

# Life in Prison for Stealing \$48?: Rethinking Second-Degree Robbery as a Strike Offense in Washington State

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## I. INTRODUCTION

When Stevan Dozier was released from incarceration after fifteen years, he “tried not to look at the prison behind him.”<sup>1</sup> Instead, he ran forward toward his wife, Lillian, and graciously thanked her for supporting him during his incarceration.<sup>2</sup>

After graduating from high school in 1979, “Dozier began getting into trouble and abusing” cocaine.<sup>3</sup> As his drug addiction worsened, he became increasingly desperate to support his habit. As a result, “he was arrested after punching a woman during a purse snatching” in 1986 and arrested again for the same crime in 1988.<sup>4</sup> Each purse snatching constituted a second-degree robbery conviction.<sup>5</sup> Then, in February 1994, Dozier pushed down a sixty-nine-year-old woman and grabbed her purse, which resulted in his third second-degree robbery conviction.<sup>6</sup> He was subsequently sentenced to life in prison without parole, pursuant to Washington State’s Persistent Offender Accountability Act (POAA), commonly referred to as the “three strikes” law.

Under the POAA, second-degree robbery is considered a “strike offense.”<sup>7</sup> In Washington, strike offenses include a variety of crimes<sup>8</sup> from

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1. Jennifer Sullivan, *Freed 3-Strikes Offender is Being Watched Closely by Supporters, Critics*, SEATTLE TIMES, June 11, 2009, [http://seattletimes.nwsourc.com/html/politics/2009325750\\_threestrikes11m.html](http://seattletimes.nwsourc.com/html/politics/2009325750_threestrikes11m.html).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *State v. Dozier*, No. 35368-3-I, 1998 WL 130098, at \*1 (Wash. Ct. App. Mar. 23, 1998).

7. WASH. REV. CODE § 9.94A.030(31)(o) (2011).

8. Strike offenses include:

first-degree promoting prostitution<sup>9</sup> to first-degree manslaughter.<sup>10</sup> Under the POAA, once an offender has three separate convictions of crimes considered strike offenses, the offender receives a mandatory sentence of life without parole.<sup>11</sup> Essentially, as in its baseball namesake, under the POAA, three strikes and an offender is out. In 1993, the Washington State legislature adopted this three strikes policy to “[r]educe the number of serious, repeat offenders by tougher sentencing.”<sup>12</sup> This reasoning is grounded in the notion that repeat offenders commit a “disproportionately high volume of violent crimes.”<sup>13</sup> For example, at the time of the POAA’s adoption, nearly 50% of the criminals convicted in Washington had prior criminal histories.<sup>14</sup>

“During [Dozier’s fifteen] years in prison, he held down a number of jobs, attended drug and alcohol counseling, and joined the ‘Concerned Lifers,’ a group of men serving life sentences who convene to discuss social issues.”<sup>15</sup> Dozier’s behavior in prison while serving a life sentence without parole earned him the support of King County Prosecutor Dan Satterberg, the judge who sentenced him to prison Brian Gain, and conservative talk-show host and three strikes coauthor John Carlson.<sup>16</sup> After Dozier spent years waiting and hoping, Washington Governor Christine Gregoire granted him clemency “based upon the length of his sentence,

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Assault in the second degree; assault of a child in the second degree; child molestation in the second degree; controlled substance homicide; extortion in the first degree; incest when committed against a child under age fourteen; indecent liberties; kidnapping in the second degree; leading organized crime; manslaughter in the first degree; manslaughter in the second degree; promoting prostitution in the first degree; rape in the third degree; robbery in the second degree; sexual exploitation; vehicular assault when caused by the operation or driving of a vehicle by a person while under the influence of intoxicating liquor or any drug or by the operation or driving of a vehicle in a reckless manner; vehicular homicide, when proximately caused by the driving of any vehicle by any person while under the influence of intoxicating liquor or any drug as defined by RCW 46.61.502 or by the operation of any vehicle in a reckless manner; any other class B felony offense with a finding of sexual motivation; and any other felony with a deadly weapon verdict under RCW 9.94A.602.

*Id.* §§ (a)–(t) (internal numbering omitted).

9. “A person is guilty of promoting prostitution in the first degree if he or she knowingly advances prostitution by compelling a person by threat or force to engage in prostitution or profits from prostitution which results from such threat or force.” WASH. REV. CODE § 9A.88.070(1) (2011).

10. “A person is guilty of manslaughter in the first degree when: (a) He recklessly causes the death of another person; or (b) He intentionally and unlawfully kills an unborn quick child by inflicting any injury upon the mother of such child.” WASH. REV. CODE § 9A.32.060(1) (2011).

11. WASH. REV. CODE § 9.94A.570 (2011).

12. WASH. REV. CODE § 9.94A.555(2)(b) (2011).

13. Edwin Meese, *Three-Strikes Laws Punish and Protect*, 7 FED. SENT’G REP. 58, 58 (1994).

14. WASH. REV. CODE § 9.94A.555(1)(b) (2011).

15. Sullivan, *supra* note 1.

16. *Id.*

the crime he committed, and his behavior in prison.”<sup>17</sup> Dozier is the first “three-strikes offender to be granted clemency” in Washington.<sup>18</sup>

Following Dozier’s release in May 2009, two more three strikes lifers have been recommended for conditional clemency.<sup>19</sup> Both Al-Kareem Shadeed and Michael Lee Bridges have spent fifteen years in prison, and for both, attempting to steal a wallet was their third strike offense that earned them a life sentence.<sup>20</sup> Like Dozier, both men are former drug addicts<sup>21</sup> who have now become model prisoners.

Shadeed, now forty, was twenty-four when he was sentenced to life in prison after attempting to steal a wallet from a high-school teacher.<sup>22</sup> His prior strike convictions consisted of robbery, the first for \$2 and the second for less than \$150.<sup>23</sup> According to Shadeed’s attorney, the victim of his third strike offense told Shadeed’s trial judge that “a life sentence was a waste of the young man’s life.”<sup>24</sup> Within his first year of incarceration, Shadeed earned his high school diploma.<sup>25</sup> Additionally, he “took classes in writing and business, . . . consistently attended Narcotics Anonymous meetings, and participated in a series of programs that brings victims and offenders together.”<sup>26</sup>

Similar to Shadeed, Bridges, now forty-eight, was “an alcoholic and cocaine addict in 1994” when he attempted “to steal a man’s wallet that would have netted him \$48.”<sup>27</sup> He grabbed the victim’s wallet and pushed him away with sufficient force to constitute second-degree robbery.<sup>28</sup> Bridges had previously been convicted of second-degree robbery in 1987 and 1989—before the POAA was even enacted.<sup>29</sup> Accordingly, his 1994 attempt was his third strike because the POAA is retroactive

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17. Jennifer Sullivan, *Clemency Recommended for 3-Strikes Offender*, SEATTLE TIMES, Dec. 11, 2008, [http://seattletimes.nwsourc.com/html/localnews/2008496057\\_webthreestrikes11m.html](http://seattletimes.nwsourc.com/html/localnews/2008496057_webthreestrikes11m.html) (modified on May 8, 2009).

18. Sullivan, *supra* note 1; see also Kim Murphy, *Washington State Revisits Three-Strikes Law*, L.A. TIMES, Aug. 11, 2009, <http://articles.latimes.com/2009/aug/11/nation/na-three-strikes11> (Dozier is also “the first three-strikes lifer in the nation to be pardoned.”).

19. Sara Jean Green, *Clemency Recommended for 3-Strikes Offenders*, SEATTLE TIMES, June 12, 2009, [http://seattletimes.nwsourc.com/html/localnews/2009330285\\_threestrikes12m.html](http://seattletimes.nwsourc.com/html/localnews/2009330285_threestrikes12m.html).

20. *Id.*

21. *Id.*

22. Shadeed “tried to grab [the victim], threatened to kill him, and demanded money.” State v. Shadeed, No. 35647-0-I, 1997 WL 288995, at \*1 (Wash. Ct. App. May 27, 1997). When the victim yelled out for help, Shadeed lied and said “he had a gun and would kill him.” *Id.* When a car came down the street, Shadeed ran away. *Id.*; see also Green, *supra* note 19.

23. Shadeed, 1997 WL 288995, at \*5.

24. Green, *supra* note 19.

25. *Id.*

26. *Id.*

27. *Id.*

28. State v. Bridges, 91 Wash. App. 102, 103, 955 P.2d 833, 834 (1998).

29. Green, *supra* note 19.

and includes crimes committed prior to its enactment.<sup>30</sup> “Since being sentenced to life in prison, Bridges has undergone drug and alcohol treatment, become a Christian and worked to be a good father to his now-16-year-old son . . . .”<sup>31</sup>

For each of these men, his third and final strike was second-degree robbery.<sup>32</sup> “None of the three men used weapons or caused serious injury to their victims.”<sup>33</sup> Without the application of the POAA, these defendants would have served between fifteen months and ten years in prison for their third second-degree robbery convictions.<sup>34</sup> But because second-degree robbery has been categorized as a “most serious offense” for the purposes of the POAA, these men were sentenced to life in prison without parole—the same sentence that Gary Ridgway, the Green River Killer, received after pleading guilty to forty-nine murders.<sup>35</sup>

The Washington State legislature should remove second-degree robbery as a final strike because of the large sentencing disparity between the POAA’s mandatory sentence of life without parole versus the Washington State Sentencing Guidelines Commission’s sentencing range for this offense. But second-degree robbery should remain as a first or second strike offense to serve the goal of deterrence, and failing that, to ensure the incarceration of offenders whose crimes escalate in violence.

