

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION**

UNITED STATES OF AMERICA)	
)	
)	
v.)	Case No. 07 CR 541
)	
)	Hon. Charles R. Norgle, Sr.
ROBERT GROEBNER,)	
)	
Defendant.)	
)	

ROBERT GROEBNER’S POSITION PAPER AS TO SENTENCING FACTORS

Robert Groebner, by his undersigned counsel, hereby submits this Position Paper as to Sentencing Factors, pursuant to Local Criminal Rule 32.1(g). This Position Paper is filed on November 21, 2007. Mr. Groebner’s counsel has not received a copy of the Pre-Sentence Report. On November 20, 2007, Mr. Groebner’s counsel and the government reached agreement on an undisputed tax loss amount for the purposes of the Sentencing Guidelines and restitution calculations.

I. INTRODUCTION AND SUMMARY

Bob Groebner is a 63-year old family man with no criminal history. Every day, Mr. Groebner confronts myriad, serious health problems: side effects of a stroke he suffered after the investigation of this case began, symptoms of his diabetes and heart disease and Fuch’s Dystrophy, which will eventually take his eyesight entirely. On August 30, 2007, Mr. Groebner pleaded guilty in this case to an information containing a single tax count. Nearly five years before that, in September 2002, Mr. Groebner was confronted by the government concerning his receipt of cash payments from three auto body shops whose work he oversaw for Allstate insurance company. Mr. Groebner had not reported these cash payments to the IRS.

Mr. Groebner responded to the initial government inquiries in September 2002 by agreeing to meet with prosecutors and agents investigating the case. On October 4, 2002, he provided a complete proffer, expressed his remorse and offered to do anything he could to advance the government's investigation. Mr. Groebner was then forced to retire from Allstate, the only job he had known for 35 years. On advice of counsel, and to avoid any possible witness contact, he then isolated himself from decades-long friendships and colleagues in the insurance and auto repair business. He effectively withdrew into himself after his proffer, living in that isolation for five years, until his arraignment on August 30, 2007. During that time, Mr. Groebner's health, which was never good, progressively deteriorated.

Bob Groebner is not the man in 2007 that he was five years ago in 2002, when he began to exact punishment on himself for the offense conduct. He has suffered physically and emotionally. He has prepared to pay complete restitution, to both the government and to those from whom he accepted money, as soon as the Court fixes the amount. Mr. Groebner appreciates that loss of freedom is also often part of a criminal sentence. He respectfully requests, however, that in light of the unique circumstances of his case, his loss of freedom here be limited to home confinement and/or a period of supervised release.

A sentence of home confinement and/or supervised release in this case would be consistent with the Federal Sentencing Reform Act, 18 U.S.C. § 3553, as limited by the Supreme Court's decision in *United States v. Booker*, 125 S. Ct. 738 (2005). This sentence would further be consistent with the United States Sentencing Guidelines, as described further below.

Moreover, such a sentence, combined with the red letter of a felony conviction, the disgraced ending of a 35-year career, complete restitution and a fine, together with the impact of the past five years on Mr. Groebner's physical and mental health, would be both fair and just. The bases

for this suggested sentence, together with relevant facts and legal authorities are discussed below.

II. FACTUAL BACKGROUND

The facts of this case are generally set out in the plea agreement. This Memorandum attempts to put those facts into context: first, with regard to the impact of this case on Mr. Groebner and his family in the more than five years since he first proffered to the government; and, second, how the offense conduct fits within Mr. Groebner's overall career.

A. **Mr. Groebner has been overwhelmed by this case over the past five years**

Mr. Groebner is a straightforward man. He was born March 14, 1944 in Chicago. He attended Loyola University before serving in the Air Force, from which he was honorably discharged. Mr. Groebner still remembers the day, on December 11, 1967, he was hired by the Allstate insurance company. He was 23. Mr. Groebner worked the remainder of his adult life for Allstate. At first, Mr. Groebner was an Adjuster, writing repair estimates for damaged cars. After that, he was a "Field Adjuster"; then a Quality Control Manager; then a Senior Damage Appraiser; then an in-house Instructor, conducting training sessions. Ultimately, he returned to the field, overseeing as many as 30 or more auto repair shops at various times. At the time of the offense conduct, Mr. Groebner oversaw 27 shops.

During this time, Mr. Groebner and his wife, Irene, were building a family in suburban Morton Grove. As she puts it in the letter accompanying this paper, "We have gone together for 45 years. We have been married for 41 of them." *See* I. Groebner Letter, Exhibit A. They have two children together, Mariette and Bob, Jr. *See* M. Lindt & R. Groebner Letter, Exhibit B.

