THE VISIT

Philip G. Barry

"It would be nice if you visited your son," she told her husband at the dining room table. He shifted in his chair but kept the newspaper aloft between them while formulating a response. "Well you said he's taking some new classes, and I'm sure he has a lot of new friends down there. He's too busy to have his father bothering him." "You wouldn't be bothering him at all. I'm sure he'd be happy to see you. I've gone twice already. It's his first year away from home. He needs his father too, even if it's just for an hour." Finding himself reading the same sentence for a fifth time, he gave up on the paper and slapped it on the table. "Alright for crissakes I'll go. Then maybe I can get some peace and quiet around here."

The Saturday morning traffic was backed up several miles from where the turnpike narrows. He couldn't remember when it had begun, but he routinely talked to himself out loud when alone in the car. "Where are all these bastards going?" he muttered. The stalled traffic allowed his mind to wander. "He's a good kid. He always got high marks in school. That's why Princeton accepted him. He'll be fine."

A blasting tractor-trailer airhorn jolted him out of his reverie. A ten car-length gap had opened in front. He advanced and watched the big rig in his rearview mirror. It lurched forward, refilling the rear window vista with its grill. "Why can't these truckies drive at night? They should make a law. Keep 'em from jammin' up the roads during the day." Perhaps hoping for an unspoken expression of empathy, he looked to the stationary car to his right. Its driver glanced in his direction, displaying eyes distorted by lenses thick as a magnifying glass. "Look at this googly-eyed bastard. How can they let a guy like that drive?"

A "STOP HERE" sign was attached to the security booth at the entrance to the grounds. "I guess you can't just drive in anymore—not with all the crap been goin' on lately." he reasoned. A guard motioned for him to lower the window, then demanded his license and insurance card. After scrutinizing the documents, the guard asked, "Who are you here to see?" He told the guard his son's name. After

looking up the name, the guard leaned out and said, "I'm sorry, but your son was just reassigned to special housing. You won't be able to visit him today." "Okay, no problem. Thank you anyway."

Traffic was heavy but moving on the way back. "Special housing, that sounds nice. Naturally there wouldn't be time for visiting today while he's moving all his things and getting settled in the new room. Maybe some other time."

When the car crested the center of the Verrazzano Bridge, Brooklyn loomed ahead. He felt relieved to be back home and pleased how well everything had worked out. What would he have talked to his son about for an hour anyway? He couldn't remember ever talking to him that long. It would have been uncomfortable. "Wives get crazy ideas, but if you don't go along with them every now and then, you'll never get to finish a paper."

"How did it go?" his wife inquired. "The traffic was a nightmare on the way down. I don't know where everybody's going. Why can't they just stay where they are? It wasn't as bad on the way back." At one time, she might have snapped that she wasn't interested in a traffic report, but had learned to handle her husband with care. She waited while he hung up his jacket, stopped in the bathroom, then plopped down in his stuffed chair before resuming questioning. "So did you have a nice visit? How is he"? "Oh he's doin' fine babe. They're letting him move into special housing." She let a few seconds pass to insure that the flash of concern would not be noticed. "What else did you two talk about"? "Oh I didn't get to see him. I assume it's because he's moving today." She retreated into deep troubled thought and asked no further questions.

It all started with a fairly innocent attempt to avoid shame and save face with the neighbors. The timing was fortuitous. They'd all heard he'd been accepted to Princeton on a scholarship, and he was gone as expected in the last week of August. Luckily, there was nothing in the local papers to dispel the assumption that he was away at college.

Soon after they bought him the car with part of the money they'd saved up in anticipation of paying college tuition, his lifelong dearth of companions cleared up at once. His new found popularity

was attested to by his carload of local miscreants cruising the neighborhood almost nightly. The new car smell was shortly replaced with the stench of stale tobacco and marihuana smoke. Owing to a lack of points of comparison, he considered these sudden associates to be friends.

He would chauffeur them to wherever they requested. The most common destination was a place to buy pot, usually for smoking in the car that evening. He did not smoke himself, and they gladly omitted him from the pass-around circle once he had been offered a drag, and had waived-off the joint with a nervous laugh. He became in essence just their driver and occasional bank for one-way pot money loans. They never offered to pay for gasoline and became livid when the night's cruising had to be cut short because they had borrowed and spent all his planned gas funds. Nevertheless, to his mind's disembodied third eye, cast in the role of hypothetical local observers turning their heads towards the source of blaring car stereo music, these were his friends. He was now well-liked.

