

Table 59

**SENTENCING ISSUES APPEALED FOR SELECTED GUIDELINES<sup>1</sup>**  
**Fiscal Year 2008**

<b>ISSUE</b>	<b>Number</b>	<b>Percent</b>	<b>Affirmance Rate<sup>2</sup></b>
<b>DRUG TRAFFICKING (§2D1.1)</b>	<b>1,632</b>	<b>100.0</b>	<b>84.8</b>
Challenge to weight/amount of drugs involved in the offense	199	12.2	92.0
Crack/powder sentencing disparity based on <i>Kimbrough</i> decision	190	11.6	37.9
Application and definition issues	182	11.2	93.4
Question regarding dangerous weapon possession	123	7.5	95.9
Two-level reduction for crack	123	7.5	86.2
Application of mandatory minimum statute/21 U.S.C. §§ 841, 846, or 851	108	6.6	92.6
Challenge to weight/amount of drugs based on relevant conduct determination	96	5.9	94.8
Other issues appealed	611	37.4	89.0
<b>18 U.S.C. § 3553 FACTORS</b>	<b>1,725</b>	<b>100.0</b>	<b>93.0</b>
18 U.S.C. § 3553(a) cited, no specific reason	884	51.2	94.7
History and characteristics of the defendant (18 U.S.C. § 3553(a)(1))	194	11.2	96.9
Adequacy of 18 U.S.C. § 3553(c) statement of reasons	162	9.4	84.6
Avoiding unwarranted disparities between co-defendants (18 U.S.C. § 3553(a)(6))	158	9.2	96.8
Seriousness, respect for the law and just punishment (18 U.S.C. § 3553(a)(2)(A))	55	3.2	96.4
Disparities in districts without “fast track programs” (18 U.S.C. § 3553(a)(6))	53	3.1	98.1
Crack/Powder ratio with reference to <i>U.S. v Booker</i>	42	2.4	73.8
Nature and circumstances of the offense (18 U.S.C. § 3553(a)(1))	36	2.1	94.4
Defendant’s correctional treatment (18 U.S.C. § 3553(a)(2)(D))	33	1.9	90.9
Adequacy of 18 U.S.C. § 3553(c) statement of reasons with references to <i>U.S. v Rita</i>	18	1.0	88.9
Disparities between state and federal law punishments (18 U.S.C. § 3553(a)(6))	17	1.0	82.4
Empirical base of the sentencing guidelines	14	0.8	85.7
Protect the public (18 U.S.C. § 3553(a)(2)(C))	13	0.8	100.0
Afford adequate deterrence (18 U.S.C. § 3553(a)(2)(B))	11	0.6	90.9
Other issues appealed	35	2.0	71.4
<b>OTHER NON-GUIDELINE ISSUES</b>	<b>1,562</b>	<b>100.0</b>	<b>92.8</b>
Challenge based on <i>Apprendi v. New Jersey</i>	585	37.5	98.8
Plea bargain issues/Rule 11 issues	344	22.0	93.3
Rule 35 issues (correction or reduction of sentences)	191	12.2	87.4
Rule 32 issues	124	7.9	87.9
Specifics unknown	65	4.2	92.3
Notice of variance from the guideline range	43	2.8	74.4
Statement of reasons requirement (18 U.S.C. § 3553(c))	40	2.6	90.0
Extent of variance from the guideline range ( <i>U.S. v Gall</i> )	15	1.0	60.0
Challenge based on <i>Blakely v. Washington</i>	12	0.8	100.0
Other issues appealed	143	9.2	88.1
<b>DEPARTURE GUIDELINES (Chapter 5, Parts H and K)</b>	<b>367</b>	<b>100.0</b>	<b>88.8</b>
Challenge to court’s refusal to make downward departure (§5K2.0)	54	14.7	96.3
Challenge to the extent of the departure (§5K1.1)	28	7.6	78.6
Challenge to government’s refusal to make motion for §5K1.1 (breach of plea)	27	7.4	100.0
Challenge to court’s refusal to make downward departure for substantial assistance	26	7.1	92.3
Challenge to government’s refusal to make §5K1.1 motion (no plea)	23	6.3	100.0
District court mistakenly believed it had no authority to depart	18	4.9	61.1
Challenge to factors used in making an upward departure	17	4.6	88.2
Refusal of court to depart based on family ties and responsibilities (§5H1.6)	14	3.8	92.9
Challenge to the extent of the departure/“variance”	14	3.8	100.0
Challenge to court’s refusal to make downward departure for diminished capacity	11	3.0	100.0
Challenge to factors used in making a downward departure	10	2.7	30.0
Other issues appealed	125	34.1	88.8

