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March 31, 1996

TO WHOM IT MAY CONCERN:

RE: *United States v. Robert L. Guenther*
Cause No. 4:94CR37

I have been asked to write a letter summarizing the underlying circumstances leading to the most unfortunate conviction sustained by Bob Guenther last year in the above-referenced case, prosecuted by the U.S. Attorney's office for the Eastern District of Texas. I have represented Mr. Guenther in this case since December or 1994. It is my conclusion that Bob Guenther should not have been prosecuted in this matter, and that a properly prepared and presented defense at trial would have likely been successful, despite the scapegoating atmosphere that continues to fuel these prosecutions.

Because the factual background is quite complex and involved, only a bare synopsis will be included, as necessary to place some of my observations in perspective. I have also been requested to begin with a brief statement of my own background and professional qualifications, to assist the reader in evaluating these reflections. I have been licensed to practice law since 1979, and have restricted my practice to criminal defense litigation, with an emphasis on business crime matters, such as bank fraud. I have served as the elected president of the Dallas Criminal Defense Lawyers Association, the Criminal Justice Chairman of the Dallas Bar Association, and on numerous state and local bar committees and law-related civic task forces. I chaired a task force recently at the behest of the Dallas City Council to evaluate and overhaul the structure and procedures of the Dallas municipal courts. I have authored numerous published law review articles, co-authored a widely-used two-volume practice manual on Texas and federal criminal law, and am currently under contract for another book on criminal law for one of the large national legal publishing houses. I have served as the legislative liaison for the State Bar of Texas on criminal justice issues over several sessions of the state legislature, and have drafted numerous pieces of legislation. Finally, I have been asked to speak at a number of legal seminars, conferences and symposia, from the American Bar Association to law schools to local bar groups. My firm and I have represented a number of prominent individuals and companies, serving most recently as one of the three members of the trial team defending United States Senator Kay Bailey Hutchison, whose trial last year ended in acquittal.

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Bob Guenther's case presents a classic example of someone who was simply at the wrong place at the wrong time. He had the misfortune of running a business which was brought down for reasons beyond his control during the midst of a banking "crisis" which was largely inspired by government and regulatory mismanagement, when the most trivial defaults were routinely converted into federal felonies and successful entrepreneurs were turned into villains. Bob was one of the victims of the "cottage industry" of regulators, investigators and prosecutors whose sole raison d'etre was the targeting of as many scapegoats as they could find the resources to prosecute (and the resources provided them were substantial).[1] While there are numerous ways to avoid being trampled by this juggernaut, circumstances made it impossible for Bob to step out of its path.

When Bob first came to us in November of 1994, he had been represented by other counsel who was moving to withdraw primarily for medical reasons. The case had already been indicted, and there were less than two months remaining before the trial setting. While hindsight is 20/20, it was apparent by then that his original attorney's tactics and strategy for derailing prosecution and later preparing for trial were fatally flawed. Perhaps understandably, that attorney's investigation had led to the early conclusion that the allegations were meritless and that indictment could be avoided by rational analysis and presentation of the facts. But by that time the investigation had taken on a life of its own, as bank fraud cases typically do, and a grand jury was persuaded to return an indictment. It was also clear that Bob's position had been badly discredited due to a profound personality conflict between his original attorney and the government lawyer handling the case.

Bob's defense then depended upon aggressive and thorough preparation of the case, which simply never happened. The government lawyers and the F.B.I. had devoted over a year to constructing a case against him. Bob's defensive posture had been so compromised by the time Bob first conferred with us that the only realistic opportunity for effectively representing him would necessitate a continuance. That also never happened.

Once Bob was able to complete the financing of his new representation the second week of December, and it was determined that the trial court was serious about the trial date (the case had been continued on the docket already due to Bob's need to secure new

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[1] Nothing herein is intended as a criticism of Assistant U.S. Attorney Michael Savage individually. It is the writer's opinion that Mr. Savage's involvement in the Guenther prosecution was consistent with appropriate standards of professional responsibility and that he discharged his official duties in accordance with prevailing rules, procedures and customs of line prosecutors for the Justice Department and the Eastern District of Texas. In fact, the final, successful sentencing disposition of the case was achieved in part as a result of Mr. Savage's full compliance with certain "gentlemen's agreements" favorable to Bob Guenther which other prosecuting attorneys may not have honored.

counsel) and that a further continuance would be denied, the only viable scenario was to pursue a plea arrangement on the best possible terms, hopefully one which could somehow avoid the almost-certain prison time mandated by the federal Sentencing Guidelines. Going to trial was simply untenable at that point, with less than 20 business days to trial, in light of the incredible volume of documentary evidence to be reviewed and the number of witnesses to be interviewed and prepared. Even the easiest of defenses in white-collar crime cases cannot prevail when the defense is overwhelmed in the area of pre-trial preparation. And in the event of defeat, the sentencing repercussions could be severe. We evaluated the chance of winning the trial at 80% with full preparation, and about 30% - 40% without it. This trial, and any resulting sentencing, were before Judge Paul Brown, known well as a strict sentencing judge who could make a defendant "pay rent on the courtroom," meaning that defendants who go to trial and are unfortunate enough to lose can expect dire consequences at sentencing. Conversely, those who plead out and make a demonstration of contrition are often treated with exceptional leniency, if permitted within the constrictions of the guidelines. The bottom line was that, in spite of the mounting evidence that Bob wasn't guilty of anything, a simple and realistic cost-benefit analysis made the proper course obvious — negotiate the best possible plea agreement to minimize the risk of imprisonment.

