



# PRETRIAL JUSTICE IN VIRGINIA:

What Light Can the  
New Pretrial Data Project  
Microdata Shed?

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# EXECUTIVE SUMMARY

- Until recently, the effectiveness of Virginia's pretrial system in achieving its goals of public safety, protection of individual freedoms, and efficient and just court proceedings has been hard to ascertain, due in part to the lack of available systematic data.
- New data released as part of the Virginia Pretrial Data Project (PDP) now provide opportunities to more closely examine the pretrial system in much richer detail and with more rigorous statistical methods than have previously been available.
- We examine the recently released PDP data reflecting the pretrial experiences of more than 350,000 individuals who committed an offense in 2018. These data include a large suite of variables relating to key aspects of the defendants' initial charges, pretrial detention and release, any new arrests during the pretrial period, and case outcomes.
- This report examines three important areas that have been the focus of recent debate: (i) reducing charge severity from felonies to misdemeanors, (ii) eliminating presumptions against bail, and (iii) identifying racial disparities throughout the pretrial system.
- In the first section, we study the impact that charging someone with a misdemeanor rather than a felony has on the person's pretrial release and case outcomes, as well as on public safety. We find that the 2018 legislation in Virginia that raised the threshold for when certain larcenies are charged as misdemeanors rather than felonies shortened the length of time a person was detained and increased the likelihood they would be assigned an unsecured rather than secured bond.
- The reduction in charge type also substantially altered case outcomes. Being charged with a misdemeanor causes a person to be much less likely to be convicted of any charge associated with their original arrest, and reduced the likelihood they would be sentenced to 12 months or more of incarceration. In other words, even for an arrest for the same criminal act, the class of charge brought against a defendant dramatically affects whether the person will actually be convicted and imprisoned.
- Finally, we observe no offsetting encouragement of new larcenies after the reform, either in the PDP data or in the Uniform Crime Reporting data.
- In our second section, we examine the use of presumptions against bail using the first PDP release reflecting individuals charged with an offense in October 2017.
- Our analysis finds that at least 9.5% of defendants statewide were subject to presumptions against bail in the 2017 sample, with many others potentially subject to them.
- Unsurprisingly, the data shows these defendants were much less likely to be released pretrial (50%, compared to 83% among other defendants), and when released, they frequently faced more onerous release conditions (even when compared to people charged with similar crimes that did not trigger presumptions).
- However, this lower release rate for those subject to presumptions against bail was not selectively of defendants at "higher risk" of arrest for new criminal activity. Many of the individuals who fell within the

presumptions against bail also had the lowest risk assessment ratings (based in large part on their minimal criminal records). Despite their low risk, these individuals were detained at higher rates when subject to presumptions.

- To further assess whether presumptions improved public safety, we compare the rearrest rates for defendants subject to presumptions who were released pretrial to those of defendants not subject to presumptions who were also released. Fewer than 5% of defendants who faced presumptions but were released were charged with a new violent offense in the pretrial period, nearly identical to the share among defendants who did not face presumptions.
- Why do we find this? The charge a defendant faces is a very weak predictor of the likelihood they will be arrested for a new crime. Because the presumptions were largely based on the charge the defendant faces, they also proved to be a very weak predictor of subsequent criminal activity. As such, they are not useful as tools to distinguish high- and low-risk release (i.e., to identify defendants with high risk of new criminal activity).
- The presence of presumptions (prior to 2021) likely cost at least \$65M in additional jail operating costs and created significant unmeasured burdens on defendants, their families, and communities, without improving public safety.
- Finally, in our third section, we examine the extent to which defendants of different races experience different pretrial conditions using the PDP for all defendants charged in 2018.
- African-Americans comprise nearly 40% of the defendants charged with an offense punishable by incarceration in 2018, double their share of the overall population (20%).
- African-Americans are much more likely to be held without bail by a magistrate than

defendants of other races, and much less likely to be assigned an unsecured bond (which does not require cash or upfront payment).

- These disparities are not simply due to differences in the types of offenses with which African-Americans are charged relative to others, to different conditions in localities with higher African-American populations, or other demographic factors.
- The largest factor explaining these disparities appears to be the difference in the criminal history records of African-Americans relative to other defendants, which could itself reflect prior disparities experienced by African-Americans. However, even this factor does not eliminate the disparities exhibited in most of the pretrial release conditions we examine.

# INTRODUCTION

Each day, thousands of people are arrested in Virginia and enter into the Commonwealth's criminal legal system. Many of these individuals will spend a period of time in pretrial detention; some may be detained for the entire period leading up to their case's disposition. Many of those who are released pretrial will be required to post a secured bond (i.e., cash bail) and/or submit to supervision by a pretrial services agency. These and other aspects of the pretrial criminal legal system are intended to balance the goals of public safety, individual freedoms, and efficient and just court proceedings.

How effectively these goals are met by Virginia's pretrial system has been hard to ascertain, due in part to the lack of available systematic data. Prior to 2021, only a limited set of aggregate, statewide data on the pretrial system was available. New data released as part of the Virginia Pretrial Data Project (PDP) now provide opportunities to more closely examine the pretrial system in much richer detail and with more rigorous statistical methods than have previously been available. In 2018, as a part of its study of the pretrial system, the Virginia State Crime Commission (VSCC) collected and analyzed an array of data relating to approximately 35,000 individuals who had been arrested in October 2017. Following requests by the advocacy community, the data was made publicly available in December 2021. Recognizing the value in both continuing to collect such data and in making that data public, in 2021 the Virginia Legislature enacted Virginia Code section 19.2-134.1, which directs the Virginia Criminal Sentencing Commission (VCSC) to collect and release an array of data relating to arrests, charging, bail, disposition, and

sentencing as well as information on court appearances and subsequent arrests and charges. The most recent PDP data was released in December 2022. It reflects the pretrial experiences of more than 350,000 individuals who committed an offense in 2018. These data include a large suite of variables relating to key aspects of the defendants' initial charges, pretrial detention and release, any new arrests during the pretrial period, and case outcomes. Policy discussions can now be informed by evidence drawn from these data.

This report leverages the December 2022 PDP data for three primary goals:

1. Offer several examples of how rigorous, policy-relevant evidence can be obtained using distinct research approaches.
2. Draw findings on key elements of Virginia's pretrial criminal legal system.
3. Identify racial disparities for new policy or legislative consideration.

To accomplish the first two goals, we look back at recently enacted legislation using a rigorous impact evaluation design, drawing important findings about how new policy can further improve the pretrial system. In Part 1, we examine the impact of legislation in 2018 that reduced the classification of certain offenses. We find both expected and unexpected improvements in pretrial release and case outcomes, with no corresponding encouragement or increase of new crimes due to their lesser penalties. Using our rigorous causal design, we are able to link these changes specifically to the enacted legislation. More broadly, we learn that reducing certain offenses to misdemeanors rather than felonies can save substantial costs for incarceration



during both the pretrial and post-conviction periods, while also enabling individuals to avoid incarceration, destabilizing barriers associated with felony convictions, and lengthy periods of incarceration.

In Part 2, we consider a second policy question: the use of rebuttable presumptions against bail for certain offenses that rest the burden of proof for release decisions on defendants rather than the prosecution. These presumptions were still in place for certain offenses during 2018, the time window covered by the most recent PDP release (these presumptions were subsequently repealed in 2021, although their partial re-introduction has been proposed and debated in each of the most recent legislative sessions). We therefore use a control variable design in which we account for factors that may be correlated with both the presence of such presumptions for each defendant and pretrial release conditions and outcomes. By controlling for a very large set of factors, we are able to draw comparisons between defendants who experienced presumptions that are not simply due to differences in the type of offense, court, locality, demographics, or other features. This approach offers an example of how one could forecast future policy impacts by considering existing (non-random) variation within Virginia.

Finally, in Part 3, we explore the extent to which African-Americans experience different conditions and treatment in the pretrial process. We find important differences between African-Americans and other defendants in whether they are held without bail, as well as whether they are assigned secured rather than unsecured bond. There are resulting differences in the number of days African-Americans are held prior to being released pretrial. We observe disparities in other features of the system as well. Many of these disparities persist even once we control for a variety of factors, including average detention rates in each locality, court type, and offense type. In some cases, these

disparities can only be accounted for by defendants' criminal history records, although even these do not fully account for disparities in all of the pretrial aspects we examine. These are intended to offer points for consideration in future legislation or policies.

