

Defending José

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SAMUEL WAS WATCHING THE DOOR INTENTLY when they let José in. He stood up, smiled as if he were greeting an old friend. He opened his body toward the inmate and reached out, completing the facade of taking José's coat at the door. They picked up the phones on each side of the glass.

"José, you doing OK, buddy?"

Prepare. First step. Get them ready. Be their friend. Build on common beliefs. Build on common ground.

José said nothing.

"José, I knew a guy who looked like you when I was a missionary in Mexico. Are you Mexican?"

José nodded. He was probably getting used to the idea that the person sitting across from him spoke Spanish.

"Are you liking it here?"

He meant the States, but knew instantly from his client's expression that José thought he meant prison. He moved on.

"I know you're gonna like this. The D.A. has given us a great offer so we can get you out of there, buddy."

Samuel was always smiles. Had he been sitting next to his client, he would have put his hand on the man's knee and looked at him square in the face.

"What are you talking about?"

"The D.A. An offer. Get out of jail almost free card, my man." Still the smile. No blinking. He felt like he was selling Buicks as Cadillacs.

"Do I know you?"

José was slow. Stupid, Samuel thought. The dumber the better. First smiles, then guilt. Only angry if he had to be. He had never been angry in Mexico. He didn't have to. They were so easy. Push the right buttons, get the right answers, get 'em in the water. Seventeen in one month. It was glorious to behold. It was the same thing here: commitment pattern them into submission.

"Are you José Alcalá-Martínez?" Samuel asked him, glancing quickly back at the file.

"Yes."

"I'm your attorney. I'm going to help get you out of there." Samuel paused for effect. "Today." Samuel paused again for effect, waiting for the realization of his promise to hit José's face. "This afternoon."

It was Tuesday afternoon. The police report said they picked up José Friday night. Samuel hadn't known a drug inmate yet who wouldn't sign off on any deal to get out of jail after weekendening at the justice center. Especially if the report he was holding was true and José had no criminal history. First time's the hardest.

A smile spread across José's face. "Good."

"Now listen, José," he said softly, as if they were right next to each other without a glass wall between them and Samuel was about to share some deep, personal secret or perhaps a hot stock tip or a key to personal happiness. "The D.A. has a real problem here—"

"Yeah, he does." José cut in. They were speaking the same language. Finally he and his attorney were speaking the same language.

"He can't keep you here—"

"No, he can't."

A real unity, these two. One language, one voice. They were edified and rejoicing together.

"The jails are too full. There's no room for guys who get caught with a few syringes and some meth. You're going to be out of here this afternoon with this deal."

Samuel was still smiling, even though the smile was disappearing from his client's face.

"I didn't do anything."

Of course not. It was his brother, Juan. No, his cousin, Alejandro. No, really, your honor, he's taking this rap for his brother-in-law, Ignacio. He has to because Ignacio has been arrested before and if he goes in again, there won't be anyone to stay with his sister, Gloria. And who would earn money to pay for their dying mother's surgery if it wasn't going to be—

Samuel bit off the cynicism. BRT, dammit, BRT.

"José, I've been doing this now for a long time. Every week I come in here and I talk to guys just like you who get busted with just enough evidence to put them away. A few syringes, maybe a trace of meth or coke. That's all it takes. You can go away for a long time."

Samuel tapped his finger down on the report.

"All it takes is some bad cop with a hangover to not like the way a Latino looks and you're picked up. All it takes is some frustrated judge who doesn't like the way a Mexican looks and you're behind bars a long time. Let me tell you something," Samuel said leaning toward his client, tilting his head down, but looking José dead on, "you can fight the sys-

tem a long time, buddy, but the judicial system has a lot more resources than you. It will wear you out."

You and me against The Man. Samuel liked it. He pushed it in the first stage. The whole world against us. I feel your pain. We can make it, but we've got to work together. He perfected the little lean-forward thing and was proud of it. He was sincere. They bought that.

"I can tell you, buddy, you aren't going to get a better offer than this. You plead to a felony and you don't give up much. Your driver's license. A small fee. Stay out of the downtown drug-free zone. Probation. Rehab. It's not hard, and it beats the alternative."

This was the dividing line. If they didn't jump now, he had to move onto the alternative. But he never thought he'd be here with this guy. A cherry, who wasn't agreeing to get out today. Samuel checked his watch. It was 2:40—2:40 on a Tuesday, he had just finished similar consultations with three other coke-heads, he then had to go enter pleas for each one and if he was lucky he'd finish up the paperwork and be home at 7:15, and he was talking this guy into getting *out* of jail?