When they started to specify farther destinations, sometimes in other boroughs to buy their pot, he did not mind much. Driving up and down the same streets had become monotonous. Nor did it disturb him to learn that one of his passengers was buying a little extra to resell, with the stated goal of getting his own supply for free. It had nothing to do with him. He didn't even smoke. And he was relieved that they were borrowing less from him. There was even discussion of which car models they each planned to buy for themselves in the near future. The prospect of their self-sufficiency was welcomed, as he was tired of the chauffeuring. The novelty of driving his car had worn off and this friendship thing wasn't all it was hyped up to be.

He didn't think he'd committed any driving infraction when the unmarked car's red lights flashed behind him. He pulled into a bus stop to let them pass, but the police stayed on his bumper. He had never been pulled over before and was terrified of getting a ticket. He was listed on his father's auto insurance policy. His passengers barked questions and advice to him. Both were talking at once. Did he have all his papers? "Don't act nervous"! "Open your window"! They seemed even more jittery than he was.

The tension escalated when a marked police car blocked them in front. Two cops from each car approached simultaneously, all from different angles with hands near their weapons. Blinding flashlight beams criss-crossed the passenger compartment. One cop came to the driver's window, examined the registration and inspection stickers, then asked for the license, registration, and insurance card. He then said, "I smell marihuana smoke. Do you smell marihuana?" His partner confirmed that he too smelled it. "Alright, everybody out of the car, slowly"! "What are you doing around here? You don't live here."

They were patted down for weapons. The interior of the car was probed by flashlights, now with the doors open. "What's that under the seat"? Two cops crouched down and concentrated their beams on the space under the driver's seat. "I see a clear bag with powder containing a second smaller bag with pills. Whose bag is that?"No one answered. Another marked car arrived bearing a lieutenant. Another bag was discovered under the passenger seat. Everyone was handcuffed, searched, and transported first to the precinct house and then to central booking.

That night he found out that his "friends" had expanded their product line to include meth and opioids. He told the cops that he didn't know the drugs were under the seats. He wasn't lying, but the cops didn't believe him. His associates denied all knowledge, one even going so far as to say, "It ain't my car. How am I supposed to know what he got in there?" The bags were originally concealed under the backseat passenger's shirt. Seeing the flashing lights, he shoved a bag under each front seat— one not far enough, the other too far.

He reached home on his one phone call early the following morning. He talked to his mother. His father came down to post bail. He pleaded not guilty and was released. His car was not. Conversation on the ride home consisted of seven words: "I didn't do anything," and his father's response, "You stupid bastid."

He was re-arrested by D.E.A. agents at his next court appearance. The dealer was a federal confidential informant. The feds claimed the case, and the state dropped theirs against all three defendants. He was brought to 26 Federal Plaza and then back to Brooklyn for arraignment in Federal Court where a court-appointed lawyer pleaded not guilty for him. His father signed a bond for his release. There was

no conversation between them this time.

He skipped his graduation ceremony that weekend. They mailed him his diploma. It arrived the same day as a letter from Princeton about orientation weekend, and a notice of his next court date. He set the mail on his desk with the court notice on top so he wouldn't forget when he would be next leaving the house. Paper covers paper. His room was his world again, as it was before his car and its friends.

He sat alone at a small conference table in a room lined with shelves of law books from floor to ceiling behind him. Although ostensibly true that he was in a law office, he did not yet know that a more apt description would be plea factory. While waiting for his court-appointed federal defender, he perused the bindings of the books. They looked impressive, but then noticed thin layers of undisturbed dust on each shelf. Perhaps they are just for show, he thought.

"Okay, we have started to receive the evidence from the government, and I'm afraid it's not good. First off, any challenge to the search which uncovered the drugs is out. The car stop was made after you left a known drug location, with one of your passengers having entered, then exited with a bulge under his shirt. The police report also states that occupants of your vehicle were observed making furtive movements, whatever that means. Two officers confirm that the bag of drugs was visible from outside the car, protruding from under the rear of the driver's seat. So their case is airtight from a search and seizure perspective.