## PART 1:

# IMPACTS OF RECLASSIFYING CERTAIN CHARGES FROM FELONIES TO MISDEMEANORS

### EXECUTIVE SUMMARY

- Many types of criminal acts may be charged as either misdemeanors or felonies, depending on both statutory requirements and prosecutorial discretion. In this section, we study the impact that charging someone with a misdemeanor rather than a felony has on the person's pretrial release and case outcomes, as well as on public safety.
- To date, there has been no causal analysis of the impact charge type has on these outcomes, largely because there has not been a setting where an as-good-as-random change in charge types occurred and where defendant-level microdata on both charge types and outcomes was available.
- The analysis focuses on 2018 legislation in Virginia that raised the threshold for when certain larcenies are charged as misdemeanors rather than felonies. The legislation in question raised the threshold to charge grand larceny from \$200 to \$500.
- We use the PDP microdata released by the VCSC covering persons who were charged with a crime in calendar year 2018. Because the aforementioned legislation went into effect on July 1, 2018, the PDP data provides both pre- and post-reform observations.
- To account for any broader changes occurring during 2018 that might otherwise confound our pre- and post-July 2018 comparisons, we construct a comparison group of individuals facing charge types that are charged as felonies at similar rates prior to the legislation and which the legislation did not affect.
- Our analysis essentially compares defendants charged with larceny in early 2018 to otherwise identical defendants arrested for a similar larceny later in the year but who were charged with a misdemeanor.
- We find important differences in pretrial release conditions of the two groups due to the change in charge type. Notably, we find that while being charged with a misdemeanor did not change whether a person is likely to be released, it did shorten the length of time a person was detained between arrest and release. It also caused defendants to be 44% more likely to be released on unsecured bond rather than secured bond.
- Notably, being charged with a misdemeanor rather than a felony does not cause a person to be any more likely to be arrested on a new offense during the pretrial period (including new misdemeanors, felonies, or violent offenses). Being charged with a misdemeanor also does not cause a defendant to be more likely to fail to appear for a court hearing associated with the original offense. In other words, the greater use of unsecured bond for misdemeanor charges does not appear to be associated with worse public safety outcomes or less frequent court appearances.



- The reduction in charge type also substantially altered case outcomes. Being charged with a misdemeanor causes a person to be 40% less likely to be convicted of any charge associated with their original arrest. For comparison, 70% of those facing felony larceny charges in the first six months of 2018 were convicted; changing these to misdemeanor charges reduces this conviction probability to 30%. In other words, even for an arrest for the same criminal act, the class of charge brought against a defendant dramatically affects whether the person will actually be convicted.
- This major impact on conviction rates may be due to a variety of factors, including greater attention or effort by prosecutors in obtaining convictions on felony charges, as well as differences in defendants' ability to mount a defense against these charges.
- Being charged with a misdemeanor also reduces the probability that a defendant will be sentenced to 12 months or more in prison or jail by 14%. In addition to the reduced odds of prolonged incarceration, prior research suggests defendants may be better able to obtain employment, housing, and access benefits when they do not have felony convictions on their records.
- Finally, we observe no offsetting encouragement of new larcenies after the reform, either in the PDP data or in the Uniform Crime Reporting data.
- Taken together, our findings suggest that reducing felony larceny to a misdemeanor decreases the criminal legal system's impact on defendants. This means a shorter stay in pretrial detention, greater use of unsecured bond, a lower chance of felony conviction,

and less chance of long-term incarceration. Further, our findings demonstrate that these beneficial outcomes are achieved without compromising public safety or compliance with appearing at court hearings.

## **CONTEXT: 2018 LAW RAISING FELONY LARCENY THRESHOLDS IN VIRGINIA**

A number of offenses in Virginia can be charged as either a misdemeanor or felony depending on criteria established by the relevant statutes. Misdemeanor offenses are generally punishable by up to 12 months in jail and/or a fine of up to \$2,500, as well as other terms such as community supervision. Felonies, on the other hand, carry sentences that include years, decades, or even life imprisonment. While both misdemeanors and felonies carry numerous collateral consequences, some of the most onerous, far-reaching, and long-lasting barriers arise from felony convictions.<sup>1</sup> Whether a particular offense is charged as a misdemeanor or felony can be influenced both by statutory parameters as well as by prosecutors' discretion. Factors that contribute to decision-making include an individual's background (such as their criminal history and age) as well as the facts and circumstances of the case. A critical question to be posed is, how do decisions regarding the degree or class of charge influence the subsequent criminal legal system processes? To date, there has been little evidence to directly answer this question. Recent studies of changes in felony larceny thresholds have focused on their impact on subsequent rates of property crimes, finding small-to-no effects (Pew Charitable Trusts 2017, Jackson

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1. See for example, evidence presented by the National Inventory of Collateral Consequences of Conviction (<https://niccc.nationalreentryresourcecenter.org/>).

2020).<sup>2</sup> Whether legal system processes are themselves affected by the charge type has remained as-of-yet unexplored, with no existing studies explicitly comparing outcomes from different degrees of charge for the same offense.

We answer this question by examining changes occurring in 2018 in Virginia after new legislation reclassified many larcenies as misdemeanors rather than felonies. Prior to the legislation, grand larceny in Virginia was defined as theft of property valued at \$200 or more (a threshold that was the lowest in the nation).<sup>3</sup> The 2018 legislation revised the amount to raise this threshold to \$500.<sup>4,5</sup> In the decade leading up to the 2018 amendment, there had been ongoing debate about the matter, with advocates for increasing the threshold arguing the amount, set in 1985, had failed to even keep up with inflation, and retailer associations expressing concerns that raising the threshold would incentivize increased shoplifting.

The legislation was signed into law on April 4, 2018, and went into effect on July 1, 2018. There were no other major changes to Virginia's criminal code enacted in this session or taking effect at the same time, so the broader criminal legal system context remained consistent during 2018. As we document in Figure 1 below, there appear to be no anticipatory effects after the bill was

signed in April, nor any other meaningful changes in trends in the first half of the calendar year. We also investigate whether there were any concomitant changes in the characteristics of the individual defendants or localities charged with larceny after July 1, 2018, that would be indicative of broader changes in this context. We find only limited evidence of such changes, and controlling for these changes does not materially affect our main results. As described below, we use the PDP covering CY2018 to observe the impacts of the legislation.

## DATA AND RESEARCH DESIGN

We use the Virginia PDP microdata release, provided by the VCSC on December 1, 2022. These data reflect all individuals charged with a jailable criminal offense in Virginia between January 1 and December 31, 2018. The VCSC compiles these data from eight distinct sources, including the Circuit, General District, and Juvenile and Domestic Relations District Court Case Management Systems maintained by the Supreme Court of Virginia's Office of the Executive Secretary (OES). Each defendant is recorded in the data as one observation; in cases where individuals have multiple contact events in 2018, only the earliest contact event and associated variables are recorded. A contact event is defined as all charges against a defendant in the same jurisdiction and the

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2. Pew Charitable Trusts (2017): "The Effects of Changing Felony Theft Thresholds," April 2017, available at [https://www.pewtrusts.org/~media/assets/2017/04/pspp\\_the\\_effects\\_of\\_changing\\_felony\\_theft\\_thresholds.pdf](https://www.pewtrusts.org/~media/assets/2017/04/pspp_the_effects_of_changing_felony_theft_thresholds.pdf).
  - Jackson, Osborne (2020): "Punishment and crime: The impact of felony conviction on criminal activity," Working Papers, No. 20-1, Federal Reserve Bank of Boston, Boston, MA, <https://doi.org/10.29412/res.wp.2020.01>.
  3. DCJS (2015): "Virginia Felony Larceny Threshold: 35 Years Later," <https://www.dcjs.virginia.gov/sites/dcjs.virginia.gov/files/publications/dcjs/virginia-felony-larceny-threshold-35-years-later.pdf>
  4. Other statutory exceptions to the grand larceny threshold were not affected (larceny from a person remained a felony if the value of the property was \$5.00, as did theft of certain farm animals).
  5. In 2020, this threshold was again raised to \$1000. We do not study this change because the PDP covering 2020 has not yet been compiled and released, and the increase took effect during the onset of the COVID-19 pandemic, when many other confounding changes also occurred.

same date having the same bail processing number in the OES eMagistrate system.<sup>6</sup>

Under the PDP project, the VCSC gathered data on all individuals in the 2018 dataset until either their case was concluded or June 30, 2021, whichever occurred first. Because the focus of the PDP project was on the pretrial period, no outcomes are observed after a case is disposed. The follow-up window for defendants in the sample is as long as 40 months (for defendants with the earliest contact events in January 2018 whose cases were not disposed by June 2021). The average length of time observed during this pretrial period in our analysis sample is 180 days.<sup>7</sup>

The full 2018 cohort dataset contains nearly 356,000 people. For purposes of our analysis, we exclude defendants whose only charges during 2018 stemmed from earlier contact events, such as failures to appear or probation violations. Using the Virginia Criminal Code (VCC) prefixes assigned to each charge type in Virginia, we identified 20,718 people charged with at least one larceny count, among whom 17,973 were charged with larceny as their most serious offense. Notably, the PDP data does not include the specific value of goods that each defendant is accused of having stolen. Thus, we focus on whether the defendant is charged with a felony larceny or only misdemeanors and use the difference in the rates of defendants charged with only misdemeanors pre- and post-July 2018 as our primary right-hand side variable of interest. In the first half of 2018, before the new thresholds went into effect, approximately 55% of defendants charged with larceny were charged as a felony; that rate drops to 41% after the change

went into effect on July 1. We discuss these differences in more detail in the Research Design section below.