José would accept, though. He had to. He had been prepared. Time to invite.

"José, will you take this offer?"

"I didn't do anything."

"José, I'm thinking you have some concerns," Samuel said carefully. It was the script, and Samuel had helped write it. He had to say it. He would ask some open-ended questions and pretend to probe his client's feelings, then dismiss any problems José expressed with pat quips and clever sayings that other attorneys taught him to convince this guy that his problems weren't anything special and—

"Don't you want to know what happened?"

José wasn't confrontational. He was looking at his attorney compassionately as if he were embarrassed that his attorney could have glossed over such routine stuff as his side of the story. It was 2:40—2:40 on Tuesday and Samuel was about to listen how the syringes weren't his client's. The drugs weren't his client's, and on top of that, your honor, they picked up the wrong guy. His twin, I swear.

No time for questions; he would stick with the direct route. Samuel read from the report again and looked up. Time to switch approaches.

"José, they found syringes. They found traces of a brownish fluid in the syringes and they found a packet of white powder. That's strong evidence."

Samuel looked like he was giving an opening statement for the state. He was serious, but somehow managed to look pained as if the admission of his client's sins disappointed him.

"You gotta talk to my family. I've never been mixed up in drugs be-

fore. I'm not guilty of anything great, except maybe hanging around the wrong crowd. I like people. I like to laugh. I didn't do anything."

José was still congenial. Still confident. Usually Samuel could spot a crack in there somewhere. He would exploit it and bring them around. He wasn't getting through. Move on to guilt.

"José, you don't want to disappoint that family. You don't want to be doing a lot of time for something small like this. Let me show you something."

He brought out the sentencing grid. He pointed to a block in the upper right corner.

"José, in this state possession of cocaine or methamphetamines is a class-B felony. You can be sentenced for up to ten years. Ten years. Ten years and \$200,000. Is that what you want to do to your family?"

The likelihood of that happening was something short of José walking through the glass pane and getting the hell out of there, but he didn't know any better. He might get thirty days in jail and all of those other minor penalties on top. Sixty days if the judge was really pissed for allowing this to go to trial.

"Now, José, I'm your attorney. I'm supposed to tell you that you have the right to a trial before a jury. That you have the right to ask questions of the ones who accuse you. That you can remain silent and the jury can't read anything into that. But if you did that—if you got a trial—you'd be making a big mistake. This case is air-tight, and they're gonna nail you down."

Samuel was trying to remember what the police had on him. Four of these consultations right in a row and you can't tell the difference. Coke. Marijuana. Meth. In the car. In his pocket. Dropped on the sidewalk. If it wasn't one thing it was another.

"I didn't do anything."

Samuel jumped up from his chair, sending it backward into the door behind him. The chair didn't travel far; the clearance was maybe a foot. His face was bright red in rage and he slammed his fist into the glass.

"Dammit, José, I'm trying to help you and that's all you can say? What the hell do you want? You got caught! Get over it, man, and be responsible! Quit wasting my time! What do you think the judge is going to do, agree that you didn't do anything just because you *say so*? That he's going to let you go because you *want to*?"

It was all scripted. He'd done it before. Every word. Now was his favorite part. He gave José an exasperated look, sighed deeply, and let the phone hang down.

"Damn, it's hot in here," Samuel said and he opened the door. Just a crack. Two inches, tops. Enough to let José know that one of them was in a room with a door that he could open and one of them wasn't. One of

them could follow that door out to the hallway down the stairs out the front door and into the afternoon sunshine. And one of them had to pound the door to let the guard know he was finished and could be escorted back to his cell now.

Samuel always liked to pretend he wasn't watching them watch the semi-open door on the other side of the glass, wondering if the space beyond the door was something more or less than the other side of their door. He let them think about that hallway for another minute or two then he would give them the full deal. And no one had ever refused.

But José wasn't biting. José waited until the frustration on his attorney's face melted into genuine curiosity and he picked up the phone again.

"You know," José said, "you're going to have to decide whose side you're on."

He got halfway home before he remembered this was Tuesday the eighth, the night he and 'Reenie appointed to get their temple recommends renewed. In most wards this was a sterile back-and-forth answer session: yes, yes, yes, make an appointment with the stake presidency, sign here, see you on Sunday. But he and 'Reenie weren't in any ward; they were in the Third Ward, and the Third Ward was guided by the heavy, loving hand of Bishop Thomas Young, who never let his counselors handle the recommend interviews, who always made sure to impart three bits of scriptural wisdom to the recommend seekers who piously entered his office, and who just happened to be 'Reenie's father.

