

Short Lobsters

by Con Chapman

The call came to the associate in the library; the librarian took it in her office and came out to give him the message. "Mr. Fox would like to see you," she said evenly in a soft tone. "He says he has an assignment for you."



The young man got up, said "Thank you," and started off quickly.

"You should probably take a pad," the librarian said, knowing from long experience that the younger lawyers were sometimes so flustered by the thought of an audience with a senior partner that they forgot the essentials.

"Oh, right," he said, and turned back to the table where he had been working. With an touch of guilt he straightened the messy pile of books he had pulled from the shelves, picked up the leather portfolio his parents had given him when he graduated from law school, closed it on the legal pad within and headed out a second time.

He took the internal stairway and doubled back down the hall to the litigation department, where he found the door to Mr. Fox's office, his secretary serving as a sort of sentinel to a windowed room that looked out over Boston harbor.

"You can go in," she said with just a glance over her half-glasses as she continued typing.

"Mr. Fox," the young man said as he stood hesitantly at the inner door.

"Come in, Thomas, come in," the older man said, briefly taking his gaze away from the view. "Just saw the damndest thing," he said, without turning around. "Plane coming in from the south was about to land, when woosh"—here Fox made an upward-swooping gesture—"it aborted and took off again."

"No kidding."

"Nope. Pretty dramatic. Banked to the right and took off to circle the airport again as far as I can figure." Here Fox turned around and smiled grimly. "Sure takes away my appetite for air travel."

The partner came back to his desk and settled himself in his chair. "Well—how are you doing?"

"Fine."

"Keeping busy?"

The associate always answered such inquiries carefully. If you said you weren't busy—which he wasn't, particularly—doubt would be cast upon your abilities, for there is no more educated consumer of legal services provided by a young lawyer than an old lawyer. If you said you were busy you might miss out on a choice assignment, or be thought a slacker for not being willing to take on more work.

"Moderately so," the young man said finally, choosing the middle path.

"Interesting work?"

"Well, sure, some of it."

"But not all, that's for damn sure—right?" the older man asked with a wry look. "When my wife asks me that question I say 'If it was interesting they wouldn't pay us so much,'" he said, then laughed at his own joke.

The young man smiled and exhaled in relief that the older man had broken the tension.

"Well, this one should be interesting," Fox said. "It's a constitutional case."

"That does sound interesting," the young man said as he uncapped his pen in preparation to take notes.

"This is pro bono, I'll give you the number as soon as I get the damn paperwork done," Fox said, then began to recount the sad tale of a poor fellow who'd been charged with taking short lobsters. "These guys from the state, they've got too much time on their hands," he said with disgust. "Our client had a couple of lobsters that weren't long enough—but only by a little bit, I guess," he continued.

"Were there any witnesses?" the young man asked, trying to think of something to say that would be taken as a display of competence.

"None other than the staties and our guy," Fox said. "I don't think that angle's worth pursuing. They measured the lobsters and they were short. But like I said, not by much. If they had any sense they'd leave the poor guy alone and go after the big fish." The partner turned to the associate with a serious look that melted a bit once he realized he'd gotten off a pun of sorts.

"So what's the constitutional issue?" the associate asked.



"Unreasonable search and seizure—Fourth Amendment. They had no reason to board the guy's boat. They had no warrant, no probable cause. The evidence ought to be thrown out."

The younger man dutifully took notes. "So . . . you want me to . . ."

"Find out what the law is. We're going to move to dismiss the case. This poor fellow's facing jail time, fer Christ sake."

The seriousness of the situation sank in to the associate's mind, which was normally engaged in abstractions. "How long?"

"Up to three months. I don't know if that's for each lobster—be sure and research that point. But the fines can go as high as a thousand dollars a lobster!"

"Gosh," the young man said, suitably impressed by the awesome powers of the state that his legal skills would be called upon to oppose.



"So this fella's in need of some serious help. You up for it?"

"Absolutely," the young man said. "What's the timetable?"

"He was arraigned yesterday. I don't do much criminal law, but I feel pretty strongly about this case, so I need somebody to keep me honest."

The young man didn't know exactly what that meant, although over time he came to understand that the partner's charge to him was to make sure he made no mistakes, didn't slip up or miss a technical point that would cost the client his money or his freedom.

"Okay, sure," he said uncertainly.

"Why don't you call the court clerk and the district attorney's office. Introduce yourself, tell them you'll be working with me. File an appearance on behalf of the client."

"What's his name?"

"Wat Tyler. Kind of a character, you'll enjoy him I think."