As noted above, the PDP only includes the first contact event for each defendant in calendar year 2018. As such, some contact events for defendants arrested later in the year do not appear in the data because the event is their second (or subsequent) of the year. Using the event counts for Jan. — Mar. 2018 as a benchmark (since few events were as-of-yet omitted then), we estimate that the full annual sample includes 82% of the true larceny cases. However, because missing contact events largely reflect defendants with more extensive criminal histories, they could confound our comparison of outcomes earlier and later in the year. We take a number of approaches to mitigate this problem. First, we use the PDP data on defendants' criminal histories to directly control for each defendant's number of prior arrests and number of convictions in the preceding two years. The VCSC obtained defendants' Virginia State Police (VSP) criminal history records, supplemented by information from the OES Court Case Management System.<sup>8</sup> Second, we create a comparison group of defendants to account for the changing composition of the overall sample over the year. We discuss this further below. Third, we utilize a research design that specifically focuses on the change occurring on July 1, 2018, while controlling for trends happening throughout the year. We discuss the details of this design further below. Finally, to ensure our estimates are representative of the full set of cases, we reweight our analysis to account for the smaller sample of cases observed in our

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6. The same bail process is defined as having the same "Commit, Bond, Release" (CBR) number in the eMagistrate system.
  7. One might reasonably be concerned that changes in charge class could affect the time until case disposition and thus bias our ability to detect other outcomes during this time window. Below, we confirm that there are no effects on this time-to-disposition due to the felony larceny threshold changes.
  8. These data are also drawn from the Fairfax County and Alexandria Circuit Court Case Management Systems.

data in later months (we weight by the inverse of the monthly share of all larceny cases).

In addition to controlling for each defendant's prior arrests and convictions, we also adjust for defendant demographics (gender, age (in 10-year categories), race, and indigency status, proxied by whether the defendant was assigned a public defender).

To consider a defendants' pretrial release outcomes, we use the PDP measures of whether the defendant was released pretrial, the type of bond they had (personal recognition, unsecured bond, or secured bond), whether the defendant was assigned to pretrial services supervision, and the length of time the defendant was in detention prior to release.

There are many potential public safety outcomes one might consider. Because the PDP microdata is anonymized and thus cannot be linked to individual outcomes reflected in other datasets, we must rely on those produced by the VCSC in the PDP, drawn largely from the VSP criminal record histories.<sup>9</sup> We focus on whether the defendant was arrested for a subsequent offense in Virginia during the pretrial follow-up period (which lasted until March 2020 in many cases). We thus rely on their measure of whether the defendant was arrested for a follow-up offense, as well as details of these charges (misdemeanor vs. felony, whether the charge was violent, etc.).

Different charge types—and the ensuing pretrial release conditions they may produce—could lead to differences in defendants' court appearance rates. We examine this question using the failure-to-appear (FTA) variables in the PDP data, primarily whether the defendant is charged with a new FTA during the pretrial period, drawn primarily from the VSP criminal record histories.

The PDP includes a set of case outcome variables for the 89% of defendants whose cases were disposed of by the end of the follow-up window. Chief among these is whether the defendant was convicted on any charges or whether the charges were dismissed, the prosecution dropped the charges (*nolle prosequi*), the defendant was found not guilty, or whether the case was still pending. In addition, for those convicted, the PDP includes the sentence type (probation, jail, or prison) as well as the overall imposed and effective sentence length.

Finally, to assess whether raising the felony threshold led to more frequent larcenies, we also use the Uniform Crime Reporting data, which provides total counts of larceny offenses by month across the Commonwealth. We extract these for 2016-2018 from the "Crime in Virginia" Reports of the Virginia State Police.

## RESEARCH DESIGN

As noted above, the new legislation went into effect on July 1, 2018, and was specific to only larceny charges. Because we have multiple pre- and post-reform observations among both those charged with larceny and those charged with other offenses, we adopt a difference-in-difference (DD) panel model approach in which we define those charged with larcenies as our treated group and construct a comparison group of defendants charged with non-larcenies. We then compare the post-July change among our treated group (those charged with larcenies) with the post-July change among our comparison group. This DD approach addresses potential concerns that the change among those charged with larcenies may have been due to broader changes in Virginia's criminal legal system or wider context. Using a comparison

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9. The PDP did not run national criminal history reports, only Virginia reports. As a result, neither the VCSC nor the PDP public data has information on criminal history and arrests (or the absence of any such history or arrests) outside of Virginia.



Table 1: Defendant Characteristics and Outcomes by Offense Category at Baseline

	Offense Category			
	Larceny	Narcotics	Weapons	Fraud
Charged with 1+ felony	0.55	0.44	0.48	0.78
Male	0.56	0.74	0.87	0.57
African-American	0.42	0.44	0.57	0.41
Indigent	0.83	0.52	0.62	0.84
Released pretrial	0.89	0.91	0.89	0.86
Released on unsecured bond	0.28	0.14	0.25	0.33
Arrested on new charge	0.24	0.26	0.21	0.20
Convicted on original offense	0.68	0.67	0.58	0.65
<b>Observations</b>	<b>10,033</b>	<b>21,232</b>	<b>2,656</b>	<b>2,932</b>

Sample is all defendants with a contact event in January through June of 2018, thereby reflecting “baseline” conditions.

group of those charged with non-larcenies allows us to focus on the changes that are specific to larceny charges.

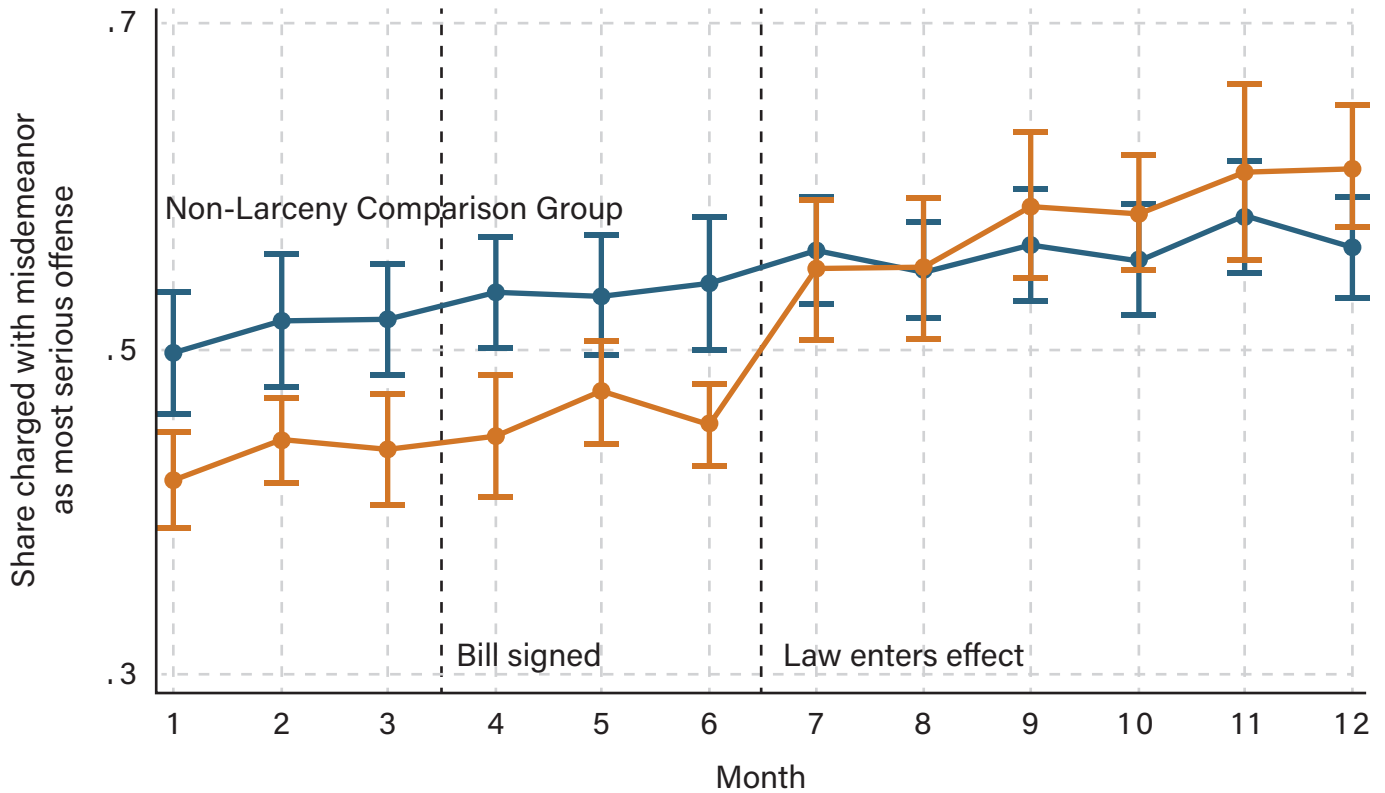
To construct our comparison group, we focus on the VCC offense categories that are both highly prevalent (defendants in 2018) and charged as felonies at similar rates to larcenies (55% +/- 25%). These offense categories are Narcotics (44% felonies), Weapons (48% felonies), and Fraud (78% felonies).<sup>10</sup> While these offenses are clearly different from larcenies in key ways, the demographics and outcomes among these defendants are actually reasonably similar. Table 1 shows these similarities at baseline (in Jan.-Jun. of 2018).

