The Presumption for Detention Statute's Relationship to Release Rates

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SINCE 1984, THE pretrial detention rate for federal defendants has been steadily increasing. Recent work has aimed to address why the detention rate continues to rise and if there may be alternatives that could slow or reverse this trend. The presumption for detention statute, which assumes that defendants charged with certain offenses should be detained, has been identified as one potential factor contributing to the rising detention rate. Therefore, in this article I examine the relationship between the presence of the presumption and release rates. I will also examine the effect, if any, of the presumption on the release recommendations made by pretrial services officers. Finally, I will compare outcomes—defined as rates of failures to appear, rearrests, or technical violations resulting in revocation of bond—for presumption and non-presumption cases.

Historical Background

For almost 200 years, the federal bail system was premised on a defendant's right to bail for all non-capital offenses if the defendant could post sufficient sureties (Schnacke, Jones, & Brooker, 2010). In other words, all defendants were entitled to release, but release was based on a defendant's financial resources, leaving indigent defendants with few alternatives. Eventually, this disparity led to the passage of the Bail Reform Act of 1966 [18 U.S.C. § 4141-51 (repealed)]. The purpose of the act was "to revise the practices relating to bail to assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges, to testify, or pending appeal, when detention serves neither the ends of justice nor the public interest." [18 U.S.C. § 4141-51 (repealed)] To accomplish this goal, the act restricted the use of financial bonds in favor of pretrial release conditions (Lotze et al., 1999). Furthermore, the Bail Reform Act of 1966 limited a judicial officer's determination to the question of nonappearance for court hearings—and not other issues such as danger to the community—stating that "any person charged with an offense […] be ordered released pending trial […] unless the officer determines […] that such a release will not reasonably assure the appearance of the person as required." [18 U.S.C. § 4141-51 (repealed)].

The movement for bail reform continued throughout the 1960s and 1970s, with special interest in how judicial officers could obtain the information they needed about defendants prior to making release recommendations (GAO, 1978). In response, Congress passed the Speedy Trial Act of 1974, which among other things allowed for the creation of 10 pretrial "demonstration" districts (Hughes & Henkel, 2015). The mission of these districts was twofold: They were to increase the number of defendants released on bail while also reducing crime in the community (Hughes & Henkel, 2015). To fulfill this mandate, pretrial agencies were charged with interviewing newly arrested defendants for background and biographical information, verifying this information by contacting family or friends, and preparing a report for the court with a recommendation regarding bail (Hughes & Henkel, 2015). Should the defendant be released during the pretrial period, a pretrial services officer (PSO) would be responsible for supervising them in the community (Schnacke, Jones, & Brooker, 2010).

During this time, there was also growing concern about judicial officers' lack of discretion to consider a defendant's dangerousness when making a release decision. In response, the Attorney General's Office (OAG) established a Task Force on Violent Crime that produced a final report on August 17, 1981 (US DOJ, 1981). The report made a number of sweeping recommendations for many aspects of the criminal justice system, including the existing bail system. In their report, the task force recommended that the Bail Reform Act of 1966 be amended to include the following (not exhaustive) recommendations:

Permit courts to deny bail to persons who are found by clear and convincing evidence to present a danger to particular persons or the community.

Deny bail to a person accused of a serious crime who had previously, while in a pretrial release status, committed a serious crime for which he or she was convicted.

Abandon, in the case of serious crimes, the current standard presumptively favoring release of convicted persons awaiting imposition or execution of sentence or appealing their convictions.

While these recommendations were being made, Congress was receiving testimony from judicial officers that the information received from federal public defenders and prosecutors was insufficient to make an informed bail decision, and that they valued the investigations and reports that had been prepared by

the 10 demonstration districts. Therefore, in 1982, Congress expanded the Pretrial Services Agency to each of the 94 districts in the United States (Schnacke, Jones, & Brooker, 2010).

Following the expansion of pretrial services and the recommendations by the AGO in 1981, a 1984 Senate report stated, "Considerable criticism has been leveled at the Bail Reform Act [of 1966] in the years since its enactment because of its failure to recognize the problem of crimes committed by those on Pretrial release. In just the past year, both the President and the Chief Justice have urged amendment of federal bail laws to address this deficiency."[1] This same year, federal legislation was enacted under the Comprehensive Crime Control Act of 1984, which included the Bail Reform Act of 1984 (US DOJ, 1981).

The Bail Reform Act of 1984 stated that all defendants charged in federal court were to be released on their own recognizance unless the "judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community" (18 U.S.C. § 3142(b)). If the judicial officer determined that a defendant posed a risk of nonappearance or danger, he or she could still order release on a condition or combination of conditions that would mitigate the established risk (18 U.S.C. § 3142(c)(1)(A) & (B)). Finally, if the judicial officer found "that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, such judicial officer shall order the detention of the person before trial." (18 U.S.C. § 3142(e)(1)). Therefore, the presumption was that all defendants would be ordered released, save for those determined to pose too great a risk of nonappearance or danger to the community.

Additionally, the Bail Reform Act of 1984 established two circumstances under which this presumption for release is reversed. Defendants falling into either of these two categories (commonly referred to as "presumption cases") are presumed to be detained unless they can demonstrate by clear and convincing evidence that they do not pose a risk of nonappearance or danger to the community.

Presumptions

The first such presumption is often referred to as the "Previous Violator Presumption" (18 U.S.C. § 3142(e)(2)). This presumption applies to a defendant charged with *any* crime of violence or act of terrorism with a statutory maximum term of imprisonment of 10 years or more, *any* drug offense with a statutory maximum term of imprisonment of 10 years or more, *any* felony involving a minor victim, *any* felony involving the use or possession of a firearm or destructive device, a charge for Failure to Register as a Sex Offender, *any* felony with a statutory maximum sentence of life or death, or *any* felony if the defendant has at least two prior felony convictions for one of the above-noted offenses at the federal, state, or local level (18 U.S.C. § 3142(e)(2)).

Despite this seemingly broad qualification, the Previous Violator Presumption has three "qualifiers" that must be met before the presumption can apply. These qualifiers are:

Does the defendant have a prior conviction that would trigger this presumption? If yes,

Was that prior offense committed while the defendant was out on bail for an unrelated matter? If yes,

Has less than five years passed from the date of conviction or from the defendant's release for that conviction (whichever is later)?

If the answer is yes to all of these questions, the defendant is subject to the Previous Violator Presumption (18 U.S.C. § 3142(e)(2)).

