

Written Advocacy on Appeal

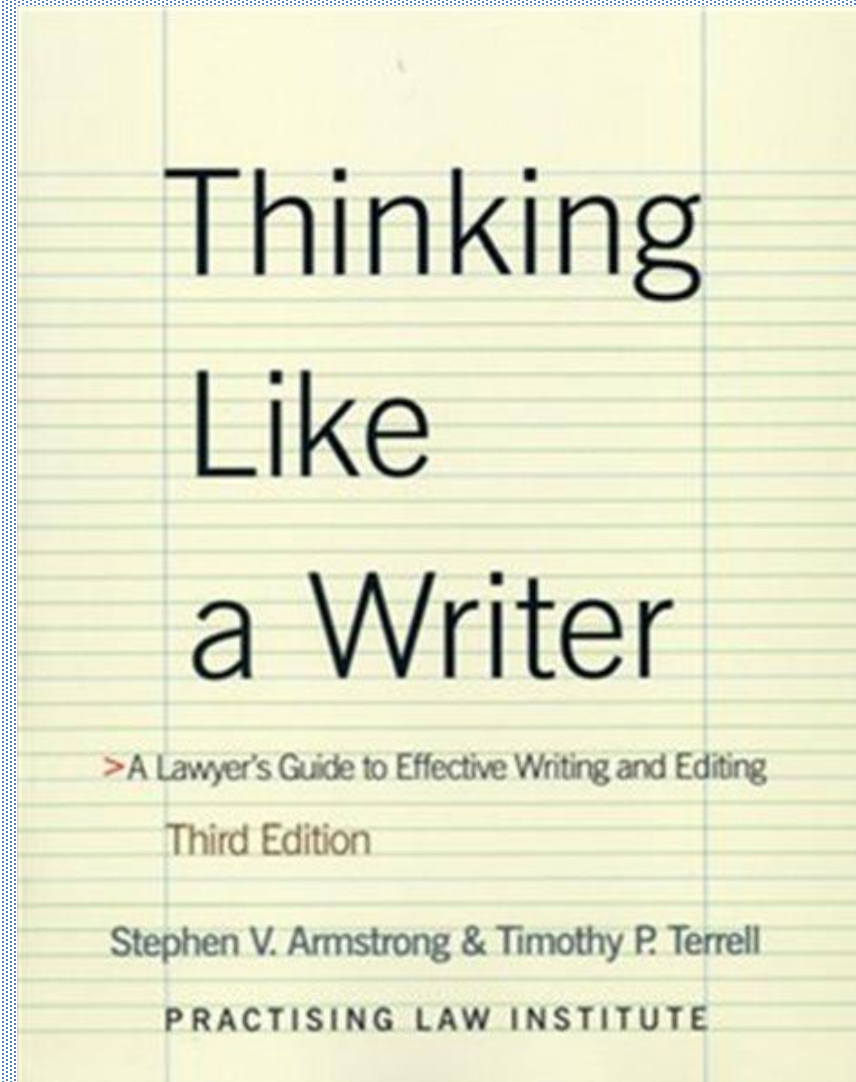
**The Honourable Thomas A. Cromwell C.C.
Senior Counsel Borden Ladner Gervais LLP**



Session Plan

- **Part I: The Persuasive Writer's Toolbox**
 - Some of the attitudes and techniques that will help make your writing more persuasive
- **Part II: The Overview Technique**
 - A technique that will help to move your documents beyond being logical to being clear

An Excellent Source:



Part I: The Persuasive Writer's Toolbox



The Persuasive Writer's Toolbox

1. Know the Rules
2. Desire to improve
3. Humility
4. Own style
5. Strong Structure
6. Strong Prose
7. Professionalism



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Written Submission: Factums & Statements

- 1. Criminal Factums & Statements:** Rule 10 of *Criminal Appeal Rules*, though largely governed by timelines set in case management. Factums are in Form 6, though were working on updating templates. For sentence appeals, observe *Sentence Appeals* (Criminal Practice Directive, 11 March 2016) and MS Word templates on the website to guarantee formatting.
- 2. Civil Factums:** Rule 21 of the *Court of Appeal Rules*. Timelines are generally 30 days apart for appellants and respondents. Factums are in Form 10. There are MS Word templates to guarantee formatting.
- 3. Citations & Form:** Be mindful of *Citation of Authorities* (Civil & Criminal Practice Directive, 30 May 2013).