Perhaps more importantly, our comparison group also exhibits quite similar trends to larceny defendants throughout the

baseline period. Figure 1 plots the share of defendants by offense group charged with a misdemeanor over the calendar year. Clearly, the share of defendants charged with misdemeanor among the larceny group is about 8 percentage points lower than among our non-larceny comparison group, but both shares are generally stable between January and June of 2018 (increasing by 4 percentage points in both groups). This continuous increase is likely due to the PDP sample construction protocol discussed above, in which only defendants’ first contact events in 2018 are included in the dataset. Thus, as defendants with multiple events—who are also likely to face more serious charges—are excluded from the data as the year passes, the misdemeanor share increases continuously over the year. Again, it does so very similarly for both the larceny and comparison groups.

10. There is some coincidence of larceny and these offense categories: 8.6% of defendants charged with larceny as their most serious offense are also charged with narcotics, weapons, or fraud charges. As a robustness check, we exclude defendants with coinciding charges from our analysis and find similar results.

Figure 1: Share of Offenses Charged as Misdemeanors Over CY2018



Each point reflects the share of defendants charged with a misdemeanor for their most serious offense. Vertical bars around each point reflect 95% confidence intervals.

However, the groups' time paths diverge in July. The share of people charged with misdemeanors among our comparison group continues to slowly and stably tick upward after July, never rising or falling by more than a few percentage points in a given month. The share of people charged with misdemeanors among the larceny group, however jumps substantially by nearly 10 percentage points beginning exactly in July, and continues to increase more rapidly for the remainder of the year (increasing by a further 7 percentage points after July).

We are thus able to create a quasi-experimental design that draws comparisons in the change in outcomes prior to and after

July between our larceny and non-larceny comparison groups.

Trends over all of 2018 could reflect seasonality that is specific to larcenies rather than other offense types, such as increases in certain larcenies during the holiday shopping season in the late fall. We therefore narrow our subsequent analysis to only examining 4 months prior to and 4 months after the law entered (March — October 2018). As noted above, our data specifies the charge type of each defendant but not the value of goods they are charged with having stolen; we thus rely on the differences in the overall rates of misdemeanors among all defendants charged



with larceny.<sup>11</sup> In essence, we scale up the effects on outcomes by dividing them by the effect on the share of defendants charged with a misdemeanor, allowing us to interpret the results as the effects of an (exogenous) change in charge type on the outcomes of interest.

Finally, we also control for a broader set of factors that could influence pretrial conditions. These include defendant-specific controls such as demographics, prior arrests and convictions, as well as court type and locality. That is, we account for factors that are specific to each locality and for each type of court, thus isolating the effects of felony or misdemeanor charge classification.

As one check on our research design, we examine whether the demographics of defendants in our larceny group remained similar to those of the comparison group throughout the year, particularly after July. In the Appendix, Figure 19 plots the shares of the age, race, gender, indigency rate, number of prior convictions in previous two years, and risk assessment ratings for the two groups over each month of 2018. Similarly, we assess whether the localities in which these cases occurred changed over the year differentially for those charged with larceny and those in our comparison group (Figure 20). These checks provide support for our research design. There is no differential change in July 2018 for the larceny group relative to the comparison group for nearly all of these

characteristics. Random chance would predict that at least one out of 20 such tests would yield a statistically significant result, so finding one significant result among 12 tests is not surprising. The one exception is that the share of defendants who are African-American increased by 3 percentage points after July differentially for the larceny group. This may be due to actual changes in criminal activity, changes in policing, or other drivers. Alternatively, this may be unrelated to the larceny legal change but occurring contemporaneously. Nonetheless, we control for defendants' race in all of estimations (finding it does not substantially alter the main results). Moreover, we also disaggregate some of the key findings by race and discuss these below.

## CHARGE TYPE AND PRETRIAL RELEASE

Did the change to the larceny threshold—and thus the shifting of cases that would have otherwise been charged as felonies to be charged as misdemeanor—affect pretrial release conditions? We do not find a significant effect on whether defendants are released pretrial. However, we do find impacts on the length of time they are held until release and type of release they are assigned. Figure 2 shows the effects of being charged with a misdemeanor (instead of a felony) on release type and the time-to-release. Being charged with a misdemeanor leads to much higher

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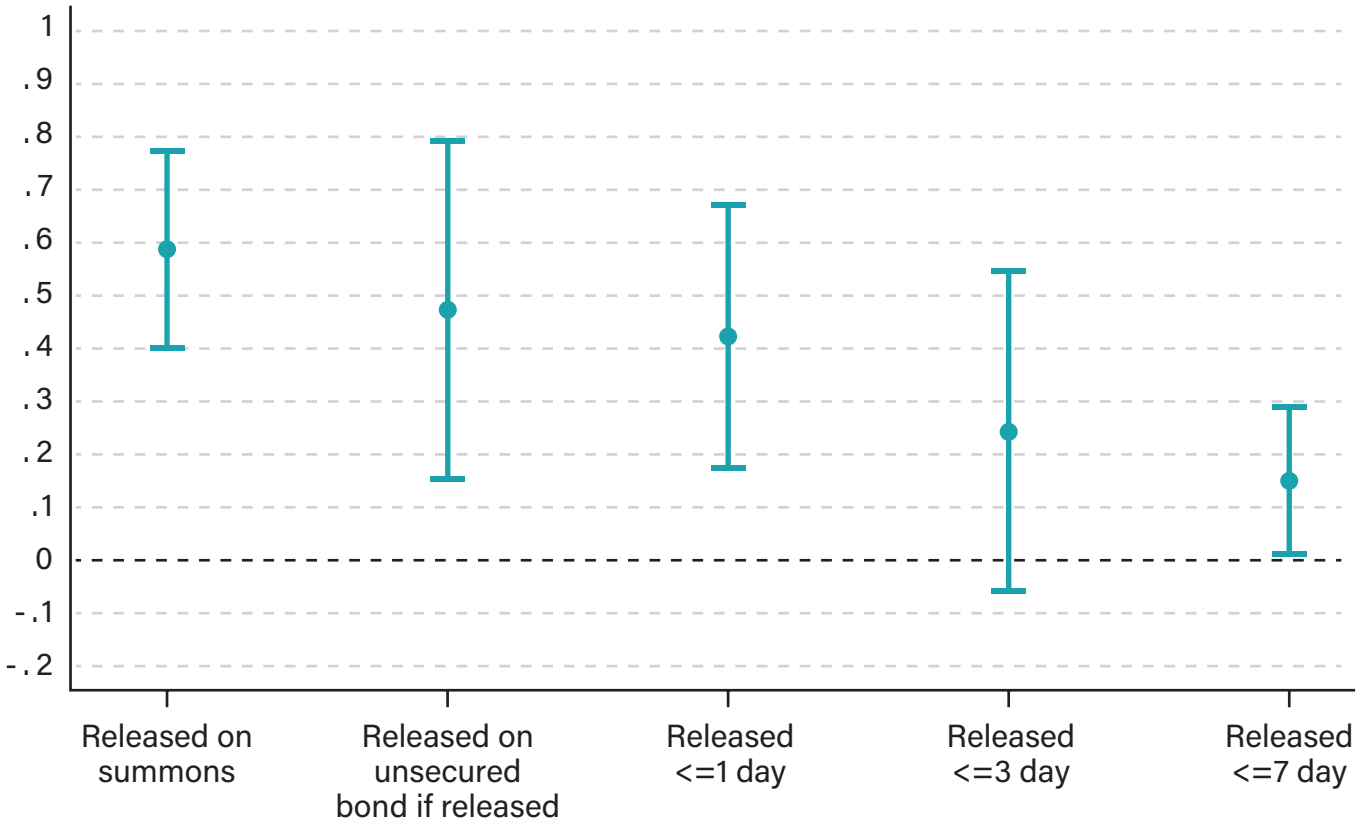
11. We estimate a IV-DD panel design as follows:

$$(1) \text{Misdem}_{ict} = \beta_1 \text{Larceny}_{ict} * \text{PostJuly}_{ict} + D_c + D_t + \lambda_1 t + \omega_1 t * \text{PostJuly}_{ict} + \Gamma_1 X_{ict} + \nu_{ict}$$

$$(2) y_{ict} = \beta_2 \text{Misdem}_{ic} + D_c + D_t + \lambda_2 t + \omega_2 t * \text{PostJuly}_{it} + \Gamma_2 X_{it} + \varepsilon_{it}$$

in which  $y_{ict}$  is our outcome of interest for defendant  $i$  charged with offense category  $c$  in month  $t$ ,  $\text{Misdem}_{ict}$  indicates whether the defendant was charged with only a misdemeanor(s), and  $\text{Larceny}_{ict} * \text{PostJuly}_{ict}$  identifies the post-July differential specific to those charged with larcenies and serves as our instrumental variable.  $D_c$  and  $D_t$  are offense category- and month-specific fixed effects, and  $t$  and  $t * \text{PostJuly}$  are smooth time trends that may vary after July. Finally,  $X_{it}$  is an array of defendant-specific controls including demographics, prior arrests and convictions, court type, and locality. Our first stage results are sufficiently strong ( $\beta_1$   $t$ -stat = 4.5,  $p = 0.000$ ; Cragg-Donald Wald  $F$ -stat = 88.1 relative to Stock-Yogo weak identification critical value at 10% maximal IV size = 16.4) to support this identification strategy.

