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NATHANIEL

“Big John, I need a favor.”

“Oh, shit,” I thought to myself.

On the other end of the line was Vern Hayes, the Mercer County Public Defender. The last time I had done Vern a favor, a judge almost held me in contempt, so I had sworn never again. When Vern wanted a favor, it was usually a problem client he was hoping to unload on some unsuspecting attorney. However, he caught me in a moment of weakness. It was a Friday, and I had had a very good week. Anyway, helping Vern was a two-way street—he was always good at giving something back, whether it was advice or help with an expert witness or maybe even a case.

“Sure, Vern,” I responded against my better judgment, “what do you need?”

“There’s a file ready for pickup—a case remanded by the appellate division. Three years ago the defendant was convicted of robbing a convenience store, but the appellate court overturned the conviction because the judge failed to tell the jury the law on identification. Now the case is back, and you’ll be starting from scratch.

“John, the thing about it is,” he continued, “I read the opinion and talked to his prior attorney, and I think this guy may be innocent. They locked him up right after the verdict, and he’s spent three years in jail for nothing. Unbelievable—what a system.”

“Innocent, no way,” I responded in disbelief, for Vern had been around a long time and did not say such things lightly. “Vern,

everyone says they're innocent. How many trials have you had where they were really innocent?"

"I don't know, but, hell, what do you care?" Vern responded with a slight laugh. "Come get the file and go see the guy. He's at the workhouse."

"No problem, boss, you know me—I'll walk him out the door after trial. And you're right, I don't care," I said with half-feigned overconfidence.

I went to pick up the file four days later. The Office of the Public Defender is in Trenton, a small city that rests uneasily on the banks of the Delaware River in central New Jersey. The city was founded on its precise location because it was the farthest point north on the Delaware where large sailing ships could travel up river. Trenton became famous in 1776, when George Washington won a battle there on the day after Christmas, and a week later won another. After that, it slowly grew into an industrial center fed by immigrants from all over Europe, including Poles, Italians, Germans, and Jews. They were followed by a large influx of African Americans, mostly hailing from North Carolina, in their flight from Jim Crow. The Roebling factories gave the city a firm industrial base, and the metal coils that were used to construct the Brooklyn Bridge were forged in the fires of Trenton kilns. There was a reason why the iconic railroad bridge spanning the Delaware River from Trenton to Pennsylvania boasted in large, proud, illuminated letters: "Trenton Makes, The World Takes."

The riots of 1968 hit the city hard. You can still talk to people who remember the violence vividly, who remember having to be driven to work in the city by family members with a shotgun in tow and a German shepherd in the back. The riots were focused on an area in the center of the city near the State Capitol called the Battle

Monument, the spot where Alexander Hamilton had placed the cannons that were employed to blast the Hessians into submission during the Battle of Trenton. If you mention the Battle Monument today, the first thing that comes to mind is not the Revolutionary War but a particularly rundown section of the town that is rich in liquor stores and drug dealing, but little else.

After the riots, Trenton went into a steady decline. The last factories chained their gates shut in the early 1970s. Residents began leaving the city in droves, headed for the burgeoning suburbs as jobs disappeared, crime increased, and schools started to fail.

This is not to say that the city is lost. Unlike other urban areas in New Jersey, Trenton has an advantage: It is the state capital, and because big government is a way of life in New Jersey, there will always be a large employer located in the city. Therefore, while the city will never be in as desperate a condition as a place like Camden, for the eighty thousand or so residents who call Trenton home, their city's best days are behind it.

Conveniently situated on South Broad Street, the public defender's office is directly across from the Old Mercer County Courthouse, where the criminal courts are located. The courthouse itself is approximately a century old, and the spot has been home to judicial proceedings for over 180 years. In fact, Daniel Webster (whose street name was "Black Dan") argued a case there back in 1836. The adjective "old" aptly describes the place—it is a dump.

A couple of years ago the building had to be closed down because of mold infestation. A year after the mold attack, a janitor somehow fell into a gaping maw that had opened up in the main stairway and was sucked into the marble quicksand so he was stuck, half suspended, between the flight of stairs and some unknown subterranean dungeon that held who knew what. After about three

hours, when it was touch or go whether the poor soul would disappear forever into the bowels of the courthouse, he was rescued by a small army of Trenton firemen. He went from his dangling near-death experience right down Broad Street and limped into a personal injury lawyer's office, and he hasn't worked since.

To this day, large irregular stains mysteriously appear on courtroom ceilings and then disappear, like a toxic aurora borealis. The Old Mercer County Courthouse is little more than a brick and mortar carcinogen.

