

Table 59

SENTENCING ISSUES APPEALED FOR SELECTED GUIDELINES¹
Fiscal Year 2005

| ISSUE | Number | Percent | Affirmance Rate² |
|--|---------------|----------------|------------------------------------|
| DRUG TRAFFICKING (§2D1.1) | 1,257 | 100.0 | 66.7 |
| Challenge to weight/amount of drugs involved in the offense | 392 | 31.2 | 63.0 |
| Application and definition issues | 299 | 23.8 | 52.2 |
| Question regarding dangerous weapon possession | 163 | 13.0 | 69.3 |
| Challenge to weight/amount of drugs based on relevant conduct determination | 95 | 7.6 | 69.5 |
| Application of mandatory minimum statute/21 U.S.C. §§ 841, 846, or 851 | 81 | 6.4 | 90.1 |
| §2D1.1(b)(4) two-level decrease | 14 | 1.1 | 92.9 |
| Sentence entrapment/manipulation | 11 | 0.9 | 100.0 |
| Other issues appealed | 202 | 16.1 | 78.7 |
| ROLE IN THE OFFENSE GUIDELINES (§§3B1.1, 3B1.2) | 372 | 100.0 | 78.8 |
| Whether defendant was a minor participant in the offense (§3B1.2) | 115 | 30.9 | 91.3 |
| Determination that defendant was an organizer or leader of 5 or more (§3B1.1) | 75 | 20.2 | 76.0 |
| Determination that defendant was an organizer or manager of 5 or less (§3B1.1) | 73 | 19.6 | 67.1 |
| Determination that defendant was a manager or supervisor of 5 or more (§3B1.1) | 39 | 10.5 | 71.8 |
| Question regarding application of reduction and level of culpability (§3B1.2) | 21 | 5.6 | 85.7 |
| Whether defendant was a minimal participant in the offense (§3B1.2) | 15 | 4.0 | 80.0 |
| Questions regarding application of enhancement and level of culpability (§3B1.1) | 12 | 3.2 | 91.7 |
| Other issues appealed | 22 | 5.9 | 59.1 |
| ACCEPTANCE OF RESPONSIBILITY (§3E1.1) | 166 | 100.0 | 83.7 |
| Application and definition issues | 56 | 33.7 | 78.6 |
| Challenge to refusal to grant one-level reduction | 21 | 12.7 | 76.2 |
| Challenge to granting adjustment | 21 | 12.7 | 81.0 |
| Denial of §3E1.1 because of applicability of §3C1.1 | 19 | 11.4 | 84.2 |
| Challenge to denial of adjustment because of failure to admit conduct | 19 | 11.4 | 100.0 |
| Other issues appealed | 30 | 18.1 | 90.0 |
| DEPARTURE GUIDELINES (Chapter 5, Parts H and K) | 448 | 100.0 | 76.3 |
| Challenge to court's refusal to make downward departure (§5K2.0) | 95 | 21.2 | 92.6 |
| District court mistakenly believed it had no authority to depart | 36 | 8.0 | 77.8 |
| Challenge to factors used in making downward departure | 28 | 6.2 | 39.3 |
| Challenge to government's refusal to make substantial assistance motion (no plea) | 23 | 5.1 | 91.3 |
| Challenge to the extent of the departure (§5K1.1) | 23 | 5.1 | 69.6 |
| Challenge to court's refusal to make downward departure for substantial assistance | 20 | 4.5 | 75.0 |
| Challenge to downward departure - single act of aberrant behavior | 13 | 2.9 | 61.5 |
| Challenge to the extent of the departure | 13 | 2.9 | 76.9 |
| Other mitigating circumstances as a basis for departure | 13 | 2.9 | 53.8 |
| Challenge to factors used in making an upward departure | 12 | 2.7 | 83.3 |
| Refusal of court to depart based on family ties and responsibilities (§5H1.6) | 11 | 2.5 | 100.0 |
| Challenge to court's refusal to make downward departure for diminished capacity | 11 | 2.5 | 100.0 |
| Other issues appealed | 150 | 33.5 | 70.7 |

Table 59 (cont.)

