

Table 59

SENTENCING ISSUES APPEALED FOR SELECTED GUIDELINES¹
Fiscal Year 2004, Pre-Blakely (October 1, 2003, through June 24, 2004)

ISSUE	Number	Percent	Affirmance Rate²
DRUG TRAFFICKING (§2D1.1)	661	100.0	95.5
Challenge to weight/amount of drugs involved in the offense	281	42.5	94.7
Question regarding dangerous weapon possession	101	15.3	99.0
Application of mandatory minimum statute/21 U.S.C. §§ 841, 846, or 851	67	10.1	92.5
Challenge to weight/amount of drugs based on relevant conduct determination	65	9.8	95.4
Application and definition issues	54	8.2	96.3
§2D1.1(b)(4) two level decrease	16	2.4	93.8
Sentence entrapment/manipulation	12	1.8	100.0
Other issues appealed	65	9.8	95.4
ROLE IN THE OFFENSE GUIDELINES (§§3B1.1, 3B1.2)	401	100.0	93.5
Whether defendant was a minor participant in the offense (§3B1.2)	173	43.1	94.8
Determination that defendant was an organizer or leader of 5 or more (§3B1.1)	80	20.0	91.2
Determination that defendant was a manager or supervisor of 5 or more (§3B1.1)	47	11.7	93.6
Determination that defendant was an organizer or manager of 5 or less (§3B1.1)	37	9.2	94.6
Whether defendant was a minimal participant in the offense (§3B1.2)	35	8.7	94.3
Question regarding application of reduction and level of culpability (§3B1.2)	14	3.5	92.9
Other issues appealed	15	3.7	86.7
ACCEPTANCE OF RESPONSIBILITY (§3E1.1)	207	100.0	90.8
Challenge to denial of adjustment because of failure to admit conduct	58	28.0	98.3
Challenge to refusal to grant one-level reduction	45	21.7	86.7
Denial of §3E1.1 because of applicability of §3C1.1	34	16.4	97.1
Application and definition issues	27	13.0	88.9
Burden of proof issues	17	8.2	100.0
Challenge to granting of adjustment	12	5.8	33.3
Other issues appealed	14	6.8	100.0
DEPARTURE GUIDELINES (Chapter 5, Parts H and K)	560	100.0	84.8
Challenge to court's refusal to make downward departure (§5K2.0)	131	23.4	97.3
Challenge to government's refusal to make substantial assistance motion (no plea)	40	7.1	97.5
Challenge to factors used in making an upward departure	27	4.8	85.2
Challenge to court's refusal to make downward departure for substantial assistance	27	4.8	96.3
Challenge to court's refusal to make downward departure for diminished capacity	27	4.8	96.3
Challenge to court's refusal to depart based on family responsibilities	26	4.6	65.4
Challenge to factors used in making downward departure	19	3.4	31.6
Challenge to the extent of the departure	19	3.4	89.5
District court mistakenly believed it had no authority to depart	17	3.0	76.5
Challenge to downward departure - single act of aberrant behavior	15	2.7	60.0
Co-defendant disparity as basis for departure	14	2.5	71.4
Challenge to the extent of the departure under (§5K1.1)	12	2.1	83.3
Other mitigating circumstances as a basis for departure	12	2.1	58.3
Challenge to government's refusal to make motion; breach of plea agreement (§5K1.1)	11	2.0	90.9
Extreme conduct as a basis for departure	11	2.0	90.9
Other issues appealed	152	27.1	81.6

Table 59 (cont.)

ISSUE	Number	Percent	Affirmance Rate²
CRIMINAL HISTORY GUIDELINES (Chapter 4)	487	100.0	91.2
General determination as career offender (§4B1.1)	65	13.3	89.3
Downward departure - overrepresented criminal history (§4A1.3)	43	8.8	86.0
Application of career offender definition of "crime of violence" (§4B1.2)	32	6.6	87.5
Question regarding related cases and calculation of criminal history (§4A1.1)	31	6.4	90.3
Definition of related cases (§4A1.2)	30	6.2	96.7
Determination that prior offenses meet criterion set forth in §4B1.1	30	6.2	93.3
Determination that prior offenses meet criterion for Armed Career Criminal (§4B1.4)	23	4.7	95.6
Definition of prior sentence (§4A1.2)	21	4.3	95.3
Upward departure - category didn't reflect seriousness of defendant's criminal history	14	2.9	92.9
§4A1.2(c) precludes counting of certain prior sentences	12	2.5	83.3
Application of procedures set out in guideline (§4A1.1)	10	2.0	100.0
Other issues appealed	176	36.1	91.5
FRAUD AND DECEIT (§2F1.1 and §2B1.1)	215	100.0	87.4
Challenge to the calculation of loss	110	51.2	89.1
Application and definition issues	32	14.9	87.5
Application of specific offense characteristics (§2B1.1)	28	13.0	78.6
More than minimal planning	12	5.6	91.7
Other issues appealed	33	15.3	87.9
IMMIGRATION AND NATURALIZATION OFFENSES (Chapter 2 Part L)	1,009	100.0	98.2
Challenge to "previously deported for an aggravated felony" adjustment (§2L1.2)	549	54.4	98.5
Challenge to "previously deported for a felony" adjustment (§2L1.2)	292	28.9	99.0
Application and definition issues (§2L1.2)	119	11.8	97.5
Application and definition issues (§2L1.1)	20	2.0	90.0
Other issues appealed	29	2.9	93.1
OTHER NON-GUIDELINE ISSUES	1,752	100.0	95.2
Challenge based on <i>Apprendi v. New Jersey</i>	837	47.8	99.3
Plea bargain issues/Rule 11 issues	423	24.1	94.3
Rule 35 issues (correction or reduction of sentences)	92	5.3	92.4
Rule 32 issues	60	3.4	75.0
Statement of reasons requirement (18 U.S.C. §3553(c))	24	1.4	87.5
Other issues appealed	316	18.0	90.8

¹Based on 3,882 "Pre-Blakely" appeals defendants with sentencing as at least one of the reasons for appeal. Information on issues was available in 3,882 of these cases which cited 7,415 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 by the circuit court.