It would be useful at this juncture to digress for a brief discussion of the factual background underpinning the case, and what we discovered in the brief time we began preparing for trial. Bob Guenther was the majority owner and chief operating officer of Heritage Oldsmobile (located in Dallas and later in Plano) from 1984 until its ultimate demise in early 1989. For most of its duration Heritage was one of the most successful dealerships in the Southwest, and employed over 150 people. As with nearly all automobile franchises, the bulk of its financing for automobiles was through what is known as a "floor plan" revolving credit line, by which the bank or manufacturer would advance funds for each vehicle equal to 90% of the dealership's cost, which would later be repaid with interest once the vehicle was sold. Naturally, the lender would maintain a security interest in the "floored" vehicles, and would release its security interest upon repayment. Among Heritage's floor plan lenders were GMAC (for most new cars) and City National Bank of Plano (for most used cars).

Over the four-year history of their relationship from '84 to the middle of '88, Heritage sold and made repayments on some 4,000 vehicles to City National Bank ("CNB"), representing over $36,000,000 in principal payments alone. This was out of a total sales volume of 22,000 new and used vehicles, representing over $236 million in floor plan repayments during that time. One of the factors in the smooth and pleasant relationship between CNB and Heritage was that CNB was quite flexible in the mode and timing of Heritage's repayments under the floor plan credit line. As demonstrated by

CNB's own ledger entries, it was generally understood between the parties that the repayments were not strictly required to be made immediately upon sales of the financed vehicles. In fact, the loan documents did not include any express provisions for the timing of repayment. If cash flow or other circumstances made it more appropriate for Heritage to make repayments several days or weeks subsequent to the sales, Heritage was permitted to do so. This pattern was consistent and evident from the early stages of the floor plan line, which was renewed over and over again by CNB annually as recently as 1988.

The normal procedure for repayment involved telephonic or fax notification of each sale by Heritage to the bank, followed by the bank's releasing of the title to Heritage and a repayment check from Heritage or agreement to simply debit its operating account, where all the proceeds from the sales were deposited.

What changed everything were two circumstances entirely beyond Bob Guenther's control. One was the general downturn in the economy and the specific downturn in the automobile market in the late '80's. The other was the insolvency of Bob's 49% business partner in Heritage, an investment subsidiary of Majestic Savings Association. Once this thrift was declared insolvent in November of 1987, GMAC was required under its operating rules to suspend Heritage from its own floor plan line, through which almost all of Heritage Oldsmobile's new cars were obtained. This began an intensive and desperate mission to recapitalize and buy out Majestic's share.

After months of frenzied negotiating activity culminating in an agreement by the Federal Home Loan Bank Board for Majestic to finance a purchase by Bob of its share, the plan disintegrated overnight with the surprise takeover of Majestic under the "Southwest Plan" in the middle of 1988, which the FHLBB had somehow forgotten to tell Bob was imminent. This forced Bob to start all over and immediately seek other sources of financing, so that the once highly successful Heritage could survive.

CNB was keenly aware of all of these developments, and continued to finance Heritage's used cars, despite Heritage's increasing cash flow problems and increasingly slow repayments under the floor plan arrangement. But in late August of 1988, a bank officer presented Bob with a letter, which he was asked to countersign, that henceforth "all cars are to be paid as sold." Having little practical choice, Bob agreed and signed the letter. Knowing the bank and its people as well as he did, and realizing that a new president had just been hired at CNB, he suspected that someone at the bank might be simply trying to "clean up the file" in light of Heritage's more-precarious financial position. He continued to optimistically pursue the dealership recapitalization and believed that he would succeed.

During the following two months, the dealership was essentially on life support, selling only used cars, maintaining its service and repair facility, and having laid off much of its once-extensive sales and support staff, now down to about 70 people. Nevertheless, its overhead remained huge, including service of debt on the physical plant. CNB well knew of Bob's circumstances and all of his efforts to keep the dealership alive until he could finance the buy-out of Majestic's successor. They had stuck with him so long because they had confidence in him and his ability to make things happen, and because they had so profited from their relationship with him over the years. But creditors were now constantly calling, and Bob spent much of his time simply trying to keep them at bay. Cash flow had to be managed in a daily "crisis" fashion.

As before, Heritage utilized its revenue from car sales as necessary to stay in business, now paying essential utility bills and its scaled-down payroll. Bob treated the bank as he always had, knowing that the bank had full access to his sales and deposit records.[2] Indeed his account was being monitored daily by his bank officer at CNB. Obviously, both Heritage and the bank would have ultimately benefitted by the survival of Heritage pending its recapitalization, which Bob continued to tenaciously pursue. But as the year ended, the infusion of capital had not yet materialized and Heritage was forced into involuntary bankruptcy by two large creditors (*The Dallas Morning News* and the *Dallas Times Herald*). Heritage was unable to pay off the advances on just eleven of these vehicles, worth all of $76,134 in loaned value.