This Comment begins by discussing the history of three strikes legislation both nationally and in Washington State and explains why three strikes laws became popular in the mid-1990s. Part II also addresses the elements and sentencing of second-degree robbery under Washington’s current sentencing structure. Part III provides an overview of the sentencing process in Washington State, including the background of the Washington Sentencing Guidelines Commission and its goals; the role of both the governor and the Washington State Clemency and Pardons Board in granting clemency; and the severity of life in prison without parole. Part IV addresses why the POAA should be amended to better align with the reality of how Washington prosecutors use second-degree robbery as a strike offense. Part IV also assesses the disconnect between the outcomes and the goals behind three strikes laws, and the politics

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30. WASH. REV. CODE 9.94A.030(31)(u) (2011).

31. Green, *supra* note 19.

32. *Id.*

33. *Id.*

34. ST. OF WASH. SENT’G GUIDELINES COMM’N, ADULT SENTENCING GUIDELINES MANUAL III-196 (2008) [hereinafter ADULT SENTENCING GUIDELINES].

35. Natalie Singer, *If Ridgway Got Life, Would Anyone Get Death?*, SEATTLE TIMES, Jan. 31, 2007, [http://seattletimes.nwsourc.com/html/localnews/2003548923\\_deathpenalty31m.html](http://seattletimes.nwsourc.com/html/localnews/2003548923_deathpenalty31m.html). Since Ridgway’s plea deal in 2003, he pleaded guilty to a forty-ninth murder. Jennifer Sullivan, *Green River killer Ridgway pleads guilty to 49th murder*, SEATTLE TIMES, Feb. 18, 2011, [http://seattletimes.nwsourc.com/html/localnews/2014272411\\_ridgeway19m.html](http://seattletimes.nwsourc.com/html/localnews/2014272411_ridgeway19m.html).

behind criminal sentencing legislation including Washington State Senate Bill 5292 and Senate Bill 5236.

## II. BACKGROUND

Three strikes legislation became increasingly popular in the mid-1990s. This Part first outlines the reasons behind the widespread emergence of three strikes legislation during this time. Next, this Part discusses how and why three strikes legislation was adopted in Washington State as well as the goals behind the legislation. Finally, this Part concludes by discussing the elements and sentencing of second-degree robbery in Washington State.

### *A. The Emergence of Three Strikes Laws*

#### 1. Three Strikes Legislation Nationally

During the early 1990s, three strikes legislation was publicized as “a new way to fight crime in America.”<sup>36</sup> But prior to the 1990s, many states had already enacted laws similar to three strikes laws called “habitual offender” laws.<sup>37</sup> For example, Washington State had a Habitual Criminal Statute<sup>38</sup> that became ineffective after the Sentencing Reform Act of 1981.<sup>39</sup> The main difference between a habitual criminal statute and a three strikes law is semantic. For example, a habitual criminal statute focuses on the “status” of the criminal if he commits a certain number of crimes; the status as a “habitual criminal” is what determines his punishment. Conversely, a three strikes law may refer to the offender as

36. Meredith McClain, Note, “*Three Strikes and You’re Out: The Solution to the Repeat Offender Problem?*,” 20 SETON HALL LEGIS. J. 97, 101 (1996).

37. *Id.*

38. The statute stated:

Every person convicted in this state of any crime of which fraud or intent to defraud is an element, or of petit larceny, or of any felony, who shall previously have been convicted, whether in this state or elsewhere, of any crime which under the laws of this state would amount to a felony, or who shall previously have been twice convicted, whether in this state or elsewhere, of petit larceny, or of any misdemeanor or gross misdemeanor of which fraud or intent to defraud is an element, shall be adjudged to be an habitual criminal and shall be punished by imprisonment in the state penitentiary for not less than ten years. Every person convicted in this state of any crime of which fraud or intent to defraud is an element, or of petit larceny, or of any felony, who shall previously have been twice convicted, whether in this state or elsewhere, of any crime which under the laws of this state would amount to a felony, or who shall previously have been four times convicted, whether in this state or elsewhere, of petit larceny, or of any misdemeanor or gross misdemeanor of which fraud or intent to defraud is an element, shall be punished by imprisonment in the state penitentiary for life.

WASH. REV. CODE § 9.92.090 (1909).

39. Washington’s Habitual Criminal Statute, RCW 9.92.090, is not applicable to crimes committed on or after July 1, 1984. WASH. REV. CODE § 9.92.900 (2011).

being habitual, or “persistent” as in Washington, but shifts the focus from status to the number of crimes the offender commits.

In 1993, Washington was the first state in the nation to adopt a three strikes law, the POAA.<sup>40</sup> The POAA was “modeled after and more narrowly drafted than Washington’s habitual criminal statute,”<sup>41</sup> which applied after the third conviction of any felony. Subsequently, between 1993 and 1995, twenty-four states and the federal government<sup>42</sup> adopted similar three strikes laws.<sup>43</sup>

Three strikes legislation is rooted in the notion that repeat offenders, “who represent a relatively small component of the offender population, commit a disproportionately high volume of violent crimes.”<sup>44</sup> For example, three strikes supporters often rely on federal statistics that show “6 percent of criminals commit about 70 percent of all crimes.”<sup>45</sup> Hence, crime rates should decrease if these persistent offenders are imprisoned for a lengthy amount of time.<sup>46</sup> Additionally, proponents of three strikes laws hope that offenders will be less likely to commit a crime when they know the punishment could increase.<sup>47</sup> A potential deterrent effect exists when a person is convicted of a strike offense because both his counsel and the sentencing judge will inform him of the consequences of later strike-offense convictions. Proponents argue this deterrent effect will reduce crime rates.<sup>48</sup> But those offenders whose two prior strike convictions occurred before the POAA,<sup>49</sup> like Dozier, Bridges, and Shadeed, could not have been notified of the possible sentence that would result from a third strike-offense conviction.<sup>50</sup>

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40. Michael Vitiello, *Three Strikes Laws: A Real or Imagined Deterrent to Crime?*, A.B.A. HUM. RTS. MAG., Spring 2002, at 3.

41. *State v. Dozier*, No. 35368-3-I, 1998 WL 130098, at \*8 (Wash. Ct. App. Mar. 23, 1998).

42. *See, e.g.*, 18 U.S.C. § 3559(c).

43. Thomas B. Marvell & Carlisle E. Moody, *The Lethal Effects of Three-Strikes Laws*, 30 J. LEGAL STUD. 89, 89 (2001).

44. Meese, *supra* note 13.

45. Timothy Egan, *A 3-Strike Law Shows It's Not as Simple as It Seems*, N.Y. TIMES, Feb. 15, 1994, <http://www.nytimes.com/1994/02/15/us/a-3-strike-law-shows-it-s-not-as-simple-as-it-seems.html?pagewanted=1>.

46. Kent Scheidegger & Michael Rushford, *The Social Benefits of Confining Habitual Criminals*, 11 STAN. L. & POL'Y REV. 59, 59 (1999).

47. Marvell & Moody, *supra* note 43, at 90.

48. Scheidegger & Rushford, *supra* note 46, at 60.

49. If a defendant who committed a Class B felony that was a strike offense spends at least ten consecutive years in the community after release from prison without committing another strike offense, then the prior conviction is “washed out” and does not count toward the defendant’s offender score. *State v. Failey*, 165 Wash.2d 673, 678, 201 P.3d 328, 330 (2009); *see also* WASH. REV. CODE § 9.94A.525(2)(b) (2011).

50. The Court of Appeals of Washington Division I held that despite this lack of warning, the POAA did not violate the ex post facto clause of either the United States or Washington State Constitutions because the POAA is only triggered upon the defendant’s third conviction, which occurred

The surge of three strikes laws across the United States in the early 1990s occurred, in large part, in response to the murder of twelve-year-old Polly Klaas. On October 1, 1993, Klaas was kidnapped from her home in Petaluma, California, and brutally murdered.<sup>51</sup> At the time of her kidnapping, Klaas was in her bedroom with two of her friends who were spending the night for a sleepover.<sup>52</sup> Her admitted killer,<sup>53</sup> Richard Allen Davis, had a long criminal history that included two prior kidnapping convictions.<sup>54</sup> Davis had served only half of his most recent sixteen-year sentence for kidnapping, assault, and burglary.<sup>55</sup> If he had served his entire sentence, Davis would have been in prison the day he kidnapped Klaas.<sup>56</sup> “Klaas’s murder galvanized support for the three strikes initiative”<sup>57</sup> in California. “Shortly thereafter, people all over the United States began demanding their legislatures pass tougher crime bills,”<sup>58</sup> and legislatures responded with three strikes legislation.

Three strikes laws differ across the nation. For example, California’s law is broader than Washington’s regarding how a person can obtain three strikes. In Washington, each offense must be from the strike-offense list. In contrast, in California, “only the first two convictions need be from the state’s list of ‘strikeable’ offenses [and] any subsequent felony counts as a third strike”<sup>59</sup> making the law far broader than Washington’s. Nevertheless, the length of incarceration is less severe in California: twenty-five years to life in prison,<sup>60</sup> compared to life without parole in Washington.<sup>61</sup> But by including any felony as a third strike, California’s broad three strikes law has led to some controversial results.<sup>62</sup> For example, in one case, the defendant’s third strike consisted of steal-

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after the POAA had passed. *State v. Angehrn*, 90 Wash. App. 339, 343–44, 952 P.2d 195, 197 (1998).