Figure 2: Pretrial Release Effects of Misdemeanor Charge Instead of Felony



Each point reflects the effect of a misdemeanor rather than felony charge, adjusted for other factors using linear models described in footnote 10. Confidence intervals (95%) shown for each estimate. Sample for “Released on summons” and “Released <= X days” includes all defendants arrested for either larceny or comparison group charges (N = 42,322). The sample for “Released on unsecured bond if released” is further limited to defendants who were ever released pretrial (N = 18,604) to assess impacts on type and timing of release.

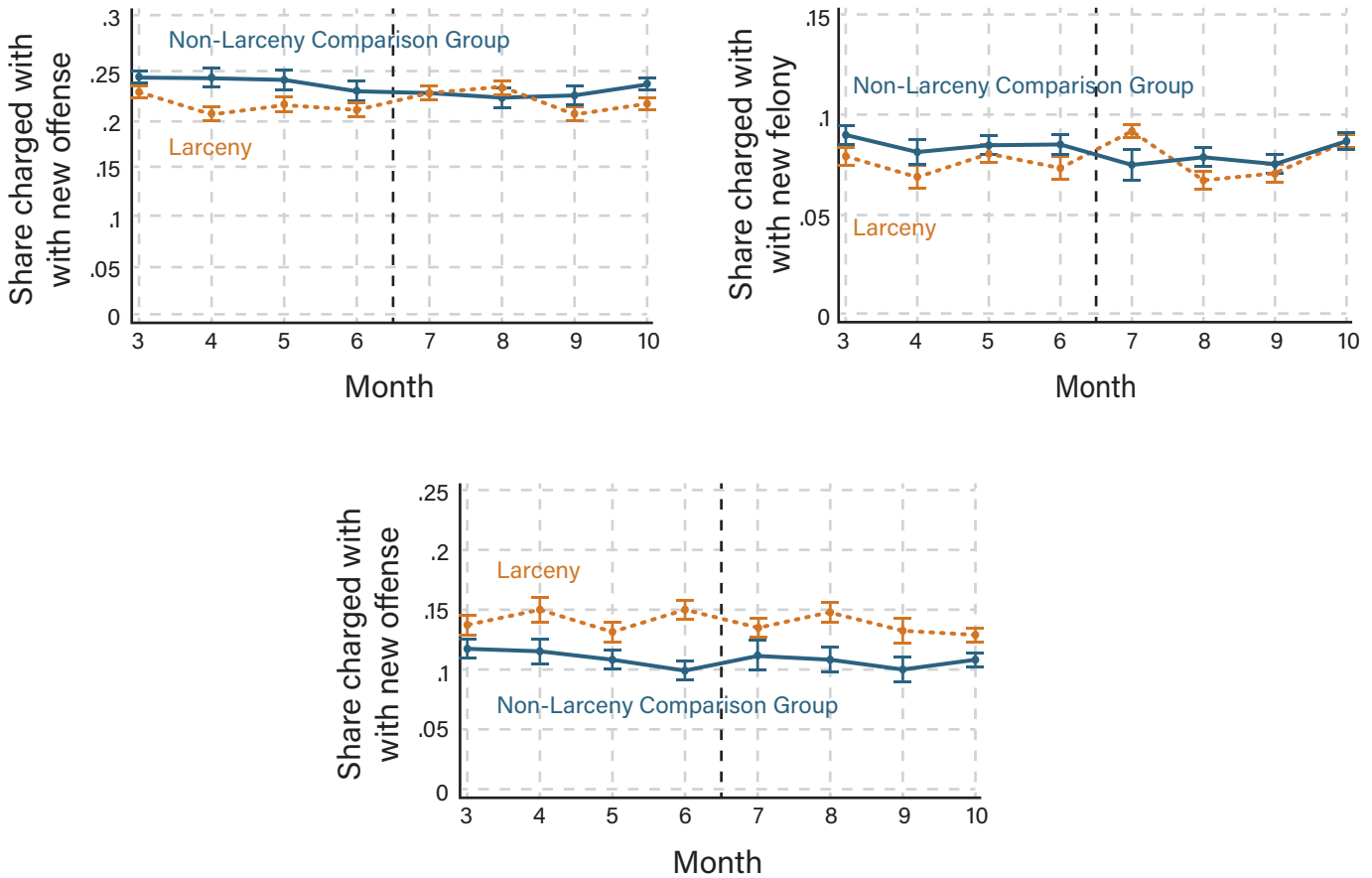
odds of being released on summons rather than being detained and appearing before a magistrate or judge. Almost no defendants charged with felony larcenies are released on a summons by law enforcement, while being charged with misdemeanor larceny leads nearly 60% of defendants to be released on a summons. Moreover, among the remaining defendants who are detained and appear before a magistrate or judge and then released, being charged with a misdemeanor leads to much higher odds of being assigned unsecured bond rather than secured bond.<sup>12</sup> Because unsecured bonds do not require defendants to

post cash, they impose much lower real and opportunity costs on those arrested.

Being charged with a misdemeanor also causes defendants to be released within shorter timeframes. Among those released pretrial, we find major increases in the odds of being released within one, three, or seven days, respectively. For interpretation, 92% of those charged with misdemeanor larceny are released within one day and 94 and 95% are released within three and seven days, respectively. The counterfactual rates implied by our estimate would be only 34% released within one day, 72% released within three days, and 80% within

12. No statewide guidelines exist in Virginia regarding the use of unsecured bonds for misdemeanor charges. There is substantial jurisdiction- and judge-specific discretion in the use of distinct bond types.

Figure 3: New Arrest Effects of Misdemeanor Charge Instead of Felony



All estimates control for other factors using linear models described in footnote 10 as well as time-to-disposition. Confidence intervals (95%) shown for each estimate.

seven days. These impacts likely occur because defendants are released on summons or are assigned unsecured rather than secured bond, making it easier for them to post this bond. In our analysis, we were able to control for other potential pathways through which misdemeanor charges could influence time-to-release, such as in what jurisdiction or court a case occurs.

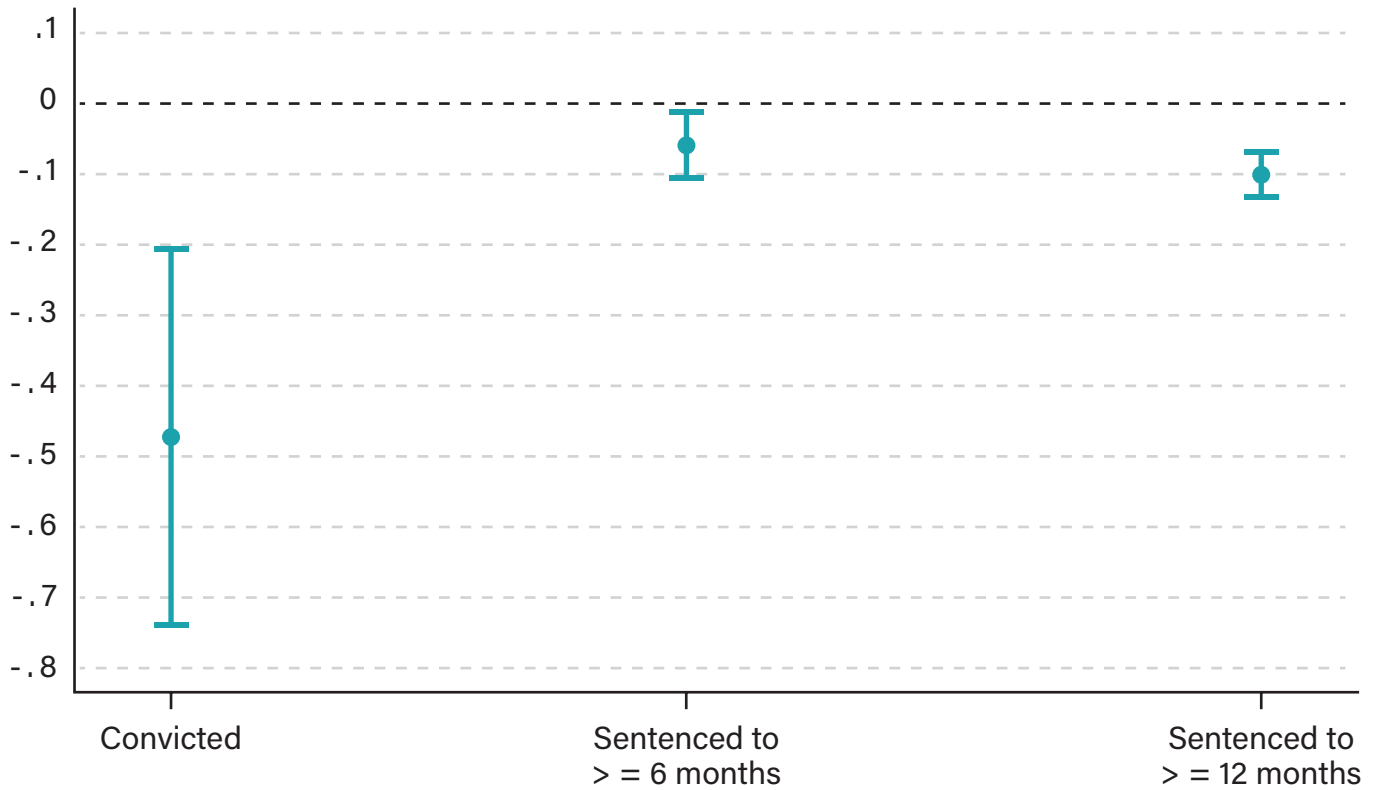
### CHARGE TYPE AND NEW PRETRIAL ARRESTS

