

Table 59

**SENTENCING ISSUES APPEALED FOR SELECTED GUIDELINES<sup>1</sup>**  
**Fiscal Year 2005, Post-Booker (January 12, 2005, through September 30, 2005)**

ISSUE	Number	Percent	Affirmance Rate <sup>2</sup>
<b>DRUG TRAFFICKING (§2D1.1)</b>	<b>1,128</b>	<b>100.0</b>	<b>63.9</b>
Challenge to weight/amount of drugs involved in the offense	355	31.5	60.0
Application and definition issues	296	26.2	52.0
Question regarding dangerous weapon possession	136	12.1	66.2
Challenge to weight/amount of drugs based on relevant conduct determination	73	6.5	61.6
Application of mandatory minimum statute/21 U.S.C. §§ 841, 846, or 851	65	5.8	89.2
§2D1.1(b)(4) two-level decrease	8	0.7	87.5
Sentence entrapment/manipulation	6	0.5	100.0
Other issues appealed	189	16.8	78.3
<b>ROLE IN THE OFFENSE GUIDELINES (§§3B1.1, 3B1.2)</b>	<b>271</b>	<b>100.0</b>	<b>74.2</b>
Whether defendant was a minor participant in the offense (§3B1.2)	77	28.4	88.3
Determination that defendant was an organizer or manager of 5 or less (§3B1.1)	62	22.9	66.1
Determination that defendant was an organizer or leader of 5 or more (§3B1.1)	52	19.2	69.2
Determination that defendant was a manager or supervisor of 5 or more (§3B1.1)	32	11.8	68.8
Question regarding application of reduction and level of culpability (§3B1.2)	14	5.2	85.7
Whether defendant was a minimal participant in the offense (§3B1.2)	9	3.3	77.8
Questions regarding application of enhancement and level of culpability (§3B1.1)	8	3.0	87.5
Other issues appealed	17	6.3	47.0
<b>ACCEPTANCE OF RESPONSIBILITY (§3E1.1)</b>	<b>121</b>	<b>100.0</b>	<b>86.0</b>
Application and definition issues	36	29.8	80.6
Challenge to granting adjustment	17	14.1	88.2
Challenge to refusal to grant one-level reduction	16	13.2	81.2
Challenge to denial of adjustment because of failure to admit conduct	15	12.4	100.0
Denial of §3E1.1 because of applicability of §3C1.1	14	11.6	85.7
Challenge to denial of application based on falsely denying relevant conduct	8	6.6	100.0
Other issues appealed	15	12.4	80.0
<b>DEPARTURE GUIDELINES (Chapter 5, Parts H and K)</b>	<b>285</b>	<b>100.0</b>	<b>72.3</b>
Challenge to court's refusal to make downward departure (§5K2.0)	58	20.4	87.9
Challenge to factors used in making downward departure	18	6.3	27.8
Challenge to government's refusal to make substantial assistance motion (no plea)	18	6.3	88.9
District court mistakenly believed it had no authority to depart	17	6.0	64.7
Challenge to the extent of the departure (§5K1.1)	16	5.6	62.5
Challenge to court's refusal to make downward departure for substantial assistance	14	4.9	78.6
Challenge to factors used in making an upward departure	11	3.9	81.8
Challenge to the extent of the departure	10	3.5	80.0
Challenge to downward departure - single act of aberrant behavior	10	3.5	70.0
Refusal of court to depart based on family ties and responsibilities (§5H1.6)	7	2.5	100.0
Other mitigating circumstances as a basis for departure	7	2.5	71.4
Challenge to court's refusal to make an upward departure	5	1.8	60.0
Challenge to court's refusal to make downward departure for diminished capacity	5	1.8	100.0
Other issues appealed	89	31.2	64.0

Table 59 (cont.)

