To: Law Clerk
From: Senior Partner
Re: People v. Walker
Date: August 23, 2012

Jonas Walker has been charged with burglary under Westmoreland Penal Code Section 459. Use the precedent case of People v. Tragni to determine whether the element of "entry" can be established.

PERTINENT WESTMORELAND PENAL CODE SECTION

§459 BURGLARY

Burglary defined. Any person who, either in the night or day time, with the intent to steal or commit a felony, breaks into and enters a dwelling-house, or any building, structure, or enclosure within the curtilage of a dwelling-house, though not forming a part thereof, or into any shop, store, warehouse, or other building, structure or enclosure in which goods, merchandise or other valuable thing is kept for use, sale, or deposit…is guilty of burglary.

SUMMARY OF DEPOSITION OF NODADIAH PEEPLES

My name is Nodadiah Peeples. I own a pig farm on Rural routen2 in the State of Westmoreland. I grow corn which I use to feed my pigs and sell commercially. After I harvest my corn, I shell it and store it in a corncrib which is located on my property near my house and my barn. The corn crib is a wooden enclosure which is raised off the ground on three foot legs. The floor and walls ofof the corn crib are made of closely spaced wooden slats. The top is a hinged roof of corrugated aluminum, which is always kept locked.

I always keep the corncrib locked. Despite this, I noticed a significant depletion in my stock of corn. I hired a guard to watch the barn and corn crib. On August 3, 2012, the guard caught Jonas Walker under the corn crib. Upon coming out, Walker said that he had bored a hole into the wooden bottom of the corn crib with a two inch auger, through which corn flowed out, into a sack he held under the hole. He admitted to having taken about three pecks of corn. As soon as I found out about this, I notified police, who arrested Walker and charged him with burglary.

113 Misc. 2d 852, *; 449 N.Y.S.2d 923, **;
1982 N.Y. Misc. LEXIS 3390, ***

The People of the State of New York, Plaintiff, v. Peter Tragni et al., Defendants

[NO NUMBER IN ORIGINAL]

Supreme Court of New York, Trial Term, New York County

113 Misc. 2d 852*; *449 N.Y.S.2d 923*; *1982 N.Y. Misc. LEXIS 3390

May 5, 1982

SUBSEQUENT HISTORY: Related proceeding at *Chinatown Carting Corp. v. Bus. Integrity Comm'n, 2007 N.Y. Misc. LEXIS 870 (2007)*

DISPOSITION: [***1] Accordingly, and for all of the reasons stated, the motion of all defendants to dismiss for legal insufficiency the count of burglary in the third degree is, in all respects, granted.

COUNSEL: *David Jacobs* for Peter Tragni, defendant, *Joseph Domanti* for John Barrios, defendant, *John Patten* for Anthony Mazzocchi, [***3] defendant, *Herbert Adlerberg* for Raheem Thomas, defendant, *Jules Sack* for James Dowtin, defendant, *Max Lerner* for Michael McCarter, defendant, *Rachel Wolkenstein* for Minster Dowtin, defendant.

Robert M. Morgenthau, District Attorney (*Kim Hogrefe* of counsel), for plaintiff.

JUDGES: Sheldon S. Levy, J.

OPINION BY: LEVY

OPINION

[*852] [**924] **OPINION OF THE COURT**

Is drilling a hole through an outside wall of a building an entry within the meaning of the burglary statutes, or is it merely [**925] evidence of a breaking and an attempt to enter?

[*853] No New York court appears to have been confronted with even a similar instrumentality problem in the law of burglary under the revised Penal Law, and this decision, accordingly, is one of first impression.

The seven defendants on trial and two others -- colloquially known as "The Gang That Couldn't Drill Straight" -- were indicted, *inter alia*, for crimes of burglary in the third degree (first count) and attempted burglary in the third degree (second count), while acting in concert.

The charge is that, on January 26, 1981, at about 4:30 A.M., the two members of the group, not now on trial, drilled [***4] one hole through and one hole partially through the exterior storefront wall of the China Jade Company jewelry store on Canal Street in Manhattan. The holes were apparently purposefully placed on each side of a 3,000-pound safe, located directly within the premises and adjacent to the exterior wall.

Defendants Tragni and Barrios, long-time private garbage truck drivers in the Chinatown area, positioned their respective vehicles in front of the jewelry store and revved their motors in an attempt to shield the activity from public view and to mask the sounds of the drilling operation.