Bob and Irene Groebner imbued their children with solid core values. As the children describe it, Mr. Groebner and Irene led by example, regularly volunteering at Thanksgiving or Christmas at the Little Brothers of the Poor. *See* Lindt/Groebner Letter at 2, Exhibit B. Mr.

Groebner urged his children to public service. His example had the desired result: Mariette has been an administrative law judge for the Illinois Human Rights Commission for the past seven years. Bob Jr. has been a Cook County Assistant States Attorney, prosecuting criminal cases for the past eight years. *Id.* Mr. Groebner was also devoted to his extended family, in particular the family of his only sibling and brother, who died this past summer and whose daughter, Mr. Groebner's niece, has written in his support. *See* Leonard Letter, Exhibit C.

Mr. Groebner's life changed unalterably in September 2002 when the government confronted him about his conduct in this case. He was contrite from the start, offering a full proffer and assistance to the government within weeks of its first contact with him. The government apparently concluded that he had no useful information. His next government contact was in April 2006, when he was asked to (and did) sign the first of a series of waivers of the statute of limitations as to certain tax claims. While Mr. Groebner was not charged until he agreed to plead guilty to an information in August 2007, the anticipation of pleading guilty and receiving his punishment bore down upon him with an awful gravity.

Mr. Groebner was forced to retire from Allstate in 2002, after 35 years of service. As already noted, Mr. Groebner cut himself off from those with whom he had associated in the only business he had known since 1967. He withdrew into himself. This solitude gave Mr. Groebner an extraordinary amount of time to dwell on what he had done, leading to an overwhelming shame that has consumed him.

As Irene Groebner explains, Mr. Groebner was already not a physically well man in 2002, "but it did not seem to slow him down if he took his medication. All of this changed in September of 2002." I. Groebner Letter, Exhibit A. His physical condition deteriorated to now include, as his primary treating physician explained it last February: "diabetes mellitus, hyperlipidemia, hypertension, obesity, probable sleep apnea, cerebrovascular disease (he has

sustained a stroke), gout, kidney stones, peripheral neuropathy, Fuch's dystrophy (which threatens his vision) and prostatic hypertrophy." 2/7/2007 Dr. Lee Freedman letter, Exhibit D.

Mr. Groebner experienced the stroke identified by Dr. Freedman in 2004. In his children's words, "[t]he stroke has left his left arm and leg with a constant feeling of intense heaviness, which causes him trouble standing and walking." Lindt/Groebner Letter at 1, Exhibit B. They describe in stark terms the consequences of these symptoms, relating how they left him cleaning a lawnmower one day only to return a couple hours later to find him stuck in the same spot on the lawn, tearful, explaining that he had tried to rise, but could not. His limbs were too heavy. *Id.* at 1-2.

Mr. Groebner will eventually lose his sight to his Fuch's dystrophy. 11/7/2007 Dr. Lee Freedman Letter, Exhibit E. That condition, as with his other physical ailments, requires regular monitoring by a specialist to maintain the appropriate regimen of medication and therapy. *Id.*

Mr. Groebner's family is confident his physical deterioration has been exacerbated by his intense shame over the offense conduct. As his children put it: "We have witnessed our dad's physical condition deteriorate greatly over the last five (5) years and we know that it is a direct result of the emotional distress, shame, self-hatred and regret that he experiences on a daily basis." Lindt/Groebner Letter, Exhibit B. Irene corroborates this fact. I. Groebner Letter at 1, Exhibit A. Dr. Freedman has also witnessed both the physical and mental impact of this case on Mr. Groebner. He has witnessed Mr. Groebner, whom he diagnoses as depressed, break down in tears describing his shame over this case. 11/7/2007 Dr. Freedman Letter, Exhibit E.

It is simply a fact that Mr. Groebner has had an unusually long time to reflect on his conduct. Furthermore, this time for reflection has led to more severe self-punishment, physical and mental, than most defendants would have suffered in similar circumstances. This only

reflects on the conflict between Mr. Groebner's character and the conduct in which he engaged that led him to this point.