ISSUE	Number	Percent	Affirmance Rate <sup>2</sup>
<b>CRIMINAL HISTORY GUIDELINES (Chapter 4)</b>	<b>515</b>	<b>100.0</b>	<b>81.0</b>
General determination as career offender (§4B1.1)	81	15.7	80.2
Determination that prior offenses meet criterion set forth in §4B1.1	47	9.1	85.1
Determination that prior offenses meet criterion for Armed Career Criminal (§4B1.4)	41	8.0	80.5
Application of procedures set out in guideline (§4A1.1)	32	6.2	90.6
Application of career offender definition of “crime of violence” (§4B1.2)	27	5.2	85.2
Question regarding related cases and calculation of criminal history (§4A1.1)	21	4.1	81.0
Definition of prior sentence (§4A1.2)	18	3.5	83.3
Upward departure - category did not reflect seriousness of criminal history (§4A1.3)	13	2.5	84.6
Downward departure - overrepresented criminal history (§4A1.3)	12	2.3	83.3
Other upward departure issues (§4A1.3)	10	1.9	70.0
Definition of “related cases” (§4A1.2)	9	1.8	66.7
Felon-in-possession and §4B1.2	9	1.8	66.7
§4A1.1(a) precludes including a certain sentence in criminal history category	6	1.2	83.3
§4A1.1(c) precludes counting of certain prior sentences	6	1.2	83.3
Use of relevant conduct in determining instant offense (§4A1.1)	6	1.2	66.7
Prior conviction is beyond time period for §4A1.2(e)	6	1.2	66.7
Upward departure - prior unlawful conduct not accounted for (§4A1.3)	6	1.2	83.3
Application of definition of “two prior felony convictions” (§4B1.2)	5	1.0	80.0
Other issues appealed	160	31.1	80.0
<b>FRAUD AND DECEIT (§2F1.1 and §2B1.1)</b>	<b>360</b>	<b>100.0</b>	<b>58.9</b>
Challenge to the calculation of loss (§2B1.1)	126	35.0	61.9
Application and definition issues (§2B1.1)	62	17.2	29.0
Challenge to the calculation of loss (§2F1.1)	36	10.0	55.6
Application of specific offense characteristics (§2B1.10)	35	9.7	62.9
Application and definition issues (§2F1.1)	17	4.7	88.2
Application of more than minimal planning adjustment (§2B1.1)	14	3.9	50.0
Other issues appealed	70	19.4	74.3
<b>IMMIGRATION AND NATURALIZATION OFFENSES (Chapter 2 Part L)</b>	<b>805</b>	<b>100.0</b>	<b>83.0</b>
Challenge to “previously deported for an aggravated felony” adjustment (§2L1.2)	321	39.9	87.9
Challenge to “previously deported for a felony” adjustment (§2L1.2)	188	23.4	87.2
Application and definition issues (§2L1.2)	172	21.4	74.4
Application and definition issues (§2L1.1)	23	2.9	56.5
Challenge to the number of aliens involved in the offense	5	0.6	40.0
Other issues appealed	96	11.9	82.3
<b>OTHER NON-GUIDELINE ISSUES</b>	<b>1,673</b>	<b>100.0</b>	<b>79.0</b>
Challenge based on <i>Apprendi v. New Jersey</i>	418	25.0	92.1
Plea bargain issues/Rule 11 issues	336	20.1	92.3
Specifics unknown	222	13.3	36.5
Challenge based on <i>Blakely v. Washington</i>	217	13.0	65.0
Rule 35 issues (correction or reduction of sentences)	59	3.5	89.8
Rule 32 issues	25	1.5	68.0
Statement of reasons requirement (18 U.S.C. § 3553(c))	17	1.0	76.5
Other issues appealed	379	22.7	85.0

<sup>1</sup>Based on 5,010 “Post-Booker” appeals defendants with sentencing as at least one of the reasons for appeal. Information on issues was available in 5,010 of these cases which cited 11,192 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 five times among relevant cases.

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