Written Submissions: Other

- 1. Civil Chambers:** A short, written outline to hand up summarizing your position is useful in chambers. In civil appeals, there is a three page cap: see *Filing Written Argument in Court of Appeal Chambers* (Civil Practice Note, 1 March 2012)
- 2. Criminal Chambers:** There are no restrictions on the use of written argument in chambers. As above, short outlines are always useful.

2. Desire to Improve

- **Nothing is more important for law and lawyering than a deep respect for language**
- **Persuasive writing is a core skill for every lawyer**
- **You have to want to do it**

Writing is a craft. It's a lot of work and your writing is always evolving. If you want to be a better writer, you must write more and read often.

Andrea Cremer

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3. Humility

- There is no such thing as good writing, just better re-writing
- A key is capacity for self-criticism
- We need to learn to become our own editors



4. Your own style

- You must develop your own “voice” – what you “sound” like when you write
- The beginning of wisdom is to recognize the choices and their respective advantages and disadvantages
- Style emerges over time: don’t rush it.



5. Strong Structure

- **Structure is everything – or almost**
 - The structure is the foundation of the argument
 - It must be not only logical, but easy to follow
 - It must show how the pieces fit together
 - Think of the structure as the steps you are asking the reader to take with you



Structure (con't)

- **Three key elements of a strong structure:**
 - Point first
 - Overview at the outset
 - Use of overview technique throughout
- **Help the reader appreciate the logic of the structure while reading, not after having read!**



Structure (con't)

- **The importance of “point first” writing.**
- **You are not writing a mystery novel.**
- **You are not trying to make the reader relive the struggles that you have had in understanding the material.**

Compare

- **The accused was driving westerly. It was 8 pm and the weather was clear, but it was getting dark. There was little traffic and few people on the sidewalks that were found adjacent to both sides of the road. The pavement was dry. The accused's car had just been checked by a mechanic and was in good condition. The speedometer and the brakes were working...**
- **The accused's driving leading up to the collision was not a marked departure from the standard expected of a reasonably prudent driver.**

6. Strong prose

- The default setting should be strong, active sentences
- What makes sentences “strong” and “active”?



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(i) Avoid the passive voice

- The gun was discharged v. he discharged the gun
- Mistakes will be made by people v. People make mistakes.
- His death was caused by a heavy blow to the head v. A heavy blow to the head caused his death



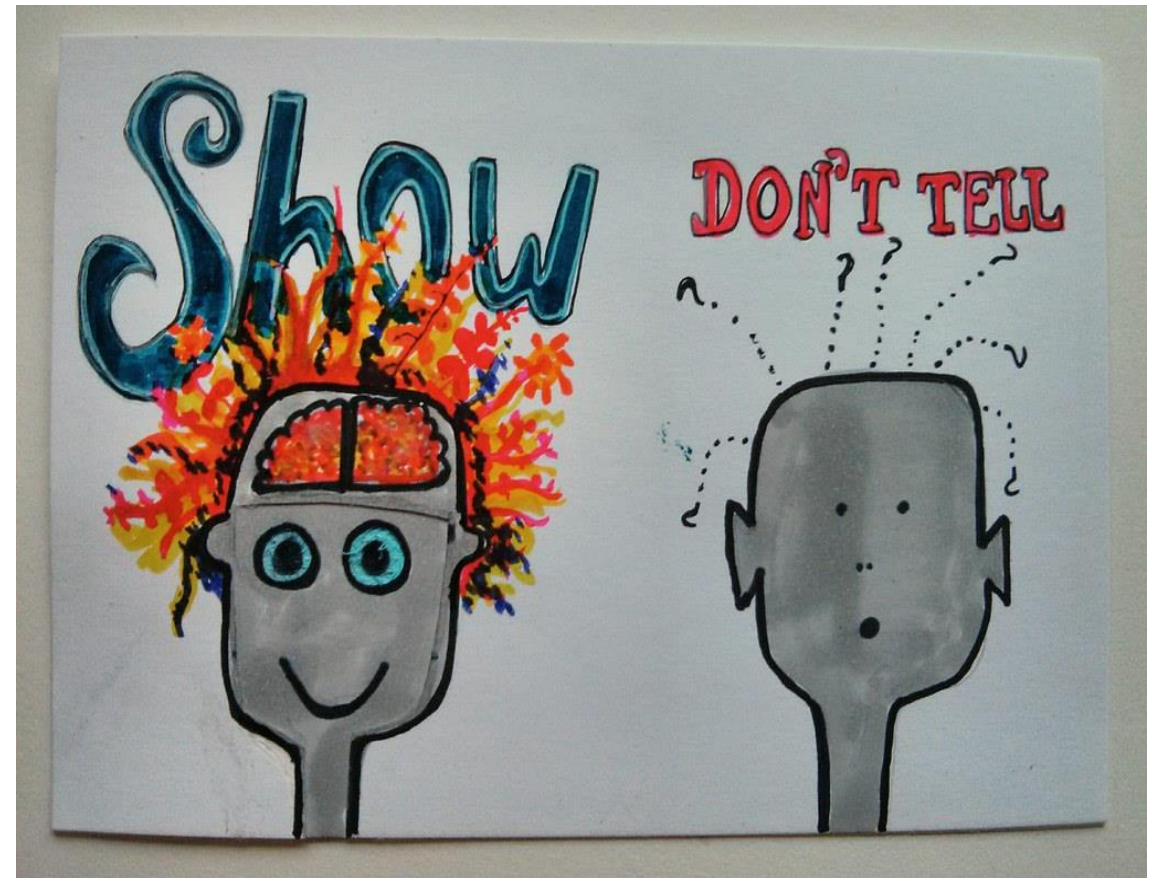
Homer is strangling Bart with his own hands.

