

Table 59

SENTENCING ISSUES APPEALED FOR SELECTED GUIDELINES¹
Fiscal Year 2010

ISSUE	N	%	Affirmance Rate ²
DRUG TRAFFICKING (§2D1.1)	1,585	100.0	92.7
Two-level reduction for crack	798	50.3	95.5
Challenge to weight/amount of drugs involved in the offense	184	11.6	93.5
Crack/powder sentencing disparity	132	8.3	80.3
Application of mandatory minimum statute/21 U.S.C. §§ 841, 846, or 851	116	7.3	90.5
Application and definition issues	79	5.0	93.7
Question regarding dangerous weapon possession	66	4.2	93.9
Challenge to weight/amount of drugs based on relevant conduct determination	63	4.0	92.1
Challenge based on <i>Booker</i> decision	34	2.1	88.2
Challenge to drug type	16	1.0	87.5
Sentence entrapment/manipulation	13	0.8	100.0
Equal Protection/Due Process challenge to penalty for crack	11	0.7	100.0
Other issues appealed	73	4.6	95.9
18 U.S.C. § 3553 FACTORS	1,501	100.0	93.5
Adequacy of 18 U.S.C. § 3553(c) statement of reasons	428	28.5	87.4
18 U.S.C. § 3553(a) cited, no specific reason	422	28.1	95.7
History and characteristics of the defendant (18 U.S.C. § 3553(a)(1))	221	14.7	98.6
Avoiding unwarranted disparities between co-defendants (18 U.S.C. § 3553(a)(6))	170	11.3	95.9
Disparities in districts without “fast track programs” (18 U.S.C. § 3553(a)(6))	60	4.0	95.0
Nature and circumstances of the offense (18 U.S.C. § 3553(a)(1))	57	3.8	96.5
Afford adequate deterrence (18 U.S.C. § 3553(a)(2)(B))	40	2.7	92.5
Seriousness, respect for the law and just punishment (18 U.S.C. § 3553(a)(2)(A))	39	2.6	89.7
Defendant’s correctional treatment (18 U.S.C. § 3553(a)(2)(D))	21	1.4	95.2
Protect the public (18 U.S.C. § 3553(a)(2)(c))	19	1.3	94.7
Avoiding unwarranted disparities - state/federal punishments (18 U.S.C. § 3553(a)(6))	11	0.7	100.0
Other issues appealed	13	0.9	92.3
OTHER NON-GUIDELINE ISSUES	839	100.0	89.9
Plea bargain issues/Rule 11 issues	370	44.1	95.1
Empirical basis of the sentencing guidelines	86	10.3	100.0
Extent of variance from the guideline range (<i>U.S. v. Gall</i>)	53	6.3	96.2
Rule 32 issues	52	6.2	76.9
Sentence exceeds statutory maximum	51	6.1	72.6
Rule 35 issues (correction or reduction of sentences)	43	5.1	90.7
Challenges to the application of mandatory minimum	33	3.9	90.9
Rule 36 issues (challenge to prior convictions based on <i>Begay/Chambers</i>)	33	3.9	51.5
Policy disagreement with the sentencing guidelines	21	2.5	85.7
Notice of variance from the guideline range (Rule 32)	14	1.7	100.0
Specifics unknown	12	1.4	83.3
Post-sentencing events	10	1.2	100.0
Other issues appealed	61	7.3	82.0
DEPARTURE GUIDELINES (Chapter 5, Parts H and K)	259	100.0	91.9
Challenge to court’s refusal to make downward departure (§5K2.0)	28	10.8	100.0
Challenge to court’s refusal to make downward departure for substantial assistance	17	6.6	94.1
Application and definition issues	16	6.2	87.5
Rule 35(b) - reduction of sentence	13	5.0	84.6
Challenge to court’s refusal to depart based on mental or emotional capacity (§5H1.3)	11	4.2	100.0
Challenge to court’s refusal to depart based on family responsibilities (§5H1.6)	10	3.9	100.0
Challenge to the extent of the departure (§5K1.1)	10	3.9	90.0
Other issues appealed	154	59.5	90.2

Table 59 (cont.)

