

Table 59

**SENTENCING ISSUES APPEALED FOR SELECTED GUIDELINES<sup>1</sup>**  
**Fiscal Year 2012**

ISSUE	N	%	Affirmance Rate <sup>2</sup>
<b>REASONABLENESS ISSUES</b>	<b>3,040</b>	<b>100.0</b>	<b>96.6</b>
Substantive: Unreasonable weighing decision	1,003	33.0	99.2
Substantive: General	419	13.8	99.0
Procedural: Court failed to address/improperly considered 3553(a) factors	408	13.4	95.8
Procedural: Court did not adequately explain the chosen sentence	351	11.5	92.6
Procedural: Court improperly calculated guidelines range	276	9.1	88.4
Procedural: General	132	4.3	97.7
Substantive: Lack of empirical basis of a guideline	114	3.8	99.1
Procedural: Court selected a sentence based on clearly erroneous facts	109	3.6	95.4
Procedural: Court did not treat the guidelines as advisory	86	2.8	94.2
General reasonableness challenge	77	2.5	98.7
Presumptive reasonableness of a guidelines range sentence	33	1.1	97.0
Procedural: Lack of empirical basis for a guideline	32	1.1	100.0
<b>18 U.S.C. § 3553 FACTORS</b>	<b>1,504</b>	<b>100.0</b>	<b>98.2</b>
History and characteristics of the defendant (18 U.S.C. § 3553(a)(1))	490	32.6	99.0
18 U.S.C. § 3553(a) greater than necessary	375	24.9	99.2
Nature and circumstances of the offense (18 U.S.C. § 3553(a)(1))	179	11.9	99.4
Avoiding unwarranted disparities between co-defendants (18 U.S.C. § 3553(a)(6))	125	8.3	98.4
18 U.S.C. § 3553(a): Other unwarranted disparities	80	5.3	97.5
Disparities in districts without “fast track programs” (18 U.S.C. § 3553(a)(6))	57	3.8	96.5
Afford adequate deterrence (18 U.S.C. § 3553(a)(2)(B))	37	2.5	94.6
Defendant’s correctional treatment (18 U.S.C. § 3553(a)(2)(D))	35	2.3	80.0
Seriousness, respect for the law and just punishment (18 U.S.C. § 3553(a)(2)(A))	31	2.1	96.8
Protect the public (18 U.S.C. § 3553(a)(2)(C))	30	2.0	100.0
Other issues appealed	65	4.3	96.9
<b>DRUG TRAFFICKING (§2D1.1)</b>	<b>687</b>	<b>100.0</b>	<b>91.4</b>
Fair Sentencing Act (Amendment 748), mitigating role cap; changes to quantity table	220	32.0	91.8
Challenge to weight/amount of drugs involved in the offense	122	17.8	95.9
Amendment 706, 711, 713, 715 two-level reduction for cocaine base (crack )	74	10.8	87.8
Question regarding dangerous weapon possession (§2D1.1(a)(1)-(5))	74	10.8	98.6
Challenge to weight/amount of drugs based on court’s relevant conduct determination	55	8.0	92.7
Application of mandatory minimum/enhancement/notice statute/21 U.S.C. §§ 841, 846, or 851	49	7.1	73.5
Cocaine base (crack)/powder sentencing disparity	21	3.1	90.5
Other issues appealed	72	10.5	90.3
<b>OTHER NON-GUIDELINE ISSUES</b>	<b>1,496</b>	<b>100.0</b>	<b>74.8</b>
Plea bargain issues/Rule 11 issues, not stipulations	450	30.1	96.0
Rule 4(b): Federal Rule of Appellate Procedure	109	7.3	99.1
Joint motion for resentencing	75	5.0	25.3
Extent of variance from the guideline range ( <i>Gall v United States</i> )	61	4.1	95.1
Rule 36 issues (challenge to prior convictions based on <i>Begay/Chambers</i> )	53	3.5	60.4
Rule 32 issues	51	3.4	80.4
Conflict between oral pronouncement and written judgement	46	3.1	43.5
Judicial or prosecutorial issues	36	2.4	83.3
Sentence exceeds statutory maximum	35	2.3	62.9
Challenges to the application of mandatory minimum	32	2.1	84.4
Rule 35 issues (correction or reduction of sentence)	29	1.9	86.2
Policy disagreement with the sentencing guidelines	21	1.4	90.5
Other general legal or statutory issues	419	28.0	50.4
Other issues appealed	79	5.3	94.9