51. *People v. Davis*, 208 P.3d 78, 96, 99 (Cal. 2009). The jury found Davis guilty of first-degree murder, burglary, robbery, kidnapping, and an attempted lewd act against a child. *Id.* at 94.

52. *Id.* at 95–96.

53. The defense conceded that the defendant had killed Klaas, but asserted that the evidence did not show that he sexually assaulted her. *Id.* at 102.

54. *Ewing v. California*, 538 U.S. 11, 14 (2003); *see also Davis*, 208 P.3d at 102–03.

55. *Ewing*, 538 U.S. at 14–15.

56. *Id.* at 15.

57. *Id.*

58. McClain, *supra* note 36, at 99.

59. John Clark, James Austin & D. Alan Henry, ‘Three Strikes and You’re Out:’ Are Repeat Offender Laws Having Their Anticipated Effects?, 81 JUDICATURE 144, 145–46 (1998).

60. CAL. PENAL CODE § 667(e)(2)(A) (West 2010).

61. WASH. REV. CODE § 9.94A.570 (2011).

62. *See, e.g., Ewing*, 538 U.S. at 18–20 (third strike consisted of stealing three golf clubs); *Lockyear v. Andrade*, 538 U.S. 63, 66–68 (2003) (third strike consisted of stealing \$150.00 worth of videotapes); *People v. Drew*, 47 Cal. Rptr. 2d 319, 321 (Ct. App. 1995) (third strike consisted of possessing codeine).

ing a piece of pizza.<sup>63</sup> Even Klaas's father expressed shock at the "small time crooks" who were striking out under the law,<sup>64</sup> stating, "I've had my car broken into and my radio stolen and I've had my daughter murdered, and I know the difference."<sup>65</sup> Despite the debatable outcomes, the United States Supreme Court has held that California's broad three strikes law "does not violate the Eighth Amendment's prohibition against cruel and unusual punishment."<sup>66</sup>

## 2. Three Strikes Legislation in Washington State

Similar to California's reaction to the Polly Klaas murder, "Washington was reeling from a series of horrific crimes committed by repeat offenders when voters passed the" POAA.<sup>67</sup> Early supporters of the POAA consisted of Helen Harlow "whose 7-year-old son had been raped, choked, and sexually mutilated in 1989 by a man who had been assaulting children for 24 years, and Ida Ballasoites, whose daughter was abducted and murdered in 1988 while walking from her office to her car in downtown Seattle by a man" twice jailed for sexual assault.<sup>68</sup>

In reaction to these crimes, on November 2, 1993, "voters in Washington approved the first three-strikes statute in the nation by a 3:1 margin."<sup>69</sup> Voters intended to "[i]mprove public safety by placing the most dangerous criminals in prison" and to ensure punishments proportionate "to both the seriousness of the crime and the [offender's] prior criminal history."<sup>70</sup> The POAA became effective on December 2, 1993, and amends the Washington Sentencing Reform Act of 1981 to define a new type of offender, the "persistent offender,"<sup>71</sup> and a new type of offense, the "most serious offense," commonly referred to as a strike offense.

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63. *25 Years for a Slice of Pizza*, N.Y. TIMES, Mar. 5, 1995, <http://www.nytimes.com/1995/03/05/us/25-years-for-a-slice-of-pizza.html?scp=1&sq=%2225%20Years%20for%20a%20Slice%20of%20Pizza%22&st=cse>. The defendant stole a piece of pepperoni pizza from a group of children at Redondo Beach, CA. He had prior convictions for robbery, attempted robbery, drug possession, and unauthorized use of a vehicle. *Id.* His sentence of twenty-five years to life was later reduced to six years. Jerry Dewayne Williams, *3rd Strike Theft of a Slice of Pizza, Sentence: 25 Years to Life, Reduced to 6, THREE STRIKES & YOU'RE OUT: STOP REPEAT OFFENDERS*, <http://www.threestrikes.org/calaw01.html> (last visited Jan. 26, 2011).

64. McClain, *supra* note 36, at 118 n.96.

65. Jennifer Edwards Walsh, "In the Furtherance of Justice": *The Effect of Discretion on the Implementation of California's Three Strikes Law*, THREE STRIKES & YOU'RE OUT 12 (1999), <http://www.threestrikes.org/JEWalsh.pdf>.

66. *See Ewing*, 538 U.S. at 28–31.

67. Murphy, *supra* note 18.

68. *Id.*

69. Francis T. Cullen, Bonnie S. Fisher & Brandon K. Applegate, *Public Opinion About Punishment and Corrections*, 27 CRIME & JUST. 1, 38 (2000).

70. WASH. REV. CODE § 9.94A.555(1)(c), (2)(a) (2011).

71. WASH. REV. CODE § 9.94A.030(36) (2011).



For a defendant to be a three strikes persistent offender, he must satisfy several requirements.<sup>72</sup> First, the defendant must be convicted of any felony in Washington considered a strike offense.<sup>73</sup> Second, the defendant must have previously been convicted of a strike offense at least twice before.<sup>74</sup> Third, “at least one of the prior convictions must have occurred before the commission of any of the other most serious offenses.”<sup>75</sup> “In other words, the sequence must be: first offense, first conviction; second offense, second conviction; third offense, third conviction.”<sup>76</sup>

The POAA applies retroactively, so any strike-offense conviction prior to December 2, 1993, comparable to a most serious offense on the strike list counts as a strike offense.<sup>77</sup> Furthermore, any “out-of-state and federal convictions with titles different than, but conduct similar to,” a listed strike offense also counts.<sup>78</sup>

### *B. Second-Degree Robbery in Washington State*

The POAA lists over twenty strike offenses including second-degree robbery.<sup>79</sup> Not every state includes second-degree robbery as a strike offense.<sup>80</sup> In Washington, a person commits robbery if he “takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone.”<sup>81</sup> A person commits first-degree robbery when, “in commission of

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72. 13 ROYCE A. FERGUSON, JR., WASHINGTON PRACTICE: CRIMINAL PRACTICE & PROCEDURE § 3514 (3d ed. 2010–2011).

73. See *supra* note 8 and accompanying text.

74. WASH. REV. CODE § 9.94A.030(36)(a)(ii) (2011).

75. See 13 FERGUSON, JR., *supra* note 72, § 3514.

76. *Id.*

77. WASH. REV. CODE § 9.94A.030(31)(u) (2011); see also *supra* note 49 and accompanying text.

78. Daniel W. Stiller, Note/Comment, *Initiative 593: Washington’s Voters Go Down Swinging*, 30 GONZ. L. REV. 433, 435 (1995); WASH. REV. CODE § 9.94A.030(31)(u) (2011).

79. WASH. REV. CODE § 9.94A.030(31)(o) (2011); see also *supra* note 8 and accompanying text.

80. See *infra* Appendix A. Although most states do include a crime equivalent to second-degree robbery in their habitual offender statutes, many of these states do not have such lengthy sentences as Washington. For example, in North Dakota, the maximum term of imprisonment is ten years for a conviction equivalent to second-degree robbery when the offender has two prior offenses. N.D. CENT. CODE § 12.1-32-09(2) (2009). In Rhode Island, the court may sentence a habitual offender to an additional sentence with a maximum of twenty-five years. R.I. GEN. LAWS § 12-19-21 (2010).

81. WASH. REV. CODE § 9A.56.190 (2011). Additionally:

Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking

the robbery or immediate flight therefrom, he or she is armed with a deadly weapon, displays what appears to be a firearm or deadly weapon, inflicts bodily injury, or commits robbery against a financial institution.”<sup>82</sup> A person commits second-degree robbery in Washington if “he commits a robbery.”<sup>83</sup> In other words, first-degree robbery includes the element of possession of a deadly weapon or infliction of bodily injury whereas second-degree robbery does not. This added element is based on the theory that the dangerousness level of a crime elevates exponentially when a weapon is involved, even if the weapon is not used.

Second-degree robbery is a Class B felony<sup>84</sup> along with many other three strikes offenses.<sup>85</sup> According to the Washington State Sentencing Guidelines, the mandatory prison sentence after one second-degree robbery conviction is twelve to fourteen months.<sup>86</sup> The minimum prison sentence after three separate second-degree robbery convictions is fifteen to twenty months.<sup>87</sup> For an attempt conviction, the offender would receive 75% of the sentencing range for the completed crime.<sup>88</sup> In Washington, the maximum sentence for all Class B felonies, including second-degree robbery, is ten years<sup>89</sup>—far from the mandatory sentence of life without parole when this crime is considered a strike offense.<sup>90</sup>

### III. SENTENCING AND CLEMENCY IN WASHINGTON STATE

Removing second-degree robbery as a final strike will lead to more consistent results under Washington’s sentencing and clemency structure. First, this Part outlines the sentencing policy under the Washington State Sentencing Guidelines Commission. Second, this Part describes the difficult clemency process in Washington and the role of both the gover-

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was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

*Id.*

82. WASH. REV. CODE § 9A.56.200(1) (2011).

83. WASH. REV. CODE § 9A.56.210 (2011).

84. *Id.*

85. Class B felonies on Washington’s three strikes list include second-degree assault; assault of a child in the second degree; child molestation; child molestation in the second degree; indecent liberties, unless committed by forcible compulsion, which increases the charge to a Class A felony; kidnapping in the second degree, unless there is a finding of sexual motivation, which increases the charge to Class A felony; manslaughter in the second degree; and promoting prostitution in the second degree. *See* WASH. REV. CODE § 9.94A.030(31), (36)(b)(i) (2011).