Bart is being strangled by Homer

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(ii) Show rather than tell

- Avoid abstract assertions and statements of legal principle not connected to the facts
- Set up the conditions that dictate the legal result rather than simply assert the principle



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Showing and telling

Telling

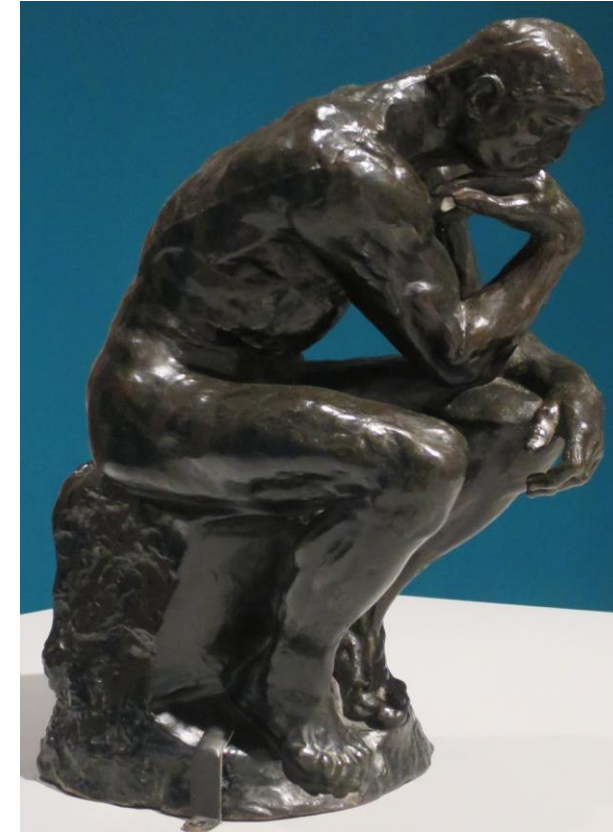
No one other than the person whose rights were infringed has standing to seek exclusion of the evidence on the basis that a search was conducted unreasonably.

Showing

- **The accused was not at home when the police searched it and found the drugs. The way the police conducted the search was unreasonable because they entered the home by force without first knocking and announcing their presence. But that unreasonable conduct did not affect the accused in any way because he was miles away, buying more drugs. No right of his was infringed and he therefore has no standing to seek exclusion of the evidence.**

(iii) Avoid “watch me think” writing

- “The writer knows the truth before putting it into words; he is not using the occasion of writing to sort out what he thinks.” (Steven Pinker, *The Sense of Style* (2014))
- Strive to lead the reader through the results of your analysis and the reasons for them, not the process of conducting the analysis



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Watch me think...