The other presumption established in the Bail Reform Act of 1984, often referred to as the "Drug and Firearm Offender Presumption," is much more straightforward—a defendant qualifies based exclusively on the charge and statutory maximum term of imprisonment (18 U.S.C. § 3142(e)(3)). The charges included in this presumption are: *any* drug charge with a statutory maximum term of imprisonment of 10 years or more; *any* firearms case where the firearm was used or possessed in furtherance of a drug crime or crime of violence; a conspiracy to kill, kidnap, maim, or injure persons in a foreign country; an attempt or conspiracy to commit murder; an act of terrorism transcending national boundaries with a statutory maximum term of imprisonment of 10 years or more; a charge of peonage, slavery, or trafficking in persons with a statutory maximum term of imprisonment of 20 years or more, or *any* sex offense under the Adam Walsh Act where a minor victim is involved (18 U.S.C. § 3142(e)(3)).

Since the enactment of these presumptions in the Bail Reform Act of 1984, there has been no known research into the effect of the presumptions on pretrial detention rates. As such, the focus of this study was to examine the relationship between the presumption and the pretrial release decision.

Rising Detention Rates and Consequences

Since the passing of the Bail Reform Act of 1984, pretrial detention rates in the federal system have been steadily increasing. Including defendants charged with immigration charges, the federal pretrial detention rate increased from 59 percent in 1995 to 76 percent in 2010 (Bureau of Justice Statistics, 2013). During the same time period, the percentage of defendants charged with drug offenses who were detained pretrial increased from 76 percent to 84 percent, and defendants charged with weapons offenses who were detained pretrial increased from 66 percent to 86 percent (Bureau of Justice Statistics, 2013). Even after excluding immigration cases, from 2006 to 2016, the pretrial detention rate increased from 53 percent to 59 percent.

The rising pretrial detention rates have generated a number of social and fiscal concerns. Significantly, when the 1981 task force report recommended the addition of dangerousness as a consideration, it was with the understanding that defendants ordered detained as a risk of danger would only be detained for a brief period of time under the Speedy Trial Act. The task force specifically stated that this recommendation would not be favorable for systems where defendants may wait one to two years before their trials (US DOJ, 1981).

As of 2016, the average period of detention for a pretrial defendant had reached 255 days, although several districts average over 400 days in pretrial detention (H-9A Table). At an average cost of $73 per day, 255 days of pretrial detention costs taxpayers an average of $18,615 per detainee (Supervision, 2013). In contrast, one day of pretrial supervision costs an average of $7 per day, for an average cost of $1,785 per defendant across the same 255 days (Supervision, 2013).

There are also significant social costs to the defendant as the result of pretrial detention. Every day that a defendant remains in custody, he or she may lose employment, which in turn may lead to a loss of housing. These financial pressures may create a loss of community ties, and ultimately push a defendant towards relapse and/or new criminal activity (if he was guilty of the charged criminal activity) (Stevenson & Mayson, 2017). Pretrial detention has also been found to correlate with

[1] Senate Report No. 98-225, at 3.

a greater likelihood of receiving a custodial sentence, and one of greater length, than for defendants released on pretrial (Lowenkamp, VanNostrand, & Holsinger, 2013a). This study found that defendants who were detained for the entire pretrial period were 4.44 times more likely to receive a jail sentence and 3.32 times more likely to receive a prison sentence (Lowenkamp, VanNostrand, & Holsinger, 2013a). In addition to making it more likely that a custodial term would be received, never being released pretrial was associated with significantly longer sentences. For those defendants not released pretrial who were later sentenced to jail, their sentences were 2.78 times longer than those of defendants who had been out on bond, and, for defendants sent to prison, sentences were 2.36 times longer (Lowenkamp, VanNostrand, & Holsinger, 2013a).

Another recent study found a relationship between the pretrial detention of low-risk defendants and an increase in their recidivism rates, both during the pretrial phase as well as in the years following case disposition (Lowenkamp, VanNostrand, & Holsinger, 2013b). In this study, low-risk defendants who were held pretrial for two to three days were almost 40 percent more likely to recidivate before trial compared to similarly situated low-risk defendants who were detained for 24 hours or less (Lowenkamp, VanNostrand, & Holsinger, 2013b). When held for 8 to 14 days, low-risk defendants became 51 percent more likely to recidivate within two years of their cases' resolution, and when held for 30 or more days, defendants were 1.74 times more likely to commit a new criminal offense than those detained for 24 hours or less.

The increasing rate of pretrial detention, along with the effects noted above, have prompted growing interest in what factors may be contributing to the detention of low-risk defendants, with a special focus on what has been deemed "unnecessary" detention. In federal bail statute, unnecessary detention occurs when a defendant with a high predicted probability of success is nonetheless detained as a potential risk of danger to the community or nonappearance.[2]

Among other factors, the statutory presumptions for detention were identified as a potential factor influencing the pretrial release decision. Therefore, the focus of this study was to examine the relationship between the presumption and the pretrial release decision. Furthermore, the dataset was used to compile descriptive statistics on presumption cases, identify the average risk levels of presumption cases, and determine their release rates compared to release rates for non-presumption cases. Finally, the outcomes of presumption cases were compared to those of non-presumption cases for failures to appear, rearrests, violent rearrests, and technical violations leading to revocations.

Methods

The first step in the three-pronged study was to distinguish presumption cases from non-presumption cases. This process was complicated by the fact that presumption cases are not identified in any existing source, because the U.S. Code does not provide a specific list of citations that would be subject to the presumptions (18 U.S.C. § 3142(e)(2) & (3)). Instead, pretrial services officers have identified presumption cases by experience and the general guidance provided in the statute (e.g., any drug offense with a statutory maximum term of imprisonment of ten years or more).

In order to identify as many presumption cases as possible, a dataset was created containing every pretrial case received from fiscal year 2005 through fiscal year 2015 (N= 1,012,874). Next, cases where the defendant was categorized as being in the United States without legal status were excluded from the sample (N lost= 437,022). Defendants without legal status in the United States were removed from the sample, because they are detained in such high numbers based on their lack of legal immigration status that it would not have been clear whether the lack of immigration status or the presumption led to the detention. The resulting dataset consisted of 575,412 defendants. At this point, a manual inspection of the citations was conducted to ascertain exactly which citations were subject to which presumption.

As described above, the Previous Violator Presumption is subject to a number of criteria that must be met before the presumption can apply. In addition, there is significant overlap between the two presumptions, most notably among drug and sex offenses. After I excluded any citation that triggered both presumptions, only 6 percent of all the cases met the initial criteria for the Previous Violator Presumption. Unfortunately, the data needed to identify the exact number of cases under this presumption does not exist, as officers do not record the nature of previous convictions or the specific dates of any prior convictions. Therefore, it was impossible to determine exactly how many cases may be subject to this presumption, but a conservative estimate is less than 3 percent of all cases. Given the limited number of cases subject to this presumption and the lack of needed data, I focused the rest of the study on the Drug and Firearm Offender Presumption, which is triggered solely by the charge and potential statutory maximums. The manual inspection of the data produced a comprehensive list of citations subject to each presumption, listed in Appendix A.