They report your statement that you didn't know the drugs were under the seats, but as I said, it doesn't look good. You see, the location was under surveillance by the D.E.A. At some point, we don't know when, they had arrested a dealer there and he agreed to flip and become a confidential informant. The government has sent us a set of photographs showing your car at the drug location on multiple dates. The most damning photo is a blow-up which shows you handing money to one of your passengers just as he's exiting the car to enter the dealer's building." "But I was only lending them like twenty dollars so that they could buy pot to smoke that night! I never even smoked any." "That's fine, but not good enough for a defense. Regardless of what states have done to decriminalize small quantities of pot, it's still

illegal federally, and we only have your word that it was only twenty dollars for pot. Whatever you say, that's not the way the government will portray it.

They haven't indicted you yet, but I think I can get them to let you plead guilty to an information which is based upon the Complaint itself. You should get leniency for accepting responsibility early." "But I didn't do anything"! "Unfortunately, in the eyes of the law you did. We should have a little time yet, so think about it and let us know how you want to proceed. We'll contact you if we get any indication of where the prosecutor wants to go with this, but as of right now, I recommend that you plead early."

After a few days of sullen solitude, the lawyer summoned him back. This time there was a second older lawyer in the room introduced as "co-counsel." "I wish I had good news for you, but I don't," his lead counsel said. "Both of your co-defendants have already agreed to plead guilty. The types and quantities of drugs involved trigger a substantial mandatory minimum sentence, so one of your co-dees has agreed to cooperate with the government to get leniency. The government wants both of them to plead to the conspiracy count, which implicates you. According to their standard cooperation agreement, he'll have to confess to everything, even things the government doesn't know about. We strongly advise you to get out ahead of this before the others start to sing. The cooperator will probably embellish your role to help himself. I would say at this point, if you decide quickly—meaning today, you probably wouldn't have to do any more than ten years." "Ten years! But I didn't do anything! You want me to put myself in prison for ten years for nothing?"

The older lawyer spoke for the first time. "I don't think you comprehend the situation. According to the Complaint, the government will seek to indict you on a least four counts: Conspiracy to possess and distribute methamphetamine; possession with intent to distribute the meth; possession with intent to distribute the opioid pills; and a marihuana charge. If you were to go to trial and lose, the mandatory minimum would be fifteen years and the Sentencing Guidelines would probably run higher than that." "But why would I lose? I'm innocent." "Because neither of your co-defendants are going to admit that the drugs were entirely theirs, and they may testify against you

that the contrary is true. It was your car. You drove them there regularly and you were photographed handing them money. That makes you the government's favorite target. They'd rather let the other two guys walk than let you get off. If you told a jury that you didn't know the drugs were in your car, on cross-examination the government will force you to acknowledge how well you do in school. They will then go on to argue that there's just no way an intelligent person such as yourself didn't know. You might pass every test in school with flying colors, but a defense based on ignorance of what was in your car just won't pass the laugh test."

"What's the difference anyway, ten or fifteen years? I can't go to college. I lose my scholarship. They took my car. My life's pretty much over anyway. I should just take my chances with a trial." The two attorneys gave each other exasperated looks. Co-counsel started pacing the room, then said, "Let me tell you a story— a true story about a client we had not too long ago. He also had opioid possession with intent to distribute. Like you, we urged him to plead guilty, get his time over with, and get on with his life. He insisted on going to trial. Said it was his constitutional right. It's true, he had that right, but if you force the government to go to the time and expense of meeting their burden of proof at trial, they will punish you for it.

As soon as we advised the government of his decision, they searched through all the drug-related deaths during the period of time he was selling, and found one that could have been related to him. In other words, he had sold to the deceased on at least one occasion. The dead guy had four different substances in him at the time of death, including a fifth of alcohol. He had five bottles of prescription pills from three doctors, and he could have copped from other dealers, but the government insisted that it was our client's pills that killed him. Of course, they couldn't prove it beyond a reasonable doubt, so they didn't even mention it at trial. You know what they did? They held it like an ace in their pocket, then sprang it at sentencing when the standard of proof is lower. Bottom line— instead of getting the ten years we believe he would have gotten with a plea, the judge sentenced him to thirty years. Now that it worked out so well for the government, it's part of their standard playbook.