Defendant Mazzocchi acted as lookout, while the four remaining defendants (all helpers on the garbage trucks, and ultimately acquitted) stood on the sidewalk nearby.

The People theorized that, once the holes were drilled, something would be inserted through the openings and slipped around the safe so that it could be pulled through the wall and removed.

The defendants were aware that the Fifth Precinct station house of the New York City Police Department was around the corner. The defendants were not aware, however, that their activities were being continually monitored by members of that precinct's [***5] anticrime unit, who apprehended all defendants when drilling of the second hole was abruptly terminated (probably because the defendants were alerted by a police radio communication).

At the conclusion of the People's opening statement, all defendants moved to dismiss the burglary count for [*854] legal insufficiency. The defendants argued that, since no defendant physically entered the building at any time, there could be no completed burglary. The People responded that at least one drill bit broke through the wall into the air space of the premises and that the entry contemplated by the burglary statutes was accomplished at that point. In the view of this court, neither contention has merit, and the instant determination is a result of that application.

Section 140.20 of the Penal Law, as it applies to this case, reads as follows: "A person is guilty of burglary in the third degree when he knowingly enters * * * unlawfully in a building with intent to commit a crime therein." The essence of this statute is unlawful and knowing entry with intent to commit some crime in the premises. To find guilt, all elements of a crime must be proven beyond a reasonable doubt, but entry [***6] is the active element that surely must be adequately demonstrated.

At common law, an entry was a key component of the crime of burglary. A breaking was another element of the crime, but a relatively insignificant one (see Hechtman, Practice Commentaries, McKinney's Cons Laws of NY, Book 39, *Penal Law, art 140*, p 9). Until 1967, however, the statutory law of New York tracked both of these elements (former *Penal Law, ßß 400*, 402-404). Thereafter, the requirement for a breaking was eliminated (Penal Law, ßß 140.20-140.30). Its demise provided no occasion for prolonged lamentation. It had usually created more problems than it solved (see *People v Toland, 217 NY 187*; *People v Viola, 264 App Div 38*; *People v Krevoff, 11 AD2d 1053*).

Nevertheless, when the breaking element for the crime of burglary was removed [**926] from the revised Penal Law, the Legislature deleted not only the definition of the word "break", but also the detailed delineation of the word "enter". The defining of the phrase "enter or remain unlawfully", which was appended to the present Penal Law at that time (*Penal Law, ß 140.00*, *subd 5*), was neither a substitute for nor a definition of the entry [***7] element of burglary. Instead, it was merely a particularized exposition of the "*unlawful*" aspect of the crime. Accordingly, [*855] there presently remains no direct legislative guidance as to the meaning of the all-important word "enter".

Moreover, no specific legislative history or drafters' commentary reveals the reason for the obviously purposeful and simultaneous elimination of both the breaking and entering definitions, although the entry element is surely elevated in stature under the Penal Law revision.

Previously, the definitional language had carefully, but restrictively, explained that "[enter]" includes "the entrance of the offender into such building or apartment, or the insertion therein of any part of his body or of any instrument or weapon held in his hand, and used, or intended to be used, to threaten or

intimidate the inmates, or to detach or remove property" (former *Penal Law, ß 400*). In the view of this court, the revisers became fully cognizant of the limiting nature of this language, particularly as it pertained to and seemingly confined the instrumentality rule to potential crimes of larceny (i.e., "any instrument * * * used, or intended to be [***8] used * * * *to detach or remove property*"; emphasis added).

Understandably, they were concerned that the retention of such a definition might serve to free, from warranted burglary charges, persons intending, by the use of some instrument, object or weapon, such crimes as murder, assault and arson. Furthermore, the drafters must have been equally anxious about the prospect of evolving statutory language broad enough both to prevent technical escapes from legislative intendment and to encompass within a single, comprehensible definition the myriad means of entry, presently limited only by the bounds of scientific advancement and human imagination.

Accordingly, the revisers opted for a total elimination of any -- in their view -- restrictive definition of the element of entry. However, if their actual aim in this regard was to permit the courts to fashion the meaning of entry on a case-by-case basis, then they were plainly misguided. Such a lack of predictability in a criminal statute can present a marked impediment to the prosecution in both evidence gathering and presentation and to the defense in attempting to guard against unknown or unanticipated proofs. The [*856] [***9] true balance of justice would be sadly lacking were the Legislature to relegate its duties to the courts.