Not so good

For many years, scholars have argued that the law of privity of contract is in need of reform. And yet, other scholars note that there are several reasons why it might be thought to continue to serve a useful purpose. For example, the rule concerning privity concurs with the rule requiring consideration, but they are not identical rules as an Australian case illustrates. So while the rule about consideration might at first blush support the rule about privity, on reflection we would conclude ...

Somewhat better

The common law of privity needs to change: it is aridly technical and its application often leads to injustice. Four main arguments have been advanced in support of this doctrine, but they do not justify its retention. First ...

Sentences: the good, the bad and the ugly

This case involves the novel issue of whether or not a minor is liable to pay damages to a restaurant where it loses profits because its licence was suspended as a result of the minor misrepresenting her age to the owner of the restaurant who thereafter sold liquor to the minor.

Sentences: Possible rewrites – Which do you like best?

- 1. A minor lied about her age to a waiter who then served her liquor in a restaurant. As a result, its liquor licence was suspended and it lost profits. The novel question is whether the minor is liable to the restaurant for those lost profits?**
- 2. This case raises a novel question: is a minor who lies about her age to be served alcohol liable in damages to the restaurant who served her and lost its liquor licence as a result?**
- 3. Mundane facts can give rise to novel questions. Minors routinely lie about their age to be served alcohol. Bars that serve them routinely get caught and lose their licences and their profits. The novel question is whether a bar can sue a lying minor for those lost profits?**

Some useful general rules (from Richard C Wydick, Plain English for Lawyers (5th, 2005))

- Avoid wide gaps between the subject, the verb, and the object

Compare:

This **agreement**, unless revocation has occurred at an earlier date, **shall expire** on November 1, 2012.

With

Unless sooner revoked, this **agreement expires** on November 1, 2012

Some useful general rules con't

- Put conditions and exception where they are clear and easy to read

Compare:

If disclosure is necessary to prevent substantial injury that is likely to result from a client's commission of a crime or fraud, a lawyer may disclose a client's confidential information.

With

A lawyer may disclose a client's confidential information if necessary to prevent substantial injury from a client's crime or fraud.

Some useful general rules (con't_

- Use lists

Compare:

If you are sixty-four or older and unable to work, or if you are blind in one or both eyes or are permanently disabled in the course of your employment you can qualify for benefits under section 64.

With

You can qualify for benefits under s 64 if you meet any one of the following conditions: ...

Some useful general rules

- Put modifying words close to what they modify

He got into a fight with the fellow who plays the saxophone's father.

Some useful general rules

- **Avoid “nested” modifiers**

The defendant, who was driving a flatbed truck that was laden with a tangle of old furniture some of which was not tied down securely, stopped without warning.

Some useful general rules

- Clarify the “reach” of modifiers

A corporation is liable for financial losses suffered by an investor due to criminal conduct of a high-ranking officer or employee **acting within the scope of his or her authority.**

Some useful general rules

- Avoid “It is ...” sentences.

Compare –

It is clear and not disputed that the defendant was drunk at the time of the robbery.

With

The defendant does not dispute, and the evidence clearly shows that he was drunk at the time of the robbery.

And

The defendant was drunk at the time of the robbery.

Some useful general rules

- **Avoid sentences starting with “While ...”**

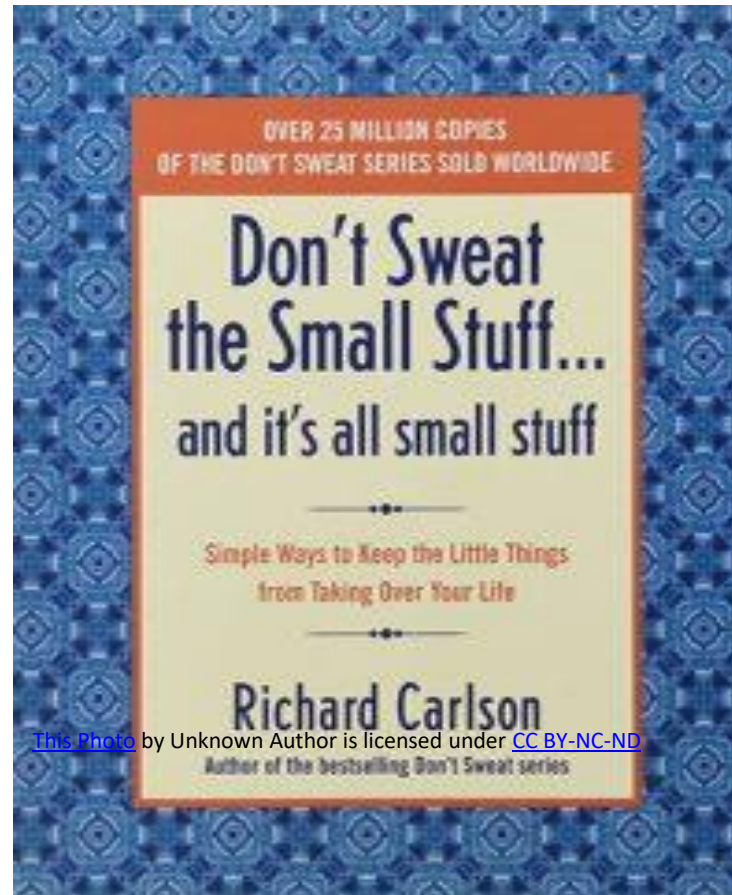
Compare:

While he doubted that any good would come of it or that he could usefully intervene, he went to New York to try to talk his sister out of the marriage.

With

He went to New York to try to talk his sister out of the marriage even though he doubted that he could.

7. Professionalism



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Professionalism

- **The written argument may be the “first impression” you give to the court**
- **You have to “sweat the small stuff”**
 - Grammar and spelling
 - Careful proof-reading
 - Pinpoint references

Professionalism

- The judge's idea of the perfect factum:
- One that I could simply change “we submit” to “in my view” and then sign it.



Part II -- The Overview Technique



Part II: The Overview Technique

- 1. What is the overview technique?**
- 2. Why is it important?**
- 3. Where do you use the overview technique?**
- 4. What are some examples?**

1. What is an overview?

- A paragraph (or group of paragraphs) that
 - State the main point or thesis or controlling idea
 - Provide context for the detailed discussion to come
 - State or anticipate the structure of what is to come

Example

Whether hearsay evidence meets the requirement of threshold reliability is mainly a question of fact which it is not open to the Crown to appeal. The trial judge reviewed the extensive evidence about threshold reliability and concluded that the requirement was not established. The Crown argues that he made three errors in doing so. But these alleged errors are purely factual and arise only from a partial and unfair reading of the judge's reasons. The appeal should be dismissed.

Thesis

Context

Structure

Why is the overview technique important?

- Lawyers' writing is almost always logical.
- But for the reader, logical writing may not be clear writing or writing that is easy to understand.
- Why?
- Logical writing often lacks three critical elements that help make writing clear and easy to follow. The reader needs and wants:
 - **familiar information before new information;**
 - **context before detail;**
 - **a sense of the structure of what is to come.**

Old information before new information

Scary

- Under s. 20(1) of the Income Tax Act, in computing a taxpayer's income for a taxation year from a business or property, there may be deducted from amounts that are wholly applicable to that source an amount paid or payable in the year pursuant to a legal obligation to pay interest on borrowed money used for the purpose of earning income from a business or property or a reasonable amount in respect thereof whichever is the lesser.

Friendly

- People often borrow money to use to earn income. The interest they pay on the loan can be deducted for tax purposes from the income earned.

Context before detail

- Ms. Doolittle graduated from UBC law school in 2004 and is a partner in a law firm in Vancouver. She practises mostly construction law. She had a large mortgage on her residence, but had significant capital in her capital account at the firm. She withdrew her capital in cash and replaced it with borrowed money. She then used the cash to pay off her mortgage. When she filed her income tax return for 2017, she claimed a deduction for \$28,741 representing the interest she paid on the loan. By its notice of assessment CRA disallowed the deduction ...
- **Interest paid on borrowed money is tax deductible if the borrowed money is used to earn income. Ms Doolittle used her partner's equity in her law firm to pay off the mortgage on her house and replaced her equity in the firm with borrowed money. The question is whether the interest she pays on that loan is deductible. The answer turns on whether the borrowed money is used for the purpose of earning income.**

A sense of the structure of what is to come

- Interest paid on borrowed money is tax deductible if the borrowed money is used to earn income. Ms. Doolittle used her partner's equity in a her firm to pay off the mortgage on her house and replaced her equity in the firm with borrowed money. The question is whether the interest she pays on that loan is deductible. The answer turns on whether the borrowed money is used for the purpose of earning income. **That, in turn, depends on whether one looks simply at the fact that borrowed money was deposited to the firm's capital account or whether the fisc can rely on what it calls the "economic realities" of the situation.**

Putting it all together

Interest paid on borrowed money is tax deductible if the borrowed money is used to earn income. Ms. Doolittle used her partner's equity in a her firm to pay off the mortgage on her house and replaced her equity in the firm with borrowed money. The question is whether the interest she pays on that loan is deductible.