When Samuel got to the chapel he was nearly an hour late. 'Reenie had sat patiently waiting, reading an *Ensign* while Bishop Young tut-tutted his young son-in-law's lateness, and took all of the appointments ahead of them. He parked and jogged in. 'Reenie looked up, expectant and tired.

"Well," the bishop said, looking at Samuel up and down quickly, not quite disapproving, but certainly not with any fondness either.

"Hi, 'Reen," Samuel said and opened his mouth to give an explanation.

"Let's do this one at a time," the bishop said, "then we can talk all three together. Sam, why don't you come in first." It was a statement, not a question.

Samuel squeezed his wife's hand and walked into the bishop's office. 'Reenie. Samuel often wondered how much more she wanted. He had been such a bright, young stud: returned missionary, honors undergraduate, accepted to no less than five law schools. Together they chose one closest to her parents because you go to law school where you want to practice law, and 'Reenie wanted to be near her parents.

First there was marriage, and for the first time in his life he felt like he had to have family home evening. Then they moved from the students' ward to the family ward, and home teaching wasn't something he could pass on when he didn't feel like it. Then he was called to the elders' quorum presidency and he always was either on the phone, moving someone in or out of the ward or preparing another lesson. Then their daughter Kailey came and there was no sleep for the sleepless.

And to the surprise of neither he nor 'Reenie, his grades fell. First came the disappointment of the first semester with the realization that these grades wouldn't get him on law review. Then the shock of the end-of-the-year grades when the envelope came and he knew he wouldn't finish in the top quarter of his class, probably not in the top half and likely wouldn't finish much higher than bottom third. Second year came and went and Samuel flirted with the line between acceptable and probation. In his third year Samuel stopped looking forward to school altogether, the steam totally gone. He hung on and graduated 158th out of 171. But he had finished.

'Reenie had been so good about it though. "He's not Perry Mason," she'd tell people with a sly grin on the corner of her mouth, "but he's not Hamilton Burger either."

So he looked for a job without the experience of a clerkship, without the law review's stamp of approval, and with a G.P.A. that would have embarrassed most. He didn't come close to making it in the door of the city's large firms. He didn't even get many second interviews, but he kept looking until a little Spanish-speaking criminal defense firm looked his way and liked the fact that he could speak better Spanish than the Hispanic managing partner.

"At Mejia-Morales, they like Samuel because he looks like such an Opie, but eats peppers like such a Juan," 'Reenie would tell all the Relief Society ladies and laugh. Laugh and laugh. 'Reenie, the only daughter of a self-made businessman, who had grown up never wanting, now cut coupons and chided her husband when he ate lunch out. So it goes when you have \$84,000 in student loans. But she never complained. Samuel always watched her, waiting to see the bitterness behind the laughter. Perhaps sometimes he hoped she would break and they would finally have it out in the open, but she never did.

"You were a little late today, Sam. Had us wondering," the bishop said. Wondering, not worried. Always accusatory, making you feel guilty, unsettling you from the start, even when you haven't done anything wrong. It was a mission president's trick and a cheap one.

"I had a live one at the justice center this afternoon. Refused to take a plea. Made for a few hours of extra work."

"So what's José in for? Drugs? Prostitution? Immigration?" The tone

again spoke more than the words. Thomas could care less what his son-in-law's client was charged with, he wanted to set him back, let him know what he thought of his client, his profession. Samuel briefly thought it was amusing that his father-in-law's derogatory term for Hispanics was dead-on for his client's name.

"He's been charged with possession. He claims he didn't have any drugs, though, and that the cops found drugs in the car he was a passenger in and picked him up."

"Hmm. No accountability. No responsibility. No one stands up and accepts the consequences of their actions anymore. No one stands up for what is right. Drugs, sex, murder, theft, rape, pornography. *They will be drunken with iniquity and all manner of abominations.*"

Signs of the times—Bishop Young saw them everywhere. Everything on television pointed to the Second Coming. Everything that had to do with technology was good because it portended the Savior's arrival, but bad because it usually came with some sort of filthy message, which Bishop Young could neatly frame in a final warning to the ward before dismissing for Sunday school.

"No one stands up for what is right," he said again looking at Samuel.