This process also led to the creation of a sub-category of cases, designated as "wobblers." The wobbler category was created to address an ambiguity in the statute that includes any crime of violence if a firearm was used in the commission of the crime or any sex offense where the victim was a minor (18 U.S.C. § 3142(e)(3)(B) & (E)). Unfortunately, the details of the weapon used or the age of the victim are rarely specified in the citation for the offense. For instance, the citation for assault (18 U.S.C. § 113) does not specify whether the assault was committed with a firearm, vehicle, or a knife. Therefore, the citation itself is not sufficient to know if an assault case is subject to this presumption. As a result, wobblers represent cases, mostly crimes of violence or sex offenses, that may or may not be subject to the presumption, depending on the specific details of the offense.

Once the list of citations that triggered the Drug and Firearm Offender presumption and wobblers had been identified, it was coded into statistical analysis software, creating "presumption" and "wobbler" variables and allowing for the direct comparison of presumption cases to non-presumption cases. After excluding illegal defendants, the final dataset consisted of 568,195 defendants.

The PTRA and Risk Categories

The Pretrial Risk Assessment Tool (PTRA) was used to identify defendants' risk level. The PTRA was developed in 2010 by Christopher Lowenkamp, Ph.D., a nationally recognized expert in risk assessment and community corrections research who was hired by the AO for his extensive experience with actuarial risk assessment. He has presented on the subject of risk assessment at many forums and training events and routinely consults with government agencies and programs.

The primary purpose of the PTRA tool was to aid officers in making pretrial release recommendations by providing an

[2] *Guide to Judiciary Policy*, Vol. 8C, § 140.30.

actuarially-based risk category for defendants (Lowenkamp & Whetzel, 2009). Since its implementation in 2010, it has been found to effectively predict pretrial outcomes, specifically defined as failure to appear, suffering a new criminal arrest, and/or engaging in technical violations substantive enough to result in revocation of bond (Cadigan, Johnson, & Lowenkamp, 2012). Additionally, the PTRA has been validated in all 94 federal districts and found to be valid and predictive in every one (Cadigan, Johnson, & Lowenkamp, 2012).

The PTRA tool places defendants into one of five categories based on a total score obtained from responses to 11 questions. The total score can range from one to fifteen points. This score, known as the raw score, then corresponds to a risk category with a predicted risk of failure as follows: category 1 defendants are predicted to fail while on pretrial release 3 percent of the time, category 2 defendants have failure rates of 10 percent of the time, category 3 defendants have failure rates of 19 percent, category 4 defendants have failure rates of 29, and category 5 defendants have failure rates of 35 percent. For the purposes of this study, those falling into categories 1 and 2 are considered low-risk defendants, category 3 defendants are considered moderate risk, and categories 4 and 5 defendants are considered high-risk.

Composition of Presumption Cases

As can be seen in Figure 1, between fiscal years 2005 and 2015, the Drug and Firearm presumption was found to have applied to between 42 and 45 percent of cases every year.

When analyzed by risk category, there was a higher proportion of presumption cases among categories 3 to 5 (Figure 2).

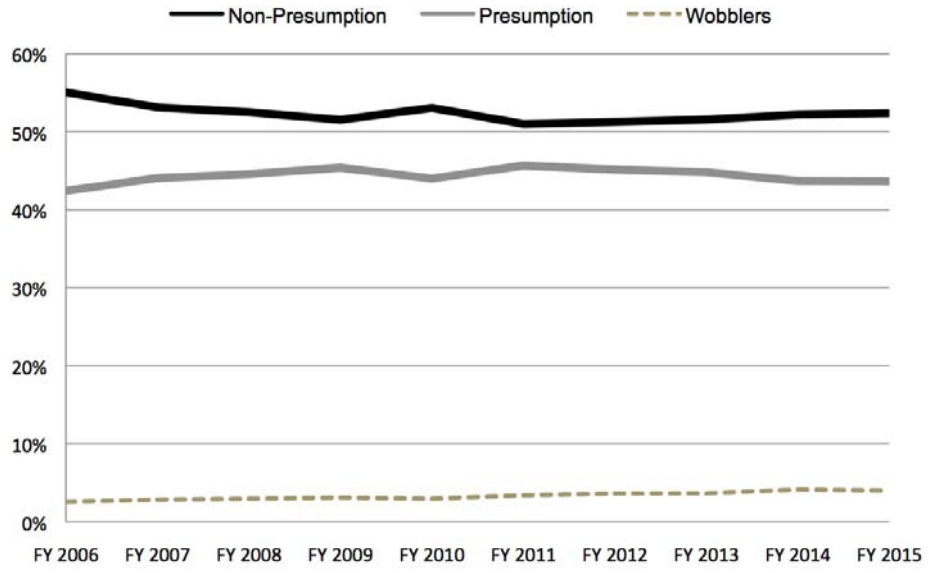
Presumption cases were also compared to non-presumption cases by offense type and PTRA category (Table 1). Presumption cases accounted for 93 percent of drug offenses; 77 percent of sex offenses, 17 percent of all weapons offenses, and only 2 percent of all violence charges (however, an additional 44 percent of violent offenses were categorized as wobblers).

Interestingly, for weapons and sex offenses, as risk levels increase, fewer and fewer cases are subject to the presumption, indicating that for these charges, the presumption may be targeting lower-risk defendants rather than higher-risk defendants. One potential explanation may be that while all sex offenses

TABLE 1.
Percent of defendants with presumption charge, by offense type and PTRA category

		Percent of defendants with		
PTRA category	Number	Non-Presumption	Presumption	Wobblers
Drugs				
One	4,761	14.56%	85.44%	0.00%
Two	15,425	5.90%	94.10%	0.00%
Three	25,449	3.19%	96.81%	0.00%
Four	19,201	2.32%	97.68%	0.00%
Five	8,215	1.83%	98.17%	0.00%
Property				
One	24,996	99.85%	0.09%	0.06%
Two	10,927	99.43%	0.14%	0.43%
Three	6,234	97.53%	0.32%	2.15%
Four	3,106	96.97%	0.32%	2.70%
Five	807	97.15%	0.25%	2.60%
Weapons				
One	978	80.27%	18.71%	1.02%
Two	2,611	76.02%	23.67%	0.31%
Three	6,036	77.62%	22.23%	0.15%
Four	8,140	83.14%	16.72%	0.14%
Five	5,932	87.42%	12.53%	0.05%
Sex				
One	4,394	6.78%	91.94%	1.27%
Two	3,680	16.63%	81.41%	1.96%
Three	2,035	37.15%	60.10%	2.75%
Four	995	53.47%	44.02%	2.51%
Five	203	55.67%	42.36%	1.97%

FIGURE 1.
Percent of defendants charged with presumption or non-presumption case, 2006–2015



against minors (known as Adam Walsh cases) are presumption cases, many defendants charged with these offenses do not have significant prior criminal histories and are usually categorized as low-risk defendants (Cohen & Spidell, 2016). By contrast, a defendant charged with a violent sexual assault is more likely to have a substantial criminal history and a higher risk level, yet, because the victim is an adult, this violent sexual assault may not be categorized as a presumption case (Cohen & Spidell, 2016).