We next assess the impacts of misdemeanor rather than felony charges on public safety

and FTAs. The PDP data follow-up window is limited to the pretrial period (i.e., up to case disposition), but we do not find impacts of charge type on the time-to-disposition, as we discuss further below. This allows us to examine impacts on new arrests that occur during this window while controlling for the length of the follow-up window (i.e., time to disposition).<sup>13</sup> Figure 3 plots the share of defendants arrested on any new offense during the pretrial period by group, controlling for the demographics and other characteristics noted in footnote 10. The upper left subfigure graphs the share arrested for any new offense, which

13. We control for categorical bins of time-to-disposition (30-day bins) to account for non-linearities in the dynamics of new offenses. Irrespective of whether or how we include such controls, our main results remain quite similar (as might be expected given the time-to-disposition does not appear to be impacted by the treatment).

Figure 4: Case Outcome Effects of Misdemeanor Charge Instead of Felony



The sample includes all defendants facing jailable offenses for larceny or comparison group charges. Confidence intervals (95%) shown for each estimate.

appears to increase slightly for the larceny group beginning prior to the date the law took effect. The upper right subfigure graphs the share charged with a new felony, which shows a brief uptick in rates among the larceny group in July that dissipates thereafter. Finally, the lower subfigure plots failure-to-appear rates for the group over time, showing no meaningful changes in these rates for the two groups over time. Taken together, none of the figures imply significant differences associated with the law’s entry. This supports a conclusion

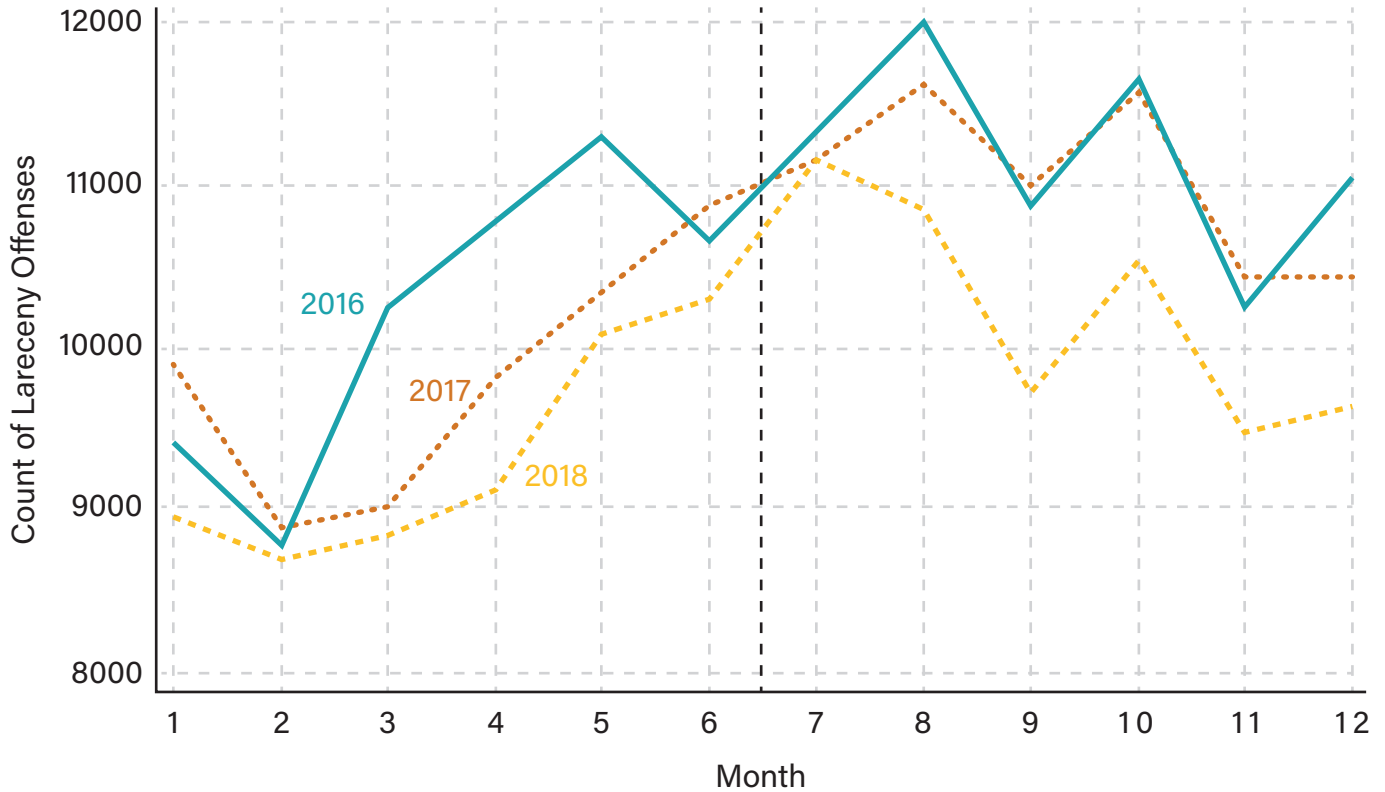
that reducing the severity of charges does not immediately alter the rate at which individuals are re-arrested.

### CHARGE TYPE AND CASE OUTCOMES

In Figure 4, we plot the impacts of misdemeanor rather than felony charges on defendants’ probabilities of being convicted, as well as on the sentences they receive.<sup>14</sup> We find very large effects on the likelihood of being

14. In some settings, deferred disposition may be used by courts to withhold imposition of a sentence and place probation-like conditions on the defendant that, when met, allow for the charges to be dismissed. Virginia Code § 19.2-303.2 allows such deferred disposition for first offense misdemeanor property cases (such as misdemeanor larceny). The PDP data do not specify whether deferred disposition was invoked for a defendant, but does not include whether a defendant received pretrial services. We find no impacts of the charge class on defendants’ likelihood of receiving pretrial services. We also find that misdemeanor charges lead to lower likelihood that case disposition is classified as “pending” in the PDP, a category which includes deferred disposition. Together, these suggest that the change to misdemeanor larcenies does not appear to have led to greater use of deferred disposition.

Figure 5: Seasonality in Larcenies 2016-2018



The figure uses larceny offense counts by month from the UCR and plots all offenses across Virginia in each month.

convicted, equal to a reduction of approximately 40 percentage points. That is, *for the same criminal offense*, defendants are much less likely to be convicted if they are charged with a misdemeanor. In other words, if 70% of defendants facing grand larceny charges are convicted, only 30% of similar defendants facing misdemeanor larceny charges would be convicted. Of course, those that are convicted of misdemeanor larceny face lesser sentences and thus fewer collateral consequences.

Why are there such impacts on conviction rates due to misdemeanor rather than felony charges? A variety of factors could be at play, including greater attention or effort by prosecutors in obtaining convictions on felony charges and by retailers' staff or contractors in testifying against defendants facing felony charges. In addition, we find greater rates of unsecured bond and quicker release due to misdemeanor charges, which can mean these

defendants may also be better able to mount a defense against these charges.

In addition, we find reductions in the likelihood that a defendant is sentenced to incarceration for at least 12 months, as well as marginally significant reductions in the likelihood of being sentenced to prison and to terms of at least 6 months. This is likely because defendants are less likely to be convicted and thus to incur such sentences. Specifically, a defendant charged with misdemeanor larceny rather than felony larceny is 15 percentage points less likely to be sentenced to 12 months or more of incarceration.