The answer turns on whether the borrowed money was used for the purpose of earning income and not, as the Minister contends, on the “economic realities” of the transactions.

Canadian tax law has consistently held that the tax payer's good faith legal relationships must be respected and cannot be put aside on the basis of “economic realities”. The trial court followed this well-established authority and the appeal should be dismissed.

Thesis Context Structure

Overviews: Not just at the beginning

- **The overview technique should be used throughout a complex document.**
- **The more complicated the subject matter or the argument, the more you need to use the overview technique repeatedly.**
- **The technique will make the reader “smart” in the sense that he or she will understand where the document is going and why the detail is important.**

Some examples: 1. Overview of the facts

It is important to look at the facts about the search in issue here in the broader context of the investigation of which it formed a part. It is also important to remember that the decisions made by the police as to how to conduct the entry to the residence must be assessed in light of the information reasonably available to them at the time the decision was made ...

The police obtained three search warrants on the morning of November 30, 2005. Two of the warrants related to dwelling houses and the third to a motor vehicle. The appellant was not and never had been a target of the investigation. Rather, the police were investigating what they believed to be a dial-a dope operation run by two members of a violent criminal gang. Based on surveillance and other evidence, the police thought that the appellant's residence was being used in that operation. This investigation was not about someone like the appellant who was previously unknown to police and who was keeping a little cocaine in his bedroom. The police nonetheless were entitled to draw reasonable inferences about the risks the search posed to them and in relation to the destruction of evidence from the activities and people involved. As I shall outline in a moment, the police had good reasons to believe... that the Cornell residence ... was being used in a drug dealing enterprise carried on by members of a violent criminal gang. They also had good reason to believe that the appellant himself was associated with at least one of these gang members... Attempts to consider the appellant in isolation from these facts are, in my respectful view, highly artificial.

- *R. v. Cornell* 2010 SCC 31 para 4 - 5

Rewrite of factual overview

The police were investigating what they believed to be a dial-a dope operation run by two members of a violent criminal gang. Based on surveillance and other evidence, the police thought that the appellant's residence was being used in that operation.

The appellant was not and was a target of the investigation. This investigation was not about someone like the appellant who was previously unknown to police and who was keeping a little cocaine in his bedroom. However, the appellant's situation must be considered in the context of this broader investigation.

As I shall outline in a moment, the police had good reasons to believe that the Cornell residence was being used in a drug dealing enterprise carried on by members of a violent criminal gang. They also had good reason to believe that the appellant himself was associated with at least one of these gang members. The police were entitled to draw reasonable inferences about the risks the search posed to them and in relation to the destruction of evidence from the activities and people involved.

Some examples: 2. Overview of law section

The appellant submits that the critical issue on appeal is whether the manner of entry by the members of the police tactical team was reasonable in the circumstances. The focus is on the decision to use a forced, unannounced entry with masked officers who did not have a copy of the search warrant with them. In the appellant's submission, the most aggravating component of the search flows from choices made by the police with respect to the manner of entry.

While the conduct of a search as a whole must be assessed in light of all of the circumstances, it will nonetheless be helpful to look separately at the individual matters on which the appellant relies: the police decision making leading to the choice of a forced entry while masked, and the failure of any member of the tactical team to have the warrant at the time of entry.

To address the appellant's submission it will be helpful first to briefly summarize the relevant legal principles about reasonable searches, resort to unannounced forced entries and judicial review of the reasonableness of a search. I will then turn to the police decision to use a hard entry and the failure of the tactical team to have a copy of the warrant.

Cornell, para 13 - 15

Rewrite of law overview

The appellant submits that the critical issue on appeal is whether the manner of entry by the members of the police tactical team was reasonable in the circumstances. The focus is on the reasonableness of the police decision to use a forced, unannounced entry with masked officers who did not have a copy of the search warrant with them.

