CHAPTER 13

# Law Office Memo

## INTRODUCTION

One of the standard legal documents written by a paralegal or attorney is what will be referred to in this book as the "law office memo." (Sometimes it may be referred to as an "office memo" or "interoffice memorandum.") This chapter includes two sample office memos and explains the purpose and use of the office memo and its format. The first time you read this chapter, glance over the sample office memos, noting their format. Then refer back to the sample office memos as they are being analyzed in the balance of the chapter.

The first sample office memo has been extensively annotated to provide you with writing and citation tips. If the notes do not make much sense to you right now, read them again after you have reviewed the rules for citations and quotations contained in Appendixes B and C. It might also be helpful to you to refer to the footnotes again when you are writing your own office memo.

## PURPOSE AND USE

Legal research is required when the client or the attorney is confronted with a legal problem and the answer to the problem is unclear. A client who is planning a business deal may be wondering how the deal can be structured most advantageously to minimize taxes. Often a client is contemplating suing someone. It is important for both the client and the attorney to know what the chances are of the client obtaining a judgment and whether the client would be entitled to attorney fees. After the lawsuit has been filed, there may be a procedural question that the attorney needs researched.

The main purposes of the office memo are to record the law found as a result of the research, to explain how the researcher analyzed the law and applied it to the facts, and to ultimately propose a solution to the problem. At the moment the research on the problems has been completed; the researcher is the "expert" on the legal principles involved but the researcher will quickly forget many of the details of the research. Depending on the complexity of the questions, one hour, several hours, or several weeks of research might have been required. For a client being billed at an hourly rate, research is expensive but necessary. Writing an office memo allows both the client and the attorney to benefit from the research. The office memo can be read several times and discussed before a decision is made. Although you will find that your first office memo seems to take days to write, edit,

and rewrite, the time spent by an experienced writer on an office memo is fairly small in comparison to the time spent doing the research.

Usually, multiple copies of the office memo are made, with one copy being kept by the researcher, one copy going to the attorney in the office who had requested the research, one copy being placed in the client file, one copy going to the client (if the client is sophisticated enough to understand it), and one copy being placed in a research file in the office. The attorney and the client use their copies to decide how to resolve the problem discussed in the memo. The copy in the client file can be used later to quickly refer to the facts or to the analysis behind the decision made. Often the researcher has spent time pulling the facts together from various sources and organizing them. The memo may be referred to quickly to refresh one's memory on the facts without having to consult various sources or to understand later why the particular decision was made. The copy placed in the research file may be used to aid in later research; there may be further research to be done later on the same or a related problem. The researcher can quickly pull prior office memos and determine whether any of the research previously done can be used. If the researcher is lucky enough to find a prior office memo involving the same problem, all the researcher may have to do is update the research from the date of the prior memo.

## STYLE

A number of common style errors made in office memos can be easily avoided if you know what to do and what not to do. After you have written the first draft of your office memo, read this section again and make any necessary change to your memo.

First of all, the tone of the office memo should be objective rather than persuasive. Choose words that are fairly neutral. For example, referring to the illegal drug problem as a "serious menace" as one court did in its opinion is fine for an opinion, but that language sounds too persuasive for an office memo. Instead substitute "serious problem."

Secondly, keep yourself out of the memo. Even if the office memo contains your opinion, keep the tone of the office memo as impersonal as possible and do not use the word "I." Instead of saying: "I think that . . ." you might substitute: "Based on similar facts in Smith and Campbell it is obvious that. . . ."

A third style tip is to avoid using contractions, slang, or any other informal expressions that are normally used in spoken rather than in written communication. Although the tone of the office memo does not have to be so formal it is uninviting to read, it should be somewhat formal. Contractions and slang lend too informal a tone to your office memo.

A fourth error is use of elegant variation. Your English composition teacher probably told you not to use the same word twice and to use synonyms to make your writing more interesting. This is fine for English composition but not for legal writing. If you use two different words that mean the same thing, like "lawyer" and "attorney" or "purchaser" and "buyer," an attorney reading your writing will immediately want to know why you changed wording. The attorney will also assume there is some reason for the change. Perhaps you were referring to something different when you used a different word. If you are referring to the same thing a second time, use the same reference term.

The final style error is to use an abstract word when a more specific one is available. For example, in *Campbell* (the case on which the first sample office memo was based), the agents discovered cocaine in Campbell's car. Rather than talking about suppression of the "evidence" or the "drugs," tell your reader that Campbell filed a motion to suppress the "cocaine." It is just as easy to use the word "cocaine," it makes it easier for your reader to picture, and the word is more descriptive than "evidence" or "drugs."

## FORMAT

Although there is no one correct format for office memos, the format given in this chapter is fairly standard. Another format frequently used has the same major sections but places the facts after the issues and answers. Ask your professor what format he or she prefers. You will need to do the same thing if you are asked to write an office memo for your job. Many law offices have a format that the attorneys prefer.

The following portion of this chapter tells you in general terms what to put in each section of the office memo. You may want to read the following sections while comparing them to the sample office memos.

### TO AND FROM

These two sections contain the name of the person who assigned you the office memo and your name. If the office memo will be read by persons other than the person who assigned you the memo, you may want to add their names as well.

### RE

Identify the subject matter of the office memo in a phrase with sufficient detail so a reader will know whether to read further.

### DATE

The memo should be dated either the date you complete your research or the date you deliver it to your reader. The date is important for future reference because it is assumed that the research reflected in the memo is current with the date of the memo or shortly before.

### FACTS

Clearly state significant facts that the reader needs to know to understand the reasoning section of the memo and limit them to one or two paragraphs. The facts are the facts; do not invent facts. If you do not know important facts spend more time gathering them, or, if that is impossible, state what facts are not known. Where important facts are unknown, you may have to assume facts and then base your research and your office memo on the assumed facts. This is fine so long as you clearly state your assumption and explain that your discussion and conclusion are based on your assumption. You may even want to assume facts in the alternative and explain what conclusions you would reach based on the various assumptions.

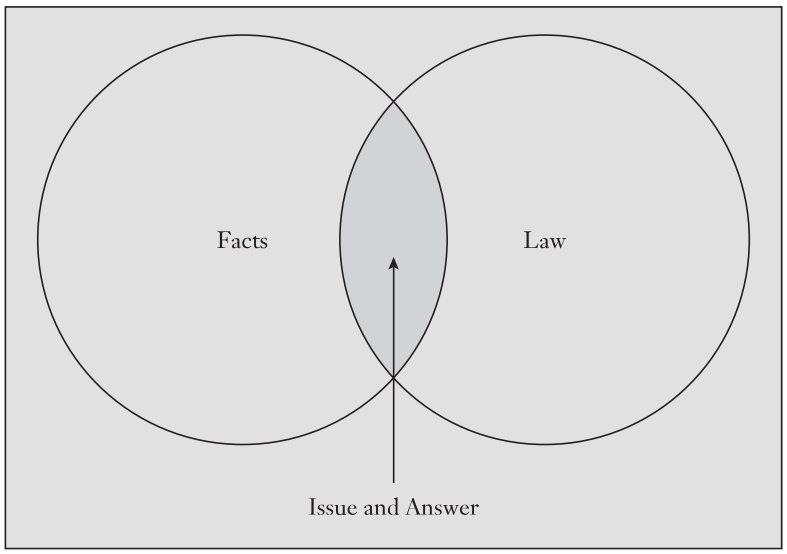
### ISSUE(S) AND ANSWER(S)

You should spend considerable time writing your issues and answers because they are the heart of your memo. You may have an idea of what your issues will be before you begin your research, so write down your issues at this preliminary stage. As you perform your research and write your office memo, you will probably find yourself revising your issues and answers several times.