At this time, under the bank's new president, and under the cloud of suspicion and finger-pointing that prevailed in the industry, it was routine practice for bank officers to file "criminal referrals" with the Comptroller of the Currency whenever there was any hint of a violation of banking regulations or financing or security agreements. Rather than simply file as a secured creditor in the Heritage bankruptcy proceedings and procure reimbursement through the court, CNB opted to file a criminal referral. That document winded its way through the bureaucracy and, years later, finally ended up on the desk of an F.B.I. agent assigned to the bank fraud task force. He dutifully commenced a criminal investigation. The Heritage default on 11 used cars thereby turned into a federal criminal case for defrauding a bank of its security interest, despite the bank's notice that the security interest was being compromised to keep a customer afloat.

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[2] The bank held the title certificates to the floor-planned vehicles in its custody, to be released upon payment by Heritage of the loaned amount. On several occasions during this period, CNB released the titles to Heritage without a transfer of funds against the floor-plan loan, obviously evidencing their knowledge that vehicles were being sold without immediate application of the sales proceeds to the loan.

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From the limited investigation we conducted prior to the decision to enter the plea, which involved interviews of witnesses including the bank president, there is no doubt in my mind that the letter Bob was asked to sign in August of 1991 was generated for record purposes only and that none of the parties actually intended that it be construed literally. There is likewise no doubt in my mind that the bank officers were aware that funds from secured car sales were not being immediately and directly applied by Heritage to the loan. But the fact that Bob did not intend to "defraud" or otherwise criminally victimize CNB was beside the point; the sad truth was that at the time the decision had to be made, our ability to convince a jury of Bob's honorable intentions was seriously jeopardized by the lack of preparation prior to our entry into the case. The brutal consequences of a loss would have made an election to proceed to immediate trial truly irresponsible.

At the sentencing hearing, Judge Brown reviewed the factual background and analyzed the sentencing guidelines applicable to the case, which under the terms of the plea agreement we negotiated required a relatively modest term of imprisonment. In light of the circumstances, the judge did something extraordinary, and in my experience virtually unprecedented, and decided to depart downward from the Guidelines a total of *six* levels, for the obvious purpose of placing Bob in a range for which he could receive straight probation. The judge then imposed a brief (3-year) period of probationary supervision, and Bob's long legal nightmare was finally over. The court's view of the triviality of the case was palpable.

While most bank fraud defendants would give almost anything to get off with what would be considered a "slap on the wrist," the devastating element for Bob was the very fact of the conviction. I have no doubt that Bob would have preferred even a prison sentence to the burden and blemish of carrying around a federal felony conviction for the rest of his life. This is the real tragedy of this case, that an honorable man who was only guilty of trying valiantly to save a business from extinction would be branded a felon by a system which shows little mercy to those caught in its web by circumstances beyond their control, victimized by finger-pointing bankers and overzealous investigators.

Respectfully,

S. MICHAEL McCOLLOCH

SMM/jb

U. S. Department of Justice

United States Attorney
Eastern District of Texas
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CERTIFICATE OF RELEASE OF LIEN
FROM JUDGMENT IMPOSING A FINE OR PENALTY

United States Attorney's Office for

The Eastern District of Texas

I hereby certify that the fine or penalty imposed against the following named individual has been satisfied; and that the lien for such fine or penalty has thereby been released. The proper officer in the office where the notice of lien was filed on January 29, 1996, is hereby authorized to make notation on the books to show the release of said lien, insofar as the lien relates to the following judgment.

Name of defendant: Robert L. Guenther
Residence: 507 Farine Drive, Irving, Texas 75062
United States District Court for the Eastern District of Texas
Docket Number: 4:94CR000037-001
Date of entry of judgment: December 27, 1995
Unpaid balance of fine or penalty: $0.00
Place of filing: County Clerk, Dallas County, Texas - Personal Property Records
This certificate was prepared and signed at Tyler, Texas on April 15, 1999.

Signature Randi Russell AUSA
RANDI RUSSELL
Assistant United States Attorney

STATE OF TEXAS:
COUNTY OF SMITH:

Before me, a Notary Public, on this day personally appeared Randi Russell, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that she executed the same for the purposes and consideration therein expressed.
Given under my hand and seal of office on the 15th day of April, 1999

Rosie Trimble
Notary Public, State of Texas

ROSIE TRIMBLE
NOTARY PUBLIC
State of Texas
Comm. Exp. 02-17-2003

U. S. Department of Justice

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Signature Randi Russell AUSA
RANDI RUSSELL
Assistant United States Attorney

STATE OF TEXAS:
COUNTY OF SMITH:

Before me, a Notary Public, on this day personally appeared Randi Russell, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that she executed the same for the purposes and consideration therein expressed.
Given under my hand and seal of office on the 15th day of April, 1999

Rosie Trimble
Notary Public, State of Texas

ROSIE TRIMBLE
NOTARY PUBLIC
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