I don't think that as you sit here right now, you can tell me for sure that none of your co-conspirators sold to someone who later O.D.'d. If they find a stiff, they'll put it on you and use it to get you thirty years also. It would be another feather in their cap. They'd send out a press release to show how they're doing something about the opioid crisis. They did the same thing thirty years ago with the so-called crack crisis. Some of those guys are still doing time, and some of them will never get out.

So to answer your question from earlier, you're not putting yourself in prison for nothing. You're pleading guilty to avoid that thirty years." "But I still didn't do anything." "As I said, no jury is going to believe that you didn't know. You're not stupid. You're not going to come across as sympathetic to the jury. All presumption of innocence aside, they're going to be looking at you as a drug dealer making up a story— an incredible story."

The lawyer happened to be right, but for all the wrong reasons. He would not come across as sympathetic or credible, not because it couldn't be done, but because these two lawyers couldn't manage to be able to do it. They weren't the brightest mouthpieces in the band. Many paid lawyers, especially those available to defendants with a half million dollars or more to spend would be able to raise reasonable doubt in the jurors' minds, resulting in a not guilty verdict.

If, after the fact, he were to file a claim that he was denied the constitutional right to effective counsel, he would find himself up against a newly formed unholy trinity. The government would respond that a defendant is entitled only to counsel which meets minimum professional standards of competence, and that he is not entitled to a "Modern-day Clarence Darrow." Defense counsel would submit sworn declarations defending their performance, which the government might even be so nice as to draft for them. Attorney-client privilege of confidentiality would be thrown out the window. His lawyers would claim that it was a strategic decision to not hire any investigator or expert, nor to cross-examine most of the prosecution witnesses, and to not call any defense witnesses. The judge would join-in to preserve the conviction at any cost. The government and his honor would fall all over each other praising the defense lawyers as wise master strategists who did the best anyone could have done in the

face of such "devastating overwhelming evidence."

By this point, the lawyer had both hands on the table and was looming over his client. It reminded him of TV show police interrogations. If these were his attorneys, how much worse would the prosecutors be acting, he wondered. He felt exhausted and in a cold sweat from just sitting there. "Alright, just do what you wanna do," he told them. "No, you have to tell us. We work for you. Do you want us to negotiate a plea agreement for you?" Just getting out of there right away felt more important than anything down the road, so he said, "Yeah ok."

While waiting for the subway home, he stood at the edge of the platform staring down at the tracks. He felt a numbness like being dead inside. When the incoming train roared into the station, he didn't step back. He stared trance-like into the headlights. He now understood the people who jump in front of trains.

At the change of plea hearing the lawyer handed him a plea agreement to sign. After he'd read only the first page, the prosecutor wanted a signed copy because the judge would be coming in any second. The lawyer took back the papers, flipped to page fourteen, and said, "Sign here. I'll go over as much of it as possible with you before the judge comes in."

The lawyer took out his own copy and continued, "You'll see that it says the statutory range of incarceration is five to forty years, but don't worry about that. It's just a required notice. The estimated Sentencing Guidelines range is more important and it reflects credit for your acceptance of responsibility. Although there's no guarantees, I'd be surprised if you got more than ten years, but we're not at that stage yet. Today is just for you to change your plea to guilty. The judge is going to ask you questions to make sure that you know what you are admitting to, and the rights you are waiving. I can't answer those questions for you. It's a conversation between you and the judge known as the colloquy."

The "colloquy" droned on with a seemingly endless series of questions calling for a "yes" answer which he provided in mindless robotic fashion. Yes he did drive his car to the location multiple times. Yes he conspired to possess a substance containing a measurable

amount of methamphetamine. Yes he intended to distribute five grams or more of that methamphetamine. Near the end, the judge said that it was important that he was knowingly, intelligently, and willingly pleading guilty. "Therefore, I must ask, have you been coerced in any way into entering this plea of guilty?" He reflexively responded "Yes." "Excuse me"? the judge said while bolting upright and glaring at the lawyer. The lawyer nudged his client with his elbow. He turned to see an alarmed wide-eyed expression on his lawyer who was also almost imperceptibly shaking his head from side to side.

Through inattentiveness, the defendant had accidently told the truth. Yes he had been coerced by the specter of thirty years in prison. But this was federal court where the truth was evidently no longer the coin of the realm. Neither the judge nor the lawyer wanted to hear it. The price of leaving the truth out there undisturbed would be the rejection of the plea, a trial, and the same possible thirty year sentence which had coerced him in the first place.