An issue and the corresponding answer should each be one sentence in length while giving the reader the most information possible. An issue is usually stated in the form of a question, and the answer is a full sentence response to the issue. Usually there are the same number of issues as answers, with each issue being paired with an answer. Number your issues and answers to make it easier for your reader. If you find, in including as much information as possible in your issue and answer, that the issue and answer become unwieldy, experiment with splitting up an issue and answer into two issues and two answers.

An issue and answer contain a blend of fact and law, as depicted in Exhibit 13-1. For example, the first issue and answer from the first sample office memo in this chapter are shown.

**EXHIBIT 13-1**
Issue and Answer.




The words relating to the facts are underlined and the words relating to the law are italicized. Some words are italicized and underlined because they relate both to law and to fact.

## ISSUE

1. Did the agents have *reasonable suspicion* to stop the car for an *illegal* drug violation?

## ANSWER

1. Because the *factors* in the *drug courier profile*, even if taken together, did not support *reasonable suspicion* of *illegal* drug activity, the cocaine should be *suppressed* unless the agents had *probable cause* to stop the car for a *traffic violation*.

## REASONING

The substance of the reasoning portion of the office memo usually is comprised of a thesis, a short conclusion, the statement of the rule of law, and the application of the rule of law to the facts.

### Format for Reasoning

The reasoning portion of the first and second sample office memos in this chapter are examples of the way in which an office memo with more than one issue and one answer can be organized. The first sample office memo contains two issues and two answers; the second sample office memo contains three issues and three answers.

### Thesis Paragraph

**thesis paragraph**
This paragraph should contain your thesis—the central idea of your memo.

The reasoning portion of your office memo should begin with a **thesis paragraph**. This paragraph should contain your thesis—the central idea of your memo. It should serve as a road map, giving your reader the big picture of your memo. Besides stating your thesis in your thesis paragraph, you may want to state your final conclusion in simple terms.

### Rule of Law

**statement of the rule of law**
The law contained in legal sources.

The **statement of the rule of law** is the law contained in any legal sources and which will be applied to your facts later in your memo. Usually the law is contained in primary

sources, but sometimes you may have to rely on secondary sources (such as law review articles or legal periodicals) if there are no primary sources on point.

You need to clearly explain the rule of law to the reader so the reader has a solid basis for understanding the rest of your reasoning. If your law is contained in constitutional or statutory provisions you may want to quote the relevant portions of those provisions. Leave out any portions of the provisions that are irrelevant and indicate any omission by the use of an ellipsis. If the provisions are very simple, you may want to explain them in your own words rather than quoting them. If your law is from case law, explain enough about the precedent case so the reader can understand what the case stands for and can better comprehend your application of the case to the facts of the current problem. You may need to devote one or more paragraphs to explaining the significant facts of an important case where you will later be comparing the facts of the case to the facts of the current problem. Your reader will be able to understand the rest of your reasoning better if you have first given the reader a good foundation in the rule of law.

### Application of Law to Facts

Many students spend so much energy explaining the rule of law that they do not have energy for the application and may skip from the rule of law to the conclusion. This is a fatal error because the application is the most important part of the office memo. Omission of the application in the office memo results in a reduction of the student's grade, severely hampers the reader's understanding, and greatly lessens the memo's utility.

When applying the law to the facts, you must lead the reader step by step from the law to your conclusion. You must specifically explain why a constitutional or statutory provision applies or does not apply to the facts before explaining the consequences of the application. When applying case law, specifically tell your reader what facts from a case are similar to and what facts are different from the facts in the memo and explain why. It is not sufficient to simply state that facts are similar or different without telling your reader which facts you are referring to and why. You may not be conscious of some of the steps you used in concluding that a particular case is or is not controlling. Try to consciously think of the steps you went through in moving from the law to the conclusion and then write your steps down on paper so your reader can understand your analysis.

Exhibits 13-2 and 13-3 are charts you might use to help you brainstorm your application. Use Exhibit 13-2 if you have a case you will be discussing in the application portion of your reasoning. Use a separate chart for each case discussed in your application. In the first column, list facts that are similar when comparing the facts of the problem you have researched. List facts that differ in the second column. In the last column, state the rule of law from the case and state a conclusion for your research problem. Remember the doctrine of stare decisis. If the case you are using is mandatory authority and the facts are substantially the same as the facts in your research problem, then the research problem should be decided the same way. If the facts are not substantially similar, then your research problem may be decided differently than the case.

Use Exhibit 13-3 if you have one or more statutes you are applying to your research problem. In the first column, write the citations to your statutes. In the second column, list ways in which the statutory language applies or does not apply to your research problem. In the third column, write your conclusion as to the applicability of the statutes to your research problem.

Your writing of the statement of the rule of law and the application should be so clear that someone who has never read about the area of law before can understand your memo. You probably have a friend or relative who has a difficult time understanding a detailed

| NAME OF CASE | | |
|---|---|---|
| Facts that Are Similar | Facts that Are Different | Rule of Law and Conclusion |
| | | |

**EXHIBIT 13-2** Case Analysis Chart.

| STATUTORY ANALYSIS | | |
|---|---|---|
| Relevant Statutory Sections | Relevance | Conclusion |
| | | |

**EXHIBIT 13-3** Statutory Analysis Chart.

explanation. Picture yourself with that person and imagine how you could explain your office memo to that person. Have someone else who has no knowledge of that area of the law read your memo and tell you if there are any passages he or she could not understand. Rewrite those passages so almost anyone can understand them. Try reading your office memo out loud either to yourself or to someone else. A passage that seems perfectly clear when you read it silently may not sound very clear when read out loud. Rewrite any passages that are unclear or awkward.

### CONCLUSION

Your conclusion should be a final paragraph that ties everything together. Remember that in applying case law to your facts you are guided by the *doctrine of stare decisis*. If the facts in a prior case from the same or a higher court are substantially similar, then the answer to the problem should be the same as the result reached by the court in the prior case. Summarize the similarities and differences between the case law used as authority and the facts of the memo and explain what cases you are relying on to reach your conclusion.

## FIRST SAMPLE OFFICE MEMO

**To:** legal research and writing classes

**From:** your author

**Re:** whether cocaine found in a car stopped on I-95 should be suppressed

**Date:** April 13, 2009

### Facts

Mike Campbell[1] and his best friend, John Wright, were driving north on I-95 returning from spring break in Florida, when they were stopped by members of a drug task force made up of Volusia County Sheriff officers and federal drug enforcement agents. The agents requested permission to search the car. When Campbell refused consent, the agents brought in a drug dog that alerted to the trunk of the car. The agents then claimed that the dog's actions gave them probable cause to search the trunk and gave Campbell the choice of either opening the trunk or waiting until the agents obtained a search warrant. After Campbell opened the trunk, the agents found two kilograms of cocaine in a brown paper bag. Campbell and Wright were arrested and charged with possession with intent to distribute cocaine. Prior to trial they filed a motion to suppress the cocaine claiming that it was the fruit of an unreasonable search and seizure.

The agents claimed they stopped the Campbell car because Campbell was following the car in front of him too closely and because the following facts fit a drug courier profile used by the Volusia County Sheriff officers:

1. The car was a large late model;
2. The car had out-of-state tags;
3. The car was being driven cautiously at the speed limit;
4. The car was being driven on a known drug corridor, I-95;
5. There were two passengers in the car;
6. The passengers were in their twenties;

[1]It is easier for your reader to understand if you refer to people by their names (a surname is sufficient) instead of as "plaintiff," "defendant," or similar terms. An alternative is to use terms such as "suspect" or "officer."

7. The car was being driven in the early evening; and
8. The passengers were dressed casually.[2]

Although not listed by the agents, Campbell and Wright believe the real reason they were stopped is because they are Afro-Americans.