"The Constitution demands that Mr. Alcala-Martinez get a trial if he wants one. It doesn't matter if he had drugs or not. It's his right," Samuel said without revealing José's name.

Samuel fell back to his fall-back argument earlier than usual. There was no arguing the Constitution, and he knew his father-in-law knew it. Bishop Young scowled; he had heard this argument at dozens of Sunday dinners and Thanksgivings. It was what Samuel always came back to when he was asked how he could defend someone whom he knew was guilty. Besides, Samuel knew there wasn't a quorum of Mormons anywhere who would argue against the divine inspiration of the Constitution.

"Sam, I don't disagree that it's his right. I know he gets an attorney and all that. But why does it have to be you? Why can't you leave that to someone else and practice a more respectable kind of law, like tax law or patent law?"

Sam and 'Reenie had kept his law school grades and employment search woes from her parents. At Sam's insistence. His father-in-law had no idea how lucky he was to be practicing at all. There were those who graduated ahead of him who looked for months to no avail, and finally resigned themselves to a volunteer position to get experience.

"Not my style. I'd get too bored poring over bottom lines and contract disputes. Besides," he said, trying to charm his bishop, "who would keep bringing the Latinos into the church?"

There had been one man who Samuel felt he had really turned around in the last year and a half he had worked as a defense attorney. One person who served a short sentence after he took a plea, then came back to Samuel's office, and started taking the discussions. Samuel baptized him in weeks.

"We haven't seen Dias in over two months," Bishop Young retorted, stifling Samuel's attempt at levity. "I'm worried about you. I'm worried about Maureen. I see you working all kinds of hours to keep drug dealers and prostitutes on the street. I see Maureen by herself, or worrying herself to death about loan payments and grocery bills, and I wonder how you're ever going to make it. Remember, *if you will be delivered you shall set in order your own house.*"

"Sam, we've had our differences. But I want you to succeed. I want you and my daughter and my grandchildren to grow together and be bound to one another."

Samuel feigned deep reverence for his father-in-law's feigned deep feelings.

"But I'm concerned because when I look out there and see you, all I see is you standing up with the pimps and the pornographers and the child molesters. Let me read you something."

He flipped open the scriptures, even though Samuel knew he probably didn't have to.

"Wherefore, he that fighteth against Zion, both Jew and Gentile, both bond and free, both male and female, shall perish; for they are they who are the whore of all the earth; for they who are not for me are against me, saith our God."

Samuel's expression didn't change. He waited.

"I just want to see you out of the middle, Sam. This," he said, holding up the small piece of paper that gained him access to the temple another year, "is just a piece of paper. It doesn't really get you in and not having it really doesn't keep you out. I know how you'll answer all of the questions, and, to be honest, I don't feel much like asking you them. Please think about what I've said. Don't be ashamed of partaking of the fruit of the tree."

Samuel knew he had been dismissed. He watched his bishop sign the recommend and he got up to leave. As he ushered in his wife, he realized he had been graced with a fourth scriptural gem.

When the guards brought José into the courtroom, the room was cramped with attorneys all trying to sweet-talk the clerks and the judge into letting them go next. An early afternoon might mean eighteen holes instead of nine. Or it might mean a chance to eat dinner at home instead of over a desk. Either way no attorney liked spending the day in one of the justice center's courtrooms listening to other attorneys drone on and on.

But Samuel was ready for this hearing on his motion to suppress with his interpreter and had checked twice to make sure José would be brought up, not conveniently forgotten at the jail, forcing him to set over. When Judge Thompson looked up, he saw an almost too eager Samuel, his unshackled client, and an interpreter, and called them first off the docket after lunch.

The prosecutor was ready too. Both the officers showed up and testified at the hearing. The first, Officer Macy, was brief. Samuel held his questions for the second officer, not wanting to tip his hat too early. José had been a passenger in a car without taillights driving through one of the heavier drug areas in town. The officers ran a check on the license plates and found the car was stolen. They pulled the car over, and the driver took off running. He escaped into the night, and José remained in the passenger seat.

"He seemed to be tucking something under the seat as I approached the car," recalled Officer Tucker.

"I was tying my shoe," whispered José to his attorney.

"Be quiet," Samuel scolded him under his breath.

José was asked to step out of the car. One officer took his driver's license while the other started questioning him.

"Did you speak to José in Spanish or English?"

"English."

There wasn't an officer in the bureau who would admit that the Hispanic he'd picked up couldn't speak anything but the clearest, most intelligible English he'd ever heard.