But at least the old courthouse has its charm. Whoever designed the *new* courthouse must have been on the take. This courthouse, where the civil and family parts are located, is a model of inefficiency. It has no readily accessible stairs. Its five floors are serviced by two teeth-grindingly slow elevators, one of which is invariably out of service. If you have a matter on any floor but the first, you had better be 10 minutes early or you run a serious risk of being late.

I entered the public defender's office that early afternoon and passed by the security officer, who never bothered me—presumably because I wore a suit and moved with a sense of purpose. Taking an elevator to the second floor, I greeted the secretary, who sat protected behind a wall with a large window, and was then buzzed into the office. Immediately to my left was the conference room. It was lunchtime, and a few public defenders I knew were in the room sitting at the large rectangular table, eating sandwiches and munching on chips. I knew and liked them all. I was in no rush so I stopped in to say hi. They were talking shop.

My friend Ed was reciting a familiar litany of woe. "I was in court today representing this guy who has two priors for distribution. He was nabbed with two bundles of heroin and \$1,304 on him. The original offer was ten with a four. I convince the prosecutor to

give him probation as long as he gets into a long-term inpatient drug program. Not only does the idiot not take it, he tells me I am trying to sell him out and if only he had a ‘real’ attorney and not a ‘public pretender’ he would get off. We go before the judge and he informs the court that I am not working on his behalf and that he is hiring somebody else. He then mentions he is talking to probably the worst attorney down here. Next he tells the judge that I won’t listen to him and that I don’t believe him when he says he is innocent. Hey, I guess the cops planted the drugs, the hand-to-hand was actually him doing a bump with his cousin, and the thirteen hundred in assorted bills was for rent—even though he was popped on the 20th and rent is due on the first. Yeah, a jury is going to buy that. The judge then let him have it, telling him you have an excellent attorney and you better think about that offer, and he adjourned the case for one week.”

I’ve heard this conversation a million times. It’s funny—public defenders are often the best lawyers in the courthouse, but because people don’t pay them they assume they aren’t any good. And so the accused will can an experienced public defender who has tried a hundred cases and enjoys a good working relationship with the prosecutor and the judge, and hire someone who has a nice office and a great webpage but wouldn’t recognize a Fourth Amendment issue if it fell on his head and landed in his lap.

I sat down, made myself comfortable, grabbed the well-read sports page from a local paper haphazardly tossed on the table, and joined in the banter. There were the usual complaints about pain-in-the-neck prosecutors, pain-in-the-ass clients, and getting screwed by a judge in some ruling. Finally, somebody asked me what I was doing at the office.

“Picking up a file. Vern asked me to do him a favor.”

Everyone laughed in unison. A lawyer named Chris said, “Weren’t you held in contempt the last time you did a favor for Vern?” I responded that, no, I was *almost* held in contempt but not actually held in contempt. All of a sudden, I regretted my decision to take the case. At that point, lunch was over and most of my *compadres* had to go back to court. We said goodbye and I sauntered to the bin where the files ready for pickup are stored.

The solitary file was sitting there in the bin. Written in green letters on the front was the name *Nathaniel Smith*. Right away, it looked different from the typical file; most are thin, with almost nothing in them. They are also new. This file, Nathaniel Smith’s file, was bulky. You could tell it was filled with police reports, transcripts, briefs, and an opinion. It had that characteristically worn, musty look of a file back on appeal. I picked it up with both hands and headed for the exit. I had done so many cases that I was usually in no rush to read the files. But Vern said he thought this man was actually innocent, and I was intrigued in spite of having told Vern I didn’t care.

At this point, you may be wondering why a private attorney would be representing an indigent client. The reason is as follows: The public defender’s office is a law office. Therefore, such issues as conflicts of interest apply to them as they would to regular law firms. Just as two attorneys from the same office usually cannot represent co-defendants, the public defender’s office can also be conflicted out of cases. As a result, cases are “pooled” out to attorneys who are qualified and have requested to be placed on the pool list. When I started doing pool work in the mid-90s, it paid peanuts. It was now up to \$50 an hour out of court and \$60 an hour in court. I had stopped doing pool work in bulk a couple of years earlier because my practice was going pretty well, but I always liked to

have a few pool cases going at any particular time. As I said, Vern was always good in returning a favor.

