

Table 59

**SENTENCING ISSUES APPEALED FOR SELECTED GUIDELINES<sup>1</sup>**  
**Fiscal Year 2009**

ISSUE	N	%	Affirmance Rate <sup>2</sup>
<b>DRUG TRAFFICKING (§2D1.1)</b>	<b>2,523</b>	<b>100.0</b>	<b>94.1</b>
Two-level reduction for crack	1,178	46.7	96.0
Challenge based on <i>Booker</i> decision	434	17.2	96.8
Challenge to weight/amount of drugs involved in the offense	181	7.2	94.5
Crack/powder sentencing disparity based on <i>Kimbrough</i> decision	167	6.6	75.4
Application of mandatory minimum statute/21 U.S.C. §§ 841, 846, or 851	115	4.6	95.6
Question regarding dangerous weapon possession	97	3.8	92.8
Challenge to weight/amount of drugs based on relevant conduct determination	92	3.6	90.2
Application and definition issues	88	3.5	94.3
Sentence entrapment/manipulation	22	0.9	95.4
Determination that state sentence met criterion for enhancement ( <i>Rodriquez</i> )	17	0.7	100.0
Equal Protection/Due Process challenge to penalty for crack	10	0.4	100.0
Other issues appealed	122	4.8	92.6
<b>18 U.S.C. § 3553 FACTORS</b>	<b>1,769</b>	<b>100.0</b>	<b>94.8</b>
18 U.S.C. § 3553(a) cited, no specific reason	923	52.2	96.4
Adequacy of 18 U.S.C. § 3553(c) statement of reasons	206	11.6	89.3
History and characteristics of the defendant (18 U.S.C. § 3553(a)(1))	161	9.1	96.9
Avoiding unwarranted disparities between co-defendants (18 U.S.C. § 3553(a)(6))	137	7.7	94.9
Empirical base of the sentencing guidelines	74	4.2	100.0
Crack/powder ratio with reference to <i>Booker/Kimbrough</i>	59	3.3	78.0
Nature and circumstances of the offense (18 U.S.C. § 3553(a)(1))	49	2.8	98.0
Disparities in districts without “fast track programs” (18 U.S.C. § 3553(a)(6))	41	2.3	95.1
Seriousness, respect for the law and just punishment (18 U.S.C. § 3553(a)(2)(A))	28	1.6	96.4
Adequacy of 18 U.S.C. § 3553(c) statement of reasons with references to <i>U.S. v Rita</i>	23	1.3	91.3
Defendant’s correctional treatment (18 U.S.C. § 3553(a)(2)(D))	15	0.8	100.0
Afford adequate deterrence (18 U.S.C. § 3553(a)(2)(B))	13	0.7	92.3
Protect the public (18 U.S.C. § 3553(a)(2)(C))	12	0.7	91.7
Other issues appealed	28	1.6	85.7
<b>OTHER NON-GUIDELINE ISSUES</b>	<b>1,238</b>	<b>100.0</b>	<b>89.0</b>
Plea bargain issues/Rule 11 issues	508	41.0	94.3
Challenge based on <i>Apprendi v. New Jersey</i>	159	12.8	98.1
Rule 32 issues	113	9.1	85.0
Rule 35 issues (correction or reduction of sentences)	71	5.7	85.9
Extent of variance from the guideline range ( <i>U.S. v Gall</i> )	55	4.4	87.3
Specifics unknown	47	3.8	93.6
Statement of reasons requirement (18 U.S.C. § 3553(c))	25	2.0	88.0
Notice of variance from the guideline range	19	1.5	84.2
Challenge to prior convictions based on <i>Begay/Chambers</i>	19	1.5	26.3
Other issues appealed	222	17.9	72.5
<b>DEPARTURE GUIDELINES (Chapter 5, Parts H and K)</b>	<b>322</b>	<b>100.0</b>	<b>95.0</b>
Challenge to court’s refusal to make downward departure (§5K2.0)	72	22.4	97.2
Challenge to court’s refusal to make downward departure for substantial assistance	24	7.5	100.0
Challenge to government’s refusal to make §5K1.1 motion (no plea)	17	5.3	94.1
Challenge to factors used in making an upward departure	16	5.0	93.8
Challenge to the extent of the departure (§5K1.1)	15	4.7	93.3
Challenge to the extent of the departure/“variance”	13	4.0	84.6
Challenge to court’s refusal to make downward departure for diminished capacity	13	4.0	100.0
Challenge to government’s refusal to make motion for §5K1.1 (breach of plea)	11	3.4	100.0
Other issues appealed	141	43.8	93.6