Instead, it must be assumed that the drafters had no such unseemly motive and that what they really envisioned was an adoption by the courts of common-law, common-usage and common-sense definitions of both bodily and instrumental entry.

However, no persuasive support appears for a claim that the legislative deletion of the prior entry explanation signaled any such radical departures from previously accepted definitional standards as either the defendants or the People suggest.

It is true that our State's highest court has twice indicated that a defendant was correctly charged only with attempted burglary rather than with the completed crime where he did not physically gain entrance to the premises involved (see *People v Gilligan, 42 NY2d 969*; *People v Henderson, 41 NY2d 233, 236*; see, also, *People v Campbell, 54 AD2d 777*).

It seems clear, however, that the statements contained in these cases were meant to pertain to and comment upon only the factual patterns evidenced therein. Such *gratis dictum* obviously was not designed to constitute an unusually restrictive [***10] interpretation of an entry for purposes of a [**927] burglary. The defendants are in error to suggest that physical presence on the premises is the sole criterion for burglarious entry.

Nor, on the other hand, does the present statutory lack of a definition of the word "enters" imply, as the People might argue, that the meaning now has been stretched beyond all recognition and intendment to include also acts of "breaking". The genuine legislative plan would certainly appear to run a more moderate and more logical course.

In this regard, a careful perusal of the varied statutes and judicial pronouncements of sister States on the subject of breaking and/or entering reveals a hodgepodge of legal platitudes, of confusing technicalities, of erroneous common-law recollections and of strained statutory interpretations which merely buttress the adage that "hard cases make bad law." Nevertheless, there at least emerges a [*857] consensus of opinion concerning common standards, which is supported by

leading writers and commentators in the criminal law field.

Initially, and obviously, full bodily entry within a building is sufficient to prove prima facie the entering element. Moreover, [***11] the penetration of air space in the premises by any portion of the body, whether by a hand, foot, finger, head or shoulder, is equally adequate as a demonstration of entry.

Accordingly, a hand reaching inside an open window to unlatch a lock; a foot kicking in a door panel; a finger groping for a ring through a hole; or a head peering inside an open door to see if the way is clear, are all examples of the act of entry. When any part of the body passes the threshold, an entry is accomplished, no matter how slight the invasion or the reason therefor. With a bodily intrusion, it makes no difference whether it was intended actually to effect a crime within the premises or whether it was intended merely to aid in gaining entrance, by a breaking or otherwise, so that a crime could be committed therein.

The instrumentality criterion of burglary, however, is different. When some instrument is used in connection with a criminal purpose in a building, it is absolutely essential -- for an entry to take place -- that the instrument or weapon employed is one actually being used, or intended to be used, to commit a crime within.

Therefore, the splintering of a door with a bullet intended to [***12] kill or to injure someone inside (or even the violation of air space by a round propelled through an open door for the same purpose); the cracking of a storefront window with a fishing pole, which can then be used to hook onto a fur piece or other object therein; the shattering of a wall with a magnetized iron ball intended thereafter to attract and to steal metal objects in the premises; and the breaking of a pane of glass with a wooden torch, which can then be tossed inside to ignite combustible material, are all examples of the employment of an instrument or weapon to accomplish some crime in a building.

In all events, in each of the situations aforesaid, whether by body or instrument; whether the object crime is consummated or not; and whether other elements of the crime of burglary are ultimately proven, at least the element of entry will have been sufficiently shown.

However, the [***13] use of a weapon or instrument solely to create or enlarge an opening or to facilitate an entrance into a building, cannot be designated an entering into the building or an entry within the commonly accepted legal definition. At most, such an instrumental utilization would constitute a breaking.

Accordingly, no entry is effected when a bullet or rock is used merely to smash a lock [**928] or break open a window; a plastic credit card is slipped into a crevice to disengage a door spring; an antitank rocket is propelled only to make an opening in a wall; a crowbar is manipulated to pry open a door; or a glass cutter and adhesive are employed to remove a window pane. In point of fact, these are illustrations of a breaking, and not of an entry.

From the foregoing recital, some usual threads, some normal trends and some basic rules are readily discernible.