"Okay. So for now . . ."

"Get the research going. Put your time down to pro bono general under my number and add 'Tyler' to your description so I know which case it belongs to." This administrative detail was mummery on the partner's part; he hadn't taken a case without pay in the quarter century he'd been practicing law. He'd never handled a criminal matter.

"Okay," the younger man said as he moved to the edge of his chair, waiting for further instructions or to be dismissed.

"We should have some fun with this one—and it's for a good cause," Fox said with a smile that signaled he relished the fight that lay ahead.

"I'll get on it right away—thanks," the younger man said as he got up to go. He felt physically changed as he walked back up to the library, a different man than the one who had walked down the stairs a short time ago.

He sat down for a moment at the table where he'd left his things and opened up his portfolio to look at his notes, which upon review provided him with only the barest outline of the case; lobster, 4th amend constitut, warrant?

He went to the stacks and pulled down the deep maroon volume that contained the Fourth Amendment and began to look through the index to the cases. Nothing about lobsters. He got on the computer terminal and began to search using various combinations of terms. After a while, he came across a doctrine that seemed to create an obstacle for the client; if evidence was in plain view it could be seized without a warrant if its incriminating character was immediately apparent. He supposed it would come down to facts; where the lobsters were, how far away the state police were when they saw them, and so on.

He printed out some cases and took them back to his office. He wanted to think for awhile about how he could best characterize them to Mr. Fox. He didn't want to seem as if he was ready to give in just because the law didn't seem to be on their side.

He decided to put the research aside for the time being and follow up with the court. He called the clerk's office and got the name of the assistant district attorney who was handling the prosecution, then stewed for awhile before calling him.

He looked the fellow up in the lawyer's directory; he was a recent law school graduate, as he was, so it would be a contest of equals. He felt better about his chances and so, after taking a deep breath, he dialed the man's number.



"O'Malley," came the voice at the other end of the line.

"Hi, uh, this is Thomas Van der Kellen, I'm calling about a guy named Wat Tyler."

"Oh, yeah. That's mine. They caught him red-handed."

He knew better than to get into it with an adversary over the phone; there was no point to it he'd been told early on by one of the more senior associates. Just move things along, keep things professional.

"When's the arraignment?"

"It was yesterday—he pleaded not guilty. He said he didn't have counsel. You been retained?"

"We're representing Mr. Tyler pro bono."

"Oh, pro bo-no," the other lawyer said, drawling out the words. Thomas seemed to catch a note of mockery in O'Malley's voice. "Well, that should save him a pile of dough."

"When's the next hearing?" Thomas asked, trying to get things back on a procedural track.

"It isn't a hearing," O'Malley said, making a fine distinction with a coarse tone. "Next step is a pre-trial conference. You and me get together and talk about how we're gonna dispose of the case. If your guy's pro bono I guess that means he can't pay a fine?"

"I . . . can't say at this time."

"Cause if that's the case then we're lookin' at some jail time."

Thomas wondered if he had blundered into some sort of trap that O'Malley, apparently more experienced in criminal matters, had laid for him. "We'll be filing a preliminary motion before then," he said hastily, trying to put up a strong front after he'd lost a point.

"What kinda motion?"

"A motion to quash the evidence."

There was silence at the end of the line. I have him back on his heels, Thomas thought to himself.

"On what grounds?" O'Malley asked, sounding incredulous.

"Unlawful search and seizure," Thomas said, trying to sound more confident than he was.

"Okay, counselor, if you want to make two dozen short lobsters into a constitutional case, I guess we can play that game. I don't think the court is gonna be receptive to it."

"Well, that's why we have judges, isn't it," Thomas said, feeling a bit better about himself.

"Sure. You go ahead and file your motion. Right now, I don't even have to turn over any evidence to you, so it's gonna be premature."

"As I said, it's a preliminary motion."

"Nice talkin' to you," O'Malley said, then hung up as if their conversation had ended by agreement.

Thomas felt his face redden; he hadn't gotten things off to a good start, but Fox had been the one to strike the aggressive note, he assumed that was what was called for.

When the time came for his next interview with Fox Thomas was ready but apprehensive; he had no good news to report on either the legal or practical fronts.

"So how do they measure a lobster anyway?" Fox asked, a question Thomas wasn't expecting but was prepared for from his reading.

"From the rear of the eye socket to the rear end of the body shell."

"How the hell can they get an accurate measurement when the thing's squirming around?"

"I don't know. Maybe they hold the body down."

"Hmm. Could be. So why didn't they need a warrant?"