86. *See* ADULT SENTENCING GUIDELINES, *supra* note 34.

87. *Id.*

88. WASH. REV. CODE § 9.94A.595 (2011).

89. WASH. REV. CODE § 9A.20.021(b) (2011).

90. Although beyond the scope of this Comment, the other Class B felonies listed as strike offenses, such as second-degree assault and second-degree manslaughter, should also be removed as third strike offenses because the sentencing disparity for these crimes under the POAA is the same as for second-degree robbery.

nor and the Clemency and Pardons Board in granting clemency. Additionally, it considers recent developments in Washington that further complicate the clemency process. Lastly, this Part examines the severity and effects of a life sentence without parole.

#### *A. The Washington State Sentencing Guidelines Commission*

Washington is one of approximately twenty-one states with a sentencing guidelines commission.<sup>91</sup> The Washington State Sentencing Guidelines Commission derives its power from the Sentencing Reform Act of 1981,<sup>92</sup> which directs the Commission to “evaluat[e] and monitor[] adult and juvenile sentencing policies and practices,” to recommend modifications of these policies and practices to the governor and legislature, and to provide statistics regarding adult and juvenile sentencing.<sup>93</sup> The Commission plays an advisory role in sentencing; however, Washington’s legislature “never delegated its power over sentencing” to the Commission.<sup>94</sup> Instead, the Commission serves the “valuable role” of creating sentencing schemes and “providing policy advice” while the legislature controls sentencing policy.<sup>95</sup>

The Washington State Sentencing Guidelines Commission designed the sentencing guidelines system “to ensure that offenders who commit similar crimes and have similar criminal histories receive equivalent sentences.”<sup>96</sup> When creating the guidelines, the Commission “ranked felonies into fourteen seriousness levels and devised a scoring system for criminal history that assigned variable weights based on the number of convictions, their seriousness, the similarity of the prior conviction to the current offense, and the length of time between convictions.”<sup>97</sup> When applying the guidelines, the first step in determining an offender’s sentence is determining his offender score. For example, an offender who committed second-degree robbery and who has two previous felonies would multiply two (the number of prior felonies) by two in the “Adult History” section below. If the offender was not on community placement and did not have a juvenile history, his offender score would be four.

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91. NEAL B. KAUDER & BRIAN J. OSTROM, NAT’L CTR. FOR STATE COURTS, STATE SENTENCING GUIDELINES: PROFILES AND CONTINUUM 3, 4 (2008), available at <http://www.ncsconline.org/csi/PEW-Profiles-v12-online.pdf>.

92. Codified as RCW § 9.94A. WASH. REV. CODE § 9.94A.020 (2011).

93. *Powers and Duties of the Commission: Statutory Mandate*, ST. OF WASH. SENT’G GUIDELINES COMMISSION [hereinafter *Powers and Duties*], [http://www.sgc.wa.gov/Informational/About\\_SGC.htm](http://www.sgc.wa.gov/Informational/About_SGC.htm) (last visited Feb. 1, 2011).

94. David Boerner & Roxanne Lieb, *Sentencing Reform in the Other Washington*, 28 CRIME & JUST. 71, 83–84 (2001).

95. *Id.*

96. *Powers and Duties*, *supra* note 93.

97. Boerner & Lieb, *supra* note 94, at 86.

**ROBBERY, SECOND DEGREE**  
(RCW 9A.56.210)  
CLASS B - VIOLENT

**I. OFFENDER SCORING (RCW 9.94A.525(8))**

ADULT HISTORY:

Enter number of serious violent and violent felony convictions ..... 2 x 2 = 4

Enter number of nonviolent felony convictions ..... \_\_\_\_\_ x 1 = \_\_\_\_\_

JUVENILE HISTORY:

Enter number of serious violent and violent felony dispositions ..... \_\_\_\_\_ x 2 = \_\_\_\_\_

Enter number of nonviolent felony dispositions ..... \_\_\_\_\_ x ½ = \_\_\_\_\_

OTHER CURRENT OFFENSES: (Other current offenses which do not encompass the same conduct count in offender score)

Enter number of other serious violent and violent felony convictions ..... \_\_\_\_\_ x 2 = \_\_\_\_\_

Enter number of nonviolent felony convictions ..... \_\_\_\_\_ x 1 = \_\_\_\_\_

STATUS: Was the offender on community custody on the date the current offense was committed? (if yes), + 1 = \_\_\_\_\_

Total the last column to get the **Offender Score**  
(Round down to the nearest whole number) 4

**II. SENTENCE RANGE**

A. OFFENDER SCORE:	0	1	2	3	4	5	6	7	8	9 or more
STANDARD RANGE (LEVEL IV)	3 - 9 months	6 - 12 months	12+ - 14 months	13 - 17 months	<b>15 - 20 months</b>	22 - 29 months	33 - 43 months	43 - 57 months	53 - 70 months	63 - 84 months

After determining the offender score, the “standard sentence range for an offense can be determined by referring to the felony sentencing ‘grid’ and finding the intersection of the row identifying the seriousness level of the current offense and the column identifying the appropriate number of points in the offender’s criminal history score.”<sup>98</sup> The standard sentencing range for second-degree robbery ranges from “zero” to “nine or more.” With an offender score of four, the offender’s standard sentencing range would be fifteen to twenty months in prison. “A judge may impose a determinate sentence that falls within this standard range, or may impose an exceptional sentence with a written explanation.”<sup>99</sup>

Washington’s sentencing “guidelines provide the external standard necessary to constrain [judicial] discretion” because “[t]he applicable sentence range is determined solely by the defendant’s crime of conviction and prior criminal history.”<sup>100</sup> “Yet the Washington reformers’ intent was to structure, not eliminate, judicial discretion, and thus the guidelines were made presumptive, not mandatory.”<sup>101</sup> The POAA clashes with this intent because it removes any discretion from judges.<sup>102</sup> Already, exceptional sentences<sup>103</sup> “must be justified by explicit findings of

98. See *Powers and Duties*, *supra* note 93.

99. *Id.*

100. Boerner & Lieb, *supra* note 94, at 123, 128.

101. *Id.* at 123.

102. See McClain, *supra* note 36, at 118–19.

103. “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.” *Blakely v. Washington*, 542 U.S. 296, 301 (2004) (applying *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)).

‘substantial and compelling circumstances’ and are subject to substantive appellate review.”<sup>104</sup> The POAA eliminates judicial discretion and, additionally, suggests that every time an offender commits a serious offense, the circumstances are equivalent, making judicial discretion unnecessary. In reality, even the commission of the same crime could be very different due to innumerable factors relating to the circumstances of the offense, for example, whether the victim is injured during the act of a second-degree robbery.

Furthermore, the POAA shifts the sentencing burden from judges to prosecutors,<sup>105</sup> which contradicts the Washington sentencing guidelines’ paramount goal of sentencing consistency. Prosecutors have discretion when determining what charges to bring against a defendant, but under the POAA, “[i]f a person meets the definition of a persistent offender, a life sentence must be imposed.”<sup>106</sup> Accordingly, if a prosecutor wishes to avoid a judge imposing a life sentence on a defendant with two strike offenses, the prosecutor must decline to file any charge that may constitute a strike. The goal of Washington’s sentencing guidelines is neither to remove judicial discretion entirely nor to place sentencing discretion entirely in the power of the prosecutor.<sup>107</sup> But under the POAA, even if a judge wanted to, she lacks “the authority to depart from the mandatory sentence of life without the possibility of parole.”<sup>108</sup> Though this hard-line approach seems reasonable for some strike offenses, such as sexual exploitation, rape, or manslaughter, the lack of discretion can have the undesirable effect of imposing an overly harsh sentence on an individual who committed a lesser crime and who may be capable of rehabilitation such as Dozier.

### *B. The Washington State Clemency Process*

The need for legislative intervention in eliminating second-degree robbery as a qualifying third strike offense is made even more apparent by examining Washington State’s clemency process. Petitioning for clemency is a slow and arduous process that is rarely successful in Washington, particularly in recent years.

Clemency is a broad term that includes “the power of the President or a governor to pardon a criminal or commute a criminal sentence.”<sup>109</sup> A pardon eliminates the sentence “or other legal consequences of the

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104. Boerner & Lieb, *supra* note 94, at 128 (citing WASH. REV. CODE § 9.94A.535 (2001)).