Results

Pretrial Services Recommendations

By statute, a judicial officer (judge) may only consider certain factors in making a release decision. These factors are 1) the nature and circumstances of the offense charged, including whether the offense is violent in nature, a federal crime of terrorism, involves a minor victim, controlled substance, firearm, explosive, or destructive device; 2) the weight of the evidence against the defendant; 3) the history and personal characteristics of the defendant, including his or her character, physical and mental condition, family ties, employment history, financial condition, community ties, past criminal history, and behavior; and 4) the nature and seriousness of the danger to any person or the community posed by the defendant (18 U.S.C. § 3142(g)).

However, because pretrial services officers are not trained in the rules of evidence, local policy outlined in the *Guide to Judiciary Policy* mandates that they consider all of the above factors except the weight of the evidence and the presence of the presumption.[3] Despite pretrial services officers being trained not to consider these factors, anecdotal experience suggests that they are being considered. In order to determine if the presumption was having an effect on pretrial services officers' release recommendations, the recommendations for presumption and non-presumption cases were compared, controlling for risk. If the presumption was not being considered, then the release rates should not differ significantly between the two types of cases. The results, seen in Figure 4, demonstrate that this is not the case.

For category 1 defendants, pretrial services officers recommended release on 93 percent of non-presumption cases, compared to 68 percent of presumption cases. For category 2 defendants, release was recommended on 78 percent of non-presumption cases and 64 percent of presumption cases. By category 3, the differences are reduced, with pretrial services officers recommending release on 53 percent of cases, 30 percent of category 4 defendants and 14 percent of category 5 non-presumption cases, compared to 50 percent, 29 percent, and 13 percent of presumption cases, respectively.

Notably, the largest difference in release recommendations was for category 1 defendants, with a differential of 25 percent. As risk levels increase, the lines converge, until there is virtually no difference between moderate and high-risk defendants. Given pretrial services officers' mandate to recommend alternatives to detention and the fact that they, in theory, consider fewer factors than the judicial officers, it is unclear why their recommendations would be comparable to or lower than the actual release rates ordered by the courts for any of the case types.

Release Rates

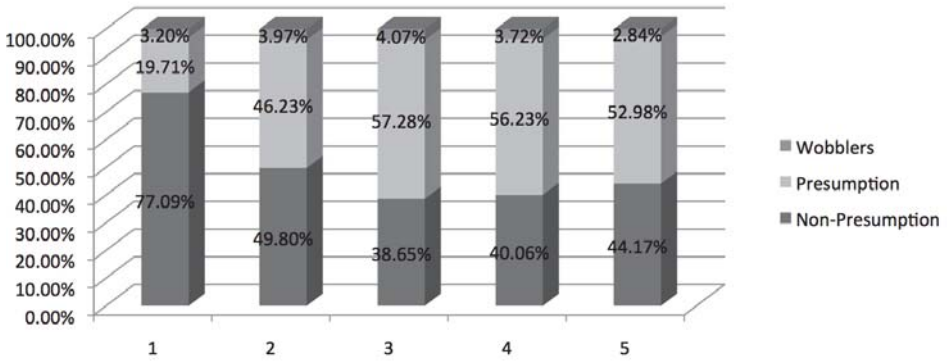
The intended purpose of the presumption was to detain high-risk defendants who were likely to pose a significant risk of danger to the

TABLE 2.
Relationship between presumption case and pretrial violations for all released defendants, by PTRA category

		Percent of released defendants with:			
Presumption and PTRA category	**Number on release**	**Any rearrest**	**Violent rearrest**	**FTA**	**Revocation**
One					
Non-presumption	22,879	2.8%	0.4%	0.7%	1.7%
Presumption	4,251	3.7%**	0.5%	0.8%	4.3%***
Two					
Non-presumption	14,211	5.9%	0.9%	1.5%	5.2%
Presumption	8,952	5.3%*	0.7%	1.6%	6.5%***
Three					
Non-presumption	9,116	10.2%	1.8%	2.7%	12.6%
Presumption	11,098	8.7%***	1.2%***	2.5%	12.9%
Four					
Non-presumption	4,029	16.8%	2.7%	3.9%	20.0%
Presumption	5,535	12.2%***	2.0%*	3.1%*	18.1%*
Five					
Non-presumption	1,076	20.8%	4.8%	5.5%	24.1%
Presumption	1,355	16.4%**	3.0%*	4.5%	22.2%

*Note: Includes subset of 82,502 defendants with PTRA assessments with cases closed prior to fiscal year 2015. *p<.05; **p<.01; ***p< .001*

FIGURE 2.
Composition of risk categories



[3] *Guide to Judiciary Policy*, Vol. 8A, § 170.

community if they were released pending trial.[4] If this purpose were fulfilled, release rates would be higher for low-risk presumption defendants than for high-risk presumption defendants. Additionally, because the presumption can be rebutted if sufficient evidence is presented that the defendant does not pose a risk of nonappearance or danger to the community, we wanted to investigate whether low-risk presumption cases were released at rates similar to low-risk non-presumption cases.

The results can be seen in Figure 3. At the lowest risk level (category 1), non-presumption cases are released 94 percent of the time, while the release rate for presumption cases was only 68 percent. For category 2 defendants, 80 percent of non-presumption cases are released, as opposed to 63 percent of presumption cases. For category 3 defendants, the release rates drop to 57 percent and 50 percent. At the high-risk categories 4 and 5, basically there was no difference in the release rates between presumption and non-presumption cases. For example, the percentage of non-presumption PTRA 4 cases released was 33 percent, while the percentage of PTRA 4 presumption cases released was 32 percent.

These results were illuminating for several reasons. The most surprising result was that the largest difference in release rates was among the lowest risk defendants, with the differential in release rates disappearing as the risk increases. Notwithstanding the presumption, a PTRA category 1 case represents a defendant with a minimal, if any, criminal history and a stable personal background in terms of employment, residence, education, and substance abuse history. Given the lack of substantive risk factors in these defendants, it seems possible that the presumption is accounting for this difference in release rates. Stated differently, were it not for the existence of the presumption, these defendants might be released at higher rates.