"Lobster fishing is a regulated activity and there's an expectation you'll be inspected. The Marine Fisheries people can stop you and ask to see your license and inspect your equipment."

"Without a warrant?"

"Without a warrant."

"That's got to be wrong," the older man said, turning to look out the window. "Did you research federal cases—I mean not just Massachusetts?"

"There's a California case."

"Involving lobster?"

"Spiny lobster. Administrative searches and seizures are reviewed under a lower standard when the governmental action serves an important state need independent of criminal law."

"So, a state lobster cop can search anybody, anytime?"

"Yes." He realized he sounded disloyal to the client and less than zealous, so he explained. "Well, no, he can only inspect people who are fishing."

"But from what I understand our guy was just cruising along. Whatever he'd done he'd done, so he wasn't fishing when they stopped him."

"They can inspect people engaged in the regulated activity if limiting inspections to those suspected of committing violations

would undermine the state's ability to address the need. That was the California case."

The partner didn't seem satisfied. "Could they do a full body cavity search? Give him a breathalyzer test?"

"No, but they didn't. If the search is limited to the purpose of the statute it's not unreasonable under the Fourth Amendment."

The reason for the rule began to sink into the older man's brain, but he still didn't seem satisfied. "Okay, I'm with you so far. But where were the lobsters? Suppose they were down in the galley? Wouldn't they have to get a warrant then?"

"Maybe, but if you read the older cases you see that shucking lobster meat and cutting it up on board was one of the ways people used to skirt the law. So it might be all right."

The partner found the whole notion troubling. "Here's a man just trying to feed his family—from the sea. He brings lobsters up into his boat, maybe hasn't even measured them yet, maybe he's just eyeballed them. He gets then on board and the police swoop down on him. Seems awfully unfair to me," he swiveled around and looked the associate straight in the eye.

"Well, I guess it will depend on the facts," Thomas said, hoping to redeem himself as an advocate in the eyes of his senior.

"Maybe it will," Fox said. "We need to get the client in here and talk to him. Abby!" he called out his door.

"Yes Mr. Fox?"

"Would you get Wat Tyler on the line?"

"Will do."



The younger man was both impressed and repelled by the practice the older lawyers followed of having their secretaries make telephone calls. On the one hand, it seemed awfully vain of some people to think such an easy task beneath them, and the person on the other end of the line might find it condescending that the caller couldn't trouble himself to do the actual physical labor of pressing a couple of buttons. On the other hand, he'd heard it explained as an efficiency measure; if you delegated that sort of thing to others you had more time to tend to the mental side of the law.

"I'll put him through," Fox's secretary said after a moment, and the phone beeped in his office.

"Hullo there," Fox boomed cordially into the receiver. "Staying out of trouble?" Thomas was impressed that a senior partner could get on so cordially with an indigent client; perhaps he'd been wrong about the apparent formality of the proxy dialing.

"Say, we've got a few questions for you about what actually happened the other day," Fox continued after the pleasantries were over. "Do you think you could come in fairly soon so we could get

your side of the story, from beginning to end? I think it would help us prepare your case."

Thomas watched as the older man handled the client in an efficient and sensitive way; he wasn't doubting the man's story, just wanted to get all the facts. There might be something that was important legally that the fellow had overlooked, or thought didn't matter.

"I've got a bright young fellow working on your case," Fox said, winking at Thomas. "He'll sit down with you and tease out all the facts, okay? So, shall we say Thursday morning about . . . 10:00? How's that? Okay, I'll get a conference room here and you'll be meeting with Thomas Van der Kellen," he paused to listen for a moment. "No, I'm not shunting you off on some rookie. I'm very involved in the case. I have a meeting out of the office in the morning so I may be running late, that's all. All right. I'll plan to see you then."

Fox hung up the phone and gave Thomas a look of exasperation. "Everybody demands top-notch service, even when they don't pay your bills," he said with a look of jaded amusement on his face. Thomas smiled back, wondering at the ingratitude of some people.

When the day arrived the partner had arranged for a tape machine to record Mr. Tyler's statement so his secretary could transcribe it into an affidavit. The receptionist called her when he arrived; she ushered him into the conference room and got him coffee, then buzzed Thomas's line to tell him the client had arrived.

When he entered the room and got his first look at Tyler he was slightly surprised, but stifled the impulse to judge the man; after all, he was poor, and so one shouldn't expect that he'd meet the standards of the professional world in his dress or appearance. He had white stubble on his face, which was red from the sun where you'd expect it to be for a fisherman, and red around the nose and eyes in a way that suggested he liked to drink. He had on boat shoes but no socks; a worn pair of Nantucket red pants; a good tattersall checked shirt that showed signs of age; and a faded blue blazer.