105. Stiller, *supra* note 78, at 456.

106. State v. Bridges, 91 Wash. App. 102, 105, 955 P.2d 833, 834 (1998).

107. Boerner & Lieb, *supra* note 94, at 118, 123.

108. State v. Dozier, No. 35368-3-I, 1998 WL 130098, at \*9 (Wash. Ct. App. Mar. 23, 1998).

109. BLACK’S LAW DICTIONARY 107 (3d pocket ed. 2006).

crime.”<sup>110</sup> In contrast, when governors commute an offender’s sentence, they substitute “a less severe punishment for a more severe one that has already been judicially imposed . . . .”<sup>111</sup>

In Washington, the governor has the sole power “to grant a pardon to a person convicted of a crime . . . .”<sup>112</sup> For offenders sentenced for crimes committed after the implementation of the Sentencing Reform Act of 1981—July 1, 1984—the Clemency and Pardons Board “receives the petitions for pardons and for review and commutations of sentences and makes recommendations to the governor.”<sup>113</sup> The Clemency and Pardons Board was statutorily “established as a board within the office of the governor.”<sup>114</sup> “The board consists of five members appointed by the governor” and confirmed by the state senate.<sup>115</sup>

The first hurdle that prisoners must overcome when seeking clemency in Washington is finding representation. Washington State “does not provide public defenders for clemency petitioners,” and prisoners convicted of second-degree robbery likely have limited funds, so finding an attorney can be incredibly difficult.<sup>116</sup> The prisoners who are most likely to afford representation are those that are supported by financially sound and supportive family and friends.<sup>117</sup> Accordingly, disparity exists between who can afford representation and who cannot. Due to lack of representation, many clemency petitions are written pro se by prisoners lacking both legal expertise and access to legal resources.

After a prisoner submits a clemency petition, the Clemency and Pardons Board reviews it and recommends to the governor whether to grant or deny clemency.<sup>118</sup> The board cannot make a recommendation “that the governor grant clemency . . . until a public hearing has been held on the petition.”<sup>119</sup> To start the process of a public hearing, a copy of the petition is sent to the prosecuting attorney of the county where the offender was convicted.<sup>120</sup> Then, the prosecuting attorney must “make

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110. *Id.* at 520.

111. *Id.* at 120.

112. See 13 FERGUSON, JR., *supra* note 72, § 5301.

113. *Id.*

114. WASH. REV. CODE § 9.94A.880(1) (2011). Additionally:

Members of the board shall serve terms of four years and until their successors are appointed and confirmed. However, the governor shall stagger the terms by appointing one of the initial members for a term of one year, one for a term of two years, one for a term of three years, and two for terms of four years.

*Id.* § (2). Members of the board do not receive compensation. *Id.* § (4).

115. *Id.* § (1).

116. Murphy, *supra* note 18.

117. Interview with Jeff Ellis, Attorney for Stevan Dozier, in Seattle, Wash. (Dec. 3, 2010).

118. WASH. REV. CODE § 9.94A.885(1) (2011).

119. *Id.* § (3).

120. *Id.*

reasonable efforts to notify victims, survivors of victims, witnesses, and the law enforcement agency or agencies that conducted the investigation of the date and place of the hearing.”<sup>121</sup> After the hearing, the Clemency and Pardons Board decides whether to recommend the petitioner for clemency. Clemency is rarely recommended.<sup>122</sup>

Even if the clemency board does recommend clemency, the governor ultimately decides if it is granted.<sup>123</sup> Placing clemency in the hands of the governor can lead to unpredictable outcomes because, like any political decision,<sup>124</sup> the likelihood that any particular governor will follow the Clemency and Pardons Board recommendations for clemency varies. Washington’s current governor, Christine Gregoire, rarely grants clemency when compared to her predecessors.<sup>125</sup> Furthermore, Governor Gregoire is not required to give any explanation for her decision.<sup>126</sup> But on some occasions, she may encourage the prisoner to reapply for clemency, which may provide some guidance for prisoners who she determines may need more rehabilitation.<sup>127</sup>

Although Governor Gregoire has always been hesitant to grant clemency,<sup>128</sup> a recent tragedy makes it less likely that she will do so in the future. On the early morning of November 29, 2009, Maurice Clem-

121. *Id.*

122. For example, Governor Gregoire was elected in 2004, and by June 2007, twenty-six prisoners had petitioned for clemency. The Clemency and Pardons Board only recommended to grant four prisoners clemency. The governor then denied three of those and approved one. Tracy Johnson, *He Began a New Life While Still Behind Bars, Hopes for Clemency*, SEATTLE POST-INTELLIGENCER, July 22, 2007, [http://www.seattlepi.com/local/324703\\_clemency23.html](http://www.seattlepi.com/local/324703_clemency23.html).

123. See 13 FERGUSON, JR., *supra* note 72, § 5301. Not every state places the sole clemency power in the office of the governor. Most states do, but, for example, Georgia’s Board of Pardons and Paroles makes a decision entirely independent of Georgia’s governor. Jake Armstrong, *Clemency Board Keeps Its Secrets*, FLA. TIMES-UNION, Sept. 14, 2008, [http://www.jacksonville.com/tu-online/stories/091408/geo\\_332001750.shtml](http://www.jacksonville.com/tu-online/stories/091408/geo_332001750.shtml).

124. Further complicating the issue are the drastic effects that clemency can have on a governor’s reelection. For example, Willie Horton, a convicted murderer, was not granted clemency from his life sentence. But in 1986 he was released for a weekend-furlough program during which time he raped a woman and brutally stabbed her fiancé. Then-Massachusetts Governor Michael Dukakis did not start the furlough program but he had supported it. His opponent in the 1988 presidential campaign, George H.W. Bush, repeatedly brought up his support for the program in debates and an aggressive media campaign that many attribute to Dukakis’s loss. Nina Shapiro, *Gov. Gregoire: One Tough Clemency Judge*, SEATTLE WKLY., July 4, 2007, <http://www.seattleweekly.com/2007-07-04/news/gov-gregoire-one-tough-clemency-judge.php/3>.

125. Robert Winsor, a former King County Superior Court and state Court of Appeals judge who served twelve years on the board, states, “Gov. Locke and Gov. [Mike] Lowry usually accepted our recommendations . . . ‘Almost always’ might be the right word. I do think that Gov. Gregoire thus far has not followed our recommendations that often.” *Id.*

126. *Id.*

127. *Id.*; Johnson, *supra* note 122.

128. Governor Gregoire has only granted 26 of the 215 requests she has received while in office. Nina Shapiro, *Gregoire to Be Even Tougher on Clemency?*, SEATTLE WKLY., Dec. 2, 2009, <http://www.seattleweekly.com/2009-12-02/news/gregoire-to-be-even-tougher-on-clemency/>.

mons walked into a coffee shop in Lakewood, Washington, and opened fire on four uniformed police officers as they sat working on their laptops.<sup>129</sup> All four officers died at the scene.<sup>130</sup> A two-day manhunt revealed surprising and concerning details about Clemmons's criminal history. Originally from Arkansas, Clemmons had a long history of committing violent crimes, "including pending felony charges of raping a 12-year-old relative and assaulting police officers."<sup>131</sup> Prior to moving to Washington, he had been serving a ninety-five year prison sentence in Arkansas, but in 2000, then-Governor Mike Huckabee granted him clemency after only eleven years.<sup>132</sup> The recent murders of the four Lakewood police officers will undeniably increase public scrutiny of Governor Gregoire's future decisions and serve as a reminder of the risks involved when granting clemency.<sup>133</sup>

Inarguably, clemency should not be easy for a prisoner to attain, otherwise the state's sentencing structure would become moot. But when defendants are sentenced inconsistently or unfairly, as Dozier, Shadeded, and Bridges, the inability to overcome the clemency process can prevent them from attaining freedom after they have been rehabilitated.

### C. *The Severity of Life in Prison Without Parole*

Second only to the death penalty, life without parole<sup>134</sup> is the most severe sentence a court may impose.<sup>135</sup> Both prisoners<sup>136</sup> and scholars

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129. William Yardley, *Tacoma Suspect Said to Threaten to Shoot Police Officers*, N.Y. TIMES, Nov. 30, 2009, <http://www.nytimes.com/2009/12/01/us/01tacoma.html><http://www.nytimes.com/2009/12/01/us/01tacoma.html>.

130. *Id.*

131. *Id.*

132. *Id.*

133. Shapiro, *supra* note 128. For example, in December 2010, Governor Gregoire overrode the decision of the state parole board to release Jerry Dean Lain, who attempted to kill a Richland Police Officer in 1982. Jacques von Lunen, *Governor Blocks Release of Convict*, THE NEWS TRIB., Dec. 18, 2010, <http://www.thenewstribune.com/2010/12/18/1470195/governor-blocks-release-of-convict.html>.

134. The Washington Pattern Jury Instructions on life without parole state:

A person sentenced to life imprisonment without the possibility of release or parole shall not have that sentence suspended, deferred, or commuted by any judicial officer. The Indeterminate Sentence Review Board or its successor may not parole such prisoner nor reduce the period of confinement in any manner whatsoever including but not limited to any sort of good-time calculation. The Department of Corrections or its successor or any executive official may not permit such prisoner to participate in any sort of release or furlough program.

11 WASH. SUPREME COURT COMM. ON JURY INSTRUCTIONS, WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS—CRIMINAL § 31.06 (3d ed. 2010).

135. Catherine Appleton & Bent Grover, *The Pros and Cons of Life Without Parole*, 47 BRIT. J. CRIMINOLOGY 597, 598 (2007).

