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**Would you plead guilty to a crime you didn't commit to stay out of jail?**

## **The Arrest**

Imagine you are 19 years old and you live in the South Bronx on the Grand Concourse. From your window, you can hear the cheers of the crowd from Yankee Stadium. Your neighborhood is the poorest congressional district in the United States. A stone's throw away, just across the Macombs Dam Bridge, is Manhattan, where the average apartment sells for two million dollars.

You live with one parent and three younger siblings in a one-bedroom apartment. The rent is \$1300 a month. Your parent makes minimum wage working for McDonald's, and your family needs food stamps and a rent subsidy to survive.

You are a good kid. Unlike many of the teenagers in your neighborhood who are either in jail, unemployed, and/or pregnant, you work in a CVS on Columbus Circle in Manhattan and are in your senior year at John F. Kennedy High School in the Bronx. In your neighborhood and in your school there are many gangs. There are the Bloods, the Crips, the Mexicans, the Dominicans, and the South Americans, but you don't mess with any of that. You have never been arrested, which is an anomaly. Sometimes at night you hear gunshots coming from the park or down the Concourse. During the day the area is safe because the courthouse is only a block or so away, and cops, corrections officers, court officers, assistant district attorneys, court clerks, judges, and attorneys are there. After six o'clock, though, when everybody goes home, the knuckleheads, gangbangers, stickup crews, and crackheads come out.

Today, you put on your red T-shirt, jeans, and sneakers and catch the bus to Kennedy High School, and after school you take the train to 59<sup>th</sup> Street to CVS. After work, you catch the #4 Lexington Avenue line to 161<sup>st</sup>. After you get off the EL, you walk up the hill past the courthouse to 888 Grand Concourse — your building.

There has been a robbery on the uptown #4 train. The one you just got off of. Numerous young men and women pummeled, kicked, punched, and pistol-whipped a lone female passenger. They took her purse, cell phone, and jewelry. One of the offenders was wearing a red T-shirt.

The police are canvassing the area looking for the assailants. As you are waiting for the light to change at the corner of 161<sup>st</sup> and Grand Concourse, a large white cop with his gun drawn runs up to you. He points his Glock in your face. “Get down motherfucker!” he shouts at you. Before you can say anything, another white cop tackles and body slams you to the pavement. Your face is being mashed into the blacktop as the cop’s knee is pressed to your neck. You are cuffed and brought to your feet. They search your book bag.

The robbery victim, or “complaining witness,” is in the back of a squad car on her way to Lincoln Hospital. They drive past you, handcuffed and standing between two cops in your red T-shirt. “It’s a positive ID.” You hear those words come from the police radio on the shoulder of one of the cops who arrested you.

This identification procedure is called a show-up. The policemen holding you there in your red T-shirt with your hands cuffed behind your back unduly influenced the victim. It is important to note that prior to her viewing you in this highly suggestive fashion, she was unable to give any description of her assailants other than the fact that they were young adults of color and one of them wore a red T-shirt. She couldn’t identify you if the police had put you in a lineup with others of your age, weight, height, and skin color wearing red T-shirts. Now that the police have displayed you to her in this manner, though, she is convinced that you were one of her assailants. She has gone through an extremely traumatic event and is unaware that her mind is playing tricks on her, but from this point on, every time this witness/victim sees you, she won’t be identifying you from the scene of the crime — she’ll be identifying you from the police-arranged viewing of you in cuffs between two white officers on the corner of 161<sup>st</sup> street.

The courts have held such police-arranged show-ups to be highly suggestive and have suppressed and thrown out these types of identification procedures. Eyewitness testimony is likewise considered unreliable by the courts. Expert testimony relating to unreliability of an eyewitness has been ruled admissible. That is, during a trial, judges have allowed the defense to call an expert to testify about how unreliable eyewitness testimony is. Yet despite its unreliability, this kind of testimony frequently impacts cases like yours.

Your nightmare continues. A police van arrives, and you are brought to the 44<sup>th</sup> precinct. There you are placed in a holding cell. For the next 12 hours you remain in that holding cell, other than the times that you are removed to be fingerprinted and interviewed. During your interview with a detective, you are asked if you want to give a statement. You tell the detective that you didn’t have anything to do with the robbery, and that you were coming home from your job. The detective doesn’t believe you. He tells you the victim identified you and that you are only making it harder on yourself by not cooperating.

