Mr. Chairman and Members of the Sentencing Commission:

Thank you for allowing me the opportunity to appear before the Sentencing Commission. My name is Lawrence Piersol and I am the Chief Judge of the District of South Dakota. I also serve as the President of the Federal Judges Association. Subsequent to the *Booker* decision, the Board of Directors of the Federal Judges Association unanimously adopted a resolution which is as follows:

> The Board of Directors of the Federal Judges Association has resolved that the position of the FJA should be to ask Congress to allow the present situation time to work, and only if it does not ultimately work to the satisfaction of Congress, should Congress then proceed, in consultation with the Courts, academics, the Justice Department, the United States Sentencing Commission, and other interested parties, to fashion some changes.

I would like to address you from now on from my personal point of view. Unlike some other Judges, I have not written a post-*Booker* sentencing opinion as I have not had any unusual sentencings since *Booker*. I have sentenced 17 people since the *Booker* decision on January 12, 2005. All of the sentencings were within the advisory guideline ranges with one having a downward departure for diminished capacity. The 18th sentencing was delayed as I gave a notice of intent to depart upward. None of these sentencings were so unusual that they warranted a variance. A

variance is the term that I use to describe a sentencing that is outside the advisory guidelines as well as outside the departures available under the advisory guidelines.

I believe that *Booker* provides a nearly perfect sentencing system. Advisory guidelines are helpful to the judge and to the parties. They provide a thorough review of many but not all considerations, an indication of what is generally being done in other cases, and an indication of congressional intent. There is now an ability on the part of the sentencing judge to sentence outside the guidelines and its departures. Given the clear expression of congressional intent through the guidelines, it would seem that a sentence outside of the guidelines and its departures, a sentence which I call a variance, should seldom occur. When a variance is appropriate, however, it is terribly important. It allows justice to be done where otherwise it would not be done. A variance would be those instances where an unjust sentence will result from an advisory guidelines application. Any such variance should be well explained by the sentencing court in open court and in the judgment. The variance should not be for a reason that Congress has clearly indicated should not be a sentencing factor. An example that has been discussed is socioeconomic status. Judge Cassell has demonstrated in pages 13 to 17 of his second *U.S. v. Wilson* opinion dated February 2, 2005 that there is adequate congressional intent indicating that socioeconomic status cannot be a sentencing factor (even though it is doubtful that it was a factor in the Wisconsin decision being discussed.)

As did the Chair and Commissioner Steer, I attended the House Judiciary Subcommittee on Crime hearing chaired by Representative Coble last Thursday. Just as the Senate Judiciary Committee hearing last summer concerning *Blakely*, which we all also attended, the members of

Congress were trying hard to determine what they should or shouldn't do. They asked good questions of the witnesses. From this, I urge the Sentencing Commission to take an active role. You have much to offer and you can make a difference. First of all, you must gather accurate information on what the courts as a whole are doing in sentencing after *Booker* rather than having a few unusual results color the debate about what, if anything, should be done after *Booker*. The Supplemental Statement of Reasons form that is used with judgments after *Blakely* does not accurately reflect what we should now record from each criminal judgment. We should know, at a minimum, whether the sentence was within the advisory guidelines, whether the sentence was a departure upward or downward within the advisory guideline scheme and if not, we should know that the sentence was a variance from the advisory guidelines and its departures.

I urge the Sentencing Commission to play an active role in the post-*Booker* debate. I urge the Commission to take the position that the"Bowman fix" is no fix at all - it is somewhere between a flat tire and a blowout. Professor Bowman did not advocate his "fix" before the House Judiciary Subcommittee last week. That "fix" had only been something put up as one idea for a temporary fix after *Blakely*, a temporary fix that the Senate Judiciary Committee wisely decided not to follow. The Bowman "fix" would at the least be declared unconstitutional in some Circuits so we would have a year or two where federal sentencing law would be in an upheaval while that issue was being initially resolved.

The Commission should assist in brokering a compromise if it is the will of Congress to change federal sentencing law either sooner or later.

I doubt that you can find a judge who has done any significant amount of sentencing who does not have instances of where justice was not served by mandatory guidelines. I usually sentence 150 to 180 a year and usually the mandatory guidelines worked just fine. That is not good enough. I maintain that the varying degrees of restiveness among trial judges comes from those instances where the mandatory guidelines did not do justice. We could debate what justice is and how do we know if the federal courts are doing their ultimate duty - delivering justice to the people. We do know that we are humans that have an ethical sense that can warn us in those hopefully rare instances when out laws and out institutions have failed to deliver justice.

Let me give you an example of why the system we now have is a real improvement. Several years ago I sentenced a man in a 1.3 million dollar investment fraud case. Some victims had forgiven him, others had not. The Defendant had one previous conviction for tax evasion resulting in three criminal history points, a Category II. He was not in good health but not bad enough to warrant a downward departure. He was 59 years old. A sentence of a little over 20 years as mandated by the mandatory guidelines amounted to a life sentence of incarceration. If he had been 30 years old, it would not have been a life sentence. Older persons should not get a get out of jail free pass, but some consideration should have been available.

I do not believe any statutory or guideline changes are necessary at this time. The 2nd and the 4th Circuits have already entered helpful opinions on the procedures to be used in post-*Booker* sentencings, *U.S. v. Hughes*, 2005 LW 147059 (4th Cir. 2005), *U.S. v. Crosby*, 2005 LW 240916 (2nd Cir. 2005). The other circuits will surely soon do the same. The 4th Circuit indicated it would

"affirm the sentence imposed as long as it is within the statutorily prescribed range... and is reasonable...." The courts regularly deal with applying the concept of reasonableness and need no legislation or regulation to perform that task. De novo review could be reinstated by Congress, but it is no better an idea now than it was before. Reasonableness is an appropriate standard of appellate review. Reasonableness should be the standard to be applied to each sentence, no matter whether it is an advisory guidelines sentence, a guidelines departure, or a variance from the advisory guidelines. A reasonableness review would, for example, find a sentence based upon a sentencing factor which Congress had indicated should not be a sentencing factor, such as race or socioeconomic status, to be an unreasonable sentence.