B. Receipt of unlawful payments was not Mr. Groebner's "M.O."

Mr. Groebner accepted cash payments made by the owners of three body shops and he did not declare those payments on his taxes. This reflects the worst decision Mr. Groebner made in his life, a fact about which he is painfully aware. It does not reflect how Mr. Groebner generally conducted himself. To this point, Mr. Groebner transmits to the Court with this paper letters from Pat Fahey, Bruno Gallo, Richard Serefin and Joe Vojtech, four men who operated or managed body shops that Mr. Groebner oversaw for Allstate. These men have each known Mr. Groebner for 20 years or more and have a collective experience of 107 years working with him. They confirm: (a) Mr. Groebner's outstanding reputation in the auto repair business; and (b) that Mr. Groebner never asked, or even hinted, that he wanted or expected any money from any one of them. These letters are collected at Exhibit F to this Paper.

Mr. Gallo has known Mr. Groebner for more than 30 years. He says:

I knew Bob and I knew his reputation in the auto repair business. Bob was a straight-up guy. He was honest and he called estimates the way he saw them. He never asked me for money and I never heard anything about Bob asking anybody in the business for money (or taking money from anybody in the business) until I heard about the case that is in front of you.

See Gallo Letter, Exhibit F. Mr. Serefin, who met Mr. Groebner more than 20 years ago, describes how he went above-and-beyond his job requirements to teach Mr. Serefin to write repair estimates: "The whole time, he never asked me for any money or anything else as a price for what he did for me. He just did it because he was a nice guy and he wanted me to be successful. That is just what Bob's reputation is in the business. He's a fair and honest guy. At least that is how he is known and how I knew him." *Serefin Letter, Exhibit F.* Mr. Vojtech writes that Mr. Groebner's reputation "was for being a guy who was smart about the business, a

fair auditor, who was well-liked.” Vojtech Letter, Exhibit F. Mr. Fahey, who knew Mr. Groebner the longest, having met him at Allstate in 1971 or 1972, repeated a constant theme among those in the business: “That whole time, Bob has never been anything other than honest and straight up with me. I never heard anything in the business about his being different with anybody else either.” Fahey Letter, Exhibit F.

As noted previously, Mr. Groebner oversaw 27 shops for Allstate at the time of the offense conduct. Whatever happened that led the three shops involved in this case to start making payments to Mr. Groebner, whatever those owners believed about what Mr. Groebner wanted, the letters attached here evidence that it was not Mr. Groebner’s *modus operandi*, and not his reputation, to take money from auto body shop operators in the course of doing his job. That does not excuse Mr. Groebner’s accepting money from the three owners at issue or his not declaring that money as income on his taxes. It does put that conduct into some context.

C. The tax loss from Mr. Groebner’s relevant conduct totals \$26,180

Mr. Groebner pleaded guilty to underreporting his income in a single year, 2001, but his plea negotiations and agreement with the government have always included as “relevant conduct” money that he received from the three identified body shops in each of three years, 1999-2001. On November 20, 2007, counsel for Mr. Groebner and the government agreed on an undisputed total of \$93,500 in income that Mr. Groebner did not declare on his taxes for those three tax years. Utilizing the 28% multiple in Application Note 7 of U.S.S.G. § 2T1.1, this results in a total tax loss of \$26,180. The significance of this figure pursuant to the Sentencing Guidelines is discussed further below.¹

¹ This figure is calculated based on unreported income that Mr. Groebner received from three body shop owners: so-called Owner A in the amount of \$31,500; so-called Owner B in an amount of \$36,000; and so-called Owner C in the amount of \$26,000. As noted further below, Mr. Groebner is prepared to immediately make restitution to all three of these shop owners, in addition to making restitution to the government for unpaid tax.

III. ARGUMENT

A sentence of home confinement and/or supervised release, coupled with full restitution to both the government and those from whom Mr. Groebner accepted money, would be fair and just in this case. This is consistent with the Sentencing Guidelines, as described below.

Moreover, this sentence would also be appropriate in light of the full range of factors listed in the Sentencing Reform Act. *See United States v. Booker*, 125 S. Ct. 738, 757 (2005) (“So modified, the ... Sentencing Reform Act of 1984 ... makes the Guidelines effectively advisory. It requests a sentencing court to consider Guidelines ranges ... but it permits the court to tailor the sentence in light of other statutory concerns as well, *see* § 3553(a).”). Mr. Groebner reviews the statutory sentencing factors *seriatim*.

A. **THE NATURE OF THE OFFENSE AND THE HISTORY AND CHARACTERISTICS OF THE DEFENDANT, § 3553(A)(1)**

The first sentencing factor under § 3553(a) is the nature of the offense and Mr. Groebner’s personal history and characteristics. Here, Mr. Groebner pleaded guilty to an information setting out a single tax count. Thus, without minimizing its importance, the actual offense conduct in this case is the underreporting of income in a single year.