**Table 59 (cont.)**

<b>ISSUE</b>	<b>N</b>	<b>%</b>	<b>Affirmance Rate<sup>2</sup></b>
<b>CRIMINAL HISTORY GUIDELINES (Chapter 4)</b>	<b>775</b>	<b>100.0</b>	<b>92.2</b>
Question regarding related cases and calculation of criminal history (§4A1.1)	86	11.1	96.5
General determination as career offender (§4B1.1)	69	8.9	91.3
Determination that prior offenses meet criterion for Armed Career Criminal (§4B1.4)	65	8.4	90.8
Determination that prior offenses meet criterion set forth in §4B1.1	54	7.0	90.7
Application of career offender definition of “crime of violence” (§4B1.2)	47	6.1	57.4
Downward departure - overrepresented criminal history (§4A1.3)	37	4.8	100.0
Defendant’s conviction not subject to enhancement under 18 U.S.C. § 924(e) (§4B1.4)	24	3.1	70.8
Challenge to prior convictions based on <i>Begay/Chambers</i> (§4B1.4)	24	3.1	50.0
Prior sentence does not meet criteria set forth in §4A1.2(c)(1) and should not be counted	23	3.0	100.0
Upward departure - category did not reflect seriousness of criminal history (§4A1.3)	19	2.5	84.2
Challenge to prior convictions based on <i>Begay/Chambers</i> (§4B1.1)	19	2.5	52.6
Challenge based on <i>Booker</i> decision (§4B1.1)	18	2.3	94.4
Definition of “violent felony” (§4B1.4)	16	2.1	56.2
§4A1.2(c) precludes counting of certain prior sentences	14	1.8	92.9
Challenge to prior convictions based on <i>Begay/Chambers</i> (§4B1.2)	13	1.7	46.2
Definition of “related cases” (§4A1.2)	11	1.4	90.9
Prior conviction is beyond time period for §4A1.2(e)	10	1.3	70.0
Application of definition of “controlled substance offense” (§4B1.2)	10	1.3	90.0
Other issues appealed	216	27.9	91.7
<b>FRAUD AND DECEIT (§2F1.1 and §2B1.1)</b>	<b>343</b>	<b>100.0</b>	<b>93.3</b>
Challenge to the calculation of loss (§2B1.1)	132	38.5	93.9
Challenge based on <i>Booker</i> decision (§2B1.1)	57	16.6	100.0
Application and definition issues (§2B1.1)	57	16.6	89.3
Application of specific offense characteristics (§2B1.1)	30	8.7	76.7
Challenge based on <i>Booker</i> decision (§2F1.1)	11	3.2	100.0
Challenge to definition of loss as applied to the defendant (§2B1.1)	10	2.9	90.0
Other issues appealed	46	13.4	97.8
<b>IMMIGRATION AND NATURALIZATION OFFENSES (Chapter 2, Part L)</b>	<b>561</b>	<b>100.0</b>	<b>92.9</b>
Challenge based on <i>Booker</i> decision (§2L1.2)	206	36.7	99.0
Application and definition issues (§2L1.2)	96	17.1	92.7
Challenge to “previously deported for an aggravated felony” adjustment (§2L1.2)	73	13.0	83.6
Challenge to “previously deported for a felony” adjustment (§2L1.2)	39	7.0	89.7
Challenge based on <i>Lopez v. Gonzalez</i> (§2L1.2)	36	6.4	91.7
Application and definition issues (§2L1.1)	17	3.0	100.0
Challenge based on <i>Booker</i> decision (§2L1.1)	14	2.5	92.9
Other issues appealed	80	14.3	85.0
<b>ROLE IN THE OFFENSE GUIDELINES (§§3B1.1, 3B1.2)</b>	<b>362</b>	<b>100.0</b>	<b>95.3</b>
Whether defendant was a minor participant in the offense (§3B1.2)	105	29.0	97.1
Determination that defendant was an organizer or manager of five or less (§3B1.1)	69	19.1	88.4
Determination that defendant was an organizer or leader of five or more (§3B1.1)	64	17.7	96.9
Determination that defendant was a manager or supervisor of five or more (§3B1.1)	40	11.1	95.0
Question regarding application of reduction and level of culpability (§3B1.2)	30	8.3	100.0
Questions regarding application of enhancement and level of culpability (§3B1.1)	20	5.5	100.0
Whether defendant was a minimal participant in the offense (§3B1.2)	19	5.2	94.7
Other issues appealed	15	4.1	93.3

<sup>1</sup>Based on 6,507 appeals with sentencing as at least one of the reasons for appeal. Information on issues was available in 6,507 of these cases which cited 14,516 issues. Often more than one issue was appealed; consequently, the number of issues is more than the number of defendants. The “Other issues appealed” category includes all issues appealed fewer than ten times.

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