Thomas imagined the man that morning, getting dressed up in a fashion that he was probably unused to, and uncomfortable in.

"Mr. Tyler?" he asked as he stood at the threshold. The greeting didn't register at first; Tyler sat staring straight ahead into the middle distance, lost in thought. Probably contemplating what sort of facility he'd be incarcerated in if he were convicted.

"Mr. Tyler?" he tried again, after clearing his throat.

"You Thomas?" the man said, standing up.

"Yes." Thomas moved towards the man, who seemed unsteady as he stood up. "Nice to meet you."

"Nicer to meet you, I'm sure," Tyler said, and Thomas smiled in appreciation at the man's apparent gratitude.

"Are you all set with coffee and everything?" Thomas asked.

"Yes, that nice lady took care of me."

"Good, good. So—let me get the tape recorder here going and I'll start asking you some questions."

"Fire when ready, Gridley," Tyler said. He looked out on the harbor, inattentive. Thomas identified himself and Tyler on the tape, noted the date and time, then settled himself in with three pages worth of questions that he'd thought of as relevant to the charges and the events of the fateful day.

Tyler was vague at times, but generally responsive. His story resembled that of other cases that Thomas had read; the defendant claimed he always threw back short lobsters, or didn't realize they were short, or was just in the act of throwing them back when he was caught. There were reports to the legislature of the problem of short lobsters and how the taking of them depleted the stock. The prices the shorts brought was too great a temptation, however, and so fisherman had been risking fines and jail for as long the Commonwealth had regulated them.

Tyler's defense was that he hadn't measured the lobsters yet, but this was undercut by the number he'd been caught with; he'd had plenty of time to check, but he'd kept going—it didn't look good.

Still, there was the man's demeanor, thought Thomas; he was self-assured, but not cocky. His family had been fishing for lobsters since

before he was born, Tyler said; his grandfather had taken him when he was a little boy, and he'd said that his grandfather had done the same with him. So there were at least four generations to back him up; no Tyler had ever been caught with his shorts on, as the expression went.

When Thomas had run out of questions he said "That's all I have," then intoned the magic words he'd learned from reading deposition transcripts—"Further affiant saith not"—into the tape machine and turned it off.

"Well, I hope that does the trick," Tyler said. He seemed to relax a bit, although he'd never appeared particularly worried when he was answering questions;

"Demeanor is testimony" Thomas had heard Fox say one time, and he contemplated putting the old fellow through his paces on the witness stand, then turning him over to that distasteful O'Malley fellow who he imagined would be frustrated by Tyler's aplomb.

"I think it will," Thomas said. "I hope the case goes to trial."

"You need the experience?" Tyler asked, pointedly but with a friendly tone.

"Sure. Someone like me has to spend a lot of time in the library, so you can imagine how I'm looking forward to my first trial. Especially representing someone who's indigent so you're doing good . . ."

"Indigent? Is that what Fox told you?"

Thomas wondered if he'd said the wrong thing. "Well, he said we were doing it pro bono, so . . ."

"Hell, I could buy and sell him three times over. I'm not a charity case, I'm just cheap. I hate paying lawyers money."

"Sorry I . . ."

"I was his fraternity brother in college. I could go to a real criminal lawyer but I figured he could use the work. He used to represent my dad's company, but since we sold it we haven't needed a lawyer much."

"Oh."

Fox came in and with a booming voice said "Well hello, you old salty dog!" to Tyler and the two men shook hands. "You up for a bite of lunch?"

"I could use some, sure," Tyler said. "I'm exhausted from the third degree I've been getting from this young fellow here."

"Well, I hope it wasn't too bad."

"No, you've got a good man there, very thorough, very capable," Tyler said.

"Good, good. Well, I've got a table up at the Union Club for noon if you don't mind walking a few blocks."

"Sure. Walk will do me good."

The men turned and started to leave the conference room but Fox stopped and turned around. "You'll have Abby type that up, right?"

"Right. Then I'll try to edit it down."

"Okay." Fox started to leave again but then stopped and turned around. "You . . . want to join us for lunch?" he asked, as Tyler stood in the hall, looking over his shoulder.

"No, that's fine," Thomas said. "I've got a lot of work to do."

From the collection "Ice Cubes for the Hell Ship, and Other Legal Fictions," available on amazon.com.