This must be set against Mr. Groebner’s personal narrative and characteristics. He is a man who has otherwise led an exemplary life. He served his country in the Air Force. He served his company for 35 years, developing a reputation for integrity. He devoted himself to his wife of 45 years and to his two children, raising one to be a judge and the other to be a prosecutor. The extent to which his conduct in this case disappointed his own standards and led to his consuming personal shame and deterioration also speaks to Bob Groebner’s character. While he accepts that additional punishment is required by law, the inclusion of imprisonment in such punishment is demonstrably not necessary to “send a message” to Mr. Groebner.

B. THE PURPOSE OF THE SENTENCE, § 3553(A)(2)

The Sentencing Reform Act further requires courts to “impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph 2.” 18 U.S.C. § 3553(a). Section 3553(a)(2) provides that those purposes are:

- (A) To reflect the seriousness of the offense, promote respect for the law, and to provide just punishment for the offense;
- (B) To afford adequate deterrence to criminal conduct;
- (C) To protect the public from further crimes of the defendant;
- (D) To provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

A felony conviction is always a serious matter. It marks a person for the rest of his or her life. In Mr. Groebner’s case, it forced his premature retirement. This sends a powerful message to those similarly situated to Mr. Groebner that failure to declare taxable income has serious consequences. Neither is there any need to protect the public from Mr. Groebner.

On the other hand, as discussed further below, there is a substantial need for Mr. Groebner to obtain medical care and a sentence of incarceration could well interfere with that need. The conclusion of Mr. Groebner’s treating physician could not be more stark:

Mr. Groebner’s medical conditions are complex and inter-related and require careful medical management by several medical caregivers (neurologist, ophthalmologist, internist, etc.). Incarceration would certainly adversely impact these conditions and the ability to manage them. I continue to fear that incarceration could certainly lead to unnecessary suffering and medical decline that could result in severe medical complication and even premature death.

11/7/2007 Dr. Freedman Letter, Exhibit E.

C. THE KINDS OF SENTENCES AVAILABLE, § 3553(A)(3)

A non-custodial sentence is available and appropriate in this case.

D. THE SENTENCING GUIDELINES RANGE, § 3553(A)(4)

A sentence of home confinement and/or supervised release is consistent with the Sentencing Guidelines. Mr. Groebner has no criminal history, placing him in Criminal History Category I. Concerning his adjusted offense level, Mr. Groebner's analysis is as follows.

Pursuant to U.S.S.G. §2T1.1, calculation of Mr. Groebner's base offense level depends upon calculation of the tax loss, consistent with table at U.S.S.G. §2T4.1. As set forth above, there is no dispute in this case that the tax loss to the government was \$26,180. *See supra*, at 7. Further applying U.S.S.G. §§ 2T1.1(a)(1) and 2T4.1(E), this leads to a base offense level of 12.

Mr. Groebner accepts application of the two-level enhancement in U.S.S.G. §2T1.1(b)(1) based on his having deprived his employer of its right to good and honest services. That enhancement is offset by a two-level adjustment for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1, however, resulting in an adjusted offense level of 12.²

The sentencing range for a defendant with an adjusted offense level of 12 is 10-16 months. Because this offense level is in Zone C, the Sentencing Guidelines allow a sentence that may include a term of either supervised release or home confinement. *See* U.S.S.G. § 5C1.1.

This does not end the Sentencing Guidelines analysis, however, because of the extraordinary conditions occasioned by Mr. Groebner's physical health. The Sentencing Guidelines specifically provide that "an extraordinary physical impairment may be a reason to depart downward; *e.g.*, in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment." U.S.S.G. § 5H1.4. The Seventh Circuit interprets this provision to require a departure "when medical treatment within the institution would be markedly inferior to that available outside, or when the medical condition is one that

² This calculation results in an adjusted offense level below 16 prior to application of the adjustment for acceptance of responsibility. In this context, Mr. Groebner is entitled to a 2-level §3E1.1 adjustment rather than the 3-level adjustment that would otherwise be applicable.

shortens the life span of institutionalized persons compared with those at liberty.” *United States v. Mallon*, 345 F.3d 943 (7th Cir. 2003).

