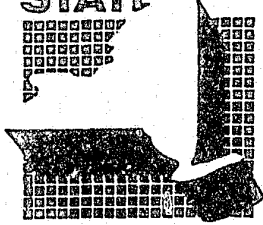




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# RESEARCH NOTE

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## 'TIMING IS EVERYTHING

FIRST FELONS WITH PRIOR FELONY CONVICTIONS

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**Sentencing of First Felons with Prior Felony Convictions:  
Timing is Everything**

**Summary**

Persons without felony convictions who continue to engage in criminal activity while an earlier arrest event is pending disposition, are not at risk of legal treatment as predicate felons. This does not mean that treatment similar to that of predicate felons cannot be given to these offenders. This paper shows that persons whose criminal histories include an arrest for a felony offense, followed by an arrest on a second felony offense, and then a conviction for the first offense may find themselves being afforded "de facto" predicate felony treatment at the disposition for the second felony offense.

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## Sentencing of First Felons with Prior Felony Convictions: Timing is Everything

### Introduction

New York State law distinguishes between two broad classifications of prior criminal histories: "predicate" and "non-predicate" felons. (see Appendix A) Persons who are sentenced as predicate felons face both a mandatory period of incarceration in state prison and a longer minimum sentence (given the same maximum) than non-predicate offenders. The legal distinctions for predicate felon treatment require that a felony conviction(s) be issued prior to the crime date of the present offense. Thus, persons without felony convictions, who continue to engage in criminal activities while awaiting disposition on a previous felony offense, are not at risk of legal treatment as predicate felons.

While treatment as predicate felon is neither mandated by law nor legally applicable to persons with this type of continued criminal activity, it does not mean that treatment similar to that of predicate felons cannot be given to these offenders. Persons whose criminal histories include an arrest on a felony offense, followed by an arrest on a second felony offense prior to conviction on the earlier offense, may find themselves being afforded "de facto" predicate felon treatment at the disposition of the second felony offense.

This "predicate-like" treatment may arise in the following way. Consider the sentencing provisions available for conviction of a Class D non-Violent Felony Offense.<sup>1</sup> At the most punitive end, a first time felon convicted of such

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<sup>1</sup>The sentencing provisions applicable for these offenses are delineated in a wide range of Penal Law Articles, and summarized in New York Sentence Charts, 1985 (Compiled by Irving Schwartz, Esq.; 1984 West Publishing Company).

an offense may receive a sentence ranging from unconditional discharge to a maximum of seven years in prison. As a predicate felon, the sentencing range is shortened to a minimum of one year mandatory imprisonment to a maximum of 7 years imprisonment. It is possible that a first felon sentenced to prison on an offense of this type may serve a sentence as long, or longer, than a predicate felon. The range of judicial discretion available in sentencing decisions allows treatment of first felony offenders to be as punitive as the most serious punishment allowed for predicate felons.<sup>2</sup>

This paper is an attempt to discover whether there are systematic differences in the treatment afforded persons with prior felony convictions who are not covered by the mandatory specifications of predicate felon treatment. An event based file of 1984 and 1985 felony convictions was obtained covering 64,498 case dispositions. Events were partitioned into three mutually exclusive categories: first felons (those with no felony convictions prior to the instant offense disposition); sequential felons (those arrested and convicted for a felony offense prior to the disposition of the instant offense); and predicate felons (those with one or more felony convictions prior to the instant event crime date).<sup>3</sup>

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<sup>2</sup>The above discussion is based on court set maximum sentences, whereas in reality most persons are released on the basis of a Parole Board decision. The longest minimum sentence to prison that could be imposed upon a first felon is 2 and 1/3 years, while the shortest minimum sentence that must be served by a predicate felon is two-years (e.g., one-half of the shortest maximum allowed, namely four-years). In terms of court set minimum sentences, it is therefore possible to sentence a predicate felon to a sanction less punitive than the most restrictive sanctions available to a first felon.

<sup>3</sup>It should be noted that the legal definition of predicate felon contains a time at-risk factor which was not considered within this analysis. It also should be noted that the prior offenses considered are only those that have dispositions on the New York State CCH database. A total of 61,607 disposition events were available for analysis after excluding cases with missing values on variables for the analysis. Of these dispositions, 2,113 events involved persons who were not treated as predicate felons because of the timing of arrests and convictions. While some 16,346 events involved persons who have been labeled "predicate" felons, this does not imply that predicate treatment has been applied to these persons.

This paper focuses on three separate measures of treatment for the various offender groups. The first of these is change in charge seriousness between arrest and conviction; this may be a measure of the degree of harshness that is recommended by the criminal justice system participants most involved in the more preliminary stages of processing. The second measure is the type of sentence sanction that is imposed upon the three separate groups. The third measure is length of sentence, for those persons who receive incarcerative sentences to state prison. These last two measures address the issue of whether the sentences imposed upon sequential felons are similar to either the sentences imposed upon first felons or to those imposed upon predicate felons.