Next, you are chained together with others who have been arrested, and you are brought over to Central Booking at the courthouse on 161<sup>st</sup> street. Ironically, you are two blocks from your building. At Central Booking you are given two pieces of white bread with a slice of bologna in the middle and a Styrofoam cup of pink lemonade. First, you are held in a cell in the first floor of the building. The cell is approximately 10’x 20’ and is packed wall to wall with others. You are now in the system, and you are referred to as a “body.” You are in with other bodies who are accused of murdering, raping, stealing, drug dealing, robbing — really, any crime you can think of. Many of those in the system with you are both emotionally disturbed and drug-addicted. There is one

toilet in the cell, and it is exposed. While you are waiting, the police who have arrested you are meeting with the assistant district attorney in the complaint room (located in the same building where you are now being held), and the criminal complaint charging you with robbery in the first degree, gang assault, and other crimes is being drafted. The minimum sentence for a person convicted of robbery in the first degree is five years in state prison.

After another 12 hours in Central Booking, you are brought upstairs to arraignment to see the judge. You are packed into another small cell. A court-appointed lawyer calls your name, and you're led into a small room with a mesh-wire window that you speak to the lawyer through. It's hard to hear what the lawyer says to you because the others in the cell behind you are shouting, and you can't see the lawyer's face through the wire mesh.

After you see the lawyer, you and others are lined up, and, one by one, you are brought before the judge. The assistant district attorney tells the judge what he thinks you did. He says that the person who was robbed has a fractured orbital socket, a concussion, and is still in the hospital recovering from her injuries, and that she has identified you as one of her assailants. Your lawyer tells the judge that you have no record, that you go to school, and that you work. The judge asks if you have any family in the courtroom. Although they did call your parent from the court, your parent can't be there because someone has to watch your younger siblings, and there is no one else. The judge sets your bail at \$10,000.

Now you are sent to the most violent section of one of the most violent jails in the United States: Rikers Island: the adolescent section. On a regular basis, inmates are assaulted and sometimes even murdered. You are there for five days until you are brought back to court. Criminal Procedure Law §180.80 in New York State requires that any defendant who is being charged with a felony must have their case fully presented to the Grand Jury within five days of their arrest. If their case is not presented to and indicted by the Grand Jury within this time period, that person must be released.

When you are brought to court, your lawyer tells you that the District Attorney's Office has met their obligation under CPL §180.80 and your charges were presented to the Grand Jury. Now you must decide whether you wish to testify before the Grand Jury. Criminal Procedure Law §190.50 in New York State allows any defendant to testify before a Grand Jury. Every defendant in New York State is afforded this right.

What does your lawyer advise you to do? He doesn't want you to testify. Maybe because he is very busy and having you testify would eat up his whole day. Also, if you do testify, you won't get a plea offer from the District Attorney's Office, allowing you to plead guilty to a lesser count of robbery in the third degree with a promised sentence of probation. If you testify and you are indicted, unless you make bail, you will have to stay in jail on Rikers Island for two to three years waiting for trial because of the backlog in the courts. If you plead guilty the judge will release you today. What would you do?

## **The Trial**

Your lawyer tells you that if you plead guilty, you're going to have to stand in front of the judge and admit that you robbed this woman. "But I didn't," you tell him. "Then don't plead guilty to something you didn't do," he tells you. And you don't.

For two weeks you stay in jail on Rikers Island. There, you witness the unspeakable horror of a kid getting his face sliced open by a box cutter. The image of the kid holding his face together with his hands haunts you. A lot of the kids you know from the neighborhood are in Rikers with you. They are members of the Latin Kings. You don't get bothered.

They bring you back to court in a school bus with wire-meshed windows. You are held in the basement and then brought up to the holding area in the back of the courtroom. Your lawyer meets with you for a few minutes in the pens. You barely have a chance to speak with him before the court officer interrupts. You must see the judge now because they have a lot of inmates to bring up.

You are in front of a different judge this time. This judge seems nicer than the one who set the \$10,000 bail at your arraignment. Your lawyer presents your school transcript and your paycheck stubs. He asks the judge to release you because you have no criminal record, you have strong roots in the community, and you work and go to school. The assistant district attorney argues that your bail should remain the same and that you should be kept in jail because there are no new facts that warrant a change in your bail status. Your lawyer argues that he didn't have your school and employment records to present to the judge at your arraignment, and this paperwork is grounds for reconsideration. He assures the judge that you will return to court and that you have strong ties in the community.

The judge studies you. You pray that he sees that you are not a bad kid. Your prayers are heard: the judge changes your bail status, releases you on your own recognizance, and just like that, the court officers remove your cuffs and you walk out of the courtroom.

Luckily, you still have your job, and you haven't missed too much school so you will graduate on time, but this case is like a ball and chain that you carry 24/7. Every few weeks, you must wait on the long line to go through the metal detectors and take the escalator downstairs to the basement to appear before the judge.