Although the Legislature, in the enactment of the revised Penal Law, has failed thus far to make any official or explicit statement concerning the perimeters of an entry under the burglary statutes, a fair, predictable and workable definition, which accords with common custom, usual explanation and practical judgment, may be stated [***14] as follows:

Any penetration of air space in a building -- no matter how slight -- by a person; by any part of his body; or by any instrument or weapon being used, or intended to be used, in the commission of a crime, constitutes an entering.

Under this suggested simple, but hopefully all-encompassing, definition and judicial interpretation, mere acts of breaking by an instrument or weapon not intended to be used in the actual perpetration of the contemplated crime will not suffice to sustain an entry; but evidence of any breaking may well be employed as an aid in proving both [*859] the element of entry and of criminal intent. However, such proof alone cannot substitute -- in the crime of burglary -- for independent and substantial evidence of an entry into the premises by the defendant or by someone acting in concert with him.

Moreover, the use of a weapon or instrument solely to effect a breaking to gain entrance to a building, so that a defendant can then commit some crime therein, clearly is not the entering envisioned by the burglary statutes, but it may indeed serve as an adequate act to buttress an attempted burglary charge (see *Penal Law, ß 110.00*).

Applying these [***15] guidelines and the proposed definition to the case at bar, it is manifest that, as a matter of law and logic, the People will never be able to prove the element of entry from the stated facts and all reasonably drawn inferences.

No defendant was observed at any time inside the jewelry store. No part of the body of any defendant was seen within the building. Nor could any such occurrence be inferred from any evidence to be adduced.

Moreover, the drills and drill bits, employed by the two persons acting in concert with the defendants on trial to make holes in the storefront and to penetrate the air space therein, were instruments to be used solely for the purpose of effecting a break in the premises. Since the position of the holes on each side of the 3,000-pound safe demonstrated a future intention to pass something through these openings to effect a removal of the safe, it is perfectly plain that the drills and bits alone could serve no such purpose.

The intrusion of these instruments, therefore, even into the interior air space of the building, is not the entry contemplated by the statutes. Since a prime element of the crime will be missing in the proof, the burglary count [***16] is not legally sustainable.

* * *

Accordingly, and for all of the reasons stated, the motion of all defendants to dismiss for legal insufficiency the count of burglary in the third degree is, in all respects, granted.

On Tragni, case briefing and the process involved

Case briefing is a means for you to create a useful summary of the case. It is for your own use, so you can and should figure out what format works for you. Legal writing texts always list possible headings, and often provide sample case briefs. In my humble opinion, legal writing texts all suggest too many headings and their samples are far too long to be useful. It is no wonder that most students abandon case briefing immediately.

The Issue Statement

The Issue should be one sentence that includes the core legal question (here "Have defendants "entered" a building"), the controlling statute (here "N.Y. Penal Law §140.20") and two or three key facts often set apart from the other two components by the word "when." Here, the key facts are "they drilled holes through a wall on either side of the safe located within the building, apparently intending to pass something around the safe and pull it out?' Pay no mind to self proclaimed legal writing luminaries who suggest using several sentences to express the issue. Personally, I suspect there is an element of laziness to their suggestion. It is hard work to get all the components of the issue into one sentence, but the effort will serve you well. You will really have a handle on the case when you have finished.

The Holding

If you have put the work into creating a good issue, the holding will be a breeze: one word – either yes or no

The Fact Section

Relevant facts only, which is to say only the facts that actually matter to the analysis. For example, with Tragni, does anyone care that the defendants were New York City garbage collectors? Maybe the good people of New York care, but you, most certainly, do not.

Rule/Reasoning

Legal writing texts always seem to suggest two separate sections for the rule the court articulates and for its reasoning. The rule and the reasoning are so closely related it may actually be better to combine them. And, of course, the more you can streamline the briefing process, the less likely it will be that you abandon it in a New York minute! (pun intended)
It would be entirely accurate, and entirely unnecessary, to add to this brief: "The legislature eliminated the Penal Code definition of "entry" out of apparent concern that it was too narrow; the court concludes that it must therefore have intended a common law/common usage definition." We need to know nothing about the route the legislature

took to the current incarnation of the law. At least not until we sit down to write a law review article on the subject.

