

Table 59

SENTENCING ISSUES APPEALED FOR SELECTED GUIDELINES¹
Fiscal Year 2007

ISSUE	Number	Percent	Affirmance Rate ²
DRUG TRAFFICKING (§2D1.1)	1,240	100.0	94.0
Application and definition issues	421	34.0	96.4
Challenge to weight/amount of drugs involved in the offense	292	23.5	93.5
Question regarding dangerous weapon possession	156	12.6	94.9
Application of mandatory minimum statute/21 U.S.C. §§ 841, 846, or 851	135	10.9	88.2
Challenge to weight/amount of drugs based on relevant conduct determination	128	10.3	95.3
Sentence entrapment/manipulation	18	1.5	100.0
Definition of mixture of substance	17	1.4	100.0
Challenge to the drug equivalency table	17	1.4	94.1
Other issues appealed	56	4.5	83.9
18 U.S.C. § 3553 FACTORS	2,879	100.0	93.7
18 U.S.C. § 3553(a) cited, no specific reason	1,703	59.2	94.6
History and characteristics of the defendant (18 U.S.C. § 3553(a)(1))	285	9.9	95.4
Adequacy of 18 U.S.C. § 3553(c) statement of reasons	209	7.3	88.5
Avoiding unwarranted disparities between co-defendants (18 U.S.C. § 3553(a)(6))	199	6.9	94.0
Crack/Powder ratio with reference to <i>U.S. v Booker</i>	97	3.4	85.6
Nature and circumstances of the offense (18 U.S.C. § 3553(a)(1))	74	2.6	97.3
Disparities in districts without “fast track programs” (18 U.S.C. §3553(a)(6))	65	2.3	96.9
Seriousness, respect for the law and just punishment (18 U.S.C. § 3553(a)(2)(A))	46	1.6	87.0
Defendant’s correctional treatment (18 U.S.C. § 3553(a)(2)(D))	40	1.4	90.0
Afford adequate deterrence (18 U.S.C. § 3553(a)(2)(B))	39	1.4	87.2
Kinds of sentences available (18 U.S.C. § 3553(a)(3))	34	1.2	94.1
Protect the public (18 U.S.C. § 3553(a)(2)(C))	30	1.0	93.3
Other “discouraged” bases for departure	22	0.8	72.7
Disparities between state and federal law punishments (18 U.S.C. § 3553(a)(6))	13	0.5	100.0
Post-sentencing events	13	0.5	76.9
Other issues appealed	10	0.3	100.0
OTHER NON-GUIDELINE ISSUES	2,440	100.0	91.8
Plea bargain issues/Rule 11 issues	754	30.9	95.1
Challenge based on <i>Apprendi v. New Jersey</i>	662	27.1	98.6
Rule 32 issues	197	8.1	82.7
Rule 35 issues (correction or reduction of sentences)	161	6.6	90.1
Statement of reasons requirement (18 U.S.C. § 3553(c))	136	5.6	77.9
Specifics unknown	80	3.3	95.0
Challenge based on <i>Blakely v. Washington</i>	57	2.3	82.5
Other issues appealed	393	16.1	84.7
DEPARTURE GUIDELINES (Chapter 5, Parts H and K)	499	100.0	87.8
Challenge to court’s refusal to make downward departure (§5K2.0)	95	19.0	95.8
Challenge to government’s refusal to make motion for §5K1.1 (breach of plea)	45	9.0	86.7
Challenge to use of defendant’s criminal history in determining sentence (§5H1.8)	24	4.8	87.5
Challenge to factors used in making an upward departure	24	4.8	91.7
Challenge to the extent of the departure/ “variance”	22	4.4	63.6
Challenge to government’s refusal to make §5K1.1 motion (no plea)	22	4.4	95.4
District court mistakenly believed it had no authority to depart	22	4.4	90.9
Challenge to court’s refusal to make downward departure for substantial assistance	21	4.2	100.0
Challenge to the extent of the departure (§5K1.1)	19	3.8	79.0
Refusal of court to depart based on family ties and responsibilities (§5H1.6)	17	3.4	100.0
Challenge to court’s refusal to make downward departure for diminished capacity	16	3.2	100.0
Challenge to court’s refusal to make downward departure for physical condition	13	2.6	100.0
Challenge to upward departure - combination of factor	11	2.2	100.0
Challenge to refusal of court to make departure based on age (§5H1.1)	10	2.0	100.0
Other issues appealed	138	27.7	77.5

Table 59 (cont.)