## Issues[3]

1. Did the agents have reasonable suspicion to stop the car for an illegal drug violation?
2. Did the agents have probable cause to stop the Campbell car for the driver's failure to follow at a safe distance?

## Answers[4]

1. Because the factors in the drug courier profile, even if taken together, did not support reasonable suspicion of illegal drug activity, the cocaine should be suppressed unless the agents had probable cause to stop the car for a traffic violation.
2. If Campbell failed to follow the vehicle in front of him at an appropriate distance, the stop did not violate the passengers' fourth amendment[5] right against unreasonable search and seizure and the cocaine cannot be suppressed on that ground.

## Reasoning[6]

Federal legislation makes possession of cocaine a crime and officers have the task of enforcing this legislation. One method used to check illegal drug activity is to cut down on the transportation of illegal drugs along the nation's highways.[7] Unfortunately, there is no accurate method to determine which cars on the highway are carrying drugs unless the cars are stopped and searched. The car driver and passengers expect that activities within the car will be private and not subject to the scrutiny of law enforcement officials. They may feel that their privacy is invaded if a law enforcement officer stops the car to investigate. A trained police officer may have a hunch that a car's occupants are engaged in illegal

[2]When you have a list of items, make it easier for your reader to skim down the list by tabulating. Number each item, follow each item except for the last one by a semicolon, and place the word "and" after the semicolon following the next to last item. Make sure that you follow parallel construction for all items. (See Appendix D for an explanation of parallel construction.)

[3]Each issue should be a single-sentence question. Between the issue and the answer you should give your reader the most information possible. Often a reader will read the issues and the answers first to determine if he or she should read the whole memo. It is very frustrating for the reader if the reader cannot make that determination without reading the rest of the memo.

[4]Each answer should be a complete, single-sentence answer responding to an issue. Usually there are the same number of answers as there are issues. An exception would be, for example, if the issue is so broad that there are two parts to the answer. As previously, between the issue and the corresponding answer, give your reader the most information possible. If you find an issue and answer getting so long as to be unwieldy, try splitting them up into two issues and answers.

[5]If you refer to a constitutional or statutory provision in an issue or answer by number, also give your reader a short explanation of the provision's subject matter. Otherwise your reader will be frustrated by not knowing why you cited a particular provision. It is usually better not to give case citations in issues or answers. Instead, state the rule of law from the case in your issue or answer and cite the case in the reasoning section of your memo.

[6]You should begin the reasoning portion of your office memo with a thesis paragraph. A well-written thesis paragraph provides the reader with a framework into which the balance of the memo can be placed. It also tells the reader your ultimate conclusion.

A *thesis* is the central idea running through the entire memo. The time you spend before you start writing in developing your thesis is well worth it. Once you find a central idea, it will be much easier to organize the writing of your memo. To find a thesis, think in broad terms of a problem or controversy which is the basis for your memo—the problem or controversy that caused you to do the research in the first place. This memo concerns the delicate balance between society's interest in enforcing criminal drug statutes against the individual's constitutional right against unreasonable search and seizure. The courts recognize society's interest by prosecuting those believed to have violated criminal drug statutes, but the courts also recognize the individual's constitutional right by excluding any evidence obtained in violation of the Fourth Amendment.

[7]Be sure to keep your tone objective rather than persuasive.

activity; however, a law enforcement officer may not constitutionally stop a car unless there is a reasonable suspicion of illegal activity or there is a traffic violation.[8]

The stop of Campbell's car to investigate for criminal activity was not permissible because the agents did not have reasonable suspicion of illegal drug activity. If Campbell violated a Florida statute by following too closely, the stop for a traffic violation was constitutionally justifiable.[9]

The Fourth Amendment[10] to the United States Constitution guarantees "[t]he[11] right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures" and allows a search warrant to be issued only upon "probable cause."[12] The Fourth Amendment does not prohibit all searches and seizures—just *unreasonable* searches and seizures. Although obtaining a search warrant before conducting a search is preferable, the courts have allowed a number of exceptions to the search warrant requirement over the years. One exception[13] is for illegal drug activity and another exception is to investigate a traffic violation. These two exceptions are the ones involved in *Campbell* and are discussed in detail in this memo.

*Terry v. Ohio*, 392 U.S. 1 (1968)[14] was the landmark case that lowered the burden of proof necessary for a stop from probable cause to "reasonable suspicion." In *Terry*[15] the United States Supreme Court held that police officers could stop someone on the street to investigate possible drug activity so long as the stop was based on something more than an "unparticularized suspicion or 'hunch.'"[16] To reach the level of reasonable suspicion, the officer may rely on "reasonable inferences" from "unusual conduct." *Id.* at 27.[17] Such stops made on reasonable suspicion are often referred to as "'Terry stops" after *Terry* and the definition of Terry stops has been broadened to apply to car stops. Once a Terry stop is made, the officers would still need probable cause or consent to search a car.

In recent years, federal courts[18] have decided a number of cases in which the defendants filed motions to suppress claiming that the evidence seized from cars should be suppressed because of a violation of their right against unreasonable search and seizure. In a case involving almost identical facts to those in *Campbell*,[19] the United States Court of Appeals for the Eleventh Circuit found that a highway stop was not reasonable under the Fourth Amendment even though the stop was made based on a drug courier profile and the driver had allegedly committed a traffic violation. *United States v. Smith*, 799 F.2d 704,

[8]This paragraph is the thesis paragraph.

[9]This paragraph contains a short conclusion.

[10]When quoting a constitutional or statutory provision, quote only the relevant portion. Set quotations of fifty words or more off from the rest of the text in a quotation block indented left and right but not enclosed in quotation marks. If the quoted passage contains a quotation, the internal quotation should be enclosed in quotation marks.

[11]The brackets indicate a change in the quotation from the original. Originally, the "t" was upper case.

[12]Periods and commas go inside quotation marks. Other punctuation is placed outside quotation marks unless it is part of the quotation.

[13]Signposts are words used to guide the reader in a particular direction. "One exception" and "another" are signposts clearly identifying the two exceptions that are discussed in much more detail later in the memo.

[14]The first time you are referring to a case by name you must give the full citation. After that you should use a short-form citation.

Citations in the sample office memo are given in *Bluebook* form. Your professor may require you to cite according to some other citation rule (perhaps your state's citation rule). If so, always check the appropriate citation rule to make sure you are citing correctly.

[15]Once you have given the full citation for a case and are referring to the case in general terms, you can refer to it by using one or two of the words from the name of the case and underlining or italicizing it. Be sure the words you select are not so common as to cause confusion. Here, for example, use *Terry* rather than *Ohio*.

[16]To indicate quotes within quotes, alternate double and single quotation marks, with double quotations outermost.

[17]"*Id.*" means that you are referring to the immediately preceding authority cited and "27" tells you the page number on which your reader will find the material.

[18]Capitalize the word "court" only when referring to the United States Supreme Court or to the full name of any other court.

[19]Refer to "*Campbell*" showing it is a case because Campbell and Wright have had charges filed against them.

712 (11th Cir. 1986).[20] Although the *Smith* court found that the *Smith* drug courier profile did not support reasonable suspicion, the use of drug courier profiles is not per se unconstitutional. *Id*. at 708 n. 5.[21] The United States Supreme Court has allowed the use of drug courier profiles where all the factors of the drug courier profile taken together do support reasonable suspicion. *United States v. Sokolow*, 490 U.S. 1, 9 (1989).

In 1996, the United States Supreme Court decided that a stop for a traffic violation does not violate the driver's constitutional right against unreasonable search and seizure. *Whren v. United States*, 517 U.S. 806, 818 (1996). Under the Fourth Amendment, a police officer may stop a car for any type of traffic violation, no matter how minor. A traffic stop is constitutional so long as there is a technical violation of a traffic regulation; it does not matter if the reason the agents gave was a pretext for the stop based on race. If Campbell violated the Florida statute by following too closely, then the stop was constitutional. If Campbell did not violate the statute, then the stop was unconstitutional.