A Word about the Structure of the Tragni case

Technically, you don't need to understand how to tell where the page breaks are when you are briefing a case, but since I have reproduced the Tragni case as you might see it online, you might as well understand its pagination as well.

The Tragni case can be found in two different sets of books, called "reporters" or "reports" as well as online. (In this case, I used the online research service, Lexis to retrieve the copy of the Tragni case that I have included here.)

The first reporter, Miscellaneous Reports, second series, is abbreviated below in the Tragni heading as "Misc.2d." The second reporter, New York Reports, is abbreviated below in the Tragni heading as "N.Y.S.2d." Lexis maintains a database for New York's intermediate appellate court cases, and Tragni can also be found there.

The People of the State of New York, Plaintiff, v. Peter Tragni et al., Defendants

[NO NUMBER IN ORIGINAL]

Supreme Court of New York, Trial Term, New York County

113 Misc. 2d 852; 449 N.Y.S.2d 923; 1982 N.Y. Misc. LEXIS 3390

The copy of Tragni found in the Miscellaneous Reports, is in volume 113 of the second series and starts on page 852. The copy of Tragni found in the New York Reports is in volume 449 and begins on page 923. Lexis groups all cases decided in New York in 1982 by the intermediate appellate courts. Tragni is the 3390 decision rendered by those courts. Lexis numbers the documents it reports sequentially but begins numbering the pages of each individual document with page one.

Armed with this information, take a closer look at the Tragni case. In the Miscellaneous Reports, second series, the Tragni decision begins on page 852. Lexis has helpfully marked page numbers from this set of books with one asterisk. In the New York reports, the decision begins on page 924. Lexis marked the page numbers corresponding to this set of books with two asterisks. Lexis marked page numbers of its own with three asterisks.

So look at the excerpt from Tragni that I've highlighted below in pink.. You can now tell that words "evidence of a breaking" can be found on the top of page 925 in the Miscellaneous Reports, second series, and at the bottom of page 852 in the New York Reports.

Is drilling a hole through an outside wall of a building an entry within the meaning of the burglary statutes, or is it merely [925] evidence of a breaking and an attempt to enter?**
[*853] No New York court appears to have been confronted with even a similar instrumentality problem in the law of burglary

Easy! (I know, it doesn't always seem easy at first, but if it doesn't seem easy to you, you are in good company. Legions of very smart law students originally found this whole page number thing to be a head scratcher.)

One last thought on the Tragni case citation. New York calls its *intermediate* court of appeals its "Supreme Court." Why? Who knows, and I think we all have better things to worry about.

People v. Tragni
NY County Supreme Court1982

Issue
Have defendants "entered" a building within the meaning of N.Y. Penal Law §140.20 when they drilled holes through a wall on either side of the safe located within the building, apparently intending to pass something around the safe and pull it out?

Held
No

Facts
Defendants drilled one hole completely through an exterior wall and had partially completed a second hole when they were apprehended. The holes were positioned on either side of a 3000 pound safe located within the building. The defendants apparently intended to pass something through the holes and around the safe in order to pull it out. Defendants unsuccessfully moved to dismiss the burglary count for legal insufficiency, were convicted and appealed on the grounds that no entry had occurred.

Reasoning/Rule

Entry occurs with any penetration of the airspace of a structure by the defendant's body, a part of his body or by any instrument being used, or intended to be used in the commission of a the crime. It is essential that the instrument penetrating the airspace is actually used to accomplish the crime, e.g. cracking a storefront window with a fishing pole which will then be used to hook an object within. In contrast, the use of a weapon or instrument solely to create or enlarge an opening or to facilitate entry is not an entry for purposes of the statute.

kate bohl 11/9/14 11:35 AM
Comment: Case briefing is a means for you to create a useful summary of the case.. It is for your own use, so you can and should figure out what format works for you. Legal writing texts always list possible headings, and often provide sample case briefs. In my humble opinion, legal writing texts all suggest too many headings and their samples are far too long to be useful. It is no wonder that most students abandon case briefing immediately .

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Case briefing in the real world

Case briefing is a means for you to create a useful summary of the case. Depending on who you ask, a case brief has between four and seven sections. It is for your own use, so you can - and should - figure out what format works for you. Legal writing texts always list possible headings, and often provide sample case briefs. In my humble opinion, legal writing texts *all* suggest far too many headings and their samples are far too long to be useful. It is no wonder that most students abandon case briefing immediately.