136. Gerald Hankerson was sentenced to life without parole at age eighteen for aggravated first-degree murder. On April 9, 2009, he became the first man in Washington State history to be



argue that life without parole may be as severe as the death penalty because “to lock up a prisoner and take away all hope of release is to resort to another form of the death sentence” with no goal of freedom, resocialization, or repayment of debt to society.<sup>137</sup> Instead, the goal is solely incapacitation. The sentence reflects society’s view that these individuals are so beyond rehabilitation that permanently removing them from society is the only viable option. The severity of life imprisonment without parole has been recognized internationally. For example, constitutional courts in Germany,<sup>138</sup> France, Italy, and Namibia, have posited that prisoners subjected to life sentences “have a fundamental right to be considered for release.”<sup>139</sup> But most states, such as Washington, employ life without the possibility of parole as a possible sentence.

In Washington, aggravated first-degree murder is the only crime that mandates<sup>140</sup> the punishment of life without parole, which illustrates the harshness of this punishment. When a defendant is found guilty of aggravated first-degree murder, the jury first must find the defendant guilty of premeditated<sup>141</sup> murder in the first degree.<sup>142</sup> Then, the jury determines whether one or more “aggravating factors” applies, for example, if the victim was a law enforcement officer or the defendant committed the murder in order to receive money.<sup>143</sup> The Washington State legislature recognizes the severity of this crime not only by mandating life without parole but also by allowing capital punishment to be imposed.<sup>144</sup> Comparing the elements of aggravated first-degree murder, where the defendant intends to take a life, to second-degree robbery, where violence may be only threatened, highlights the inconsistencies in mandating life without parole for both crimes.

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granted clemency after being sentenced to life without parole. When he was nineteen years old and in solitary confinement in Walla Walla State Penitentiary, he recalls the death-row inmates told him “I was the unlucky one; they got to die, I had to spend the rest of my life in misery in prison.” Damon Agnos, *In an About-Face, Gregoire Commutes Sentence*, Apr. 15, 2009, SEATTLE WKLY., <http://www.seattleweekly.com/2009-04-15/news/in-an-about-face-gregoire-commutes-sentence/>.

137. Appleton & Grover, *supra* note 135, at 606, 610.

138. In 1977, the German Federal Constitutional Court recognized that human dignity is compromised if a prisoner has no hope of being released. Accordingly, there is no life imprisonment without parole under German law. *Id.* at 610.

139. *Id.*

140. WASH. REV. CODE § 10.95.030(1) (2011). Unless there are significant mitigating circumstances to merit leniency, the sentence for aggravated first-degree murder is the death penalty. *Id.* § (2). If sufficient mitigating circumstances exist, then the sentence is life without parole. *See id.* § (1)–(2).

141. “[T]he premeditation required in order to support a conviction of the crime of murder in the first degree must involve more than a moment in point of time.” WASH. REV. CODE § 9A.32.020(1) (2011).

142. *See* WASH. REV. CODE § 10.95.020 (2011).

143. *Id.* § (1), (4).

144. WASH. REV. CODE § 10.95.030(2) (2011).

In addition to sentencing inconsistency, a compelling economic argument exists for the state to reduce the number of prisoners serving life without parole. According to the Washington State Department of Corrections, housing an offender in a Washington State prison costs nearly \$37,000 per year.<sup>145</sup> These costs may increase as prisoners get older because “an older inmate population will have a higher incidence of circulatory, respiratory, dietary, and ambulatory difficulties than younger inmates . . . .”<sup>146</sup> Releasing prisoners after they have passed the age where they commit the most crimes could save Washington State a considerable amount of money. Even three strikes supporters assert that life without parole may be too harsh a punishment for repeat offenders because they often stop committing crimes in middle or advanced age.<sup>147</sup>

#### IV. ELIMINATING SECOND-DEGREE ROBBERY AS A FINAL STRIKE

To ensure consistent sentencing and promote prisoner rehabilitation, second-degree robbery should be removed as a third strike option. First, this Part discusses how Washington prosecutors have exercised discretion regarding second-degree robbery convictions since the adoption of the POAA. The Part next addresses the disparity between the outcomes of three strikes legislation and the policy behind it. Lastly, this Part examines why removing second-degree robbery entirely from the strike list is not a realistic option due to the politics of criminal sentencing.

##### *A. The Reality of Three Strikes in Washington*

Although defendants like Stevan Dozier present extreme examples of the shortcomings of three strikes legislation, many cases exist where this hard-line approach has led to the incarceration of violent and dangerous repeat offenders.<sup>148</sup> For example, Lonnie Tenant’s first two strikes included second-degree assault and first-degree burglary.<sup>149</sup> His third strike conviction included second-degree child molestation, and second-

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145. Sullivan, *supra* note 1.

146. Peter J. Benekos & Alida V. Merlo, *Three Strikes and You’re Out!: The Political Sentencing Game*, 59 FED. PROBATION 3, 7 (Mar. 1995).

147. One author argues the punishment should be “[twenty-five] years to life with provisions for release of those who have served [twenty-five] or more years if correctional officials certify they are no longer dangerous” in his article that promotes three strikes laws. Meese, *supra* note 13.

148. See WASH. SENT’G GUIDELINES COMMISSION, TWO-STRIKES AND THREE-STRIKES: PERSISTENT OFFENDER SENTENCING IN WASHINGTON STATE THROUGH JUNE 2008 (2009) [hereinafter TWO-STRIKES AND THREE-STRIKES].

149. State v. Tennant, No. 28953-9-II, 2003 WL 22890423, at \*8 (Wash. Ct. App. Dec. 2, 2003).

degree rape of a thirteen-year-old.<sup>150</sup> He is currently serving a sentence of life without parole under the POAA. Washington's POAA undeniably protects the public from offenders such as Tenant.<sup>151</sup> Furthermore, the POAA has not significantly increased the prison population, which many feared would be a negative result of the law.<sup>152</sup>

Despite these positive results, use of both the POAA as well as second-degree robbery as a strike offense has decreased in Washington since the law's 1994 implementation, most likely due to increased awareness of its extreme consequences.<sup>153</sup> For example, in 1995, thirty-seven offenders were sentenced under the POAA compared to eighteen in 2007.<sup>154</sup> Also, since 1994, three strikes convictions where second-degree robbery was the third strike have decreased considerably.<sup>155</sup> In 1994, Washington State prosecutors charged second-degree robbery as a third strike in eight of fourteen three strikes cases that resulted in life imprisonment.<sup>156</sup> Currently, the last three strikes case where a second-degree robbery conviction was the third strike was in 2005.<sup>157</sup> In 1994 and 1995 combined, seven offenders whose strike convictions consisted of three second-degree robberies were sentenced to life in prison.<sup>158</sup> In comparison, since 1995, only ten offenders have been sentenced to life without parole under the POAA for three second-degree robbery convictions.<sup>159</sup> Additionally, in November 2005, Pierce County was the last prosecutor's office to sentence a persistent offender to life in prison for three second-degree robbery convictions.<sup>160</sup> In light of these statistics, it seems highly unlikely that defendants like Dozier, Bridges, or Shadeed would receive the same sentence for their crimes today that they received in 1994.

The sentencing statistics reflect that prosecutors are rethinking their charges because of the severity of a mandated sentence of life without

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150. *Id.*

151. *See also* State v. Loggins, No. 24644-9-II, 2001 WL 789711, at \*1 (Wash. Ct. App. July 13, 2001) (first strike consisted of felony assault, second strike consisted of felony assault, third strike consisted of first-degree murder); State v. Scherf, No. 16633-3-III, 1999 WL 44480, at \*1 (Wash. Ct. App. Feb. 2, 1999) (first strike was conviction for second-degree assault, second strike was conviction for rape in the first degree and assault in the first degree, third strike was conviction for first-degree rape, first-degree kidnapping, and unlawful possession of a firearm).

152. Darryl K. Brown, *Prosecutors and Overcriminalization: Thoughts on Political Dynamics and a Doctrinal Response*, 6 OHIO ST. J. CRIM. L. 453, 458 (2009).

153. *See* TWO-STRIKES AND THREE-STRIKES, *supra* note 148.

154. *Id.* at 3, 7–8.

155. *See id.*

156. *Id.* at 3.

157. *Id.* at 7.

158. *Id.* at 3.

159. *Id.* at 4–7.

160. *Id.* at 7.

parole. King County Prosecuting Attorney Dan Satterberg states that King County prosecutors “have exercised more discretion as we’ve had experience with the law.”<sup>161</sup> As a result, Satterberg’s “office rarely uses [second-degree robbery] as a third strike.”<sup>162</sup> Instead, King County prosecutors often charge first-degree theft,<sup>163</sup> which will not result in a life sentence if the defendant already has two prior strikes.<sup>164</sup> “While Satterberg [] doesn’t support the removal of second-degree robbery from the three-strikes list,”<sup>165</sup> he does “believe[] there are people serving a life sentence who should no longer be incarcerated.”<sup>166</sup> Accordingly, he has asked a group of King County Senior Deputy Prosecutors “to review three-strikes cases filed between 1994 and 1997 to make sure the sentence of life without parole fit the crime.”<sup>167</sup> He also spoke in front of Washington’s Pardon and Clemency Board in support of clemency for Dozier, Shadeed, and Bridges.<sup>168</sup>

Satterberg’s reflective stance exemplifies the heart of this issue—Washington’s three strikes law was not meant for men like Dozier but has unjustly been applied to them. Second-degree robbery is on the strike-offense list with violent crimes such as rape and manslaughter, yet second-degree robbery often lacks the harm to victims associated with these crimes.<sup>169</sup> Satterberg referred to Dozier’s second-degree robberies as “street robberies” that “did not cause extraordinary harm to anybody.”<sup>170</sup> But street robberies fall under robbery in the second degree, a crime where violence is only threatened but not necessarily used.<sup>171</sup> Additionally, three strikes supporters posit that for three strikes offenders, “rehabilitation is no longer working and jail is the only alternative.”<sup>172</sup> But offenders like Dozier prove that this theory is incorrect.