This memo will discuss *Smith*,[22] *Sokolow*, and *Whren* and apply them to the above facts to answer the two issues being considered.[23]

**Reasoning for issue one**[24]

One night in June of 1985, Trooper Robert Vogel, a Florida Highway Patrol trooper, and a DEA agent were observing cars traveling in the northbound lanes of I-95, in hopes of intercepting drug couriers. When Smith's car passed through the arc of the patrol car headlights, Vogel noticed the following factors that matched his drug courier profile:

1. The car was traveling at 3:00 a.m.;
2. The car was a 1985 Mercury, a large late model car;
3. The car had out-of state tags;
4. There were two occupants of the car who were around 30; and
5. The driver was driving cautiously and did not look at the patrol car as the Mercury passed through the arc of the patrol car headlights.

799 F.2d at 705–06.[25]

[20]Page "704" is the first page of *Smith* and "712" is the page on which the finding of the court referred to in the preceding sentence is located. As a courtesy to the reader, a page reference should be given when specific material from a case is referred to even if the material is not quoted.

The two types of sentences in legal writing are textual sentences and citation sentences. A textual sentence is the type of sentence you have been writing all your life. It is a complete grammatical sentence with a subject and a verb. A citation sentence contains only citations. A "string citation" is a citation sentence with more than one citation. In a string citation, the citations should be separated by semicolons.

A sentence is more difficult to read when it contains a full case citation, especially if the citation is long. To avoid including a full citation in a textual sentence, refer to a case in very general terms or refer to a legal principle from a case and give the full citation to the case in a citation sentence following the textual sentence.

[21]This reference is to footnote 5 of *Smith* located on page 708.

[22]Delete excess words by writing "*Smith*" instead of "the *Smith* case" or "the case of *Smith*."

[23]This sentence contains transitional language helping the reader make the transition from the introductory material contained in the first part of the reasoning section to the reasoning for issue one. Your reader will understand your memo better if you make transitions from one paragraph to the next as smooth as possible by using transitional language.

[24]The material that applies to both issues was placed in the preceding section. The material in this section of the memo applies to issue one. Some of the material in this section, such as some of the facts from *Smith*, also apply to issue two. Rather than state the *Smith* facts all over again in the next section, you can refer the reader back to this section, if necessary.

[25]When providing a citation for a block quote or other material set off from the rest of the text, as is the tabulation here, bring the citation back to the left margin. "*Id*." cannot be used here because "*id*." would refer back to the immediately preceding citation, *Sokolow*, instead of to *Smith*. Where "*id*." cannot be used, give the volume number of the reporter, the abbreviation for the reporter, "at," and the page number. You could precede this short form citation by "*Smith*," if *Smith* had not been cited for a page or more or the reader might confuse the citation with another case, especially one from the same volume of the same reporter. This is not necessary here because *Smith* has been cited fairly recently.

When citing inclusive pages with three or more digits, drop all but the last two digits of the second number and place a hyphen between the numbers.

This drug courier profile is almost identical to the *Campbell* profile.[26] In both *Smith* and *Campbell* the cars were traveling after dark, the cars were large late models with out-of-state tags, the cars were being driven "cautiously," and each car contained two passengers in their twenties or thirties. The differences between the two profiles are very minor. Campbell and Wright were dressed casually while it is not known how Smith and Swindell were dressed. Smith and Swindell did not look at Vogel as they passed. It is not known whether Campbell and Wright looked in the agents' direction as Campbell drove past. Campbell and Wright claim that race was a factor in their stop even though it was not listed as such by the agents. Smith and Swindell's race is unknown.[27]

In *Smith*, Vogel followed the Mercury for a mile and a half and noticed that the Mercury "wove" several times, once as much as six inches into the emergency lane. Vogel pulled Smith over. When a drug dog alerted on the car, a DEA agent searched the trunk and discovered one kilogram of cocaine. Smith and his passenger, Swindell, were arrested and were charged with conspiracy to possess cocaine with the intent to distribute it. Smith and Swindell's motions to suppress the cocaine were denied and they were tried and convicted. *Id.* at 706.

The issue before the appellate court was whether the stop of Smith's car was reasonable. *Id.*[28] This is the same basic issue that will be before the *Campbell* court when it considers Campbell and Wright's motion to suppress. The *Smith* court held that the stop of Smith's car could not be upheld as a valid Terry stop, *id.* at 708, finding that "Trooper Vogel stopped the car because [Smith and Swindell][29] . . . matched a few nondistinguishing characteristics contained on a drug courier profile and, additionally, because Vogel was bothered by the way the driver of the car chose not to look at him." *Id.* at 707.

Just as there was nothing in the *Campbell* drug courier profile to differentiate Campbell and Wright from other innocent college students returning from spring break in Florida, there was nothing in Vogel's drug courier profile to differentiate Smith and Swindell from other law-abiding motorists on I-95. It is usual to drive after dark to avoid heavy traffic and to complete an interstate trip.[30] Although many motorists speed on the highways, motorists driving "cautiously" at or near the speed limit are simply obeying traffic laws. Many people other than drug couriers drive large late model cars with out-of-state tags. A motorist between the ages of twenty and forty is not unusual.

[26]This is an example of a topic sentence. A topic sentence contains one main idea summarizing the rest of the paragraph, with the rest of the paragraph developing the idea presented in the topic sentence. Most paragraphs should have topic sentences. The typical location of a topic sentence is the first sentence in the paragraph. Sometimes the topic sentence is the last sentence in the paragraph and pulls together the rest of the paragraph. Some paragraphs, typically narrative paragraphs like the preceding paragraph, do not have a topic sentence.

If a paragraph sounds disjointed or unorganized, try pulling it together using a topic sentence. If a topic sentence does not help, think about breaking the paragraph up into more than one paragraph.

[27]This paragraph applies the facts in *Smith* to the facts in *Campbell*. Applying facts from one case to another case involves explaining the similarities and differences between the two sets of facts. Instead of simply stating that the facts from the two cases are very similar, the paragraph specifically states which facts are the same. Sometimes in the application you need to explain in what way the facts are similar if they are not identical.

You can either apply the *Smith* facts to *Campbell* as done here or you can wait until you have thoroughly discussed *Smith*. When you prepare your outline prior to starting to write the office memo, spend some time moving parts of your reasoning around to determine the best flow for your reasoning.

[28]When you are referring to material from the same page as the material you referred to in the last citation, use just "*id.*" Note that *id.* is capitalized only at the beginning of a sentence.

[29]"Smith and Swindell" are in brackets because this wording was inserted into the quotation by the person writing the memo. The ellipsis ( . . . ) shows that something was omitted from the original wording of the quotation. Your quotations must exactly match the wording and punctuation of the authority the quotation comes from. If you are sloppy in quoting and your reader discovers that you have taken "liberties" with the quotation, your reader may suspect that you are sloppy in other ways—perhaps even in your research. See Appendix C for an explanation of quoting correctly.

[30]No page reference is needed where you have already given the facts in the cases you are using as authority and are referring to those cases in general.