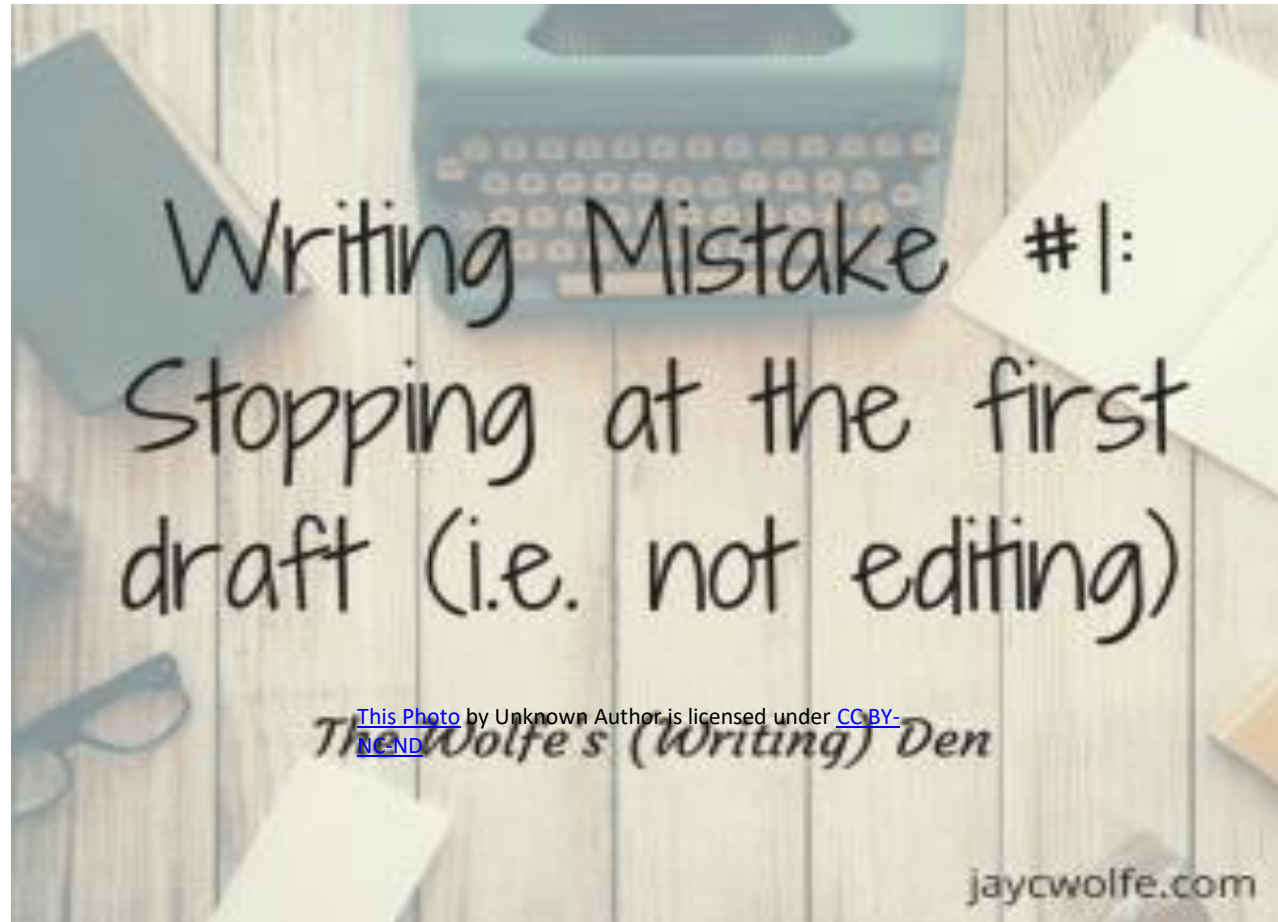
To address this issue, I will first briefly summarize the relevant legal principles about reasonable searches, resort to unannounced forced entries and judicial review of the reasonableness of a search.

Applying these principles, I conclude that the manner of search was reasonable judged, as it must be, in light of all of the circumstances that the police knew or ought to have known at the time.

Improving your writing – practical tips

- **Do a diagnosis: what are the biggest problems in your writing?**
- **Pick an issue to pursue. Don't try to fix everything at once.**
- **Pick some projects where you have time to do some extra editing.**
- **Find a writing buddy.**

Enjoy your writing journey!



Thank you!