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161. Murphy, *supra* note 18.

162. Sullivan, *supra* note 1.

163. Theft in the first degree:

A person is guilty of theft in the first degree if he or she commits theft of: (a) Property or services which exceed(s) five thousand dollars in value other than a firearm as defined in RCW 9.41.010; (b) Property of any value, other than a firearm as defined in RCW 9.41.010 or a motor vehicle, taken from the person of another; or (c) A search and rescue dog, as defined in RCW 9.91.175, while the search and rescue dog is on duty.

WASH. REV. CODE § 9A.56.030(1) (2011).

164. Sullivan, *supra* note 17.

165. Sullivan, *supra* note 1.

166. Sullivan, *supra* note 17.

167. Sullivan, *supra* note 1.

168. *Id.*

169. WASH. REV. CODE § 9.94A.030(31) (2011).

170. Murphy, *supra* note 18.

171. WASH. REV. CODE § 9A.56.190 (2011).

172. McClain, *supra* note 36, at 125.

Furthermore, sentencing an offender to life without parole does not address the social causes of second-degree robbery. Second-degree robbery is an economic crime, and money for drugs is often the cause of the offense,<sup>173</sup> as was the case for Dozier, Bridges, and Shadeed.<sup>174</sup> Low-level, economic crimes, such as second-degree robbery, increase in times of economic stress like the present.<sup>175</sup> But sentencing these offenders to life in prison does not prevent crime because it does not eliminate its causes, for example, drug addiction, poverty, or homelessness.<sup>176</sup> The money the state spends on incarcerating offenders who are past the age where they are likely to offend could be used to create social programs to eliminate the causes of economic crimes such as second-degree robbery.<sup>177</sup> By continuing to apply second-degree robbery as a third and final strike, Washington State will not eliminate second-degree robbery, but instead, will only increase its jail population.

#### *B. Disparity Between Support and Results of Three Strikes Laws*

The shift of the use of second-degree robbery as a third strike in King County elucidates one of the most problematic issues with three strikes legislation, which is a disconnect between the law and the implications of applying it. Put simply, three strikes legislation looks good on paper, but creates troubling results. Despite overwhelming support for three strikes laws,<sup>178</sup> “it is questionable, however, whether citizens truly wish” for them to apply to every qualifying offender.<sup>179</sup>

For example, in a 1995 survey in the Cincinnati area, people showed “extensive support” for three strikes legislation.<sup>180</sup> But in the second portion of the survey, the respondents rated specific vignettes that included a series of three crimes “that would make the offender eligible for a mandatory life sentence.”<sup>181</sup> The offenses were taken “from a three-strikes statute then pending in the Ohio legislature.”<sup>182</sup> While 88% of the sample stated they supported a three strikes law,<sup>183</sup> “only 16.9% assigned

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173. Trevor Bennett & Katy Holloway, *The Causal Connection Between Drug Misuse and Crime*, 49 BRIT. J. CRIMINOLOGY, 513, 515, 521 (2009).

174. Green, *supra* note 19.

175. S. B. Rep. 5292, 61st Leg., Reg. Sess., at 3 (Wash. 2009).

176. McClain, *supra* note 36, at 125.

177. *See id.* at 120, 126.

178. A 1994 Time/CNN Poll found that 81% of adults favored mandatory life imprisonment for anyone convicted of a third serious crime. Cullen et al., *supra* note 69, at 38.

179. *Id.* at 38–39.

180. *Id.* at 39.

181. *Id.*

182. *Id.*

183. *Id.* Approximately 52.1% “strongly” supported passing the law and 36.3% “somewhat supported” passing the three strikes law. *Id.*

a life sentence” in the vignettes they were shown.<sup>184</sup> Furthermore, past criminal record had “little, if any effect” on the respondents’ sentencing choices.<sup>185</sup> Additionally, a majority of the respondents favored making exceptions to imposing a mandatory life sentence “when a third offense was relatively minor . . . .”<sup>186</sup>

This study shows that while there may be agreement that dangerous people should be removed to protect society, confusion exists over who these offenders are and what their punishment should be.<sup>187</sup> In Washington, the people voted to remove the “most serious offenders” from the streets.<sup>188</sup> But did they know they would be incarcerating Bridges for life for attempting to steal a wallet?<sup>189</sup> Did voters consider that if Washington’s three strikes legislation was approved, a man like Dozier would receive the same sentence as the Green River Killer? These results are inconsistent with the goals of both the Sentencing Reform Act of 1984, to ensure sentencing consistency, and three strikes legislation, to protect society from the most dangerous offenders. Strong support behind three strikes may be sometimes incompatible with its outcome,<sup>190</sup> and when the sentence is as severe as life without the possibility of parole, this conflict creates immeasurable harm to offenders sentenced unfairly.

### C. *The Politics of Criminal Sentencing*

Like many criminal sentencing laws, there has been debate regarding three strikes legislation with specific opposition to the inclusion of second-degree robbery as a strike offense in Washington. For example, in 2009, Washington State Senator Adam Kline introduced Senate Bill 5292,<sup>191</sup> which would have removed second-degree robbery from the three strikes list.<sup>192</sup> The Bill stated that any offender who was sentenced as a persistent offender would have a resentencing hearing if any of her three strikes convictions consisted of second-degree robbery.<sup>193</sup> Proponents of Senate Bill 5292 argued that prosecutors recognize the disparity between the sentencing guidelines for second-degree robbery and the three strikes sentence for this “low level offense that often does not in-

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184. *Id.*

185. *Id.*

186. *Id.*

187. *See id.* at 39–40.

188. WASH. REV. CODE § 9.94A.555 (2011).

189. *See State v. Bridges*, 91 Wash. App. 102, 103, 955 P.2d 833, 834 (1998).

190. Cullen et al., *supra* note 69, at 38.

191. Senate Bill 5292 was originally sponsored by Senator Kline, Senator Craig Pridemore, Senator James Hargrove, Senator Jeanne Kohl-Welles, Senator Debbie Regala, and Senator Joe McDermott. S.B. 5292, 61st Leg., Reg. Sess. (Wash. 2009).

192. *See Sullivan, supra* note 1.

193. S. B. Digest 5292, 61st Leg., Reg. Sess. (Wash. 2009).

volve physical harm.”<sup>194</sup> Furthermore, although the Clemency and Pardons Board exists, the governor has the ultimate authority in granting clemency, and Bill supporters recognized “this is something that is not done lightly.”<sup>195</sup>

Despite these claims, the Bill ultimately failed.<sup>196</sup> The failure is unsurprising because “taking a tough stance on sentencing” is often seen as “symbolic of doing something about crime” regardless of the actual consequences.<sup>197</sup> Essentially, politicians understand that supporting tough sentencing proposals works for them politically.<sup>198</sup> In the past, crime was an issue associated with the Republicans, but then the Democrats realized that supporting tougher sentencing garnered them strong political support.<sup>199</sup> Now, neither party wants to be soft on crime because of the possible disastrous campaign effects.<sup>200</sup> Due to the divisive politics of criminal sentencing, removing second-degree robbery only as a final strike is a more realistic proposition than removing second-degree robbery entirely from the strike-offense list.

Additionally, it is unrealistic to expect the legislature to remove second-degree robbery from the strike-offense list entirely where a defendant’s use of violence increased with each offense. For example, Louis Barrow fits the description of a serious offender. In 1993, he was convicted of first-degree robbery, and in 1987, he was convicted of attempted second-degree robbery.<sup>201</sup> In 1999, a woman contacted the police after finding a stranger, Barrow, in her home.<sup>202</sup> Police gave chase to Barrow as he drove a stolen pickup truck, accelerated, ran red lights, and eventually collided with another driver who died at the scene.<sup>203</sup> Barrow then fled the site of the fatal collision.<sup>204</sup> He was convicted of second-degree murder for killing the innocent driver, and this strike offense was his third and final.<sup>205</sup> He is now serving life in prison without parole under the POAA, but this sentence is also the statutory maximum for second-degree murder.<sup>206</sup> Hence, a judge may have sentenced Barrow to

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194. S. B. Rep. 5292, 61st Leg., Reg. Sess., at 3 (Wash. 2009).

195. *Id.*

196. Sullivan, *supra* note 1.

197. See Benekos & Merlo, *supra* note 146, at 3.

198. *Id.*

199. *Id.* at 3–4.

200. See *supra* note 124 and accompanying text.

201. State v. Barrow, No. 45346-7-I, 2002 WL 205402, at \*3 (Wash. Ct. App. Feb. 11, 2002).

202. *Id.* at \*1.

203. *Id.*

204. *Id.*

205. *Id.* at \*2–3.

206. ADULT SENTENCING GUIDELINES, *supra* note 34, at III-155.

life in prison based on the circumstances of the offense, not the mandatory sentence dictated by the POAA.