The contrast between the *Campbell* and *Smith* drug courier profiles, which do not support reasonable suspicion, and the *Sokolow* drug courier profile, which was held to support reasonable suspicion, is instructive. *Sokolow*, 490 U.S. at 3. In *Sokolow*, DEA agents found 1,063 grams of cocaine inside Sokolow's carry-on luggage when he was stopped in Honolulu International Airport based on the following profile:

1. He had paid $2,100 in cash for two airplane tickets from a roll of $20, which appeared to contain $4,000;
2. He was ticketed under a name other than his own;
3. He traveled to Miami, a known drug source, and back;
4. Although his round trip flight lasted 20 hours, he stayed in Miami only 48 hours;
5. He appeared nervous;
6. He was about 25 years old;
7. He was dressed in a black jumpsuit and was wearing gold jewelry which he wore during both legs of the round trip flight; and
8. Neither he nor his companion checked any luggage.[31]

*Id.* at 3–5. The Court explained that the provided drug courier profile must be evaluated in light of "the totality of the circumstances—the whole picture." *Id.* at 8 (quoting *United States v. Cortez*, 449 U.S. 411, 417 (1981)).[32] "Any one of these factors [in the drug courier profile] is not by itself proof of any illegal conduct and is quite consistent with innocent travel. But we think taken together they amount to reasonable suspicion." *Id.* at 9. The *Sokolow* dissent would have found that all of the factors even if "taken together" did not amount to reasonable suspicion. In criticizing the use of a drug courier profile to stop suspects, the dissent noted "the profile's 'chameleon-like way of adapting to any particular set of observations' " "subjecting innocent individuals to unwarranted police harassment and detention." *Id.* at 13 (Marshall, J., dissenting)[33] (quoting *Sokolow v. United States*, 831 F.2d 1413, 1418 (9th Cir. 1987), *rev'd*, 490 U.S. 1 (1989)[34]).

As predicted in the *Sokolow* dissent, Smith, Swindell, Campbell, and Wright were subjected to "unwarranted police harassment and detention" even though the factors in the respective drug courier profiles, even if "taken together," did not amount to reasonable suspicion. In contrast, several of the *Sokolow* factors, such as carrying such a large amount of cash and traveling a long distance to stay a relatively short period of time, are unusual or even suspicious in and of themselves. Each of the *Smith* and *Campbell* factors was not at all out of the ordinary alone and certainly taken together did not amount to reasonable suspicion.

### Conclusion[35] for issue one

Because the drug courier profiles in *Smith* and *Campbell* are virtually identical and are in sharp contrast to the *Sokolow* drug courier profile, the *Campbell* court should find that there was not reasonable suspicion to stop Campbell and the stop on that ground was an unconstitutional violation of Campbell and Wright's constitutional guarantee against

[31]Only those facts from *Sokolow* that are relevant to the discussion of *Smith* are given.

[32]When you are quoting from a case that in turn quotes from another case, identify the second case by putting the citation to the second case in parentheses following the citation for the case you are quoting.

[33]You must identify the type of opinion you are quoting from if it is other than the majority opinion.

[34]Subsequent history must be given for the lower court decision in *Sokolow*.

[35]Your conclusion section at the end of a reasoning section ties together your previous discussion and reaches a conclusion. The difference between the conclusion section for issue one and answer one is that answer one is a more condensed one-sentence version of the conclusion section.

unreasonable search and seizure. Unless the agents had probable cause to investigate the alleged traffic violation, the *Campbell* court should suppress the cocaine as the fruit of an unconstitutional search and seizure.

**Reasoning for issue two**

An examination of *Whren v. United States* is necessary to answer the second issue. In *Whren*, Brown was driving a Pathfinder in which Whren was a passenger. Brown was stopped at a stop sign looking down into Whren's lap. Plain clothes police officers were patrolling this "high drug area" of the District of Columbia in an unmarked patrol car. The Pathfinder caught the attention of the officers because Brown remained stopped at the stop sign for approximately twenty seconds. When the patrol car made a U-turn to follow the Pathfinder, Brown turned right without signaling and started off at an "unreasonable speed." The patrol car stopped the Pathfinder. When one of the officers approached Brown's window and peered in, he saw that Whren had two plastic bags of crack cocaine on his lap. The officers arrested Whren and Brown. 517 U.S. at 808, 809.

Justice Scalia phrased the issue as "whether the temporary detention of a motorist who the police have probable cause to believe has committed a civil traffic violation is inconsistent with the Fourth Amendment's prohibition against unreasonable seizures unless a reasonable officer would have been motivated to stop the car by a desire to enforce the traffic laws." *Id.* at 808. The Court answered the question, "no." "[T]he district court found that the officers had probable cause to believe that petitioners had violated the traffic code. That rendered the stop reasonable under the Fourth Amendment, the evidence thereby discovered admissible, and the upholding of the convictions by the Court of Appeals for the District of Columbia Circuit correct." *Id.* at 819.

Whren and Brown, both black, had urged the Court to apply the reasonable officer standard. They argued that, because of the multitude of traffic ordinances, an officer could almost invariably find some reason to stop a particular vehicle for an alleged traffic violation. This might allow an officer to target a particular vehicle to be stopped on the pretext of a traffic violation, where the real reason for stopping the vehicle was an impermissible factor such as the race of the persons in the vehicle. *Id.* at 810. The Court dismissed this argument. "We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment." *Id.* at 813. The Court did not explain that an Equal Protection Clause challenge is difficult to prove because it requires evidence of intentional discrimination.

Prior to *Whren*, some courts, including the court deciding *Smith*, had decided that a car stop for a traffic violation was unconstitutional unless a reasonable officer would have made the stop. The *Smith* court found that the cocaine should have been excluded from evidence because a reasonable officer would not have stopped Smith's car for the alleged traffic violation. 799 F.2d at 711. However in *Whren*, the United States Supreme Court rejected the argument that the reasonable officer standard should apply. 517 U.S. at 813.

After *Whren*, it would be very difficult to convince a court that a stop for an alleged traffic violation is unconstitutional. However, if the court finds that the driver did not violate any traffic regulation, then the stop would be unconstitutional.

The applicable Florida motor vehicle statute states: "The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon, and the condition of, the highway." Fla. Stat. Ch. 316.0895 (1) (2008). No simple test determines if Campbell violated the statute. The court must determine from any evidence presented whether the distance at which Campbell was following the car in front of him was reasonable and prudent.

*Whren* and *Campbell* are very similar in that in both cases, the government claimed that the stop of a suspect car did not violate the driver's right against unreasonable search and seizure because there was some irregularity in the way the car was being driven that gave the officer reason to stop the car. The driving "irregularities" are similar in the failure to use a turn signal in changing lanes and speeding in *Whren* and the following too closely in *Campbell* are moving violations that can pose a severe safety hazard; under the circumstances, neither appeared to adversely impact any other vehicle's safety.

The alleged driving irregularities in *Whren* and *Campbell* are dissimilar in several respects. While it was clear that Brown committed a traffic violation, the Florida statute that Campbell allegedly violated does not apply to Campbell if he was following at a safe distance. Determining whether one vehicle is following another vehicle too closely involved much more of a judgment call than determining whether the Pathfinder in *Whren* failed to signal when turning right and exceeded the speed limit. The position of the vehicles on the highway and the weather and road conditions must all be considered to determine if Campbell violated the statute by following the vehicle in front of him too closely.

### CONCLUSION FOR ISSUE TWO

*Whren* rejected the argument that a pretextual traffic stop is unconstitutional. *Whren* is binding on the *Campbell* court. Following the mandatory authority of *Whren*, the *Campbell* court should hold that the stop was constitutional if the agents had probable cause of a traffic violation; the court should hold that the stop was unconstitutional if there was no traffic violation. If the *Campbell* stop violated the Fourth Amendment, Campbell and Wright's motion to suppress would be denied. If the stop were unconstitutional, the cocaine would be suppressed.

## SECOND SAMPLE OFFICE MEMO

**To:** legal research and writing classes

**From:** your author

**Re:** whether drugs found in a car passenger's purse should be suppressed

**Date:** July 13, 2009

### Facts

Cruz Estrada was riding with her friend, Luis Briones, when Luis's car was pulled over. They were traveling south on I-95 toward Miami to visit friends. The officer said he had stopped the car because they were speeding.