### CHARGE TYPE AND IMPACTS ON NEW CRIMINAL OFFENSES

One of the concerns expressed by some about legislation increasing the threshold for felony charges was that it might lead more people

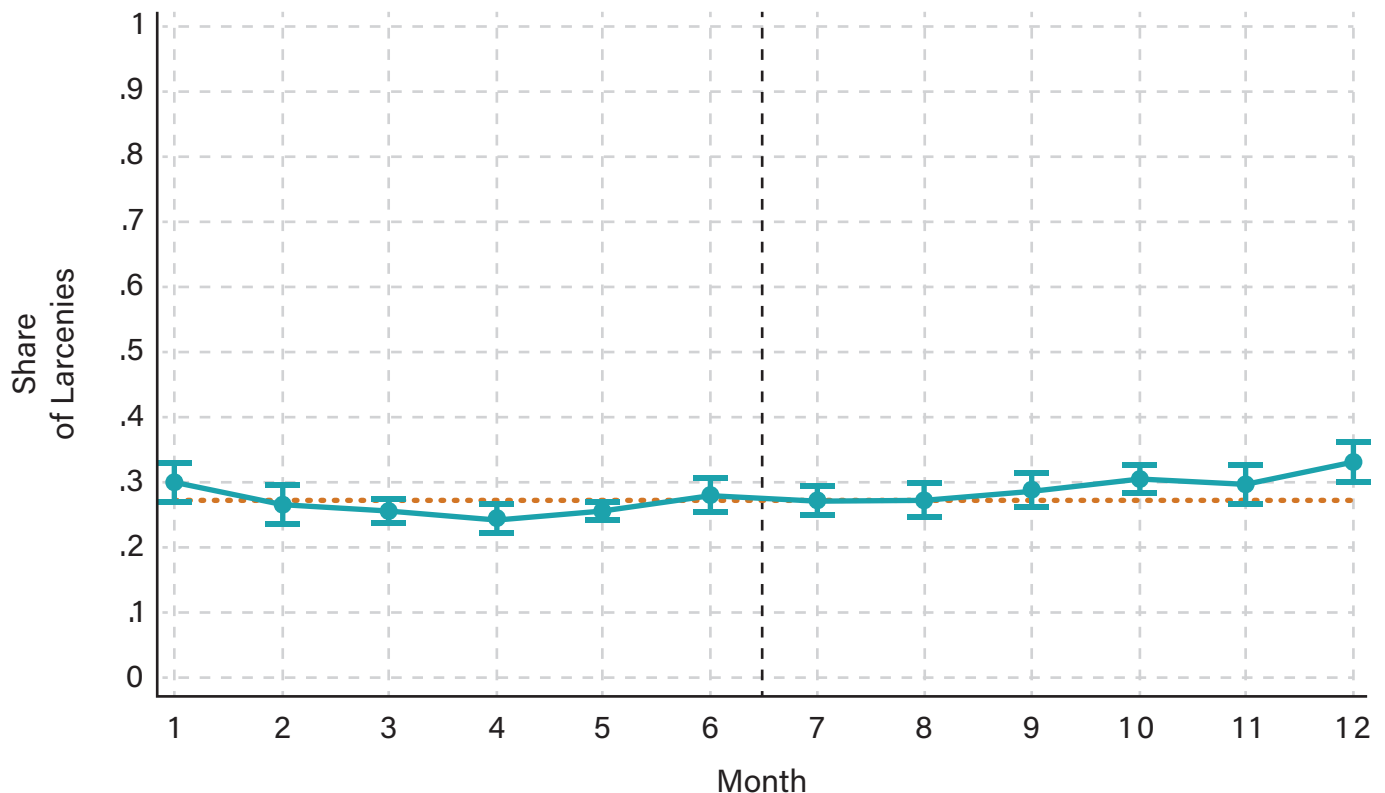
to engage in theft as they no longer risked a felony conviction in doing so (DCJS 2015). We therefore assess whether there were increases in larceny rates after the July 1, 2018, enactment of the higher threshold. We do so using two datasets: (a) the UCR, which captures all offenses and is available for multiple years but only at aggregate scales, and (b) the PDP, which provides individual-level microdata but only includes the first such offense by each defendant in the calendar year.

The UCR-based count of larcenies occurring in each month in Virginia does exhibit substantial seasonality, as shown in Figure 5. Larcenies increase during the spring and summer, declining during the fall and winter. This is true in 2018, when the peak larceny counts occurred in July and August, but also in the preceding two years (2016 and 2017), when larcenies also peaked during the

summer. There is little to suggest that the pattern in 2018 differed meaningfully from that of the previous two years, when no changes in larceny charge types were yet in place.

We also examine the larceny counts reflected in the PDP itself (although only for 2018). To account for broader seasonality, we therefore compare the changes in larceny counts to those of other offense types (i.e., our comparison group). To do so, we graph the share of defendants charged with larceny relative to those charged with any of these offense types (larcenies or the comparison offenses). If the enactment of the higher threshold for felonies encouraged more people to engage in lower-level larcenies, we would expect the share of larcenies to increase after July. In fact, what we find in Figure 6 is a very stable pattern throughout the year, with little evidence of any meaningful increase in the

Figure 6: Share of Larcenies Over 2018



The figure uses the PDP and plots the share of larcenies in the overall sample of larcenies and comparison group offenses over CY2018. The dashed horizontal line reflects the average over the full year.



latter half of the year (if anything, the larceny share appears to dip lower than average for much of the post-July period).

Taken together, we interpret these results as confirming that increasing the threshold for felony larceny charges did not lead to more thefts in any meaningful way.

## CONCLUSIONS

Much of the debate around the legislation raising the larceny felony threshold centered on whether felony convictions for larcenies of \$200-\$500 in value were a worthwhile use of public resources. These convictions carried longer sentences and resulted in substantial and sustained collateral consequences that limited a person's ability to secure and maintain productive employment, stable housing, childcare, access to education, and more.

In addition, the legislation created improvements in other aspects of the criminal legal process that may not have originally been understood or forecast. The reduction in larceny charges from felony to misdemeanors decreases the use and length of costly incarceration, which we estimate resulted in a savings of at least \$30M annually.<sup>15</sup> Moreover, the shift also increased the speed with which a person was able to be released pretrial. This can have an array of collateral benefits for the affected person, including a greater ability to present a defense to his/her accusation, to maintain community connections, support networks, employment, housing, and care for family members.

The greater use of unsecured bonds also saved expenses associated with the use of cash bail (while not increasing the overall rate of failing to appear for court), retaining those

funds for other uses that promote stability for arrested individuals and their families. The reduction in overall conviction rates—even of misdemeanor charges—likely also allowed defendants to avoid disruptions and other costs associated with probation or potential incarceration.

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15. This is based on 11,530 larceny defendants in 2018 in the UCR x 9% reduction in a larceny defendant's probability of being sentenced to a year or longer sentence x 365 days x \$92/inmate-day (the FY19 operating cost of Virginia jails tabulated in FY 2019 Jail Cost Report Annual Jail Revenues and Expenditures Report). Because this (a) is based on the PDP sample and thus includes only first-time-in-2018 offenders, and (b) ignores the additional costs of incarceration beyond the first 12 months, this can be considered a conservative estimate.

## PART 2:

# IMPACTS OF REMOVING PRESUMPTIONS AGAINST BAIL

### EXECUTIVE SUMMARY

- Between 1996 and 2021, a number of charges and circumstances in Virginia triggered statutory presumptions against bail. In these cases, the court was to “presume, subject to rebuttal, that no condition or combination of conditions will reasonably assure the appearance of the person or the safety of the public.”<sup>16</sup> The burden was placed upon the defendant to prove that they did not pose a danger to their community. From 2012 to 2020, the statute prohibited the magistrate from setting a bond for anyone arrested for these identified charges.<sup>17</sup>
- To date, there has been no statistical analysis of the number of individuals affected by these presumptions, nor of whether the presumptions actually protected public safety. This is largely due to the non-availability of statewide data on presumptions and pretrial conditions.
- For this analysis, we use the October 2017 microdata from the initial Pretrial Data Project VCSC with presumptions against bail identified. This data included all persons arrested and charged with a crime in October 2017.
- Our analysis finds that 9.5% of defendants statewide were subject to presumptions against bail in the 2017 sample, with an additional 22% of defendants who may have been subject to them (this group encompasses individuals for whom the Sentencing Commission could not conclusively confirm their status due to data limitations).
- Unsurprisingly, the data shows these defendants were much less likely to be released pretrial (50%, compared to 83% among other defendants), and when released, they frequently faced more onerous release conditions (even when compared to people charged with similar crimes that did not trigger presumptions).
- However, this lower release rate for those subject to presumptions against bail was not selectively of defendants at “higher risk” of arrest for new criminal activity. Many of the individuals who fell within the presumptions against bail also had the lowest risk assessment ratings (based in large part on their minimal criminal records). Despite their low risk, these individuals were detained at higher rates when subject to presumptions.

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16. Virginia Code section 19.2-120(B) (repealed July 2021).

17. Virginia Code section 19.2-120(D) (repealed July 2020). Note, the statute did have an exception, allowing the magistrate to set bond if the Commonwealth Attorney agreed to it.

