

**TO:** All Senators  
**FROM:** Senator Jay Costa  
**DATE:** January 11, 2011  
**SUBJECT:** Introduction of legislation  
**Re: Burglary Statutes**

Please join me in sponsoring the following legislation introduced as S.B. 436 in the 2009-2010 legislative session by Senators COSTA, KITCHEN, FONTANA, BOSCOLA, ORIE, STOUT, KASUNIC, MUSTO, O'PAKE, TARTAGLIONE, LOGAN, WAUGH AND BROWNE.

It was brought to my attention that there is an inconsistency that exists between the current burglary statute (18 Pa.C.S. § 3502) and burglary as it is used in the Three Strikes sentencing statute (42 Pa.C.S. § 9714). Under the current criminal statute, the offense of burglary is graded as a felony of the first degree when it involves a structure that is adapted for overnight accommodations *regardless* of whether a person is present during the commission of the offense. In fact, the current burglary statute makes no reference to and does not require that a person be present in order for the offense to occur.

However, the Three Strikes law is applicable for the offense of burglary only when a person was present in the structure adapted for overnight accommodations.

The problem arises in light of a recent United States Supreme Court opinion that requires that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. *Apprendi vs. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Therefore, any fact that will result in the increase of the statutory maximum sentence is a fact that must be determined by the fact finder at trial—either a jury or a trial judge where the defendant has waived his right to a jury trial. Under *Apprendi*, a sentencing court cannot conclude that a factual element exists and thereby impose a greater sentence based on criteria that exists in a sentencing statute. The statutory maximum for a felony of the first degree is

twenty years. The maximum sentence for a second or subsequent offense pursuant to 42 Pa.C.S.A. § 9714 is fifty years or life.

To remedy this situation while providing prosecutors and sentencing courts with the authority to charge and convict for the appropriate criminal behavior, I am proposing a revision of the burglary statute that specifically reflects the exact nature of the crime being committed. At the same time, the revisions to the burglary statute will address the growing “home invasion” problem that is being experienced in many parts of the Commonwealth.

The proposal will add the element that is a person present in a structure adapted for overnight accommodations. Additionally, it will add the element that there is a person present in a structure that is not adapted for overnight accommodations. In both instances, the offense will be graded as a felony of the first degree with a maximum sentence of twenty years imprisonment for a first offense. More importantly, it will allow prosecutors to specifically charge the elements that are most appropriate to the offense and preserve the application of the Three Strikes law for future cases.

This distinction currently exists under the Sentencing Guidelines and has been tacitly approved by the Legislature—but only as a regulation. By adopting the Sentencing Guidelines language as the statutory language for “burglary” in the Crimes Code, the Legislature could address both the *Apprendi* and “home invasion” problems by embracing language that it has already been approved and implemented for sentencing purposes

I hope you will join me in sponsoring this legislation by contacting my office at 7-7683 or e-mailing Anne Griffin-Gray at [aggray@pasenate.com](mailto:aggray@pasenate.com). Thank you for your attention to this matter.