I returned to my car and drove the seven miles back to my office. I had hung my shingle in a section of West Windsor, the town where I grew up, called Princeton Junction. The Junction is located within walking distance of a railroad station where you can hop a train that will get you to Newark in 45 minutes and to New York City in a little over an hour. My office is on the second floor of a rundown building. The only way to access the second floor is via the longest uninterrupted flight of stairs you have ever seen—20 steps going straight up. I have no idea how it made code. Some of the other tenants are a realtor, an investment adviser, and a tailor named Sal. Until recently, we also had two massage parlors, but the local police closed the one in the back and the FBI raided the one in the front. Needless to say, it's not the high-rent district, even though my landlord charges me as though it were.

My office is small, no frills. I have a small waiting room, a small conference room, and two small offices. I share the office with another attorney named Robin. In my career, I have shared office space with two other lawyers, and both of them are now judges. I am pretty certain the “robe streak” has come to end.

The rooms are admittedly not much to look at. There are a number of shelves in the conference room filled with legal books. It looks impressive, but in actuality the books are so out of date as to be almost useless. A few random pictures and my college degree break the monotony of the poorly painted walls. I don't physically have my law school diploma because I blew off the graduating ceremony and the provost wouldn't mail it to me. Hanging behind my “Staples Period” desk is a large poster of a cartoon caricature with suspicious eyes and a large nose peering over a wall. It reads “Just

because you are paranoid doesn't mean they are not out to get you." When I am meeting with clients in my office, they sit in an interview chair facing the poster on the wall behind me. It provides a not-so-subtle message.

A client once described my office ambiance as "underground," and I took it as a compliment. I like to keep things a little unkempt—some dust on the table, files lying around, papers on the conference table. It lends the appearance of a busy office. As an analogy, consider this: You find yourself in a small town that you have never visited before, and you need a haircut. You look in the phone book, and there are two barbers in town. You go to the first one, and it is a mess, hair all over the place. Then you head over to the second barber, and the place is immaculate, nothing out of place. Where do you go to get your haircut? You go to the first establishment. It's a mess because that's where everyone in town goes, and the townies know best. It's the same with my office; it might not be the neatest, but you know when you walk in that a lot of people have hired me. Presumably because I know what I'm doing and get good results.

The other benefit of a small office is that it keeps the expenses down. As a result, I can charge less than most other attorneys who have larger offices and support staff. In the area of criminal law, controlling your expenses is very important. Many of the clients we represent are poor. So the secret of success in this business is to offer people a competitive price and provide excellent service—or, as a fellow attorney once said, "Reasonable doubt at a reasonable price." Sure, you may lose the occasional wealthy client who looks down his nose at you, but for every one of them there are 10 people from working-class backgrounds who breathe a sigh of relief when you tell them it is not going to cost them two weeks' salary to hire

you. In my line of work, every dollar you save is a dollar you earn, and my profit margin is well over 70 percent, which is great in almost any line of business.

I plopped Nathaniel Smith's file on the conference table with the intention of digging right in. But since it was two o'clock, the mail had already arrived, so I went through it first. It consisted mainly of court notices. I promptly hand-wrote the dates onto the "Weird New Jersey" calendar my wife had bought me for Christmas. There were letters from an attorney and a judge, and as these required immediate responses, I typed them out and put them in the outgoing mail tray. There was also a check for \$500 from a client with whom I had worked out a payment plan.

By the time I'd finished with the mail and returned a few phone calls, I had lost over an hour but was finally able to walk the 10 feet from my desk to the head of the conference table where my new file lay. As I mentioned before, this file was thick. Taking it out of its jacket, I reviewed the first documents, the discovery from the case. The discovery consisted of a police report, an investigative report from a detective, a typed sworn statement from a witness, and a black-and-white copy of a photo lineup consisting of nine African American males. Photo lineups are taken in color, but because this was just a Xerox copy, the nine pictures seemed older than they were. The men's shadowy visages appeared eerie, like bygone photos you might see in a history textbook of men who were lynched in the 1920s. After reviewing the discovery, I skimmed the transcripts from the trial. Finally, I read the appellate court's decision that had reversed the jury's conviction and brought the case to my desk.

When I finished the final page of the decision, it was dark outside. I put the file back in its jacket, filled out a time sheet, placed the file in a cabinet, and prepared to head out to municipal court. As

I turned out the lights and locked the office door behind me, I was thinking Vern might be right, that Nathaniel Smith probably *was* innocent and had been falsely convicted. Here was a 50-year-old man with no criminal record, who had been charged, indicted, convicted, and sent to jail, where he waited for three years for his appeal to be filed, briefed, argued, and eventually decided in his favor. Three years behind bars for nothing, absolutely nothing.