Below is a sample case brief as it would look on your computer screen. Below that sample is a breakdown of the brief, with the text of the brief in boxes on the left and my comments about the process in boxes on the right.

People v. Tragni
NY County Supreme Court1982

Issue
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Held
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Finally, all this work becomes an office memo!

MEMORANDUM

To: Senior Attorney
From: Law Clerk
Re: State v. Walker
Date: August 23, 2012

QUESTION PRESENTED:

Whether Jonas Walker completed an entry within the meaning of Westmoreland Penal Code section 459 when he drilled a hole on the underside of a corncrib, penetrating the air space of a corncrib, and allowing the kernels to flow freely into the sack he held beneath it?

BRIEF ANSWER:

Yes. Although this question has not been addressed in this jurisdiction, persuasive precedent holds that burglary by instrumentality occurs when the instrument used to enter the premises can also commit the crime. Since Walker could complete the crime without the use of an additional instrument, he can be successfully prosecuted.

FACTS:

Nodadiah Peeples, the complaining witness, owns a pig farm. He grows corn that he uses to feed his pigs and to sell commercially. After harvesting his corn, he shells it and stores it in a corncrib on his property. The corncrib is a square wooden enclosure, raised off the ground on each corner by three foot legs. The floor of the corncrib is plywood, the sides consist of wooden slats and the top is a hinged roof of corrugated aluminum. The crib is kept locked at all times.

Although the corncrib was kept locked, Peeples noticed a significant depletion of his stock of corn. He hired a guard to watch the corncrib. On August 20, 2012, the guard caught Jonas Walker under the corncrib. When Walker came out, he admitted that he had bored a hole in the bottom of the corncrib with a two inch auger and had collected the corn in a sack. He admitted, further, that he had taken about three pecks of corn in this way.

Peeples notified the police, who arrested Walker and charged him with burglary.

ANALYSIS:

Jonas Walker can be convicted of burglary because an entry can be proved since he both broke into the corncrib and took corn away using a single instrument. Westmoreland Penal Code section 459 provides, in pertinent part, that, "any person who, with intent to steal …breaks into and enters … any building, structure… or enclosure in which goods [or] merchandise … is kept for use [or] sale … is guilty of burglary." Case law defines an "entry" as "any penetration of air space in a building no matter how slight by a person …or by an instrument or weapon being used, or intended to be used in the commission of a crime." People v. Tragni, 449 N.Y.S.2d 923, 928 (App. Div. 1982). Given this definition of "entry," Walker's actions will probably constitute an entry because the auger was the instrument directly used to accomplish the theft of corn. Therefore Walker can be convicted of burglary under Westmoreland Penal Code section 459.

Entry by instrumentality occurred when Walker drilled the hole under the corncrib and was able to remove corn. Penetration of the interior space of a building with an instrument that will actually be used to commit a crime therein is sufficient to constitute entry, Tragni, 449 N.Y.S.2d at 928. Although the controlling statute does not explicitly define "entry" this way,

Tragni adopted this definition when it construed an identical statute. In Tragni, the defendants drilled through the wall of a store, intending to pull a safe through the wall by passing a rope through the holes and around the safe. Id. at 924. The court explained that drilling the holes alone did not constitute entry of the building. Id. It explained that the legislative history of the statute demonstrated an intent to retain the definition contained in prior law, a "common usage" and a "common sense definition [] of both bodily and instrumental entry." Id. at 926. Thus, "entry would occur with the "insertion of any part of [defendant's] body or of any instrument or weapon held in his hand and used to threaten or intimidate the inmates or *to detach or remove property*." Id. at 924 (emphasis in original). Walker's insertion of the auger alone "remove[d] property," Id., satisfying this definition of entry.

Unlike the defendants in Tragni, Walker positioned the holes he drilled so that he could complete the crime without the use of an additional instrument. In Tragni, the defendants drilled holes on each side of a safe through the wall. Id. at 924. The holes were drilled solely to create openings; they were not drilled through the wall and into the safe so as to allow any jewelry inside the safe to fall through the holes and into the defendants' hands. In contrast, Walker did not use the auger "solely" to create a hole. Instead, he

bored the hole directly under the corncrib, knowing the corn would flow freely into his sack. No other instrument was required, thus, in the instant case, the placement of the hole was critical to the commission of the crime, whereas in Tragni the placement of the holes was preliminary to the crime.