**Table 59 (cont.)**

<b>ISSUE</b>	<b>Number</b>	<b>Percent</b>	<b>Affirmance Rate<sup>2</sup></b>
<b>CRIMINAL HISTORY GUIDELINES (Chapter 4)</b>	<b>740</b>	<b>100.0</b>	<b>92.2</b>
Determination that prior offenses meet criterion for Armed Career Criminal (§4B1.4)	92	12.4	94.6
General determination as career offender (§4B1.1)	76	10.3	100.0
Question regarding related cases and calculation of criminal history (§4A1.1)	49	6.6	98.0
Upward departure - category did not reflect seriousness of criminal history (§4A1.3)	48	6.5	97.9
Determination that prior offenses meet criterion set forth in §4B1.1	45	6.1	91.1
Application of career offender definition of “crime of violence” (§4B1.2)	44	5.9	79.6
Downward departure - overrepresented criminal history (§4A1.3)	35	4.7	97.1
Definition of “related cases” (§4A1.2)	22	3.0	100.0
Application of procedures set out in guideline (§4A1.1)	21	2.8	90.5
Definition of “violent felony” (§4B1.4)	21	2.8	81.0
Prior sentence does not meet criteria set forth in §4A1.2(c)(1) and should not be counted	20	2.7	65.0
Defendant’s conviction not subject to enhancement under 18 U.S.C. § 924(e) (§4B1.4)	19	2.6	89.5
Court failed to articulate basis for departure (§4A1.3)	11	1.5	81.1
Upward departure - calculation of extent of departure (§4A1.3)	11	1.5	100.0
Prior conviction is beyond time period for §4A1.2(e)	10	1.4	90.0
Other issues appealed	216	29.2	91.2
<b>FRAUD AND DECEIT (§2F1.1 and §2B1.1)</b>	<b>407</b>	<b>100.0</b>	<b>87.0</b>
Challenge to the calculation of loss (§2B1.1)	148	36.4	91.9
Application and definition issues (§2B1.1)	68	16.7	88.2
Application of specific offense characteristics (§2B1.1)	39	9.6	76.9
Challenge to the calculation of loss (§2F1.1)	24	5.9	62.5
Other issues appealed	128	31.5	88.3
<b>IMMIGRATION AND NATURALIZATION OFFENSES (Chapter 2, Part L)</b>	<b>1,123</b>	<b>100.0</b>	<b>93.7</b>
Application and definition issues (§2L1.2)	377	33.6	96.8
Challenge to “previously deported for an aggravated felony” adjustment (§2L1.2)	138	12.3	89.9
Challenge to “previously deported for a felony” adjustment (§2L1.2)	78	6.9	82.0
Application and definition issues (§2L1.1)	36	3.2	88.9
Other issues appealed	494	44.0	94.5
<b>ROLE IN THE OFFENSE GUIDELINES (§§3B1.1, 3B1.2)</b>	<b>449</b>	<b>100.0</b>	<b>93.3</b>
Whether defendant was a minor participant in the offense (§3B1.2)	171	38.1	97.1
Determination that defendant was an organizer or leader of five or more (§3B1.1)	87	19.4	95.4
Determination that defendant was an organizer or manager of five or less (§3B1.1)	66	14.7	92.4
Determination that defendant was a manager or supervisor of five or more (§3B1.1)	43	9.6	86.0
Whether defendant was a minimal participant in the offense (§3B1.2)	23	5.1	87.0
Question regarding application of reduction and level of culpability (§3B1.2)	21	4.7	95.2
Questions regarding application of enhancement and level of culpability (§3B1.1)	17	3.8	76.5
Other issues appealed	21	4.7	90.5

<sup>1</sup>Based on 6,332 appeals with sentencing as at least one of the reasons for appeal. Information on issues was available in 6,332 of these cases which cited 14,130 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.

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