This is what I found out from reading the file: The robbery had occurred at a local food market called Halo Farms on Wednesday, November 17, at approximately 7:20 PM. At that time, an African American male entered the store. There were no customers in the market at that time, only two young women working the registers at the front, and a manager and another employee in the back. The individual grabbed a small item from dairy and then went to one of the registers. He placed the item on the conveyer belt with his left hand and pulled a knife out of his coat pocket with the right. He then looked at the cashier and demanded the money from the register. The woman complied, handing him approximately \$310 in assorted bills, and the man left. From the time the robber approached the register to the time he exited the market was less than 30 seconds.

The cashier who had been robbed immediately told her coworker at the neighboring cash register what had happened. That cashier in turn notified the manager, who called the police. An officer was on the scene in five minutes. He spoke with the 18-year-old African American cashier whose register had been robbed. Despite being visibly upset, she gave a description of the perpetrator: He was a middle-aged black male dressed in dark clothing. He wore a cap on his head and had slight facial hair. She estimated the robber was a few inches taller than she was, giving her own height as five foot

seven. After she'd provided her initial statement and about 15 minutes after the robbery, the detective in charge showed up. Meanwhile, the first officer on the scene took a statement from the girl who'd been working the adjacent register. Her story was consistent with that of the victim, including her estimate of the robber's age and height; he probably stood a little less than six feet, she said. Six feet at most.

Halo Farms is located in the southernmost part of Lawrence Township in a heavily populated and traveled area of town. It's just a block from the Trenton city limits and about two blocks from the Ewing Township border, in the middle of a business district whose other notable establishments include a beauty salon, a car wash, two gas stations, assorted eateries including a McDonalds, and a strip joint. The business district is part of a racially mixed working-class neighborhood of 80-year-old row houses, meaning the robber would have blended into the surroundings within seconds of leaving the market. It seemed clear to me what had happened: Some junkie needed cash for his local drug dealer so he could get his hit. By the time the detective arrived on the scene, the perp was probably in an abandoned row house in Trenton, firing up his crack pipe with shaking hands.

It was at this point that my newest client Nathaniel Smith became caught up in the investigation. A summary of his statement to the police was in the detective's report, so I was able to quickly learn his side of the story.

Nathaniel worked two jobs. During the day he was a handyman, doing all sorts of odd jobs around his Trenton neighborhood; evenings he would walk from his house to a bus stop near Halo Farms and take a bus seven miles north to Princeton. There, he would transfer to another bus and ride an additional seven miles to

Montgomery Township, where he worked making phone calls for a telemarketing firm. On the evening of the robbery, Nathaniel had showed up at the bus stop early. He'd been helping a neighbor with a backed-up toilet late into the afternoon, after which he took a quick shower at home before heading to his night job. He stopped at a fast food restaurant and ordered a fish sandwich and a can of grape soda, then walked two blocks to the bus stop and sat down to eat his meal.

At about 7:45 PM, the detective walked out of the market and decided to drive around the area to look for the robber. A block or so away, sitting on the curb eating his sandwich and drinking his soda, he happened upon Nathaniel Smith. Nathaniel fit the general description of the robber as a middle-aged African American male with some facial hair, dressed in dark clothing. Of course, there were probably a dozen or more men who fit that description within a hundred-yard radius of the bus stop at the time.

The detective stopped the car, got out, and started to talk to Nathaniel before eventually asking him to stand up. Up stood a six foot four, rail-thin individual, at which point any suspicion of Nathaniel Smith as the suspect should have gone out the window. The cashier who'd been robbed had described the suspect as a few inches taller than she was, a statement corroborated by her co-worker. From their descriptions of a man who stood six feet or less, the detective should have realized he was barking up the wrong tree. Instead, he continued to question Nathaniel in a loud and insinuating voice.

Nathaniel, exhausted from his day's work, not particularly looking forward to another six hours or so on the telemarketing job, and none too happy at being questioned aggressively by a policeman about events he had no knowledge of, began to yell back. At this

point, the detective decided Nathaniel had something to hide and ordered him into the back of his car. As he drove back to Halo Farms, just a block away, he radioed ahead telling the police to bring the cashier outside to the curb.

What was conducted next is called a “show up.” The witness was waiting outside the market when the police cruiser arrived with Nathaniel Smith scrunched up in the back seat. The detective got out of the car and told her he had a suspect in the back. He shone his flashlight into Nathaniel’s face and the cashier said, after two seconds, “That’s the guy.”

