁵ the Supreme Court reversed the Ninth Circuit on similar grounds. A state jury had sentenced Brown to death, but the Ninth Circuit concluded that he was entitled to habeas relief because the state trial court had unconstitutionally excluded a potential juror who had expressed misgivings about the death penalty.¹⁶ By a five-to-four vote, the Supreme Court held that the Ninth Circuit had not accorded the state court the proper level of deference required under AEDPA and had thereby "failed to respect the limited role of federal habeas relief . . . prescribed by Congress and by our cases."¹⁷

In the 2008 Term, the Supreme Court was again forced to reverse the Ninth Circuit for failing to follow AEDPA—not once, but twice. In *Waddington v. Sarausad*,¹⁸ the defendant had been convicted in state court of first-degree murder, and the question was whether one of the jury instructions at trial was so ambiguous that it unconstitutionally relieved the prosecution of its burden of proving all the elements of the crime. The Ninth Circuit granted habeas relief based on the alleged problem with the jury instruction.¹⁹ But the Supreme Court, by a six-to-three vote, reversed. The Court criticized the Ninth Circuit for "dissect[ing]" and "exaggerat[ing]" parts of the record to justify the grant of habeas relief. In short, the Court concluded, the Ninth Circuit had "failed to review [the state-court decision] through the deferential lens of AEDPA."²⁰

Sarausad was followed later in the Term by *Knowles v. Mirzayance*.²¹ Like *Visciotti*, *Mirzayance* involved a Sixth Amendment claim of ineffective assistance of counsel during a state trial. The Ninth Circuit granted

¹² 537 U.S. 19, 20 (2002) (per curiam), *rev'g* 288 F.3d 1097 (9th Cir. 2002).

¹³ *Id.* at 25 (quoting *Williams v. Taylor*, 529 U.S. 362, 410 (2000)).

¹⁴ *Id.*

¹⁵ 127 S. Ct. 2218 (2007).

¹⁶ *Brown v. Lambert*, 451 F.3d 946, 953 (9th Cir. 2006).

¹⁷ *Uttecht*, 127 S. Ct. at 2224.

¹⁸ 129 S. Ct. 823 (2009).

¹⁹ *Sarausad v. Porter*, 479 F.3d 671, 674 (9th Cir. 2007).

²⁰ *Sarausad*, 129 S. Ct. at 833–34.

²¹ 129 S. Ct. 1411 (2009).

habeas relief on the claim,²² and again, the Supreme Court reversed. As in *Visciotti*, the Court's decision to reverse was unanimous. Six Justices agreed that the deferential standard of AEDPA applied, and that under that standard, "the state court's decision to deny Mirzayance's ineffective-assistance-of-counsel claim did not violate clearly established federal law."²³ Indeed, those six Justices held, the Ninth Circuit "reached a contrary result based, in large measure, on its application of an improper standard of review";²⁴ as the Justices again admonished, "[t]he question 'is not whether a federal court believes the state court's determination . . . was incorrect but whether that determination was unreasonable—a substantially higher threshold.'"²⁵ All nine Justices agreed, however, that even under a de novo standard of review, the Ninth Circuit erred, because Mirzayance could not establish the elements of a successful ineffective-assistance-of-counsel claim.²⁶

The cases I have just mentioned—*Visciotti*, *Brown*, *Sarausad*, and *Mirzayance*—are just a small percentage of the cases in which the Supreme Court has reversed the Ninth Circuit during the past decade. But in important respects, they represent the kinds of cases in which the Ninth Circuit is susceptible to reversal, and in which the Supreme Court has expressed interest in reviewing. To begin with, the cases demonstrate the Supreme Court's general commitment to policing lower courts' adherence to proper standards of review. The deference required under AEDPA is not the only standard whose application has attracted the Supreme Court's attention. In recent Terms, the Court has also shown concern about the proper application of standards governing review of criminal sentences under the federal sentencing guidelines,²⁷ agency actions under the Administrative Procedure Act,²⁸ and motions seeking relief from a judgment under Federal Rule of Civil Procedure 60(b)(5).²⁹

In addition, the cases I have briefly mentioned demonstrate the Supreme Court's concern that vague standards, like ineffective assistance of counsel, are being misused by lower-court judges sympathetic to the claims of defendants, especially in death penalty cases. Ineffective assistance of counsel is particularly prone to misuse, given the generality at which are stated the claim's two elements—counsel's "deficient" performance and "prejudice" to the defendant. It is not the only type of claim, however, whose broad contours the Court has shown interest in fleshing out. Claims of "structural error," which, if proved, would be

²² See *id.* at 1418.

²³ *Id.* at 1419.

²⁴ *Id.*

²⁵ *Id.* at 1420 (quoting *Schriro v. Landrigan*, 127 S. Ct. 1933, 1939 (2007)).