Interestingly, the difference in release rates gets smaller as the risk level increases, until it is virtually identical for high-risk defendants. A category 5 defendant, presumption or non-presumption, will most likely have multiple felony convictions, a history of failures to appear, unstable residence, little or no employment history, and a significant history of substance abuse. These are all legitimate risk factors, and their combined presence makes

[4] S. REP. No. 225, *supra* note 2, at 3.

TABLE 3.
Presence of pretrial special conditions for presumption and non-presumption cases, by PTRA category

PTRA categories	Number	Percent with conditions	Average number special conditions
All defendants			
Non-presumption	42,601	89.2%	8.5
Presumption	24,412	98.3%***	11.1***
Wobbler	2,325	97.0%***	10.5***
PTRA ones			
Non-presumption	18,648	83.7%	7.5
Presumption	3,204	98.1%***	11.5***
Wobbler	713	96.1%***	9.3***
PTRA twos			
Non-presumption	11,918	90.4%	8.6
Presumption	6,882	98.2%***	10.9***
Wobbler	687	97.5%***	10.5***
PTRA threes			
Non-presumption	7,756	96.4%	9.7
Presumption	8,779	98.4%***	11.1***
Wobbler	651	97.9%	11.3***
PTRA fours			
Non-presumption	3,396	97.0%	10.4
Presumption	4,464	98.4%***	11.2***
Wobbler	219	96.8%	12.1***
PTRA fives			
Non-presumption	883	96.0%	10.4
Presumption	1,083	97.8%*	11.1***
Wobbler	55	94.6%	11.5*

FIGURE 3.
Percent of defendants charged with presumption cases recommended for release pretrial, by PTRA category

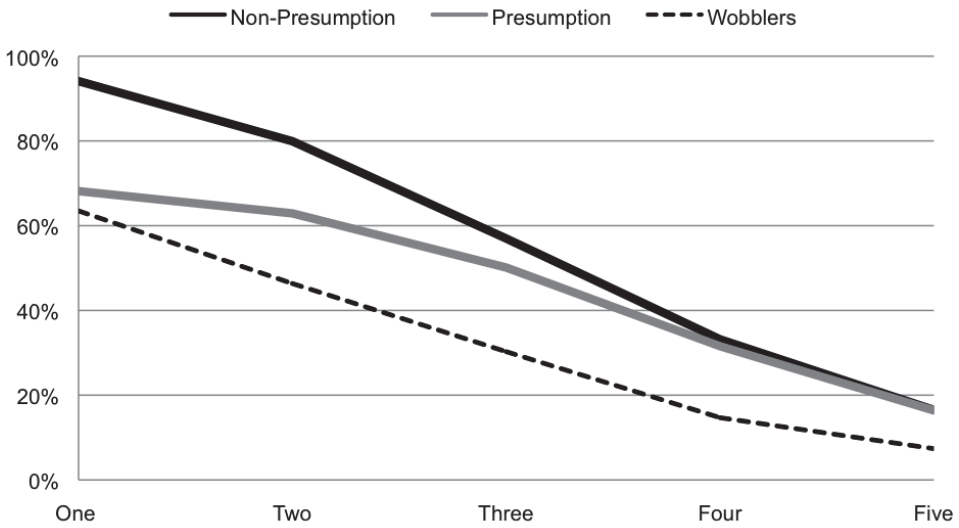
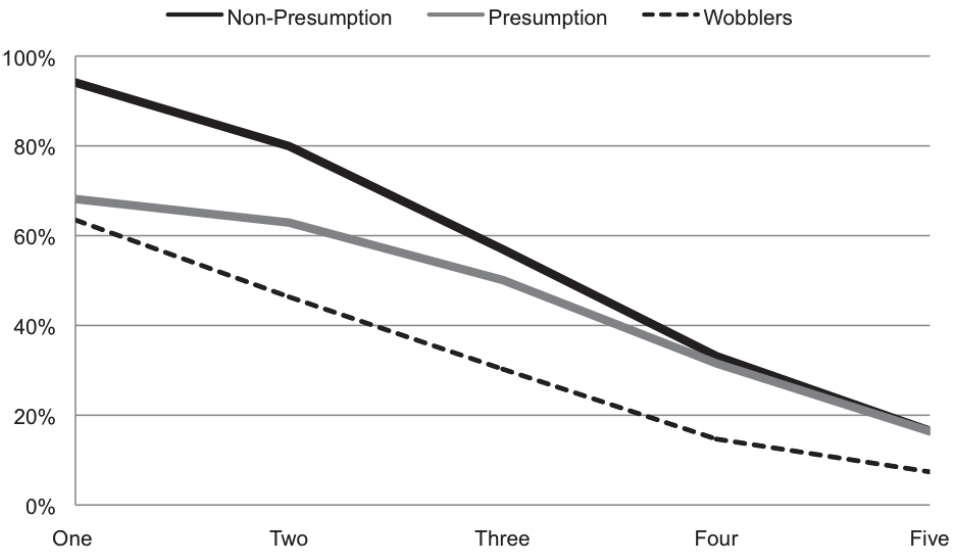


TABLE 4.
Types of pretrial special conditions for presumption and non-presumption cases, by PTRA category

	Types of pretrial special conditions				
PTRA categories	Restriction condition	Monitoring condition	Treatment condition	Education/training or employment condition	Other party guarantees condition
All defendants					
Non-presumption	83.6%	64.6%	39.9%	32.3%	13.6%
Presumption	96.8%	90.5%	68.0%	43.7%	23.3%
Wobbler	95.1%	81.6%	61.9%	32.9%	26.5%
PTRA ones					
Non-presumption	77.4%	50.0%	25.3%	24.2%	9.2%
Presumption	96.6%	86.6%	55.7%	33.3%	18.7%
Wobbler	94.1%	65.1%	41.4%	26.7%	18.8%
PTRA twos					
Non-presumption	84.2%	67.4%	40.3%	34.1%	14.1%
Presumption	96.9%	87.6%	60.8%	43.3%	22.2%
Wobbler	95.9%	83.6%	62.6%	31.2%	25.2%
PTRA threes					
Non-presumption	92.2%	81.6%	57.2%	42.9%	19.2%
Presumption	97.0%	91.7%	71.2%	47.4%	25.0%
Wobbler	95.2%	92.0%	76.8%	38.4%	34.0%
PTRA fours					
Non-presumption	94.0%	89.8%	70.6%	44.0%	21.6%
Presumption	96.5%	94.4%	78.5%	44.8%	24.6%
Wobbler	96.4%	95.9%	80.4%	42.9%	30.6%
PTRA fives					
Non-presumption	92.8%	90.0%	73.5%	42.0%	21.4%
Presumption	95.8%	95.0%	81.4%	41.7%	25.1%
Wobbler	92.7%	89.1%	70.9%	29.1%	38.2%

FIGURE 4.
Percent of defendants released pretrial, by presumption charge



release difficult, with or without the presumption. As such, it appears the presumption is influencing the release decision for the lowest-risk defendants, while having a negligible influence on higher risk defendants.