### Analysis

Table 1 presents the offense transition matrix for the three offender groups. It indicates the extent of changes in charge seriousness that occur between arrest and disposition. Some categories in this matrix have been collapsed; arrests and dispositions that varied by two or more felony classes were aggregated. It should be noted that this matrix only sketchily gets at differences in offense seriousness, since offense categorizations such as Violent Felony offense were not considered in this ranking. It is not apparent from Table 1 that there is a systematic pattern of higher conviction class for any one of the three groups. For some conviction classes, the percentage of sequential felons that are convicted for offenses of a felony class higher than charged at arrest is higher than the other two groups, while for other conviction classes the percentage is somewhat lower. Without statistical rigor, it appears that the percentages for the three groups are generally comparable when taking into account change in charge seriousness between arrest and conviction.

Table 2 presents the sentencing sanctions administered to persons in the various offender categories. Since the majority of persons in the offender group indicated as predicate felons qualify for a mandatory sentence of incarceration,

it is not surprising that this group consistently receives the highest probability of a state prison sentence. It is, however, somewhat surprising to see clear evidence of a higher probability of sentences to prison among sequential felons. Across all conviction classes, these persons receive sentences to state prison at a rate well above that of first felons. This differential sentencing pattern is particularly noticeable among offenses at the lower end of the seriousness scale (namely D and E felonies), offenses for which first felons receive sentences to prison at rates of less than one in five. If we partition the results displayed in Table 2 into categories of incarcerative versus non-incarcerative sentences, ignoring the distinction of whether time is spent in state or local facilities, the results are even more striking. Overall, only 10.3% of the sequential felons receive non-incarcerative sentences, while 38.3% of first felons receive non-incarcerative sentences. Similar results hold separately for Class C, D, and E felony convictions.

Table 3 presents the average court set minimum sentences for the three groups by felony class of the conviction event. These results are based on persons who have received sentences to state prison.<sup>4</sup> The similarities in length of sentence for first felons and sequential felons are striking in total, and across the conviction classes. The weighted average minimum sentence across all felony classes is virtually the same for the two groups, though somewhat longer for predicate felons. This is to be expected on the basis of the special relationships between minimum and maximum sentences for predicate felons. The largest average difference in sentence length for the two non-predicate groups is six months, which occurs for Class B felonies. Interestingly, sequential felons have a somewhat shorter minimum sentence length for Class E felonies. This indicates that the residue of first felons convicted of a Class E felony who receive sentences to state prison (i.e., 8.3% of all such convictions) have a common feature of seriousness picked up in the length of sentence (as well as the sentence type) decision process.

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<sup>4</sup>Special sentences, such as sentences of life imprisonment with no court set minimum, have been excluded from this analysis, as have dispositions of events processed under prior sentencing statutes. Many of the Class A felony sentences have been excluded from this table. Since the actual time that is served in state prison is determined by Parole Board release practices, and since the Parole Board may consider information about offender behavior during and prior to confinement in state prison, these values may not reflect the actual length of time that will be served before release, but are presented for a comparison of shortest average time that might be served.

## Conclusions

The most significant difference in treatment of sequential felons appears with regard to the type of sentence issued. Across all felony conviction classes, twice as many sequential felons, as opposed to first felons, receive sentences to prison. Differences are particularly noticeable at felony classes C, D, and E, the felony classes at which imprisonment is not generally mandatory. Roughly comparable percentages of first felons and sequential felons receive sentences to incarceration in local facilities, but this too comes from a generally more punitive sentencing pattern. The similarities in percentages of persons receiving jail sentences result from a general up-grading of sanctions against sequential felons: some sentences that typically would have been to probation for a first felon become sentences to jail; some sentences that would typically have been to jail for a first felon become sentences to prison.

A noticeably different pattern of average minimum sentence length for first felons and sequential felons was not apparent from the data. For the more serious conviction crime classes, the average length of sentences for sequential felons were somewhat longer, but this pattern was reversed for Class E felony convictions. The length of average minimum sentence for predicate felons was consistently longer than that of either the first felon or sequential felon group. This is not a surprising result, given the relationship between minimum and maximum mandated by law for this group.

## Appendix A

### Chapter 70.06 New York State Penal Law:

(1b) For the purposes of determining whether a prior conviction is a predicate felony conviction the following criteria apply:

- (i) The conviction must have been in this state a felony, or in any other jurisdiction of an offense for which a sentence to a term of imprisonment in excess of one year or a sentence of death was authorized and is authorized in this state irrespective of whether such sentence was imposed;
- (ii) Sentence upon such prior conviction must have been imposed before commission of the present felony;
- (iii) Suspended sentence, suspended execution of sentence, a sentence of probation, a sentence of conditional discharge or of unconditional discharge, and a sentence of certification to the care and custody of the division of substance abuse services, shall be deemed to be a sentence;
- (iv) Except as provided in subparagraph (v) of this paragraph, sentence must have been imposed not more than ten years before commission of the felony of which the defendant presently stands convicted.
- (v) In calculating the ten year period under subparagraph (iv), any period of time during which the person was incarcerated for any reason between the time of commission of the previous felony and the time of commission of the present felony shall be excluded and such ten year period shall be extended by a period or periods equal to the time served under such incarceration
- (vi) An offense for which the defendant has been pardoned on the ground of innocence shall not be deemed a predicate felony conviction.