"Did he seem to have any trouble understanding you or responding?"

"No, he did not."

"Did you have a reasonable suspicion that José had committed a crime?" asked the prosecutor.

"Yes, I did."

"And what was that suspicion?"

"José was in a stolen car. He was tucking something under his seat. He was in an area of town that I knew from training and experience to be an area full of drug traffickers. And the driver of the car ran away."

"What did you do then?"

"We checked the inside of the car under the seat where José was sitting."

"What did you find there?"

"We found drug paraphernalia: syringes, some of which had brownish fluid in it which, based on my training and experience, I suspected to be methamphetamine, balloons, small plastic disks, and we found a baggie full of white powder, which, based on training and experience, I sus-

pected to be cocaine."

The officer's testimony continued. The prosecutor had prepped him well, and he stuck in the right phrases at the right times. He certainly had "training and experience" down.

But it became obvious to Samuel that the prosecutor never read the motion and memorandum which he had filed with the court and sent copies of to her office. She was doing half of the prosecutor's work for him. The memo Samuel had drafted became his manifesto. He worked on it for days, researching and writing, double checking the citations and the quotations, and making sure that all of the case law hadn't been overruled recently. Then he filed it and waited for his chance at the hearing.

When the prosecutor finished questioning the officer, Samuel's questions were direct and stabbed the heart of the officers' conduct.

"Do I understand you correctly to say that you pulled the car over because of the taillights and because it was stolen?"

"That's correct," replied the officer.

"Was José driving the stolen car?"

"No."

"Did you see José holding the drugs?"

"No."

"Did you even see the drugs in plain sight?"

The officer blanched momentarily, and Samuel knew his use of the legal term "plain sight" had set off an alarm inside the officer's head that something was wrong. He shifted defensively.

"Not until I took it out from under the seat where José put it."

Samuel let the conjecture pass. This was a hearing, not a trial, and the evidence rules were relaxed anyway.

"You said you were talking with José while Officer Macy was checking his identification."

"That's right."

"And you said he spoke English."

"Yes."

"What did he say?"

"He said there might be drugs in the car."

"Did you think he had committed a crime?"

"I had a reasonable suspicion, but he was perfectly free to go at that point," the officer said, wanting to solidify the propriety of his actions, but not realizing the contradiction of his own testimony. "He could have left at any time."

"But how could he leave," Samuel asked, "if Officer Macy was holding on to his license?"

The officer looked at him blankly for a moment. Then decided to stick to what he had already said.

"He was free to go."

"Do you usually let criminals go?"

Again the officer shifted, but didn't answer. Samuel hadn't really expected one.

"Do you know what it means to be 'Driving While Hispanic'?"

The officer's face burned and the prosecutor jumped out of her chair. Even Judge Thompson didn't look pleased with the question. Samuel withdrew the question quickly with a wave of his hand and concluded the questioning.

In the hearing's summation, the prosecutor argued reasonable suspicion to the judge and did it effectively. Samuel could barely contain himself while she spoke. He was going to win this one and send José home, although it was almost a month after he had first promised to do so.

Samuel stood up and argued to Judge Thompson the illegality of the search. The search was outside of the scope of the traffic stop. José was "stopped" when one officer held his license and the other one interrogated him. He was not free to leave. The search of the car was warrantless. Reasonable suspicion can't be based on furtive gestures. The drugs were not in plain sight of the officers. José was not given an interpreter. He was not driving a stolen car and was not responsible for the taillights. There was never consent to search the car.

Any one of the litany of his arguments would have invalidated the search and he knew it. The hours of research on the computer and in the firm's tiny library were paying off. As Samuel continued to argue, he watched Judge Thompson begin to nod in assent until, when he finished, Samuel was sure of the outcome.

The judge ruled the search illegal and suppressed the drugs. Samuel turned to his client, who was still getting a translation in the ear from the interpreter.

"That's it," he beamed.

"That's it?" José seemed incredulous.

"The D.A.'s office has nothing to prosecute you with if the drugs are suppressed. They won't try you. You'll get out this afternoon."

"That can't be all. You never did it. You never told them. You never told them the drugs weren't mine. That I didn't do it." José's eyes were wide, imploring his attorney perhaps to re-initiate the hearing. The interpreter watched, puzzled.

"It doesn't matter, José. They won't try you. The case is over."

"It does matter," José replied as the guard reattached his cuffs and began to escort him away. "You should have told them I was innocent. You never told them."