Walker's act is comparable to an example of entry by instrumentality given in Tragni, in which a wall is shattered with a magnetized iron ball which was able to attract and remove objects from the premises without the use of any other instrument. The magnetic force in the Tragni example directly caused the metal objects to be stolen to travel through the air towards the magnetic ball itself. Id. In Walker's case, gravitational force caused the corn to travel through the opening created by the auger and towards the outside of the crib, into Walker's waiting sack. In both cases, no further action and no additional instrument was needed to complete the crime because an intangible force of nature propelled the desired product to the would-be burglar.

CONCLUSION

In Walker's case, the auger was sufficient to remove the contents of the crib and complete the crime. In Tragni, something else needed to be used after

the drill was removed. Thus, unlike the defendants in Tragni, Walker's conduct satisfies the element of "entry" under the burglary statute.

Here is the same memo, with comments:

MEMORANDUM

To: Senior Attorney
From: Law Clerk
Re: State v. Walker
Date: August 23, 2012

QUESTION PRESENTED:

Whether Jonas Walker completed an entry within the meaning of Westmoreland Penal Code section 459 when he drilled a hole on the underside of a corncrib, penetrating the air space of a corncrib, and allowing the kernels to flow freely into the sack he held beneath it?

kate bohl 11/9/14 11:43 AM
Comment: Although the broader question is whether Jonas Walker committed burglary, only the element of "entry" is at issue. When writing a question presented (a.k.a. an issue statement) be as specific as possible

kate bohl 11/9/14 11:43 AM
Comment: Since the legal term at issue is whether an entry occurred, don't use the word entry in its common, lay person form. Therefore the writer used the word "penetrating" rather than "entering."

kate bohl 11/9/14 11:43 AM
Comment: Notice that after the word "when" the writer has included three key facts. When you write an issue statement make sure to use facts, not legal conclusions.

BRIEF ANSWER:

Yes. Although this question has not been addressed in this jurisdiction, persuasive precedent holds that burglary by instrumentality occurs when the instrument used to enter the premises can also commit the crime. Since Walker could complete the crime without the use of an additional instrument, he can be successfully prosecuted.

kate bohl 11/9/14 11:43 AM
Comment: It is good to be direct in a brief answer. Don't beat around the bush!

kate bohl 11/9/14 11:43 AM
Comment: The brief answer should include legal conclusions. Keep it truly brief – two or three sentences should be enough.

FACTS:

Nodadiah Peeples, the complaining witness, owns a pig farm. He grows corn that he uses to feed his pigs and to sell commercially. After harvesting his corn, he shells it and stores it in a corncrib on his property. The corncrib is a square wooden enclosure, raised off the ground on each corner by three foot legs. The floor of the corncrib is plywood, the sides consist of wooden slats and the top is a hinged roof of corrugated aluminum. The crib is kept locked at all times.

kate bohl 11/9/14 11:43 AM

Comment: In the record the writer was given there were many more facts. The writer properly omitted facts that were not directly relevant, such as the street address of the pig farm.

Although the corncrib was kept locked, Peeples noticed a significant depletion of his stock of corn. He hired a guard to watch the corncrib. On August 20, 2012, the guard caught Jonas Walker under the corncrib. When Walker came out, he admitted that he had bored a hole in the bottom of the corncrib with a two inch auger and had collected the corn in a sack. He admitted, further, that he had taken about three pecks of corn in this way.

Peeples notified the police, who arrested Walker and charged him with burglary.

kate bohl 11/9/14 11:43 AM

Comment: This is the "procedural posture" of the case, which simply refers to whatever has happened in the legal system. In an office memo in a civil case, the procedural posture will often be simply the fact that the client or potential client has sought legal advice from you or the firm.