ISSUE	Number	Percent	Affirmance Rate²
CRIMINAL HISTORY GUIDELINES (Chapter 4)	935	100.0	91.2
General determination as career offender (§4B1.1)	133	14.2	92.5
Determination that prior offenses meet criterion for Armed Career Criminal (§4B1.4)	114	12.2	95.6
Question regarding related cases and calculation of criminal history (§4A1.1)	106	11.3	94.1
Application of career offender definition of “crime of violence” (§4B1.2)	72	7.7	81.9
Determination that prior offenses meet criterion set forth in §4B1.1	55	5.9	89.1
Definition of “related cases” (§4A1.2)	41	4.4	92.7
Downward departure - overrepresented criminal history (§4A1.3)	38	4.1	94.7
Definition of “violent felony” (§4B1.4)	37	4.0	91.9
Defendant’s conviction not subject to enhancement under 18 U.S.C. § 924(e) (§4B1.4)	28	3.0	100.0
Upward departure - category did not reflect seriousness of criminal history (§4A1.3)	26	2.8	88.5
Prior conviction is beyond time period for §4A1.2(e)	18	1.9	88.9
Other upward departure issues (§4A1.3)	18	1.9	100.0
Application of procedures set out in guideline (§4A1.1)	16	1.7	87.5
§4A1.2(c) precludes counting of certain prior offenses	14	1.5	92.9
§4A1.2(d) precludes counting of juvenile offenses	13	1.4	100.0
Use of relevant conduct in determining instant offense (§4A1.1)	10	1.1	100.0
Application of definition of “two prior felony convictions” (§4B1.2)	10	1.1	100.0
Other issues appealed	186	19.9	86.0
FRAUD AND DECEIT (§2F1.1 and §2B1.1)	330	100.0	88.2
Challenge to the calculation of loss (§2B1.1)	120	36.4	85.0
Application and definition issues (§2B1.1)	86	26.1	93.0
Challenge to the calculation of loss (§2F1.1)	35	10.6	85.7
Application of specific offense characteristics (§2B1.1)	24	7.3	95.8
Challenge to definition of loss as applied to the defendant (§2B1.1)	22	6.7	86.4
Application and definition issues (§2F1.1)	12	3.6	91.7
Application of more than minimal planning adjustment (§2B1.1)	11	3.3	81.8
Other issues appealed	20	6.1	85.0
IMMIGRATION AND NATURALIZATION OFFENSES (Chapter 2, Part L)	1,065	100.0	88.8
Application and definition issues (§2L1.2)	479	45.0	99.6
Challenge to “previously deported for an aggravated felony” adjustment (§2L1.2)	257	24.1	72.0
Challenge to “previously deported for a felony” adjustment (§2L1.2)	240	22.5	84.2
Application and definition issues (§2L1.1)	26	2.4	92.3
Other issues appealed	63	5.9	92.1
ROLE IN THE OFFENSE GUIDELINES (§§3B1.1, 3B1.2)	564	100.0	97.0
Whether defendant was a minor participant in the offense (§3B1.2)	241	42.7	98.8
Determination that defendant was an organizer or leader of 5 or more (§3B1.1)	101	17.9	97.0
Determination that defendant was an organizer or manager of 5 or less (§3B1.1)	88	15.6	92.0
Whether defendant was a minimal participant in the offense (§3B1.2)	42	7.4	100.0
Question regarding application of reduction and level of culpability (§3B1.2)	35	6.2	100.0
Determination that defendant was a manager or supervisor of 5 or more (§3B1.1)	25	4.4	100.0
Questions regarding application of enhancement and level of culpability (§3B1.1)	21	3.7	85.7
Other issues appealed	11	2.0	90.9

¹Based on 6,639 appeals with sentencing as at least one of the reasons for appeal. Information on issues was available in 6,639 of these cases which cited 16,373 issues. Often more than one issue was appealed; consequently, the number of issues is more than the number of defendants. The “Other” category includes all issues appealed fewer than ten times among relevant cases.

²Affirmance rate includes all appeals cases not reversed or directly remanded by the circuit court.