| ISSUE | Number | Percent | Affirmance Rate² |
|--|---------------|----------------|------------------------------------|
| CRIMINAL HISTORY GUIDELINES (Chapter 4) | 670 | 100.0 | 82.8 |
| General determination as career offender (§4B1.1) | 89 | 13.3 | 82.0 |
| Determination that prior offenses meet criterion set forth in §4B1.1 | 55 | 8.2 | 85.4 |
| Determination that prior offenses meet criterion for Armed Career Criminal (§4B1.4) | 51 | 7.6 | 82.4 |
| Application of procedures set out in guideline (§4A1.1) | 35 | 5.2 | 88.6 |
| Definition of prior sentence (§4A1.2) | 34 | 5.1 | 91.2 |
| Application of career offender definition of “crime of violence” (§4B1.2) | 32 | 4.8 | 84.4 |
| Downward departure - overrepresented criminal history (§4A1.3) | 25 | 3.7 | 80.0 |
| Question regarding related cases and calculation of criminal history (§4A1.1) | 22 | 3.3 | 81.8 |
| Upward departure - category did not reflect seriousness of criminal history (§4A1.3) | 17 | 2.5 | 82.4 |
| Definition of “related cases” (§4A1.2) | 13 | 1.9 | 76.9 |
| Defendant’s conviction not subject to enhancement under 18 U.S.C. § 924(e) (§4B1.4) | 13 | 1.9 | 76.9 |
| Other upward departure issues (§4A1.3) | 12 | 1.8 | 75.0 |
| §4A1.1(c) precludes counting of certain prior sentences | 10 | 1.5 | 80.0 |
| Other issues appealed | 262 | 39.1 | 82.1 |
| FRAUD AND DECEIT (§2F1.1 and §2B1.1) | 398 | 100.0 | 60.0 |
| Challenge to the calculation of loss (§2B1.1) | 134 | 33.7 | 61.9 |
| Application and definition issues (§2B1.1) | 67 | 16.8 | 34.3 |
| Challenge to the calculation of loss (§2F1.1) | 47 | 11.8 | 55.3 |
| Application of specific offense characteristics (§2B1.10) | 38 | 9.6 | 65.8 |
| Application and definition issues (§2F1.1) | 17 | 4.3 | 84.2 |
| Application of more than minimal planning adjustment (§2B1.1) | 16 | 4.0 | 56.2 |
| Other issues appealed | 79 | 19.8 | 72.2 |
| IMMIGRATION AND NATURALIZATION OFFENSES (Chapter 2 Part L) | 1,086 | 100.0 | 85.9 |
| Challenge to “previously deported for an aggravated felony” adjustment (§2L1.2) | 402 | 37.0 | 89.8 |
| Application and definition issues (§2L1.2) | 280 | 25.8 | 80.7 |
| Challenge to “previously deported for a felony” adjustment (§2L1.2) | 265 | 24.4 | 90.2 |
| Application and definition issues (§2L1.1) | 30 | 2.8 | 60.0 |
| Other issues appealed | 109 | 10.0 | 81.6 |
| OTHER NON-GUIDELINE ISSUES | 2,503 | 100.0 | 82.7 |
| Challenge based on <i>Blakely v. Washington</i> | 561 | 22.4 | 79.9 |
| Challenge based on <i>Apprendi v. New Jersey</i> | 555 | 22.2 | 92.8 |
| Plea bargain issues/Rule 11 issues | 443 | 17.7 | 92.8 |
| Specifics unknown | 250 | 10.0 | 42.8 |
| Rule 35 issues (correction or reduction of sentences) | 93 | 3.7 | 91.4 |
| Rule 32 issues | 40 | 1.6 | 75.0 |
| Statement of reasons requirement (18 U.S.C. § 3553(c)) | 29 | 1.2 | 69.0 |
| Other issues appealed | 532 | 21.3 | 85.2 |

¹Based on 6,208 “Post-Booker” appeals defendants with sentencing as at least one of the reasons for appeal. Information on issues was available in 6,208 of these cases which cited 13,440 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.

SOURCE: U.S. Sentencing Commission, 2005 Appeals Datafile, APPFY05.