²⁶ *Id.*

²⁷ *Kimbrough v. United States*, 128 S. Ct. 558 (2007); *Gall v. United States*, 128 S. Ct. 586 (2007).

²⁸ *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009).

²⁹ *Horne v. Flores*, 129 S. Ct. 2579 (2009).

grounds for automatic reversal of a conviction, are also a source of potential misuse by judges. The definition of “structural error,” like that of “ineffective assistance,” is broad; according to the Court, “structural error” is any error that “affect[s] the framework within which the trial proceeds.”³⁰ In recent Terms, the Court has agreed to hear cases in order to signal to lower courts that concepts such as “ineffective assistance” and “structural error” are not infinitely malleable.³¹

II. OCTOBER 2009 TERM

Let me turn to the 2009 Term, which, as everyone knows, was Sonia Sotomayor’s first as an Associate Justice. Not surprisingly, her arrival has not affected the Ninth Circuit’s reversal rate.

The Supreme Court rendered full opinions on the merits in fifteen cases from the Ninth Circuit last Term. Eleven of the fifteen were reversals, and five of the reversals were unanimous. In two of the cases resulting in unanimous reversal, I dissented from the decision of the majority of the three-judge panel in the Ninth Circuit. One of my dissents came in *Belmontes v. Ayers*, in which the Ninth Circuit held that Belmontes suffered ineffective assistance of counsel during the penalty phase of his capital-murder trial.³² The Supreme Court’s summary reversal of the Ninth Circuit’s decision in *Wong v. Belmontes*³³ last Term was yet another instance of its policing the misuse of broad standards by lower courts. It bears mention that the Court’s decision was the third time the Court reversed or vacated the Ninth Circuit in the same case.³⁴

The other unanimous reversal last Term of a decision from which I dissented came in *McDaniel v. Brown*,³⁵ a habeas case governed by AEDPA. Over my dissent, the Ninth Circuit majority had held that the evidence at trial was not sufficient to convict Brown of sexual assault, given that the prosecution’s DNA expert had given misleading testimony.³⁶ The Supreme Court granted certiorari and originally scheduled the case for oral argument.³⁷ About a month before the argument was to occur,

³⁰ *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991).

³¹ *See, e.g.*, *Rivera v. Illinois*, 129 S. Ct. 1446, 1455–56 (2009) (holding that a trial judge’s good-faith error in denying a defendant’s peremptory challenge is not structural error); *Puckett v. United States*, 129 S. Ct. 1423, 1432 (2009) (“[B]reach of a plea deal is not a ‘structural’ error as we have used that term.”); *Hedgpeth v. Pulido*, 129 S. Ct. 530, 532 (2008) (holding that an instructional error was not structural), *vacating* *Pulido v. Chrones*, 487 F.3d 669 (9th Cir. 2007).

³² 529 F.3d 834, 837 (9th Cir. 2008).

³³ 130 S. Ct. 383 (2009) (per curiam).

³⁴ *See* *Ayers v. Belmontes*, 549 U.S. 7 (2006), *rev’g* *Belmontes v. Brown*, 414 F.3d 1094 (9th Cir. 2005); *Brown v. Belmontes*, 544 U.S. 945 (2005) (mem.), *vacating* *Belmontes v. Woodford*, 350 F.3d 861 (9th Cir. 2003).

³⁵ 130 S. Ct. 665 (2010) (per curiam).

³⁶ *Brown v. Farwell*, 525 F.3d 787, 795 (9th Cir. 2008).

³⁷ *McDaniel v. Brown*, 129 S. Ct. 1038 (2009).

however, the Court removed the case from the calendar. Soon thereafter, the Court issued a unanimous per curiam opinion reversing the Ninth Circuit. The Court concluded, among other things, that the Ninth Circuit's "discussion of the non-DNA evidence departed from the deferential review that [AEDPA] demand[s]."³⁸ *Brown* thus falls within a long line of habeas cases in which the Court has unanimously reversed the Ninth Circuit for failing to observe the proper standard of review.

I also authored or joined a dissent from the denial of rehearing en banc in two other cases reversed by the Court last Term: *Salazar v. Buono*³⁹ and *City of Ontario v. Quon*.⁴⁰ *Buono* involved the placement of a Latin cross on federal land in the Mojave Desert as a memorial to American soldiers who had died in World War I.⁴¹ In earlier litigation, the plaintiff, Buono, had succeeded in challenging the placement of the cross as a violation of the Establishment Clause.⁴² In response, Congress enacted a statute that would transfer the land to a private party.⁴³ A three-judge panel of the Ninth Circuit, however, upheld an injunction permanently enjoining the government from implementing the transfer.⁴⁴ I wrote a dissent from the denial of rehearing en banc, joined by four other judges, arguing that the transfer of the land was a legitimate way for the government to cure the underlying constitutional violation.⁴⁵ The Supreme Court agreed to hear the case, and rendered a decision last April. Three Justices concluded that the decision to enjoin implementation of the land-transfer statute was based on improper analysis;⁴⁶ two Justices believed that Buono lacked standing to maintain the action;⁴⁷ and the remaining four Justices believed that the injunction was appropriate.⁴⁸ Despite the splintered decision, a majority agreed that the Ninth Circuit's decision had to be reversed.