The officer stood at the window on the driver's side and asked for Luis's license and car registration. While Luis searched his wallet for the documents, the officer noticed a glass vial containing small kernels of an off-white substance in Luis's lap. Believing the vial to contain crack cocaine, the officer announced that he was seizing it. He asked Luis and Cruz to exit the car and asked Luis for his wallet.

Cruz got out of the car with her purse strap slung over her shoulder. The officer approached her and said, "You don't mind if I search this, do you?" Without giving her time to respond, the officer grabbed her purse and began to search it. Inside her purse, he found a brown paper envelope. Cruz claimed that someone had given it to her to give to a friend in Miami.

Still holding Cruz's purse and Luis's wallet, the officer asked them to wait in the patrol car while he searched Luis's car. Cruz and Luis nervously waited in the backseat

of the patrol car. Cruz admitted to Luis that the envelope was hers and that it contained illegal drugs.

After Cruz and Luis were arrested, she discovered that the police officer had tape-recorded their conversation in the back of the patrol car. Luis told her that the reason the officer gave for stopping them must have been a pretext because, at the most, he was driving five miles over the speed limit. He said he suspected that he had been stopped for what is jokingly referred to as the offense of DWH or Driving While Hispanic.

She has been charged under the federal drug statutes.

### Issues

1. Did the officer have probable cause to stop the Briones car for speeding where Luis was exceeding the speed limit by only a few miles and Luis suspects that his race (Hispanic) was the motivation for the stop?
2. Where the officer grabbed Cruz's purse from her shoulder, did the officer's search of Cruz's purse violate her Fourth Amendment right against unreasonable search and seizure and can the drugs found in her purse be suppressed?
3. Where the officer tape-recorded Cruz and Luis's conversation while they were seated in the backseat of the patrol car, is the tape admissible as evidence?

### Answers

1. Because an officer can stop the car for any traffic violation, no matter how minor, the stop did not violate Cruz's Fourth Amendment right against unreasonable search and seizure and the drugs cannot be suppressed on that ground.
2. Because Cruz did not consent to the search of her purse, she may be able to have the drugs suppressed if the court views her purse as an outer layer of clothing.
3. Because Cruz and Luis had no reasonable expectation of privacy in the back of the patrol car, their conversation was not an "oral communication," suppressible under the federal eavesdropping statutes; however, the tape may be suppressed if the court decides that the search of Cruz's purse was unconstitutional and the tape is derivative of the search.

### Reasoning

The *Estrada* facts illustrate the tension between an individual's expectation of privacy and a federal law enforcement officer's duty to enforce the federal drug statutes. Car occupants usually feel that items they transport in a car will remain private; however, the Fourth Amendment allows a police officer to stop a car for a traffic violation and question the occupants. The officer may search the car if the occupants consent or if the officer has probable cause that the car contains illegal drugs. During the search, the officer may ask the car occupants to wait in the patrol car for their safety or comfort. Suspects seated in the rear seat of a patrol car may expect the same amount of privacy they would have were they in a private car. With the patrol car doors and windows closed, the officer outside the patrol car cannot hear the suspects' conversation. However, the officer might tape the suspects' conversation in the belief that the patrol car is similar to the officer's office in a police station.

Cruz can allege that her Fourth Amendment rights were violated when the officer stopped the car in which she was riding and searched her purse. She can also claim that her conversation in the backseat of the patrol car should have been protected against being tape-recorded under the federal eavesdropping statutes. The stop of the car for a traffic violation was constitutionally justifiable. Because Cruz did not consent to the search of her

purse, she may be able to have the drugs suppressed if the court views her purse as similar to an outer layer of clothing. The conversation in the backseat of the patrol car will not be suppressed under the federal eavesdropping statutes because Cruz and Luis had no reasonable expectation of privacy; however, if the search of Cruz's purse was unconstitutional and the incriminating statements on the tape were the fruit of the search, then the tape could be suppressed as well.

**General reasoning for issues one and two**

The Fourth Amendment to the United States Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures" and allows a search warrant to be issued only upon "probable cause." The Fourth Amendment does not prohibit all searches and seizures—just *unreasonable* searches and seizures. Although obtaining a search warrant before conducting a search is preferable, the courts have allowed a number of exceptions to the search warrant requirement over the years. At least two exceptions apply to a vehicle search. One exception is for the occupants to consent to a search of the vehicle. *Florida v. Jimeno*, 500 U.S. 248, 251 (1991). A second exception is that the officer can search the car if there is probable cause of criminal activity. Even without consent, the officer can search containers found in the car and suspected of holding the object of the officer's search, no matter who owns the container. *Wyoming v. Houghton*, 526 U.S. 295, 300–01 (1999). An officer may not search someone's person without probable cause. *Id.* at 303. These exceptions are the ones involved in *Estrada* and are discussed in detail in this memo.

**Reasoning for issue one**

On June 10, 1996, the United States Supreme Court decided a landmark case in which the Court held that the Fourth Amendment allows a police officer to stop a vehicle for any type of traffic violation. *Whren v. United States*, 517 U.S. 806, 819 (1996). The facts of *Estrada* and *Whren* will be compared to determine if the *Estrada* vehicle stop was constitutional.

In *Whren*, plain clothes law enforcement officers were patrolling a high drug area of the District of Columbia when they passed a Pathfinder truck stopped at a stop sign. The driver was looking into the lap of the passenger and the truck paused an overly long period of time at the stop sign. As the patrol car made a U-turn to approach the truck, the truck turned right without signalling and started off at an "unreasonable" speed. The patrol car overtook the truck and stopped it. Whren was a passenger and Brown was the driver. When one officer looked through the driver's window, he saw plastic bags of something resembling crack cocaine in Whren's hands. *Id.* at 808.

In *Whren*, Justice Scalia phrased the issue as "whether the temporary detention of a motorist who the police have probable cause to believe has committed a civil traffic violation is inconsistent with the Fourth Amendment's prohibition against unreasonable seizures unless a reasonable officer would have been motivated to stop the car by a desire to enforce the traffic laws." *Id.* at 808. The Court answered the question, "no." "[T]he district court found that the officers had probable cause to believe that petitioners had violated the traffic code. That rendered the stop reasonable under the Fourth Amendment, the evidence thereby discovered admissible, and the upholding of the convictions by the Court of Appeals for the District of Columbia Circuit correct." *Id.* at 819.

Whren and Brown, both black, had urged the Court to apply the reasonable officer standard. They argued, that because of the multitude of traffic ordinances, an officer could almost invariably find some reason to stop a particular vehicle for an alleged traffic violation. This might allow an officer to target a particular vehicle to be stopped on the pretext of a traffic violation, where the real reason for stopping the vehicle was an impermissible factor

such as the race of the persons in the vehicle. *Id.* at 810. The Court dismissed this argument. "We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment." *Id.* at 813. The Court did not explain that an Equal Protection Clause challenge is difficult to prove because it requires evidence of intentional discrimination.

After *Whren*, it would be very difficult to convince a court that a stop for an alleged traffic violation is unconstitutional. One instance is if the facts, which the officer states violate a traffic ordinance, are found by a court not to violate the ordinance. For example, an officer could stop a car because the officer believes that the windows are too heavily tinted. A court could find the stop unconstitutional if the tinting, although dark, did comply with the applicable traffic ordinance. Another instance is if the court finds that the officer lied; no facts existed that could support the alleged violation.

*Whren* and *Estrada* are very similar in that in those cases, the government claimed that the stop of a suspect car did not violate the driver's right against unreasonable search and seizure because there was some irregularity in the way the car was being driven that gave the officer reason to stop the car. The driving "irregularities" are similar in that Brown's failure to signal a right turn and speeding off and Briones' speeding did not appear to cause any imminent safety hazard. From the facts of the two cases, it appears that Brown exceeded the speed limit for only a short distance and Luis may have been travelling only a few miles over the speed limit. In each case, the reason articulated for the stop may have been a pretext for stopping the vehicle on account of the occupants' race.

