

Table 59

SENTENCING ISSUES APPEALED FOR SELECTED GUIDELINES¹
Fiscal Year 2006

ISSUE	Number	Percent	Affirmance Rate²
DRUG TRAFFICKING (§2D1.1)	2,280	100.0	78.2
Application and definition issues	1,131	49.6	76.3
Challenge to weight/amount of drugs involved in the offense	429	18.8	74.8
Application of mandatory minimum statute/21 U.S.C. §§ 841, 846, or 851	232	10.2	89.2
Question regarding dangerous weapon possession	139	6.1	84.2
Challenge to weight/amount of drugs based on relevant conduct determination	80	3.5	77.5
Rule of lenity for crack cocaine	33	1.4	81.8
Challenge to estimate of drug amount under negotiation	28	1.2	78.6
§2D1.1(b)(4) two-level decrease	17	0.8	100.0
Double counting issue involving weapon possession and 18 U.S.C. §924(c)	15	0.7	80.0
Definition of mixture of substance	11	0.5	72.7
Challenge to the drug equivalency table	10	0.4	90.0
Equal Protection/Due Process challenge to the penalty for crack cocaine	10	0.4	90.0
Other issues appealed	145	6.4	75.2
ROLE IN THE OFFENSE GUIDELINES (§§3B1.1, 3B1.2)	462	100.0	87.4
Whether defendant was a minor participant in the offense (§3B1.2)	180	39.0	98.9
Determination that defendant was an organizer or leader of 5 or more (§3B1.1)	85	18.4	76.5
Question regarding application of reduction and level of culpability (§3B1.2)	47	10.2	100.0
Questions regarding application of enhancement and level of culpability (§3B1.1)	44	9.5	68.2
Determination that defendant was an organizer or manager of 5 or less (§3B1.1)	37	8.0	73.0
Whether defendant was a minimal participant in the offense (§3B1.2)	25	5.4	92.0
Determination that defendant was a manager or supervisor of 5 or more (§3B1.1)	24	5.2	79.2
Other issues appealed	20	4.3	75.0
ACCEPTANCE OF RESPONSIBILITY (§3E1.1)	192	100.0	93.8
Application and definition issues	53	27.6	92.4
Challenge to refusal to grant one-level reduction	43	22.4	100.0
Challenge to denial of adjustment because of failure to admit conduct	33	17.2	100.0
Denial of §3E1.1 because of applicability of §3C1.1	13	6.8	76.9
Challenge to denial of §3E1.1 based on falsely denying relevant conduct	12	6.2	91.7
Other issues appealed	38	19.8	89.5
DEPARTURE GUIDELINES (Chapter 5, Parts H and K)	492	100.0	88.0
Challenge to court's refusal to make downward departure (§5K2.0)	70	14.2	95.7
Challenge to government's refusal to make motion for §5K1.1 (breach of plea)	32	6.5	93.8
Challenge to court's refusal to make downward departure for substantial assistance	30	6.1	96.7
Challenge to the extent of the departure (§5K1.1)	23	4.7	69.6
Other mitigating circumstances as a basis for departure	22	4.5	86.4
Challenge to the extent of the departure	19	3.9	94.7
Challenge to court's refusal to make downward departure for diminished capacity	19	3.9	100.0
Challenge to factors used in making an upward departure	16	3.2	81.2
Challenge to court's refusal to make downward departure for physical condition	15	3.0	86.7
Challenge to downward departure - single act of aberrant behavior	13	2.6	69.2
Refusal of court to depart based on family ties and responsibilities (§5H1.6)	12	2.4	100.0
Challenge to government's refusal to make substantial assistance motion (no plea)	12	2.4	100.0
District court mistakenly believed it had no authority to depart	11	2.2	100.0
Other issues appealed	198	40.2	83.3

Table 59 (cont.)

ISSUE	Number	Percent	Affirmance Rate ²
CRIMINAL HISTORY GUIDELINES (Chapter 4)	1,102	100.0	88.0
General determination as career offender (§4B1.1)	140	12.7	90.0
Determination that prior offenses meet criterion for Armed Career Criminal (§4B1.4)	110	10.0	89.1
Determination that prior offenses meet criterion set forth in §4B1.1	89	8.1	85.4
Application of career offender definition of “crime of violence” (§4B1.2)	72	6.5	83.3
Definition of “violent felony” (§4B1.4)	59	5.4	89.8
Defendant’s conviction not subject to enhancement under 18 U.S.C. § 924(e) (§4B1.4)	53	4.8	92.4
Downward departure - overrepresented criminal history (§4A1.3)	44	4.0	95.4
Question regarding related cases and calculation of criminal history (§4A1.1)	32	2.9	93.8
Application of procedures set out in guideline (§4A1.1)	32	2.9	96.9
Upward departure - category did not reflect seriousness of criminal history (§4A1.3)	28	2.5	92.9
Definition of “related cases” (§4A1.2)	21	1.9	90.5
§4A1.2(d) precludes counting of juvenile offenses	17	1.5	88.2
Definition of “prior sentence” (§4A1.2)	13	1.2	92.3
Other upward departure issues (§4A1.3)	13	1.2	92.3
Upward departure - calculation of extent of departure (§4A1.3)	11	1.0	90.9
Application of definition of “two prior felony convictions” (§4B1.2)	11	1.0	100.0
Use of relevant conduct in determining instant offense (§4A1.1)	10	0.9	90.0
Defendant claims prior conviction unconstitutional (§4B1.4)	10	0.9	100.0
Other issues appealed	337	30.6	83.4
FRAUD AND DECEIT (§2F1.1 and §2B1.1)	633	100.0	73.3
Application and definition issues (§2B1.1)	267	42.2	68.9
Challenge to the calculation of loss (§2B1.1)	139	22.0	77.0
Application of specific offense characteristics (§2B1.1)	72	11.4	80.6
Challenge to the calculation of loss (§2F1.1)	40	6.3	72.5
Application and definition issues (§2F1.1)	16	2.5	75.0
Challenge to definition of loss as applied to the defendant (§2B1.1)	16	2.5	81.2
Application of more than minimal planning adjustment (§2B1.1)	16	2.5	68.8
Other issues appealed	67	10.6	74.6
IMMIGRATION AND NATURALIZATION OFFENSES (Chapter 2 Part L)	2,131	100.0	85.3
Application and definition issues (§2L1.2)	814	38.2	74.3
Challenge to “previously deported for an aggravated felony” adjustment (§2L1.2)	546	25.6	95.4
Challenge to “previously deported for a felony” adjustment (§2L1.2)	439	20.6	94.3
Application and definition issues (§2L1.1)	58	2.7	58.6
Application and definition issues (§2L2.1)	12	1.5	75.0
Other issues appealed	262	12.3	89.7
OTHER NON-GUIDELINE ISSUES	3,282	100.0	91.9
Challenge based on <i>Apprendi v. New Jersey</i>	1,310	39.9	98.6
Plea bargain issues/Rule 11 issues	615	18.7	94.6
Specifics unknown	317	9.7	76.7
Rule 32 issues	111	3.4	79.3
Rule 35 issues (correction or reduction of sentences)	101	3.1	86.1
Challenge based on <i>Blakely v. Washington</i>	94	2.9	73.4
Statement of reasons requirement (18 U.S.C. § 3553(c))	63	1.9	84.1
Other issues appealed	671	20.4	90.0

¹Based on 8,283 appeals with sentencing as at least one of the reasons for appeal. Information on issues was available in 8,283 of these cases which cited 20,951 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 10 times among relevant cases.

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