Outcomes on Pretrial Release

The wide variations in release rates may be justified if presumption cases have substantially worse outcomes than non-presumption cases with regard to failure to appear, rates of rearrest, rates of violent rearrest, and/or technical violations resulting in revocations. In order to accurately measure outcomes, the data for this part of the analysis was limited to cases opened after the implementation of PTRA in 2010 and whose cases had been closed prior to fiscal year 2015, for a total value of 82,502 defendants.

Rates of Rearrest

When analyzing rates of rearrest, I found that category 1 presumption cases were rearrested at slightly higher rates than non-presumption cases; however, presumption rearrest rates were lower than non-presumption rearrest rates for every other risk level[5] (Table 2). This finding would seem to confirm the belief that the presumption does a poor job of assessing risk, especially compared to the results produced by actuarial risk assessment instruments such as the PTRA.

The risk principle could explain the slightly higher rearrest rates found for lower risk presumption defendants. In essence, the risk principle states that supervision conditions and strategies should be commensurate to a defendant's actual risk. Studies based on the risk principle have found that when low-risk cases are placed on intensive supervision strategies, such as placement in a halfway house, residential drug treatment, or participation in location monitoring, they are more likely to fail (Andrews, Bonta, & Hoge, 1990; Lowenkamp & Latessa, 2004; Lowenkamp, Holsinger, & Latessa, 2006; Lowenkamp, Flores, Holsinger, Makarios, & Latessa, 2010). Existing literature on the risk principle has explained this increased failure rate as the result of intermixing low- and high-risk defendants in the same programs and exposing low-risk defendants to high-risk thought processes and influences (Cohen, Cook, & Lowenkamp, 2016).

In support of this theory, I compared the average number of special conditions for

[5] The results were all found to be statistically significant at the .05 level.

defendants charged with presumption cases to those not charged with presumption cases, controlling for risk (Table 3). Low-risk cases (Categories 1 & 2) charged with a presumption case received an average of 12 and 11 special conditions, respectively. In contrast, low-risk cases not charged with a presumption averaged 8 and 9 special conditions respectively.

Additionally, the special conditions imposed on presumption cases were substantively more restrictive than those imposed on non-presumption cases (Table 4). Specifically, while only 50 percent of category 1 non-presumption cases were placed on a monitoring condition (such as location monitoring), 87 percent of PTRA 1 presumption cases received a monitoring condition. Furthermore, for Categories 1 and 2, presumption cases were much more likely to have a third-party guarantee condition (third-party custodian and/or co-signer) compared to low-risk non-presumption cases.

Rates of Violent Rearrest

Since presumption cases are assumed to pose a greater than average risk of danger to the community, their rates for violent rearrest while on supervision were also compared. For low-risk defendants, there was no statistical difference in rates of violent rearrest between presumption and non-presumption cases (see Table 2). However, for moderate and high-risk categories, presumption cases had *fewer* violent rearrests than non-presumption cases. Again, a possible explanation for this result is that pretrial officers supervised according to the risk principle, with higher risk presumption cases being adequately placed on intensive supervision strategies.

Technical Revocations

The risk principle also provides an explanation for the rates of revocation for presumption and non-presumption cases. For this study, the revocation rate was defined as a technical violation or series of technical violations that ultimately led to the revocation of bond. For category 1 and 2 defendants, non-presumption cases were revoked at lower rates than presumption cases (1.7 percent compared to 4.3 percent for category 1, and 5.2 percent compared to 6.5 percent for category 2). However, there was no difference in revocation rates for

TABLE 5.
Cost of Pretrial Detention versus Supervision for PTRA Categories 1 and 2 (Excluding Sex Offenses and Illegal Immigration)

Fiscal Year	PTRA 1-2 Presumption Cases	Daily Cost of Incarceration	Daily Cost of Supervision	Average Days Incarcerated	Total Cost of Incarceration	Total Cost of Supervision	Net Savings
2005	1485	62.09	5.7	213	$19,639,377	$1,802,939	$17,836,439
2006	1843	62.73	5.65	222	$25,665,728	$2,311,675	$23,354,054
2007	1853	64.4	5.85	224	$26,730,637	$2,428,171	$24,302,466
2008	1847	66.27	6.09	228	$27,907,357	$2,564,596	$25,342,761
2009	1336	67.79	6.38	231	$20,921,079	$1,968,970	$18,952,109
2010	1161	70.56	6.62	232	$19,005,477	$1,783,110	$17,222,367
2011	1603	72.88	7.35	233	$27,220,607	$2,745,218	$24,475,390
2012	1639	73.03	7.24	237	$28,367,992	$2,812,327	$25,555,665
2013	1499	74.61	7.17	243	$27,177,215	$2,611,723	$24,565,492
2014	1255	76.25	8.98	250	$23,923,438	$2,817,475	$21,105,963
2015	1330	78.77	10.08	255	$26,714,846	$3,418,632	$23,296,214
				Totals	**$273,273,753**	**$27,264,836**	**$246,008,917**

TABLE 6.
Cost of Pretrial Detention versus Supervision, PTRA Categories 1-3 (Excluding Sex Offenses and Illegal Immigration)

Fiscal Year	PTRA 1-3 Presumption Cases	Daily Cost of Incarceration	Daily Cost of Supervision	Average Days Incarcerated	Total Cost of Incarceration	Total Cost of Supervision	Net Savings
2005	5051	62.09	5.7	213	$66,800,334	$6,132,419	$60,667,915
2006	6296	62.73	5.65	222	$87,678,474	$7,897,073	$79,781,401
2007	6381	64.4	5.85	224	$92,049,754	$8,361,662	$83,688,091
2008	6250	66.27	6.09	228	$94,434,750	$8,678,250	$85,756,500
2009	6060	67.79	6.38	231	$94,896,509	$8,931,107	$85,965,403
2010	5822	70.56	6.62	232	$95,305,674	$8,941,660	$86,364,014
2011	6024	72.88	7.35	233	$102,293,785	$10,316,401	$91,977,384
2012	5605	73.03	7.24	237	$97,011,957	$9,617,507	$87,394,449
2013	5415	74.61	7.17	243	$98,175,195	$9,434,609	$88,740,587
2014	4521	76.25	8.98	250	$86,181,563	$10,149,645	$76,031,918
2015	4587	78.77	10.08	255	$92,136,087	$11,790,425	$80,345,663
				Totals	**$1,006,964,082**	**$100,250,759**	**$906,713,323**

category 3 defendants; for categories 4 and 5, non-presumption cases were *more* likely to be revoked than presumption cases.