**Table 59 (cont.)**

<b>ISSUE</b>	<b>N</b>	<b>%</b>	<b>Affirmance Rate<sup>2</sup></b>
<b>DEPARTURE GUIDELINES (Chapter 5, Parts H and K)</b>	<b>214</b>	<b>100.0</b>	<b>95.8</b>
§5K1.1: Challenge based on government’s refusal to make motion (breach of plea)	37	17.3	91.9
Other issues appealed	177	82.7	96.6
<b>CRIMINAL HISTORY GUIDELINES (Chapter 4)</b>	<b>641</b>	<b>100.0</b>	<b>86.9</b>
Determination that prior offenses meet criterion for Armed Career Criminal (§4B1.4)	116	18.1	82.8
Determination that prior offenses meet criterion set forth in §4B1.1 (Career Offender)	79	12.3	59.5
Application of career offender definition of “crime of violence” (§4B1.2)	37	5.8	86.5
§4B1.4: definition of “violent felony”	35	5.5	100.0
General determination as career offender (§4B1.1)	34	5.3	100.0
Upward departure - category did not reflect seriousness of criminal history (§4A1.3)	33	5.1	97.0
Downward departure - overrepresented criminal history (§4A1.3)	30	4.7	100.0
Other issues appealed	277	43.2	90.6
<b>FRAUD AND DECEIT (§2F1.1 and §2B1.1)</b>	<b>261</b>	<b>100.0</b>	<b>92.0</b>
Challenge to loss amount/calculation (§2B1.1)	135	51.7	93.3
Challenge to the number of victims (§2B1.1)	38	14.6	79.0
Challenge that the offense involved sophisticated means (§2B1.1)	31	11.9	93.6
Other issues appealed	57	21.8	96.5
<b>IMMIGRATION AND NATURALIZATION OFFENSES (Chapter 2, Part L)</b>	<b>337</b>	<b>100.0</b>	<b>85.2</b>
Challenge based on prior conviction for a “crime of violence” (§2L1.2)	115	34.1	74.8
Double counting issues (§2L1.2)	49	14.5	100.0
Departure based on “cultural assimilation” (§2L1.2)	46	13.7	100.0
Challenge based on prior conviction for “aggravated felony” (§2L1.2)	29	8.6	75.9
Challenge based on prior conviction for a drug trafficking offense (§2L1.2)	22	6.5	77.3
Other issues appealed	76	22.6	88.2
<b>ROLE IN THE OFFENSE GUIDELINES (§§3B1.1, 3B1.2)</b>	<b>302</b>	<b>100.0</b>	<b>96.7</b>
Whether defendant was a minor participant in the offense (§3B1.2)	88	29.1	97.7
Determination that defendant was an organizer or leader of five or more (§3B1.1)	63	20.9	95.2
Determination that defendant was an organizer or manager of five or less (§3B1.1)	53	17.6	94.3
Determination that defendant was a manager or supervisor of five or more (§3B1.1)	49	16.2	95.9
Other issues appealed	49	16.2	100.0

<sup>1</sup> Based on 5,967 appeals with sentencing as at least one of the reasons for appeal. Information on issues was available in 5,577 of these cases which cited 12,031 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 twenty times.

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

SOURCE: U.S. Sentencing Commission, 2012 Appeals Datafile, APPFY12.