

Table 59

SENTENCING ISSUES APPEALED FOR SELECTED GUIDELINES¹
Fiscal Year 2005, Pre-Booker (October 1, 2004, through January 11, 2005)

ISSUE	Number	Percent	Affirmance Rate²
DRUG TRAFFICKING (§2D1.1)	129	100.0	90.7
Challenge to weight/amount of drugs involved in the offense	37	28.7	91.9
Question regarding dangerous weapon possession	27	20.9	85.2
Challenge to weight/amount of drugs based on relevant conduct determination	22	17.1	95.4
Application of mandatory minimum statute/21 U.S.C. §§ 841, 846, or 851	16	12.4	93.8
§2D1.1(b)(4) two-level decrease	6	4.7	100.0
Sentence entrapment/manipulation	5	3.9	100.0
Other issues appealed	16	12.4	81.2
ROLE IN THE OFFENSE GUIDELINES (§§3B1.1, 3B1.2)	101	100.0	91.1
Whether defendant was a minor participant in the offense (§3B1.2)	38	37.6	97.4
Determination that defendant was an organizer or leader of 5 or more (§3B1.1)	23	22.8	91.3
Determination that defendant was an organizer or manager of 5 or less (§3B1.1)	11	10.9	72.7
Determination that defendant was a manager or supervisor of 5 or more (§3B1.1)	7	6.9	85.7
Question regarding application of reduction and level of culpability (§3B1.2)	7	6.9	85.7
Whether defendant was a minimal participant in the offense (§3B1.2)	6	5.9	83.3
Other issues appealed	9	8.9	100.0
ACCEPTANCE OF RESPONSIBILITY (§3E1.1)	45	100.0	77.8
Application and definition issues	20	44.4	75.0
Denial of §3E1.1 because of applicability of §3C1.1	5	11.1	80.0
Challenge to refusal to grant one-level reduction	5	11.1	60.0
Other issues appealed	15	33.3	86.7
DEPARTURE GUIDELINES (Chapter 5, Parts H and K)	163	100.0	83.4
Challenge to court's refusal to make downward departure (§5K2.0)	37	22.7	100.0
District court mistakenly believed it had no authority to depart	19	11.7	89.5
Challenge to factors used in making downward departure	10	11.7	60.0
Challenge to the extent of the departure	7	4.3	85.7
Challenge to court's refusal to make downward departure for substantial assistance	6	3.7	67.7
Other mitigating circumstances as a basis for departure	6	3.7	33.3
Challenge to court's refusal to make downward departure for diminished capacity	6	3.7	100.0
Challenge to government's refusal to make substantial assistance motion (no plea)	5	3.1	100.0
Challenge to government's refusal to make motion; breach of plea agreement (§5K1.1)	5	3.1	100.0
Other issues appealed	62	38.0	77.4

Table 59 (cont.)

ISSUE	Number	Percent	Affirmance Rate²
CRIMINAL HISTORY GUIDELINES (Chapter 4)	155	100.0	89.0
Definition of prior sentence (§4A1.2)	16	10.3	100.0
Downward departure - overrepresented criminal history (§4A1.3)	13	8.4	76.9
Determination that prior offenses meet criterion for Armed Career Criminal (§4B1.4)	10	6.5	90.0
General determination as career offender (§4B1.1)	8	5.2	100.0
Determination that prior offenses meet criterion set forth in §4B1.1	8	5.2	87.5
§4A1.2(c) precludes counting of certain prior sentences	5	3.2	80.0
Prior sentence doesn't meet criteria set in §4A1.2(c)(1) and thus shouldn't be counted	5	3.2	100.0
Category does not reflect likelihood defendant will commit other crimes (§4A1.3)	5	3.2	80.0
Application of career offender definition of "crime of violence" (§4B1.2)	5	3.2	80.0
Other issues appealed	80	51.6	88.8
FRAUD AND DECEIT (§2F1.1 and §2B1.1)	38	100.0	71.0
Challenge to the calculation of loss (§2F1.1)	11	28.9	54.6
Challenge to the calculation of loss (§2B1.1)	8	21.0	62.5
Application and definition issues (§2B1.1)	5	13.2	100.0
Other issues appealed	14	36.8	78.6
IMMIGRATION AND NATURALIZATION OFFENSES (Chapter 2 Part L)	281	100.0	94.3
Application and definition issues (§2L1.2)	108	38.4	90.7
Challenge to "previously deported for an aggravated felony" adjustment (§2L1.2)	81	28.8	97.5
Challenge to "previously deported for a felony" adjustment (§2L1.2)	77	27.4	97.4
Application and definition issues (§2L1.1)	7	2.5	71.4
Other issues appealed	8	2.8	100.0
OTHER NON-GUIDELINE ISSUES	830	100.0	90.0
Challenge based on <i>Blakely v. Washington</i>	344	41.4	89.2
Challenge based on <i>Apprendi v. New Jersey</i>	137	16.5	85.6
Plea bargain issues/Rule 11 issues	107	12.9	93.4
Rule 35 issues (correction or reduction of sentences)	34	4.1	94.1
Specifics unknown	28	3.4	92.9
Rule 32 issues	15	1.8	86.7
Statement of reasons requirement (18 U.S.C. § 3553(c))	12	1.4	58.3
Other issues appealed	153	18.4	85.6

¹Based on 1,198 "Pre-Booker" appeals defendants with sentencing as at least one of the reasons for appeal. Information on issues was available in 1,198 of these cases which cited 2,248 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.

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