City of Ontario v. Quon presented the question whether a police department violated the Fourth Amendment by reviewing text messages sent by officers on government pagers.⁴⁹ The Ninth Circuit concluded that the officers had a reasonable expectation of privacy in their text messages, and that the search of the messages was unreasonable because

³⁸ *Brown*, 130 S. Ct. at 673.

³⁹ 130 S. Ct. 1803 (2010).

⁴⁰ 130 S. Ct. 2619 (2010).

⁴¹ *Buono*, 130 S. Ct. at 1811.

⁴² *See id.* at 1812–13.

⁴³ *See id.* at 1813 (citing Department of Defense Appropriations Act, Pub. L. No. 108-87, § 8121(a), 117 Stat. 1054, 1100 (2004)).

⁴⁴ *Buono v. Kempthorne*, 502 F.3d 1069, 1086 (9th Cir. 2007).

⁴⁵ *Buono v. Kempthorne*, 527 F.3d 758 (9th Cir. 2008) (O'Scannlain, J., dissenting from the denial of rehearing en banc).

⁴⁶ *Buono*, 130 S. Ct. at 1816 (plurality opinion).

⁴⁷ *Id.* at 1824 (Scalia, J., concurring in the judgment).

⁴⁸ *Id.* at 1828 (Stevens, J., dissenting); *id.* at 1843 (Breyer, J., dissenting).

⁴⁹ *City of Ontario v. Quon*, 130 S. Ct. 2619, 2624 (2010).

less intrusive means could have been used to monitor them.⁵⁰ Along with five other judges, I joined Judge Ikuta's dissent from the denial of rehearing en banc, which noted that the Supreme Court has repeatedly rejected the notion that the government must use the "least intrusive means" to accomplish a search.⁵¹ The Supreme Court unanimously reversed the Ninth Circuit. Assuming without deciding that the officers had a reasonable expectation of privacy in their text messages, the Court held that the search was reasonable, and that therefore the City did not violate the officers' Fourth Amendment rights.⁵² Echoing Judge Ikuta's dissent, the Court faulted the Ninth Circuit for requiring that the government use the "least intrusive means" to search the officers' text messages.⁵³ The Court stated that "[e]ven assuming there were ways that [the government] could have performed the search that would have been less intrusive, it does not follow that the search as conducted was unreasonable."⁵⁴

As these cases illustrate, the last Supreme Court Term was no different from previous ones. Notwithstanding the Court's new makeup, the Term still featured the Ninth Circuit as the regular subject of unanimous—and even summary—reversals. I end, however, on a positive note. About a year and a half ago, I authored an opinion on behalf of a unanimous three-judge panel in *Nordyke v. King* holding that the Due Process Clause of the Fourteenth Amendment incorporates against the States the Second Amendment right to keep and bear arms.⁵⁵ The Supreme Court subsequently granted certiorari in a case from the Seventh Circuit, *McDonald v. City of Chicago*,⁵⁶ which presented the same issue. In its decision, handed down last June, the Court agreed with our holding in *Nordyke* with respect to incorporation.⁵⁷ Thus, despite all our reversals, we were on the right side of last Term's most important constitutional law case. Whether our success continues in the October 2010 Term, only time will tell.

⁵⁰ See *Quon v. Arch Wireless Operating Co.*, 529 F.3d 892, 904–09 (9th Cir. 2008).

⁵¹ *Quon v. Arch Wireless Operating Co.*, 554 F.3d 769, 774 (9th Cir. 2009) (Ikuta, J., dissenting from the denial of rehearing en banc).

⁵² *Quon*, 130 S. Ct. at 2630–33.

⁵³ *Id.* at 2632.

⁵⁴ *Id.*

⁵⁵ 563 F.3d 439 (9th Cir. 2009), *vacated*, 611 F.3d 1015 (9th Cir. 2010).

⁵⁶ *Nat'l Rifle Ass'n of Am., Inc. v. City of Chicago*, 567 F.3d 856 (7th Cir. 2009), *cert. granted sub. nom. McDonald v. City of Chicago*, 130 S. Ct. 48 (2009).

⁵⁷ *McDonald*, 130 S. Ct. at 3050 (2010).