TABLE 1  
Change in Felony Class Between Arrest and Conviction, by Conviction Class  
(1984/85 Felony Convictions)

	RAISED 1 OR MORE CLASSES			STAYED SAME CLASS			DROPPED 1 CLASS			DROPPED 2 OR MORE CLASSES			TOTAL CASES		
	Group 1	Group 2	Group 3	Group 1	Group 2	Group 3	Group 1	Group 2	Group 3	Group 1	Group 2	Group 3			
A	6.8%	10.3%	6.1%	93.2%	89.7%	93.9%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	1,040	58	330
B	6.3%	7.0%	6.4%	72.2%	83.9%	81.8%	21.5%	9.1%	11.8%	0.0%	0.0%	0.0%	4,857	372	2,225
C	5.4%	5.1%	6.0%	31.6%	37.3%	40.1%	56.4%	54.2%	50.6%	6.6%	3.5%	3.3%	7,321	432	2,904
D	1.8%	3.1%	2.1%	39.6%	42.8%	38.5%	27.9%	26.6%	26.5%	30.7%	27.4%	32.9%	18,160	864	6,647
E	0.0%	0.0%	0.0%	33.4%	31.8%	31.3%	46.3%	46.5%	47.8%	20.3%	21.7%	20.9%	11,770	387	4,240
TOTAL	2.5%	3.8%	2.9%	41.5%	48.2%	43.9%	36.3%	32.1%	33.8%	19.6%	15.9%	19.4%	43,148	2,113	16,346

Group 1 = First felons

Group 2 = First felons with convictions prior to instant offense disposition

Group 3 = Predicate felons

TABLE 2  
Sentence Sanctions, by Conviction Class  
(1984/85 Felony Convictions)

	P R I S O N			J A I L			P R O B A T I O N			O T H E R			T O T A L C A S E S		
	Group 1	Group 2	Group 3	Group 1	Group 2	Group 3	Group 1	Group 2	Group 3	Group 1	Group 2	Group 3			
A	93.1%	98.3%	99.4%	2.2%	1.7%	0.6%	4.5%	0.0%	0.0%	0.2%	0.0%	0.0%	1,040	58	330
B	80.7%	97.0%	98.8%	7.1%	2.2%	0.8%	11.9%	0.8%	0.4%	0.2%	0.0%	0.0%	4,857	372	2,225
C	44.6%	77.8%	93.5%	32.9%	18.8%	5.4%	21.8%	3.0%	1.1%	0.8%	0.5%	0.1%	7,321	432	2,904
D	16.4%	42.1%	79.3%	40.9%	44.3%	15.6%	40.2%	11.6%	4.5%	2.5%	2.0%	0.6%	18,160	864	6,647
E	8.3%	33.9%	72.8%	36.7%	45.0%	18.4%	49.5%	18.6%	7.3%	5.5%	2.6%	1.5%	11,770	387	4,240
TOTAL	28.1%	59.1%	83.2%	33.7%	30.6%	12.2%	35.6%	8.9%	4.0%	2.7%	1.4%	0.7%	43,148	2,113	16,346

Note: While the majority of persons indicated as predicate felons meet the legal definition for treatment as second felony violators the definition used here does not include a limited time-at-risk. Therefore, sentences to prison are not mandatory.

Group 1 = First felons

Group 2 = First felons with convictions prior to instant offense disposition

Group 3 = Predicate felons

TABLE 3

Average Minimum Sentence Lengths for Sentences to State Prison,  
by Conviction Class  
(1984/85 Felony Convictions)

	GROUP 1	GROUP 2	GROUP 3	ALL
A	31.5 (57)	41.1 (8)	58.4 (17)	38.0 (82)
B	41.6 (3,900)	47.6 (359)	72.6 (2,129)	52.3 (6,388)
C	25.5 (3,243)	26.0 (335)	42.7 (2,646)	32.8 (6,224)
D	17.6 (2,935)	17.8 (362)	26.7 (5,214)	23.2 (8,511)
E	16.8 (959)	14.9 (131)	18.9 (3,073)	18.3 (4,163)
TOTAL	28.4 (11,094)	28.9 (1,195)	35.6 (13,079)	32.1 (25,368)

Note: Felony convictions with life sentences were excluded from class A felonies is generally longer than indicated above.