ANALYSIS:

Jonas Walker can be convicted of burglary because an entry can be proved since he both broke into the corncrib and took corn away using a single instrument. Westmoreland Penal Code section 459 provides, in pertinent part, that, "any person who, with intent to steal …breaks into and enters … any building, structure… or enclosure in which goods [or] merchandise … is kept for use [or] sale … is guilty of burglary." Case law defines an "entry" as "any penetration of air space in a building no matter how slight by a person …or by an instrument … being used, or intended to be used in the commission of a crime." People v. Tragni, 449 N.Y.S.2d 923, 928 (App. Div. 1982). Given this definition of "entry," Walker's actions will probably constitute an entry because the auger was the instrument directly used to accomplish the theft of corn. Therefore, Walker can be convicted of burglary under Westmoreland Penal Code section 459.

kate bohl 11/9/14 11:43 AM
Comment: The thesis paragraph gives the writer's conclusion and key rules. The code provision and quote from Tragni are both edited to remove irrelevant words.

Entry by instrumentality occurred when Walker drilled the hole under the corncrib and was able to remove corn. Penetration of the interior space of a building with an instrument that will actually be used to commit a crime therein is sufficient to constitute entry, Tragni, 449 N.Y.S.2d at 928.

kate bohl 11/9/14 11:43 AM
Comment: A good topic sentence relates law to facts to make a point.

Although the controlling statute does not explicitly define "entry" this way, Tragni adopted this definition when it construed an identical statute. In Tragni, the defendants drilled through the wall of a store, intending to pull a safe through the wall by passing a rope through the holes and around the safe. Id. at 924. The court explained that drilling the holes alone did not constitute entry of the building. Id. It explained that the legislative history of the statute demonstrated an intent to retain the definition contained in prior law, a "common usage" and a "common sense definition [] of both bodily and instrumental entry." Id. at 926. Thus, "entry would occur with the "insertion of any part of [defendant's] body or of any instrument or weapon held in his hand and used to threaten or intimidate the inmates or *to detach or remove property*." Id. at 924 (emphasis in original). Walker's insertion of the auger alone "remove[d] property," Id., Therefore Walker's actions satisfy the definition of entry.

kate bohl 11/9/14 11:43 AM
Comment: Empty brackets tell the reader that you have omitted a word from a quote.

kate bohl 11/9/14 11:43 AM
Comment: Enclosing a word in brackets tells the reader that you have added a word to a quote.

kate bohl 11/9/14 11:43 AM
Comment: This is a long paragraph but, at eighteen lines long, it is about three quarters of a page long and not too long to be a single paragraph.

Unlike the defendants in Tragni, Walker positioned the holes he drilled so that he could complete the crime without the use of an additional instrument. In Tragni, the defendants drilled holes on each side of a safe through the wall. Id. at 924. The holes were drilled solely to create openings; they were not drilled through the wall and into the safe so as to allow any jewelry

kate bohl 11/9/14 11:43 AM
Comment: This paragraph disposes of a counter argument – the argument that Walker's action is like the actions the defendants took in Tragni and so does not satisfy the requirement of entry. Another way to set up a counter argument would be to say "Although the defendant will argue x, this argument will fail because…" OR "The defendant cannot successfully argue x because…"

inside the safe to fall through the holes and into the defendants' hands. In contrast, Walker did not use the auger "solely" to create a hole. Instead, he bored the hole directly under the corncrib, knowing the corn would flow freely into his sack. No other instrument was required. Thus, in the instant case, the placement of the hole was critical to the commission of the crime, whereas in Tragni the placement of the holes was preliminary to the crime.

kate bohl 11/9/14 11:43 AM
Comment: The final sentence in the paragraph restates the topic sentence in light of the precedent cited and applied to the facts at issue.

Walker's act is comparable to an example of entry by instrumentality given in Tragni, in which a wall is shattered with a magnetized iron ball that was able to attract and remove objects from the premises without the use of any other instrument. The magnetic force in the Tragni example directly caused metal objects to travel through the air towards the magnetic ball itself. Id. In Walker's case, gravitational force caused the corn to travel through the opening created by the auger and towards the outside of the crib, into Walker's waiting sack. In both cases, no further action and no additional instrument was needed to complete the crime because an intangible force of nature propelled the desired product to the would-be burglar.

CONCLUSION

In Walker's case, the auger was sufficient to remove the contents of the crib and complete the crime. In Tragni, something else needed to be used after the drill was removed. Thus, unlike the defendants in Tragni, Walker's conduct satisfies the element of "entry" under the burglary statute.

kate bohl 11/9/14 11:43 AM

Comment: A conclusion should never include new point. This is a very long conclusion and could be cut down to a single short sentence: "Walker's conduct satisfies the element of "entry" under the burglary statute."