

Table 59

SENTENCING ISSUES APPEALED FOR SELECTED GUIDELINES¹
Fiscal Year 2004, Post-Blakely (June 25, 2004, through September 30, 2004)

ISSUE	Number	Percent	Affirmance Rate ²
DRUG TRAFFICKING (§2D1.1)	123	100.0	82.9
Challenge to weight/amount of drugs involved in the offense	51	41.5	76.5
Question regarding dangerous weapon possession	19	15.4	100.0
Application of mandatory minimum statute/21 U.S.C. §§ 841, 846, or 851	19	15.4	79.0
Challenge to weight/amount of drugs based on relevant conduct determination	15	12.2	80.0
Application and definition issues	6	4.9	100.0
§2D1.1(b)(4) two level decrease	4	3.2	75.0
Other issues appealed	9	7.3	88.9
ROLE IN THE OFFENSE GUIDELINES (§§3B1.1, 3B1.2)	59	100.0	88.1
Whether defendant was a minor participant in the offense (§3B1.2)	30	50.8	90.0
Determination that defendant was an organizer or leader of 5 or more (§3B1.1)	18	30.5	83.3
Determination that defendant was a manager or supervisor of 5 or more (§3B1.1)	4	6.8	75.0
Determination that defendant was an organizer or manager of 5 or less (§3B1.1)	3	5.1	100.0
Whether defendant was a minimal participant in the offense (§3B1.2)	3	5.1	100.0
Evidentiary standard used in §3B1.2 determination	1	1.7	100.0
ACCEPTANCE OF RESPONSIBILITY (§3E1.1)	38	100.0	89.5
Challenge to denial of adjustment because of failure to admit conduct	16	42.1	87.5
Challenge to refusal to grant one-level reduction	8	21.1	87.5
Burden of proof issues	4	10.5	100.0
Denial of §3E1.1 because of applicability of §3C1.1	3	7.9	100.0
Challenge to granting of adjustment	3	7.9	66.7
Other issues appealed	4	10.5	100.0
DEPARTURE GUIDELINES (Chapter 5, Parts H and K)	134	100.0	76.1
Challenge to court's refusal to make downward departure (§5K2.0)	28	20.9	100.0
Challenge to factors used in making downward departure	13	9.7	30.8
Challenge to court's refusal to make downward departure for substantial assistance	11	8.2	100.0
Challenge to court's refusal to make downward departure for diminished capacity	10	7.5	80.0
District court mistakenly believed it had no authority to depart	8	6.0	62.5
Challenge to factors used in making upward departure	6	4.5	83.3
Challenge to court's refusal to depart based on family responsibilities	5	3.7	60.0
Challenge to government's refusal to make substantial assistance motion (no plea)	4	3.0	75.0
Challenge to the extent of the departure under (§5K1.1)	4	3.0	75.0
Challenge to government's refusal to make motion; breach of plea agreement (§5K1.1)	4	3.0	100.0
Challenge to the extent of the departure	3	2.2	100.0
Other aggravating circumstances as a basis for departure	3	2.2	100.0
Challenge to downward departure - single act of aberrant behavior	3	2.2	66.7
Other mitigating circumstances as a basis for departure	3	2.2	0.0
Other issues appealed	29	21.6	69.0

Table 59 (cont.)

ISSUE	Number	Percent	Affirmance Rate²
CRIMINAL HISTORY GUIDELINES (Chapter 4)	111	100.0	79.3
General determination as career offender (§4B1.1)	12	10.8	91.7
Downward departure - overrepresented criminal history (§4A1.3)	10	9.0	60.0
Question regarding related cases and calculation of criminal history (§4A1.1)	8	7.2	100.0
Definition of related cases (§4A1.2)	7	6.3	85.7
Determination that prior offenses meet criterion set forth in §4B1.1	7	6.3	71.4
Application of career offender definition of "crime of violence" (§4B1.2)	6	5.4	83.3
Definition of prior sentence (§4A1.2)	5	4.5	80.0
Upward departure - category didn't reflect seriousness of defendant's criminal history	5	4.5	100.0
Determination that prior offenses meet criterion for Armed Career Criminal (§4B1.4)	5	4.5	60.0
§4A1.1(c) precludes counting of certain prior sentences	3	2.7	33.3
§4A1.2(c) precludes counting of certain prior sentences	3	2.7	66.7
Category does not reflect likelihood that defendant will commit other offenses (§4A1.3)	3	2.7	33.3
Other issues appealed	37	33.3	83.8
FRAUD AND DECEIT (§2F1.1 and §2B1.1)	49	100.0	63.3
Challenge to the calculation of loss	27	55.1	51.8
Application of specific offense characteristics (§2B1.1)	8	16.3	100.0
Application and definition issues	5	10.2	60.0
Question regarding definition of loss (§2F1.1)	3	6.1	33.3
Other issues appealed	6	12.2	83.3
IMMIGRATION AND NATURALIZATION OFFENSES (Chapter 2 Part L)	63	100.0	79.7
Challenge to "previously deported for an aggravated felony" adjustment (§2L1.2)	37	58.7	75.7
Challenge to "previously deported for a felony" adjustment (§2L1.2)	14	22.2	78.6
Application and definition issues (§2L1.2)	5	7.9	80.0
Other issues appealed	7	11.1	100.0
OTHER NON-GUIDELINE ISSUES	298	100.0	85.6
Challenge based on <i>Blakely vs Washington</i>	94	31.5	77.7
Plea bargain issues/Rule 11 issues	87	29.2	89.7
Challenge based on <i>Apprendi v. New Jersey</i>	58	19.5	93.1
Rule 35 issues (correction or reduction of sentences)	16	5.4	93.8
Rule 32 issues	6	2.0	50.0
Other issues appealed	37	12.4	86.5

¹Based on 755 "Post-Blakely" appeals defendants with sentencing as at least one of the reasons for appeal. Information on issues was available in 755 of these cases which cited 1,322 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 three times among relevant cases.

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