### Conclusion for issue one

*Whren* rejected the argument that a pretextual traffic stop is unconstitutional. *Whren* is binding on the *Estrada* court. Following the mandatory authority of *Whren*, the *Estrada* court should hold that the stop for speeding was constitutional because there was probable cause of a traffic violation. Because Cruz's fourth amendment right was not violated by the stop, the drugs would not be suppressed based on the Fourth Amendment.

### Reasoning for issue two

The search of Cruz's purse is constitutional if she consented to the search or the container exception to the search warrant requirement extends to her purse. The United States Supreme Court has stated the standard for determining when an individual has consented to the search of a car. *Florida v. Jimeno*, 500 U.S. at 251. This portion of the office memo will examine whether the consent standard has been met. As far as the container exception is concerned, the United States Supreme Court recently held that "police officers with probable cause to search a car may inspect passengers' belongings found in the car that are capable of concealing the object of the search." *Wyoming v. Houghton*, 526 U.S. at 307. The facts of *Jimeno*, *Houghton*, and *Estrada* will be compared to determine if the search of Cruz's purse was constitutional.

In *Jimeno*, Officer Trujillo overheard a telephone call from a public telephone in which Jimeno was discussing a drug deal. Trujillo followed Jimeno's car and stopped Jimeno for failure to stop when turning right on red. After informing Jimeno about the traffic violation, Trujillo

> went on to say that he had reason to believe that respondent was carrying narcotics in his car, and asked permission to search the car. He explained that respondent did not have to consent to a search of the car. Respondent stated that he had nothing to hide, and gave Trujillo permission to search the automobile.

500 U.S. at 249–50. Trujillo found drugs in a brown paper bag on the car floorboard. *Id.* at 250.

The Court then set forth the test for determining whether consent was given. "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness—what would the typical person have understood by the exchange between the officer and the suspect?" *Id.* at 251. Applying this standard, the Court found that Jimeno had consented to the search of the bag.

The facts of *Jimeno* and *Estrada* are similar in that the two cars were stopped for alleged traffic violations and the officers searched containers. The facts surrounding the consent issue differ greatly. Trujillo told Jimeno that the officer suspected that there were drugs in the car and explained that Jimeno did not have to consent to the search. When Trujillo asked Jimeno's permission, Jimeno claimed that he had nothing to hide and explicitly consented to the search. The officer in *Estrada* made a statement, "you don't mind if I search, do you?"; he did not ask Cruz for her consent. He gave Cruz no time to respond before snatching her purse. In *Jimeno*, the container was a brown paper bag located on the floor of the car. In *Estrada*, the container was Cruz's purse, hanging from her shoulder.

Applying the objective reasonableness standard, it would not be objectively reasonable to believe that Cruz had consented to the search of her purse. She did not verbally consent and her actions did not imply consent. A woman's purse often contains objects of a personal nature that the individual wants to keep safe from prying eyes. A purse is often considered an extension of the individual's outer clothing. Because of the private nature of Cruz's purse, it presumably would take some overt action or response before it would be reasonable to believe that she had consented.

In *Houghton*, David Young was stopped for speeding and a faulty brake light. After the officer saw a hypodermic syringe in Young's pocket, Young admitted that he used it to take drugs. The officer asked the two female passengers seated in the front seat to exit the car and the officer searched the car. The officer found Houghton's purse on the back seat of the car. Searching the purse, the officer found a brown pouch that contained drug paraphernalia and a syringe containing methamphetamine in a large enough quantity for a felony conviction. Houghton claimed that the brown pouch was not hers. The officer also found a black container that contained drug paraphernalia and a syringe containing a smaller amount of methamphetamine, insufficient for a felony conviction. Houghton's arms showed fresh needle marks. The officer arrested her. 526 U.S. at 297–98.

The issue in *Houghton* was "whether police officers violate the Fourth Amendment when they search a passenger's personal belongings inside an automobile that they have probable cause to believe contains contraband." *Id.* at 297. The Court held "that police officers with probable cause to search a car may inspect passengers' belongings found in the car that are capable of concealing the object of the search." *Id.* at 307. The Court first relied on a 1982 case in which the Court had found that, where there was probable cause to search a car, it was constitutionally permissible to search containers found in the car that might hold the object of the search. *Id.* at 301–02. The Court noted that an individual carrying a package in a vehicle travelling on the public roads has a reduced expectation of privacy; however the Court did note the "unique, significantly heightened protection afforded against searches of one's person." *Id.* at 303. The Court found no reason to afford more protection to a container owned by a passenger than a container owned by the driver. *Id.* at 305.

In *Houghton*, Justice Breyer joined in the majority opinion and wrote a separate concurring opinion. In the concurring opinion, he stated that *Houghton* should be limited to vehicle searches and to containers found in a vehicle. He was troubled by the fact that it was Houghton's purse that was searched.

> [A]lso important is the fact that the container here at issue, a woman's purse, was found at a considerable distance from its owner, who did not claim ownership until the officer discovered her identification while looking through it. Purses are special containers. They are repositories of especially personal items that people generally like to keep with them at all times. So I am tempted to say that a search of a purse involves an intrusion so similar to a search of one's person that the same rule should govern both. However, given this Court's prior cases, I cannot argue that the fact that the container was a purse automatically makes a legal difference. . . . But I can say that it would matter if a woman's purse, like a man's billfold, were attached to her person. It might then amount to a kind of "outer clothing," which under the Court's cases would properly receive increased protection.

*Id*. at 308 (Breyer, J. concurring) (citations omitted).

The facts of *Houghton* and *Estrada* are similar in that the two cars were stopped for alleged traffic violations and the officers searched a passenger's purse. The facts of the two cases differ in that Houghton's purse was on the backseat of the car, Houghton had exited the car without taking the purse with her, and Houghton at first disclaimed ownership of the purse. In contrast, Cruz took her purse with her when she exited the car and it was attached to her when the officer snatched it from her shoulder.

In dicta in *Houghton*, the Court draws a distinction between the permissible search of containers and the search of an individual. The officer would not have been permitted to search Houghton without probable cause that she was carrying drugs or a weapon on her person. In the concurrence, Justice Breyer struggles with the fact that the container being searched is Houghton's purse. Were *Estrada* before him, he would likely find that the search of Cruz's purse was unconstitutional. As a concurrence, Justice Breyer's opinion is not mandatory authority. In addition, his opinion requiring the search of a purse attached to an individual to be treated similarly to the search of an individual's outer clothing is based on hypothetical facts.

### Conclusion for issue two

Applying the standard for consent enunciated in *Jimeno*, Cruz did not consent to the search of her purse. A reasonable person would not believe that Cruz's lack of response to the officer's statement, "you don't mind if I search, do you?", could be considered consent. Thus, the consent exception to the search warrant requirement does not exist in *Estrada*. Because Cruz did not consent to the search of her purse, the search on that ground was unconstitutional.

The comparison of *Houghton* and *Estrada* is more difficult. If the facts in the two cases are substantially similar, then the *Estrada* court should hold that the drugs found in Cruz's purse should not be suppressed. If the *Estrada* court finds that Cruz's purse can be likened to an item of clothing she was wearing, then the drugs found in her purse should be suppressed.

Although the facts in *Houghton* and *Estrada* are similar, they are different enough that a court could find that the drugs found in Cruz's purse should be suppressed. Because her purse was next to her body, Cruz had a heightened expectation of privacy in it. The officer could not have constitutionally searched Cruz without more evidence. Thus, the search of her purse should also be unconstitutional and the drugs found in the purse should be suppressed.