Failure to Appear

Finally, rates of failure to appear were compared for presumption and non-presumption cases. Across all of the risk categories, there was no significant difference in rates of failure to appear between presumption and non-presumption cases. For instance, category 1 non-presumption cases failed to appear in 0.7 percent of instances compared to 0.08 percent for category 1 presumption cases. The same trend was found at the highest risk category, where non-presumption cases failed to appear in 5.5 percent of instances, compared to 4.5 percent for presumption cases.

In sum, high-risk presumption cases were found to pose no greater risk (or in some cases, less risk) than high-risk non-presumption cases of being rearrested for any offense, rearrested for a violent offense, failing to appear, or being revoked for technical violations. At the lower risk categories, presumption cases were more likely than non-presumption cases to be rearrested for any offense or be revoked for a technical violation, both of which are likely the result of the misapplication of the risk principle in supervision. Even for categories where presumption cases fared worse than non-presumption cases, the outcomes did not vary significantly enough to justify a presumption for detention.

Discussion

The presumption was instituted by Congress to address the perceived risk of danger to the community posed by defendants charged with certain serious offenses and only after a judicial officer makes a finding of dangerousness by the "clear and convincing" standard (US DOJ, 1981). Additionally, it was clear that defendants detained as a potential danger should only be detained for the relatively short period of time—70 days—defined by the Speedy Trial Act (US DOJ, 1981).

Despite these caveats and precautions, there has been little research into whether these goals have been met. This study represents an initial attempt to do so by first defining the citations subject to the presumption as comprehensively as possible. This study found that, when clearly defined, the presumption focuses primarily on drug offenses and excludes the majority of violent, sex, or weapons-related offenses. The rise in federal drug prosecutions in the last decade means that at least 42 percent of all federal cases in any given year are now subject to the presumption. This has led to a drastic rise in the number of defendants detained in federal court, reaching as high as 59 percent in the latest fiscal year, after excluding immigration cases (Table H-14A). Compounding the matter is the lengthening average term of pretrial detention, which currently ranges from 111 days to as high as 852 days, with a national average of 255 days. Even the lowest average, 111 days, is significantly above the threshold set by the Speedy Trial Act and is counter to the intended purpose of the 1981 Task Force.

Furthermore, the effect of the presumption on actual release rates and on the recommendations of pretrial services officers was most significant for low-risk defendants (meaning there may be some level of unnecessary detention), while having a negligible effect on the highest risk defendants. Additionally, the presumption has failed to correctly identify defendants who are most likely to be rearrested for any offense, rearrested for a violent offense, fail to appear, or be revoked for technical violations. In the limited instances where defendants charged with a presumption demonstrated worse outcomes than non-presumption cases, the differences were not significant and were most likely caused by the system's failure to address these defendants appropriately under the risk principle.

These results lead to the conclusion that the presumption was a poorly defined attempt to identify high-risk defendants based primarily on their charge, relying on the belief that a defendant's charge was a good proxy for that defendant's risk. In the years since the passage of the Bail Reform Act of 1984, there have been huge advances in the creation of scientifically-based risk assessment methods and tools, such as the PTRA. This study finds that these tools are much more nuanced and effective at identifying high-risk defendants.

Cost of the Presumption

According to our estimates, after excluding defendants charged with a sex offense and those without legal status in the United States, the detention of low-risk defendants charged in a presumption case has cost taxpayers an estimated $246 million dollars in the last 10 years alone (Table 5).

When moderate risk defendants are added to these calculations, the number rises to $1 billion in costs across the last ten years (Table 6).

Aside from the fiscal cost of pretrial detention, one should not lose sight of the high social costs of pretrial detention on an entire community. Recent research has demonstrated that for low-risk defendants, as defined by actuarial risk assessment and not charge, every day in pretrial detention is correlated with an increased risk of recidivism (Lowenkamp, VanNostrand, & Holsinger, 2013). Low-risk defendants experiencing even a two- to three-day period of pretrial detention are 1.39 times more likely to recidivate than low-risk defendants released at their initial appearance ((Lowenkamp, VanNostrand, & Holsinger, 2013). When held for 31 days or longer, they are 1.74 times more likely to recidivate than similarly situated defendants who are not detained pretrial.

The first finding is especially concerning when considering that the federal bail statute allows the government to move for a formal detention hearing up to three days after the initial appearance in any case involving a serious risk that the defendant will flee, a crime of violence, a charge under the Adam Walsh Act, any charge where the statutory maximum term of imprisonment is life or death, any offense where the statutory maximum term of imprisonment is 10 years or more, any felony if the defendant has two prior felony convictions in the above-noted categories, any felony that involves a minor victim or the possession a weapon, or a charge for failing to register as a sex offender (18 U.S.C. § 3142(f)). Given the wide array of charges that qualify for a detention hearing, it is not unusual for a low-risk defendant to be detained for at least three days, which in and of itself is associated with a substantial increase in the odds of recidivating.

The second finding is equally serious when viewed from the context of low-risk presumption cases. As noted above, thousands of low-risk presumption cases are detained every year for an average of 255 days, making them almost twice as likely to recidivate as defendants who are released pretrial. Once a defendant recidivates, the cycle of incarceration begins all over again, with the defendant being even less likely to be released on bond.

Recommendations

The presumption was written into federal statute to address the potential risk of danger and nonappearance posed by certain defendants, particularly defendants charged with drug offenses. Nonetheless, this study suggests the presumption is overly broad. Therefore,

my primary recommendation is to ask the Judicial Conference, through its Committee on Criminal Law, to consider whether to seek a legislative change tailoring the presumption to those defendants who truly should be presumed to be a danger or risk of nonappearance. This can be accomplished by adding qualifiers to the existing statute, limiting the application of the presumption to those defendants who have a demonstrated history of violence and who research suggests pose the greatest risk.

Additionally, the Administrative Office of the U.S. Courts (AO) could explore means of educating all pretrial services and probation officers to 1) identify the effect the presumption is having on their recommendations and 2) address ways to limit this effect.