"I'm sorry your honor, I think my client misunderstood the question. If it would please the court to be so kind as to repeat the question," groveled the lawyer. "Were you coerced in any manner into entering this plea of guilty today"? "No," he said. "Alright then. The court accepts your plea. We will schedule a date for sentencing."

At sentencing, the judge noted the defendant's acceptance of responsibility, but said that he also found the proffered statements of the co-defendants and the confidential informant as set forth in government's sentencing memorandum, to be credible. "Those statements provide more than sufficient support for the imposition of a sentencing enhancement for the defendant's supervisory role in the conspiracy. Additionally, although the counts with respect to the opioid pills are being dropped pursuant to the plea agreement, I find that there is clear and convincing evidence that those pills were acquired by the defendant, and with the intent to distribute. I am therefore permitted to, and in fact I would be remiss if I didn't, take that into account as relevant conduct for purposes of fashioning an appropriate sentence which is sufficient but not greater than necessary to achieve the express statutory goals of sentencing. The defendant is therefore sentenced to a period of incarceration of 188 months,

five years of supervised release, during which the court orders that there will be regular drug testing. There is a mandatory special assessment of $100. due to the court immediately.

I understand that the government has a motion for forfeiture of a motor vehicle." "Yes your honor. It's a..." "Granted. Do you have a motion for remand?" "Yes, thank you your honor. We move to have the defendant..." "Granted." The marshals seized the defendant and prodded him through a door in the side of the courtroom.

At first she thought that her husband was maintaining the away-at-college ruse around the house so that he wouldn't inadvertently let the truth slip out to the neighbors. He would freely converse about classes, which prisons do offer, but he referred to their son's cell as his room, and his cellblock building as his dorm. He morphed the prison counselor into a "faculty advisor." Whenever she used terminology exclusive to prisons in connection with their son, her husband would feign incomprehension and change the subject. Over time, she adopted her husband's faux nomenclature so as to not clash with his possibly fragile coping mechanism. She grew concerned however that the reality of the incarceration had been pathologically compartmentalized beyond reach. By foisting the visit upon her husband, she believed it would help her son, but also saw it as risky but conceivably therapeutic for the father.

On a deep and muted level he knew he'd screwed up his son. He rationalized that his wife worried when the kid went out, so he had kept him in for her benefit. The truth was that his own anxieties by far exceeded hers. He knew he should have taken him to the park to teach him to catch and throw a ball, but the kid had grown up before he could get around to it. The worst guilt came from knowing that through isolation and lack of conversation, he had socially stilted the boy, thereby leaving him vulnerable to the exploitations of his car friends.

He stared through a tiny clear portion of the small window in his special housing unit cell. Seeing the activity outside reminded him of standing at the living room window as a child, watching the other kids playing on his block. He came to accept that life as seen from the window and on television family shows was for others— not

him. He could not understand why it should be that way, but was resigned that it was immutable. Adolescence had spawned an undefinable anger primarily manifested by taking his parentally impelled solitude to a maniacal level. The interminably closed door to his room conveyed the message: "You wanted to raise a recluse, now you really got one. Are you happy now? Look what you did to me."

Lying on the bed— a solid metal plate covered with a foam gym mat they called the mattress, he stared for unbroken hours at the pitted concrete ceiling, replaying it over and over in his mind. He was grabbed around the neck from behind in the shower stall by a human immovable object. "If you try to turn around to look at me, or make any noise, I'll just choke you out, do what I wanna do anyway, and leave you on the floor," came the husky whisper in his ear. It felt like a knife going in. He showered for an hour afterward, and almost missed the midnight count. He wasn't going to tell anybody, ever, but at the five A.M. count a C.O. with his flashlight saw blood on the bedsheet. He was escorted to medical, told the lieutenant he didn't see who it was, and was then transferred to the S.H.U.

The section normally used for protective custody was full, so they put him in the discipline section where only one fifteen-minute phone call was allowed per month. He called his mother. He never used the word, but she understood what had happened. "I'm so sorry all this happened to you. I'm so sorry," she said then whispered, "I don't think we should tell your father."

She cried alone in the kitchen and would remain there until she was all cried-out and appeared composed in the mirror before going into the living room to sit with her husband. She knew that the construct could not withstand tears.