Although Dozier's story identifies the problems with second-degree robbery as a strike offense, Barrow's conviction shows that leaving this crime as a strike offense will remove some of society's repeat offenders whose crimes escalate in violence. Politicians will be wary of removing second-degree robbery entirely because there are other offenders such as Barrow that have been punished under the law.<sup>207</sup> Accordingly, the goals of the POAA will still be attained by removing second-degree robbery only as a final strike.

#### *D. Senate Bill 5236*

Senator Kline recently introduced another bill reforming the three strikes law—Senate Bill 5236. If passed, the Bill would amend the POAA so that a persistent offender who does not have a prior or current Class A felony or sex offense would receive a minimum of fifteen years in prison<sup>208</sup> and a maximum term of life without parole.<sup>209</sup> After the offender serves his minimum sentence, he would petition the Indeterminate Sentence Review Board (ISRB)<sup>210</sup> for conditional release.<sup>211</sup> In order for the ISRB to grant him conditional release, “the offender must prove by clear and convincing evidence that his or her rehabilitation is complete and that he or she is fit for release.”<sup>212</sup>

If passed, Senate Bill 5236 would solve some of the problems created by including second-degree robbery as a strike offense. For example, the Bill acknowledges that not all three strikes offenders deserve

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207. See *State v. Britton*, No. 17004-7-III, 2000 WL 217738, at \*1 (Wash. Ct. App. Feb. 24, 2000) (defendant's first two strike offenses consisted of second-degree robbery and his third strike was first-degree murder); *State v. Quarles*, No. 15823-3-III, 1998 WL 17683, at \*4 (Wash. Ct. App. Jan. 20, 1998) (defendant's first strike was for first-degree robbery, his second strike was for second-degree robbery, and his third strike was for first-degree murder).

208. The minimum term must be the greater of: (1) fifteen years; (2) the high end of the standard range for the current offense; or (3) an exceptional sentence above the standard range pursuant to RCW 9.94A.535. S.B. 5236 § 1 (2)(b), 62nd Leg., Reg. Sess. (Wash. 2011).

209. *Id.*

210. The ISRB was created in 1986 and is responsible for two types of offenders: (1) felony offenders who committed crimes before July 1, 1984, and went to prison and (2) a select group of sex offenders who committed offenses after August 31, 2001. INDETERMINATE SENTENCING REVIEW BOARD, <http://www.srb.wa.gov/> (last visited Feb. 3, 2011). The ISRB takes into account “the offender's crime, past and present behavior, and possible risks” when determining whether he is eligible for release. INDETERMINATE SENTENCING REVIEW BOARD, *About Us*, <http://www.srb.wa.gov/about/> (last visited Feb. 3, 2011).

211. S.B. 5236 § 3(1), 62nd Leg., Reg. Sess. (Wash. 2011).

212. *Id.*



the same sentence,<sup>213</sup> and the opportunity to be released would provide incentive for inmates to rehabilitate themselves. Also, an inmate does not need legal representation or knowledge in order to petition to the ISRB because the petition only details the offender's behavior in prison.<sup>214</sup> Lastly, the Bill is retroactive, so offenders who received three second-degree robbery convictions when the POAA was initially passed could petition for release after they serve fifteen years.

Despite the potential positive outcomes of Senate Bill 5236, it does not apply to an offender whose third strike offense is second-degree robbery if he has only one Class A felony conviction. Essentially, an offender will still receive life in prison for a second-degree robbery conviction. Under this Bill, an inmate who committed one Class A felony prior to 1994 and one Class B felony prior to 1994, and then earned a second-degree robbery conviction in 2011 could earn a life sentence. This outcome does not align with the POAA's goal of placing the most dangerous offenders in prison because the offender's crimes are decreasing in violence. While the Bill may be drafted narrowly to increase the chance that it will pass,<sup>215</sup> it does not address the sentencing disparity created by including second-degree robbery as a third strike.

#### V. CONCLUSION

Many who supported Stevan Dozier, such as King County Prosecutor Dan Satterberg and Governor Christine Gregoire, are watching his progress.<sup>216</sup> No one would condone Dozier's past crimes, but his story proves that defendants sentenced to life under the POAA can be rehabilitated and contribute positively to society. Since being freed from prison, "Dozier spends his days pounding the streets—visiting politicians, community centers and school district offices in search of an opportunity to share his story" with young children who may be following a path of drugs and crime.<sup>217</sup> Dozier also testified at the public hearing in the senate committee in support of Senate Bill 5236.<sup>218</sup> Although Dozier says he does not dwell on the pressure, he must know that the freedom of

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213. If passed, the amended three strikes law would allow the criminal justice system "to distinguish between the least of the worst and the worst of the worst." S. B. Rep. 5236, 62nd Leg., Reg. Sess., at 3 (Wash. 2011).

214. Interview with Jeff Ellis, Attorney for Stevan Dozier, in Seattle, Wash. (Dec. 3, 2010).

215. "This is a conservative bill and applies to less than 5 percent of those who are locked up." S. B. Rep. 5236, 62nd Leg., Reg. Sess., at 3 (Wash. 2011).

216. Sullivan, *supra* note 1.

217. *Id.*

218. S. B. Rep. 5236, 62nd Leg., Reg. Sess., at 4 (Wash. 2011).

Shadeed, Bridges, and other three strike inmates with similar conviction histories rests on his shoulders.

The POAA should be amended to exclude second-degree robbery as a final strike. This amendment to the POAA should be retroactive to ensure that inmates sentenced unfairly when the POAA first passed could be released. The Washington Sentencing Guidelines provide adequate sentencing ranges for second-degree robbery, and a second-degree robbery conviction where the offender has been convicted of two prior felonies already carries a longer sentence based on the defendant's offender score. Hence, the Guidelines already provide longer sentences for recidivists.

Life without parole for a second-degree robbery conviction contradicts the goal of consistent sentencing that the Washington Sentencing Reform Act demands and does not align with the POAA's paramount objective to remove the most dangerous offenders from society. If passed, Senate Bill 5236 would resolve some of the sentencing disparities created by including specific Class B felonies as strike offenses, but it would still mandate a sentence of life without parole for a second-degree robbery conviction if the offender had only one Class A felony conviction. Accordingly, the POAA should be amended so that judges retain discretion when sentencing a defendant whose final strike offense is second-degree robbery.

## Appendix A

### Persistent or Habitual Offender Sentencing in the United States

#### STATES THAT INCLUDE SECOND-DEGREE ROBBERY AS A STRIKE OFFENSE:

Alabama – ALA. CODE § 13A-5-9 (2010)  
Arkansas – ARK. CODE ANN. § 5-4-501 (West 2010)  
California – CAL. PENAL CODE § 667 (West 2010)  
Florida – FLA. STAT. ANN. § 775.084 (West 2010)  
Hawaii – HAW. REV. STAT. § 706-606.5 (West 2010)  
Idaho – IDAHO CODE ANN. § 19-2514 (2010)  
Indiana – IND. CODE ANN. § 35-50-2-8 (2010)  
Kansas – KAN. STAT. ANN. § 21-4504 (West 2010)  
Kentucky – KY. REV. STAT. ANN. § 532.080 (West 2010)  
Louisiana – LA. REV. STAT. ANN. § 15:529.1(A)(3)(b) (2010)  
Maryland – MD. CODE ANN., CRIM. LAW § 14-101 (West 2010)  
Michigan – MICH. COMP. LAWS ANN. § 769.11 (2010)  
Mississippi – MISS. CODE ANN. § 99-19-83 (2010)  
Missouri – MO. ANN. STAT. § 558.016 (West 2010)  
Montana – MONT. CODE ANN. § 46-18-501 (2009)  
Nebraska – NEB. REV. STAT. § 29-2221 (2010)  
Nevada – NEV. REV. STAT. § 207.010 (West 2009)  
New Jersey – N.J. STAT. ANN. § 2C: 44-3 (West 2011)  
New Mexico – N.M. STAT. ANN. 31-18-17 (West 2010)  
North Carolina – N.C. GEN. STAT. ANN. § 14-7.1 (West 2010)  
North Dakota – N.D. CENT. CODE § 12.1-32-09 (2009)  
Pennsylvania – 42 PA. CONS. STAT. ANN. § 9714(a)(2) (West 2010)  
Rhode Island – R.I. GEN. LAWS § 12-19-21 (2010)  
South Dakota – S.D. CODIFIED LAWS § 22-7-8 (2010)  
Tennessee – TENN. CODE ANN. § 40-35-107 (West 2010)  
Texas – TEX. PENAL CODE ANN. § 12.42 (West 2009)  
Utah – UTAH CODE ANN. § 76-3-203.5 (West 2010)  
Virginia – VA. CODE ANN. § 19.2-297.1 (West 2010)  
Washington – WASH. REV. CODE § 9.94A.030(36) (2011)  
Wyoming – WYO. STATE ANN. § 6-10-201 (West 2010)

STATES THAT EXCLUDE SECOND-DEGREE ROBBERY  
AS A STRIKE OFFENSE:

- Arizona – ARIZ. REV. STAT. ANN. § 13-706 (2011)  
Colorado – COL. REV. STAT. ANN. § 18-1.3-801 (West 2010)  
Connecticut – CONN. GEN. STAT. ANN. § 53a-40 (2011)  
Georgia – GA. CODE ANN. § 17-10-7 (West 2010)  
New York – N.Y. PENAL LAW § 70.08 (McKinney 2010)  
South Carolina – S.C. CODE ANN. § 17-25-45 (2010)