Today on the escalator, two young men rush past you and attack a third man at the base of the escalator. The escalator is bringing you towards the melee of wild roundhouse swings and kicks. You hear the jingle of keys as the court officers run down the escalator towards the fight. You hug the black rail to let them past and walk backwards against the flow of the moving steps to avoid being brought into it.

In the courtroom, you wait for your lawyer to arrive and you watch defendants being brought through the door from the pens. Families wait all day to get a glimpse of their loved ones. It's one way to kill an idle day —

waiting in an air-conditioned courtroom.

Your life is on hold. You receive your high school diploma, but you don't go to college because you have to wait and see what happens with this case. You work as many hours as you can at CVS, your schedule revolving around your court appearances.

A photo appears on your Facebook page of you being held by those two white cops. It reminds you of the pictures you have seen in your textbooks about the civil rights demonstrations. The protests and riots in the South, Watts, and Harlem. You pass it on to your lawyer.

You endure three years of this. You are now 22. Your lawyer is grayer, and the judge seems balder. Because they have been promoted and/or left the office, there have been three different assistant district attorneys assigned to your case. Your case is in a long queue of older cases on the judge's docket. A trial date is set.

A hearing is held on the show-up that occurred when you were arrested. Your lawyer presents the court and the assistant district attorney with a copy of the Facebook photo. The judge frowns. The big white cop that stuck the pistol in your face testifies. The judge frowns some more.

The case of *Trowbridge* holds that the prosecution may not bolster a witness' in-court testimony with testimony that the witness identified the defendant in a tainted and suggestive police-arranged show-up and/or lineup; they may only introduce the witness' independent recollection — or lack thereof — of the defendant allegedly committing the crime. The witness must have sufficient independent recollection of the defendant at the scene of the crime to be able to identify them in court. Citing this precedent, the judge rules that the assistant district attorney may not introduce any evidence of this illegal show-up before the jury, nor may he use this evidence for the purpose of bolstering.

You don't understand all the proceedings and lawyer mumbo-jumbo. The jury selection starts. The room is filled with potential jurors who are questioned by the judge and the lawyers. Everybody is looking at you. "Look at the jurors. Make eye contact," your lawyer tells you. You follow his instructions.

You ask your lawyer, "If they convict me, is the judge going to put me in jail right away?"

"Let's not talk about that now," he says.

"I need to know. I need to prepare myself just in case."

"Probably," he tells you. "We can ask that he keep you out pending sentence, but it's unlikely."

Every day you wear khakis, a white shirt which you wash every night, and a brown tie. You don't sleep. It's like you are watching this happen to someone else. You're there, but you're not there. It's the only way you can cope with the stress of potentially going to jail.

You hear your lawyer tell the jury about reasonable doubt a million times — how nobody doubts that this lady got robbed, but that you didn't do it.

The cops testify. You see the way the jurors look at the cops, the way they roll their eyes. These are people who can relate. In one way or another, they or their relatives or friends have experienced what you are going through — the police planting evidence or assaulting them, their friends, or their loved ones. In Bronx County, 60% of all criminal jury trials end with an acquittal. The relationship between the police and the community is terrible. Generally, juries in Bronx County are loath to convict solely on police testimony because they don't trust them; they believe the police lie and plant evidence.

The victim testifies. After your lawyer cross-examines her, it's clear to you that she didn't really see any of her attackers that day. Is it clear to the jurors, though? You can't tell what they're thinking. The judge lets your attorney call an expert to testify regarding the unreliable nature of witness identification.

You testify. You have to grip the hand rests on the witness stand because your hands are shaking so badly. You tell them what happened that day. The assistant district attorney comes at you hard during cross-examination. You hold up.

“Do you think they believe me?” you ask your lawyer.

“It's hard to tell.” The jurors are looking back at you, and are making eye contact with you. “It's a good sign, but you can't be sure,” he tells you.

“How many young men do you think were walking the streets of the Bronx wearing a red T-shirt that day or any other day?” your lawyer asks the jury during his closing argument. You are too nervous to pay attention to anything. You sit there through the judge's instructions, and then the jury is told to retire to the jury room for deliberations. At first, you think you are going to faint. Then, it feels like you are going to vomit. You pray that the nausea will go away. It does, and now you are numb.

It doesn't take long. They are smiling when they return the verdict: not guilty on all counts. You cry and hug your lawyer, thinking that you can never recover from this. You'll never get back the two weeks you spent in Rikers, or the three years you've spent waiting for this day. Never again will you feel like this can't happen to you, because it did.