The detective’s job was now almost over. He handcuffed Nathaniel and drove him to the police station where he placed him in an interview room, read him his Miranda rights, and tried to take a statement. At first Nathaniel talked, but when it became clear the detective didn’t care what his side of the story was and only wanted him to confess to the robbery, he asserted his right to speak with an attorney. The detective stopped the interview—he really didn’t need a statement anyway—and had Nathaniel’s mug shot taken, and he wrote out a charge sheet for first degree armed robbery, third degree terroristic threats, and third degree possession of a weapon.

After typing out the charges on a multi-copy form, the detective separated the copies and handed Nathaniel his charge sheet, also known as a “green sheet” for the color of the paper it’s printed on. Next the municipal court judge was called to set bail. Bail is based on a number of factors but the greatest weight is placed upon the seriousness of the offense and a defendant’s criminal record. First degree armed robbery is about as serious an offense as you can catch without a body, so even though Nathaniel had no criminal record, the judge did not go easy. Bail was set at \$150,000 cash or bond.

It took a little over one hour for Nathaniel Smith to go from sitting quietly at a bus stop, eating a fish sandwich and sipping a grape soda, to finding himself on a one-way trip to the Mercer County Correction Center.

The next part of the investigation consisted of bringing the cashier who had been robbed to the station to be interviewed. While the young woman was en route in a police car, the detective prepared a photo lineup to show her. He took Nathaniel's photo and put it inside a cardboard jacket designed by the New Jersey State Police specifically for this procedure. After placing that photo in slot four, the detective and another officer scoured a database of other arrestees to find pictures of eight other African American men who fit the same general description as the suspect. Because Nathaniel was much older than the average armed robbery suspect, this took a little longer than usual, but they eventually had nine shots in the photo array, including Nathaniel's.

The cashier arrived at the station, and the interview got underway. First the detective talked to her about the case, and then he instructed her regarding the photo lineup. In general, the instructions are that the suspect may or may not be in the lineup; that people's appearance, such as the style of their hair, may change; and that the witness is not to guess. At this point, the detective showed the photo lineup to the young woman. Almost immediately she pointed to number four, the picture of Nathaniel Smith. This identification was hardly surprising as the woman had so recently seen Nathaniel sitting in the back of the police car, a flashlight beam in his face. The detective next had her initial the space under Nathaniel's picture to memorialize her selection. Once this was done, he took a formal statement from the victim and then closed the case.

Another file off his desk, another man on his way to jail.

It should be clear to anyone reviewing the circumstances just described—with the unfortunate exception of the detective in charge—that a problem with this case is the height of the suspect. The victim never saw Nathaniel Smith standing up; she first encountered him sitting in the back of a police car, and she later saw only his photograph. She could not have known that Nathaniel would have towered over her had they stood next to one another. In her formal statement, she gave the same description of the perpetrator as she gave to the first responding police officer: The robber was a few inches taller than she was. The identification was certainly false. But it was too late; the detective had already made up his mind.

I continued perusing the file, moving on to the trial transcripts. Two things stood out. First was that the second cashier, a young woman who saw the perpetrator if not the actual crime, was not called as a witness by the defense. Second, Nathaniel had not testified. This struck me as peculiar because he had no criminal record. Criminal records can be used to impeach a witness, so if your client has one, you usually think twice about sticking him on the stand. However, if your client has no record, you will often, though not always, want to have him tell his side of the story. I needed to know why Nathaniel had not testified.

The trial was actually very straightforward, and the openings, testimony, and summations only lasted one day. After the jury was charged—that's when the judge reads them the law and instructions—they came back in about two hours with a guilty verdict. The case was subsequently overturned because the judge had forgotten to give the Green charge—a charge named for the case *State v. Green*, which mandates that certain instructions be given to the jury

where identification is an issue. Because the Green charge is so basic and because Nathaniel's public defender was experienced and the judge was new to the criminal bench, I wondered if the attorney intentionally did not ask for it in order to create an issue for appeal. If that was how it happened, it was a great move by the defense. Trial attorneys will tell you that most jurors don't even listen to the jury charge, which usually lasts well over an hour, with some jurors nodding off as the judge reads the law in a monotonous tone.

As cases go, this one was weak for the State. Actually, it was incredibly, unbelievably weak. I couldn't believe the police charged Nathaniel Smith. I couldn't believe a grand jury indicted Nathaniel Smith. I couldn't believe the State wasted its time going to trial with this dog of a case, and I *sure* couldn't believe a jury convicted Nathaniel Smith. But here we were. This man had now done three years for a crime he almost certainly did not commit. And he would have had to do substantially more if the appellate court had not reversed the matter on what was little more than a technicality.

"This guy really *is* innocent," I thought to myself after reviewing the file, "and I have to defend him."

Talk about pressure.