ISSUE	N	%	Affirmance Rate²
CRIMINAL HISTORY GUIDELINES (Chapter 4)	683	100.0	83.3
Determination that prior offenses meet criterion for Armed Career Criminal (§4B1.4)	101	14.8	79.2
Determination that prior offenses meet criterion set forth in §4B1.1 (Career Offender)	69	10.1	71.0
Application of career offender definition of “crime of violence” (§4B1.2)	67	9.8	58.2
General determination as career offender (§4B1.1)	44	6.4	90.9
Downward departure - overrepresented criminal history (§4A1.3)	41	6.0	97.8
Upward departure - category did not reflect seriousness of criminal history (§4A1.3)	36	5.3	97.2
Amendment 709 - counting of multiple prior sentences (§4A1.2)	26	3.8	96.2
Question regarding related cases and calculation of criminal history (§4A1.1)	19	2.8	84.2
Application and procedures set out in guideline (§4A1.1)	16	2.3	87.5
Defendant’s conviction not subject to enhancement under 18 U.S.C. § 924(e) (§4B1.4)	16	2.3	81.2
Definition of “violent felony” (§4B1.4)	15	2.2	60.0
Amendment 709 - counting of multiple prior sentences (§4A1.1)	13	1.9	84.6
Definition of prior sentence (§4A1.2)	12	1.8	83.3
Prior conviction is beyond time period for §4A1.2(e)	11	1.6	90.9
Other issues appealed	197	28.8	90.4
FRAUD AND DECEIT (§2F1.1 and §2B1.1)	275	100.0	84.7
Challenge to the calculation of loss (§2B1.1)	127	46.2	89.0
Challenge to the number of victims (§2B1.1)	29	10.5	75.9
Application and definition issues (§2B1.1)	20	7.3	85.0
Challenge based on <i>Booker</i> decision (§2B1.1)	17	6.2	94.1
Challenge that the offense involved sophisticated means (§2B1.1)	17	6.2	100.0
Challenge to the amount of loss involved in the offense (§2F1.1)	13	4.7	53.8
Other issues appealed	52	18.9	78.8
IMMIGRATION AND NATURALIZATION OFFENSES (Chapter 2, Part L)	429	100.0	90.2
Challenge based on prior conviction for a “crime of violence” (§2L1.2)	114	26.6	84.2
Application and definition issues (§2L1.2)	67	15.6	100.0
Challenge to “previously deported for an aggravated felony” adjustment (§2L1.2)	51	11.9	78.4
Challenge based on prior conviction for a drug trafficking offense (§2L1.2)	27	6.3	92.6
Challenge based on bodily injury enhancement (§2L1.1)	21	4.9	95.2
Challenge based on <i>Booker</i> decision (§2L1.2)	12	2.8	91.7
Application and definition issues (§2L1.1)	10	2.3	90.0
Other issues appealed	127	29.6	93.7
ROLE IN THE OFFENSE GUIDELINES (§§3B1.1, 3B1.2)	346	100.0	97.1
Whether defendant was a minor participant in the offense (§3B1.2)	136	39.3	99.3
Determination that defendant was an organizer or leader of five or more (§3B1.1)	77	22.3	98.7
Determination that defendant was an organizer or manager of five or less (§3B1.1)	55	15.9	96.4
Determination that defendant was a manager or supervisor of five or more (§3B1.1)	43	12.4	95.4
Whether defendant was a minimal participant in the offense (§3B1.2)	14	4.0	100.0
Question regarding application of reduction and level of culpability (§3B1.2)	12	3.5	75.0
Other issues appealed	9	2.6	88.9

¹ Based on 5,269 appeals with sentencing as at least one of the reasons for appeal. Information on issues was available in 5,248 of these cases which cited 12,186 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.

² Affirmance rate includes all appeals cases not reversed or directly remanded by the courts of appeal.

SOURCE: U.S. Sentencing Commission, 2010 Appeals Datafile, APPFY10.