### Reasoning for issue three

To determine whether the audio recording of Cruz and Luis's conversation was permissible, the court must consider the federal eavesdropping statutes and their case law interpretation. The federal eavesdropping statutes protect certain types of face-to-face conversations against interception. To be protected, the conversation must qualify as an "oral communication." Under the statutes, an " 'oral communication' means any oral communications uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation. . . ." 18 U.S.C.A. § 2510 (2) (West 2000).

Thus, a conversation is not an oral communication unless the conversants expect that the conversation is private and an objective third party would consider that expectation reasonable.

It is illegal to intercept an oral communication. "[A]ny person who . . . intentionally intercepts . . . any oral communication . . . shall be punished." 18 U.S.C.A. § 2511 (1) (West 2000). One exception to this prohibition involves a police officer; however, the police officer must be party to the conversation or one conversant must have consented to the taping for the exception to apply. "It shall not be unlawful under this chapter for a person acting under color of law to intercept [an] . . . oral . . . communication where such person is a party to the communication or one of the parties has given prior consent to the interception." 18 U.S.C.A. § 2511 (2)(c) (West 2000). If an oral communication is taped in violation of the eavesdropping statutes, the conversation cannot be used as evidence in court. "Whenever any . . . oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding . . . before a court . . . if the disclosure of that information would be in violation of this chapter." 18 U.S.C.A. § 2515 (West 2000).

Thus, if Cruz and Luis's conversation were an oral communication, it should be suppressed. Whether the conversation is an oral communication turns on whether Cruz and Luis had a reasonable expectation of privacy while seated in the rear seat of the patrol car. One prong of the two-prong test is satisfied; they appear to have had an expectation of privacy or they would not have made incriminating statements. The other prong of the test is whether their expectation was reasonable. On one hand, the conversation was not audible outside the patrol car. The only way the officer could have heard the conversation was by taping it. On the other hand, Cruz and Luis were not sitting in Luis's car. They were sitting in the officer's car. While an expectation of privacy in Luis's car would have been reasonable, it is unclear from the federal statutes whether an expectation of privacy in the officer's car was reasonable. Some might equate the officer's car to the officer's office. If Cruz and Luis were conversing in an office of a police station, it might not be reasonable to expect privacy.

In a case with similar facts, the issue before the United States Court of Appeals for the Eleventh Circuit was "whether the district court erred in denying the motion to suppress the tapes resulting from the secret recording of McKinnon's pre-arrest conversations while he sat in the back seat of the police car." *United States v. McKinnon*, 985 F.2d 525, 526 (11th Cir. 1993).

In *McKinnon*, police officers stopped a pick-up truck for failure to travel in a single lane on the Florida Turnpike. Theodore Pressley was driving and Steve McKinnon was the passenger. Pressley consented to the search of his vehicle. While the officers were searching, McKinnon and Pressley waited in the rear seat of the patrol car. There they made incriminating statements that were secretly recorded by the officers. The officers arrested them after finding cocaine in the truck and they were placed in the rear seat of the patrol car. The officers again recorded McKinnon's and Pressley's incriminating statements. *Id.*

The *McKinnon* court considered the meaning of the term *oral communication* under the federal statutes. An oral communication is protected against taping. If a conversation is taped in violation of the statutes, the tape may be suppressed. A conversation is an oral communication only if the conversants exhibited a subjective expectation of privacy and the expectation of privacy was objectively reasonable. The court seemed to agree with the government's argument that a patrol car functions as the officer's office and the rear seat of the patrol car functions as a jail cell. The court held "that McKinnon did not have a reasonable or justifiable expectation of privacy for conversations he held while seated in the back seat area of a police car." *Id.* at 527.

In examining the facts of *McKinnon* and *Estrada*, the facts concerning the taping seem virtually identical. In each case, an officer asked two individuals to wait in the patrol car prior to their arrest. The officer taped their conversation in the rear seat of the patrol

car; the conversation contained incriminating statements. One difference between the two cases is that the officer in *McKinnon* also taped McKinnon's conversation following his arrest. This difference is not significant because an arrestee held in the back of a patrol car would have a lesser expectation of privacy than a person not under arrest.

A number of state and a number of federal courts, other than the *McKinnon* court, have faced the issue of whether an officer may secretly tape a conversation of individuals seated in the rear seat of a patrol car. In each case the court has said that taping is permissible. Carol M. Bast & Joseph B. Sanborn, Jr., *Not Just any Sightseeing Tour: Surreptitious Taping in a Patrol Car*, 32 Crim. L. Bull. 123, 130–31 (1996).

Cruz could make the argument that the search of her purse tainted the tape recording. Where a police officer obtains evidence in an unconstitutional manner, that evidence is excluded from use at trial. If that evidence leads the officer to other evidence, the other evidence is derivative of the first evidence. The derivative evidence is known as fruit of the poisonous tree and is also inadmissible. Generally, evidence that is tainted by the prior unconstitutional conduct is inadmissible; however, in some instances the second evidence is admissible because the connection between the unconstitutionally-seized evidence and the subsequently obtained evidence is marginal.

**Conclusion for issue three**

Although persuasive authority in other circuits, *McKinnon* is mandatory authority in this circuit. The facts concerning the taping are virtually identical in *McKinnon* and *Estrada*. A number of other state and federal courts have also held that there is no reasonable expectation of privacy for persons seated in the back of a patrol car. Therefore, a court should find that Cruz and Luis had no reasonable expectation of privacy while they were seated in the rear seat of the patrol car. Because they did not have a reasonable expectation of privacy, their conversation was not protected against taping as an oral communication.

If the court rules that the search of Cruz's purse was unconstitutional, then the tape may be suppressed if the search led Cruz to make the incriminating statements. Standard police procedure is to place a car's occupants in the rear seat of the police car while the officer is conducting a search and to tape their conversation. After the search of her purse, Cruz may have been more likely to discuss the drugs found in her purse. Cruz may have made reference to the drugs even if the officer had not found them in her purse. She might have commented that she was glad the officer did not search her purse.

The court will have to decide from the evidence the likelihood of Cruz making some type of incriminating statement without the officer having searched her purse. The court would not suppress the tape if the court decides that Cruz would have made the incriminating statements without the search of her purse.

## SUMMARY

- The office memo records the results of legal research, explains how the researcher analyzed the law and applied it to the facts, and proposes a solution to the problem.
  - The tone of the office memo is objective rather than persuasive.
  - Generally the office memo contains a heading (to and from, re, and date), facts, issue(s) and answer(s), a thesis paragraph, the rule of law, the application of the law to the facts, and the conclusion.
  - Refer to people by their names or terms such as suspect or officer instead of appellant, appellee, or similar terms.

- Each issue and each answer should be single sentences.
- Between the issue and the answer you should give your reader the most information possible.
- Usually there are the same number of answers as issues.
- If you refer to a constitutional or statutory provision in an issue or answer by number, also give your reader a short explanation of the provision's subject matter.
- A "thesis" is the central idea running through the entire memo.
- Quote only the relevant portion of constitutions or statutes.
- The first time you refer to a case by name, give the full citation; after that, use a short-form citation.

## KEY TERMS

statement of the rule of law

thesis paragraph

## EXERCISES

1. Pick one of the research problems from Appendix E.
2. Research the problem you have chosen.
3. Write an office memo summarizing and explaining your research.

## CYBER EXAMPLES

When writing legal documents for the first time, it may be helpful to look at examples. This chapter provides some examples. Professor Colleen Barger at the University of Arkansas at Little Rock School of Law had a Web site that links to pages of other legal research and writing professors (<http://www.ualr.edu/cmbarger/>).

## DISCUSSION POINTS

1. Which footnotes in the first sample office memo seem to be the most helpful and why?
2. How does the second sample office memo differ from the first?
3. What changes would you make to either of the sample office memos to make them better?

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