Application of this provision has led to downward departures for defendants in a variety of circumstances analogous to Mr. Groebner’s situation. *See, e.g., United States v. Rhodes*, 288 F. Supp. 2d 928, 938 (C.D. Ill. 2003) (departure based on defendant’s blindness; sentence limited to home confinement plus one day in prison); *United States v. Moy*, 1995 U.S. Dist. LEXIS 6732 (N.D. Ill. May 18, 1995) (relying on defendant’s age, depressive state and heart condition to depart 48 months); *United States v. Collins*, 122 F.3d 1297, 1300 (10th Cir. 1997) (affirming 109-month departure, in part based on defendant’s age (64), heart disease, high blood pressure, ulcers, arthritis and prostatitis); *United States v. Rioux*, 97 F. 3d 648, 663 (2nd Cir. 1996) (affirming departure that resulted in sentence of home confinement, in part based on defendant’s kidney problems and hip replacement). Copies of unpublished cases are attached as Exhibit G.

Mr. Groebner suffers from a range of serious physical maladies. These include a diabetic condition that requires constant monitoring; his Fuch’s dystrophy, which will ultimately take his sight; heart conditions; and complications from his stroke. Mr. Groebner takes a complex regimen of pharmaceuticals on a rigid schedule and consults multiple specialists. Dr. Freedman, who will be available telephonically at sentencing, has concluded that:

These conditions [listed above] together pose a serious threat to Mr. Groebner’s health and well being. They demand careful monitoring and treatment. Incarceration would certainly adversely impact the ability to treat and control these illnesses. As such, incarceration could certainly lead to unnecessary suffering and medical decline that could result in severe medical complication and even premature death.

2/7/2007 Dr. Freedman Letter, Exhibit D. Dr. Freedman recently confirmed this opinion. *See* Exhibit E (“I continue to fear that incarceration could certainly lead to unnecessary suffering and medical decline that could result in severe medical complication and even premature death.”)

Mr. Groebner's offense in this case was not one in which a prison sentence that could so gravely impact his health is necessary. The Sentencing Guidelines specifically recognize such a circumstance, providing for a downward departure. While the notion of departure, as such, may be "outmoded" post-*Booker*, see *United States v. Rinaldi*, 461 F.3d 922, 929 (7th Cir. 2006), the fact that the Guidelines would have provided for departure in these circumstances is an appropriate consideration in determining what a Guidelines sentence might have been.

Mr. Groebner contends that, applying U.S.S.G. §5H1.4, the Sentencing Guidelines would support a sentence comprised entirely of home confinement and/or supervised release, without any period of incarceration. This would require only a two-level departure, to an adjusted offense level of 10, allowing Mr. Groebner to be sentenced within Zone B of the Sentencing Table. Courts applying departures for health related reasons have noted that, "home confinement will be as efficient and less costly than imprisonment." *Rhodes*, 288 F. Supp. 2d at 938.

E. ANY POLICY STATEMENTS OF THE SENTENCING COMMISSION, § 3553(A)(5)

Mr. Groebner is unaware of any Sentencing Commission policy statement that would preclude a sentence of home confinement and/or supervised release in this case.

F. THE NEED TO AVOID SENTENCING DISPARITIES AMONG DEFENDANTS WHO HAVE ENGAGED IN SIMILAR CONDUCT, § 3553(A)(6)

Mr. Groebner is aware of no evidence that a sentence of home confinement and/or supervised release would create disparities among defendants.

G. THE NEED TO PROVIDE RESTITUTION TO ANY VICTIMS, § 3553(A)(7)

Mr. Groebner is prepared to immediately pay restitution in this case to both the government and those from whom he received money.

CONCLUSION

This offense has been devastating to Mr. Groebner. He has put himself through a terrible punishment for five years. Whatever the Court's decision, this matter has devastated his life and, to a large extent, has fundamentally altered the lives of those he loves. This is a tremendous impact for a single count tax case. There can be no question that Bob Groebner has taken the matter to heart. In these circumstances, and for the foregoing reasons, he suggests that a sentence of home confinement and/or supervised release would indeed be appropriate, fair and just.

Respectfully submitted,

ROBERT GROEBNER

/s/Robert M. Andalman

By: One of his attorneys

Jeremy D. Margolis (Ill. Bar No. 1763865)
Robert M. Andalman (Ill. Bar No. 6209454)
SONNENSCHN NATH & ROSENTHAL LLP
233 South Wacker Drive
Chicago, Illinois 60606
(312) 876-8000

CERTIFICATE OF SERVICE

I, Robert M. Andalman, hereby certify that on November 21, 2007, I electronically filed the preceding **Robert Groebner's Position Paper As To Sentencing Factors** with the Clerk of Court using the CM/ECF system which will send notification of such filing to all registered parties

ROBERT GROEBNER

/s/Robert M. Andalman

By: One of his attorneys