One such way to limit the unintended effect of the presumption on pretrial services officers' recommendations could be to expand the AO's Detention Outreach Reduction Program (DROP). The DROP program, created in February 2015, is a two-day, in-district program in which a representative from the Administrative Office visits a district working to reduce unnecessary detention. It includes a full-day training session for pretrial services officers and their management team on the PTRA and its role in guiding pretrial services officers' recommendations prior to the judicial decision. It also includes a briefer presentation to any interested stakeholders, such as magistrate and district judges, assistant United States attorneys, and federal public defenders.

In addition, more information regarding the effect of the presumption could be shared with pretrial services offices and judges through official notifications, communications, and trainings held for new unit executives and new judges.

Finally, districts that currently demonstrate the highest release rates for presumption cases could be encouraged to share with other districts the approaches to modifying their court culture that they have found successful.

In sum, the presumption was created with the best intentions: detaining the "worst of the worst" defendants who clearly posed a significant risk of danger to the community by clear and convincing evidence. Unfortunately, it has become an almost de facto detention order for almost half of all federal cases. Hence, the presumption has contributed to a massive increase in the federal pretrial detention rate, with all of the social and economic costs associated with high rates of incarceration. Clearly, the time has arrived for a significant assessment of the federal pretrial system, followed by modifications to reduce the over-detention of low-risk defendants, the impact of pretrial incarceration on the community, and the significant burden of pretrial detention on taxpayers, while ensuring that released defendants appear in court as required and do not pose a danger to the community while released.

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Appendix A

Drug and Firearm Presumption Fact Sheet:

ANY drug case charged as an A, B, or C Felony, most often:
21:841
21:846
21:849
21:856
21:858
21:859
21:860
21:952
21:953
21:959
21:960
21:962
21:963

Any firearms case where the firearm was possessed or used in furtherance of a drug crime or a crime of violence:
18:924c

Conspiracy to Kill, Kidnap, Maim, or Injure Persons in a foreign country
Conspiracy must have taken place in the jurisdiction of the United States but the act is to be committed in any place outside the United States
18:956(a)

Attempt or Conspiracy to Commit Murder:
18:2332(b)

Acts of Terrorism Transcending National Boundaries charged as an A, B, or C Felony:
18:2332b(g)(5)(B)
18:1030(a)(1)
18:1030(a)(5)(A)
18:1114
18:1116
18:1203
18:1361
18:1362
18:1363
18:1366(a)
18:1751(a), (b), (c), (d)
18:175b
18:175c
18:1992
18:2155
18:2156
18:2280
18:2280a
18:2281
18:2281a
18:229
18:2332
18:2332(a), (b), (f), (g), (h), (i)
18:2339
18:2339(a), (b), (c), (d)
18:2340A
18:32
18:351(a), (b), (c), (d)
18:37
18:81
18:831
18:832
18:842(m), (n)
18:844(f)(2), (f)(3)
18:844(i)
18:930(c),
18:956(a)(1)
21:1010A
42:2122
42:2284
49:46502
49:46504
49:46505(b)(3)
49:46505(c),
49:46506
49:60123(b)

Peonage, Slavery, and Trafficking in Persons with a potential maximum of 20 years or more:
18:1581
18:1583
18:1584
18:1589
18:1590
18:1591
18:1594

Any of the following offenses only if a **minor** victim is involved:
18:1201
18:1591
18:2241
18:2242
18:2244(a)(1)
18:2245
18:2251
18: 2251A
18: 2252(a)(1)
18: 2252(a)(2)
18:2252(a)(3)
18:2252A(a)(1)
18: 2252A(a)(2)
18:2252A(a)(4)
18:2260
18:2421
18:2422b
18:2423
18:2425

Disclosures:

List is **not** mutually exclusive, but includes the most frequently charged citations that trigger this presumption.

Most crimes of violence only trigger this presumption if a firearm was used in the commission of the crime. Otherwise, this presumption does NOT apply (see the Previous Violator Presumption).

Previous Violator Presumption Fact Sheet:

This presumption is triggered only after numerous qualifiers have been met. See the attached flow chart to determine if a defendant qualifies under this presumption.

Many of the charges that fall under this presumption also fall under the Drug and Firearm Offender Presumption, which does not require any additional qualification. These charges have been **bolded.**

Citations for initial qualification:

Any Crime of Violence charged as an A, B, or C Felony including :
8:1324 (if results in death or serious bodily injury)
18:111(b)
18:1111
18:112(a)
18:1112
18:113(a)(1), (a)(2), (a)(3), (a)(6), (a)(8)
18:1113
18:114
18:1114
18:115
18:1116
18:117
18:1117
18:1118
18:1153
18:1201
18:1203
18:1503
18:1512
18:1513
18:1581
18:1583
18:1584
18:1589
18:1590
18:1591
18:1594(c)
18:1791(d)(1)(C)
18:1791(d)(1)(A)
18:1792
18:1841
18:1951

18:1952
18:1958
18:1959
18:2111
18:2113
18:2114(a)
18:2118
18:2119
18:2241
18:2242
18:2243
18:2244
18:2261
18:2262
18:241
18:242
18:2422
18:2426
18:245 (b)
18:247(a)(2)
18:249
18:36
18:372
18:373
18:871
18:872
18:875
18:876
18:892
18:894
21:675
42:3631

Acts of Terrorism Transcending National Boundaries charged as an A, B, or C Felony:
18:2332b(g)(5)(B)
18:1030(a)(1)
18:1030(a)(5)(A)
18:1114
18:1116
18:1203
18:1361
18:1362
18:1363
18:1366(a)
18:1751(a), (b), (c), (d)
18:175b
18:175c
18:1992
18:2155
18:2156
18:2280
18:2280a
18:2281
18:2281a
18:229
18:2332
18:2332(a), (b), (f), (g), (h), (i)
18:2339
18:2339(a), (b), (c), (d)
18:2340A
18:32
18:351(a), (b), (c), (d)
18:37
18:81
18:831
18:832
18:842(m), (n)
18:844(f)(2), (f)(3)
18:844(i)
18:930(c),
18:956(a)(1)
21:1010A
42:2111
42:2284
49:46502
49:46504
49:46505(b)(3)
49:46505(c),
49:46506
49:60123(b)

ANY drug case charged as an A, B, or C Felony, most often:
21:841
21:846
21:849
21:856
21:858
21:859
21:860
21:952
21:953
21:959
21:960
21:962
21:963

Any felony involving a minor victim not previously mentioned:
18:1461
18:1462
18:1465
18:1466
18:1470

Any felony involving the possession or use of a firearm or destructive device:
18:844
18:921
18:922
18:924
18:930
26:5845
26:5861

Failure to Register as a Sex Offender
18:2250

ANY felony with a potential sentence of life or death

ANY felony if the defendant has at least two prior felony convictions for one of the above-noted offenses, at the federal, state, or local level.