- To further assess whether presumptions improved public safety, we compare the rearrest rates for defendants subject to presumptions who were released pretrial to those of defendants not subject to presumptions who were also released. Fewer than 5% of defendants who faced presumptions but were released were charged with a new violent offense in the pretrial period, nearly identical to the share among defendants who did not face presumptions.
- This finding is not driven by differences in the characteristics or risk factors for released defendants who were subject to presumptions and those who were not. We obtain the same findings even when controlling for many other factors, including the defendants' charges, demographics, locality, and risk assessment ratings.
- Why do we find this? The charge a defendant faces is a very weak predictor of the likelihood they will be arrested for a new crime. Because the presumptions were largely based on the charge the defendant faces, they also proved to be a very weak predictor of subsequent criminal activity. As such, they are not useful as tools to distinguish high- and low-risk release (i.e., to identify defendants with high risk of new criminal activity).
- The presence of presumptions (prior to 2021) likely cost at least \$65M in additional jail operating costs and created significant unmeasured burdens on defendants, their families, and communities, without improving public safety.

## INTRODUCTION: PRESUMPTIONS AGAINST BAIL IN VIRGINIA

Presumptions against bail were first introduced in Virginia in 1996.<sup>18</sup> Prior to this point, the burden was on the Commonwealth to prove that there was probable cause to believe that either the defendant posed an unreasonable danger to the public or that they would not appear for court.<sup>19</sup> In 1996, the Virginia General Assembly (GA) added language establishing that for drug distribution cases when certain specific conditions existed (for example, the defendant had previously been convicted as a "drug kingpin") there would be a presumption that no bond or bond conditions could reasonably assure their appearance and mitigate their danger to the community.<sup>20</sup> In these cases, the burden of proof was shifted to the defendant to show that they did not pose an unreasonable danger and would appear for subsequent hearings before a bond could be set. Over the ensuing 25 years, this relatively narrow set of exceptions was dramatically expanded 10 times to encompass more than 40 circumstances.<sup>21</sup> In a number of these instances the presumption against bond and resulting burden shift relied solely on the charges they faced (irrespective of other factors, such as the defendant's criminal history). The expansion of these presumptions in Virginia contrasted with the practice in other states. Unlike the Commonwealth, 41 other states have a presumption of pretrial release codified in their state constitution.<sup>22</sup>

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18. Kennedy, Bryan, and Catherine F. Zagurskie. "Empowering the Defense to Confront the Government's Powers: Virginia Criminal Justice Legal Reform." *Richmond Public Interest Law Review* 25.1 (2022): 47-90.

19. *Id.*

20. *Id.*

21. See VA. CODE ANN. § 19.2-120 (B) (2020)

22. *Pretrial Release: Guidance for Courts*, NAT'L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/research/civil-and-criminal-justice/pretrial-detention.aspx> (last visited Jan. 3, 2023).

The wide-ranging set of charges associated with presumptions meant that, by 2017, many cases fell within these presumptions. However, how many defendants faced these presumptions has never actually been quantified, nor has there been any statistical analysis of whether the presumptions actually protected public safety. This is largely due to the non-availability of pretrial data in Virginia more broadly. However, with the release of the microdata in the PDP, we can now examine this gap in evidence on the extent of presumptions against bail and their impacts on public safety.

By using the October 2017 statewide dataset described below (which only became available in December 2021, when the VCSC released the first dataset on pretrial conditions reflecting all defendants statewide),<sup>23</sup> we are able to better understand the extent of the presumption against bail's reach and impact. While the presumptions against bail have since been eliminated,<sup>24</sup> the examination of the data nevertheless has value. It can provide a window into understanding the connections between charges, risk, and bail as well as the effect of burden shifting. It can also help in understanding the likely impacts of the repeal.

## DATA

We use the Virginia Pretrial Data Project (PDP) microdata release, provided by the VCSC on December 1, 2021. These data reflect all individuals charged in October 2017 with an offense potentially punishable by jail time. Individuals were followed in the dataset by the VCSC until either the disposition of their case

or 15 months had elapsed since their contact event. This means the follow-up window runs until December 31, 2018 (approximately 15 months after average contact event date in the sample).

The dataset contains 22,986 defendants. Because our interest is in understanding how presumptions affected pretrial detention, we focus only on defendants who faced potential detention. To do so, we limit our sample to the 11,487 adult defendants whose contact event included a charge for a new criminal offense punishable by incarceration where a bail determination was made by a judicial officer (i.e., a magistrate or judge). Defendants released on a summons or facing charges not punishable by incarceration were thus excluded.

To reflect whether a defendant likely faced presumptions against bail, we utilize the indicator provided by the VCSC data. This is based on the VCSC staff review of whether the charge(s) faced by the defendant included one listed in the presumption against bail statute, Virginia Code §19.2-120. In some cases, the VCSC staff included defendants who may have been subject to presumptions but where this could not be confirmed.<sup>25</sup> We discuss these cases separately below.

We consider a set of measures to reflect a defendant's pretrial release outcomes. These include whether the defendant was released pretrial, the type of bond on which the defendant was released (personal recognition, unsecured bond, or secured bond), whether the defendant was assigned to pretrial

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23. In 2020, the Virginia State Crime Commission (VSCC) and VCSC compiled the first comprehensive dataset on pretrial conditions reflecting defendants charged in October 2017. In 2021, the GA enacted a new statute tasking the VCSC with publicly releasing this data (along with subsequent cohorts).

24. *Id.* at 1.

25. These were cases where the presumptions were triggered by specific details that were not captured in the OES data system. For example, some presumptions were triggered by assault or battery charges where an immediate family member was the victim; the OES system does not include information on the victim, so VCSC was not able to classify many assault and battery cases as definitively triggering presumptions or not.

services supervision, and the length of time the defendant was in detention prior to release.

We also examine the relationship between the charge, release and case outcomes, appearance rates, and the defendant's risk assessment score. In Virginia, the Virginia Pretrial Risk Assessment Instrument (VPRAI) tool is currently being used, although an alternative is currently being piloted in the state. However, as not every jurisdiction conducts a risk assessment, and because the VPRAI scores/ratings were not recorded in any of the underlying datasets on which the PDP is based, the VCSC could only retroactively partially reproduce this rating. To provide a risk assessment rating for the PDP, researchers at VCSC retroactively produced ratings using the Public Safety Assessment (PSA) tool.<sup>26</sup> This was possible because the PSA does not rely on an interview with the accused for its utilization. As a result, for each defendant in the October 2017 dataset, the VCSC computed their PSA score,<sup>27</sup> including scores for the likelihood of New Criminal Arrest (NCA) and New Violent Criminal Arrest (NVCA) scales.

Because the PDP microdata is anonymized and thus cannot be linked to individual outcomes reflected in other datasets, for our research we must rely on the information produced by the VCSC. We thus focus on whether the defendant was arrested for a subsequent offense in Virginia during the pretrial follow-up period as measured by a person's Virginia State Police (VSP) criminal history records and supplemented by information from the OES Court Case Management System, as well as Fairfax County and Alexandria Circuit Court Case Management Systems. In the PDP microdata,

we thus rely on VCSC's determination of whether the defendant was arrested for a new offense, as well as details of these charges (misdemeanor vs. felony, whether the charge was violent, etc.).

Finally, the PDP also provide a series of other variables that we use as covariates in our analysis, including defendants' gender, age (in 10-year categories), race, and indigency status (proxied by whether the defendant was assigned a public defender), as well as the court and jurisdiction in which the case was administered.

## **PRESUMPTIONS AND PRETRIAL RELEASE**

How frequently did presumptions against bail apply in cases in our October 2017 sample? Approximately 9.5% of all defendants charged with a jailable offense were confirmed to have been subject to presumptions against bail, while an additional 22.7% *may* have been subject to presumptions. That is, as many as a third of all defendants in Virginia arrested for a jailable offense (and not released on a summons) may have been subject to presumptions against bail, making these far more common than the narrow set of cases originally envisioned when presumptions were first enacted. Extrapolated to a full 12-month period, these rates indicate that between 13,000 and 45,000 individuals in Virginia were subject to presumptions in 2017.

Table 2 lays out the number of individuals subject to presumptions in our sample, as well as whether these defendants were released pretrial. Across all defendants, nearly 83% are released prior to trial, but this share falls to only 50% for those known to have been

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26. The PSA was developed by Arnold Ventures and has been used (and studied) in a number of localities and states outside of Virginia.

27. Note, the VCSC researchers only had access to the Virginia Criminal History, so in completing the PSA instrument, only the person's Virginia Criminal History was used.



Table 2: Presumptions and Pretrial Release

Presumptions Against Bail					
Was Defendant Released Pretrial?	0 (None)	1 (Maybe)	2 (Yes)	9 (Unknown)	Total
<b>Not Released</b>					
Frequency	1,167	276	540	1	1,984
Percent (of column)	15.06	10.57	49.59	2.63	17.27
<b>Released</b>					
Frequency	6,583	2,334	549	37	9,503
Percent (of column)	84.94	89.43	50.41	97.37	82.73
<b>Total</b>					
Frequency	7,750	2,610	1,089	38	11,487
Percent (of column)	100.00	100.00	100.00	100.00	100.00

subject to presumptions. That is, half of defendants subject to presumptions were not released at all during the entire pretrial period.

These differences in pretrial release could be driven in part by other factors which also differ for those subject to presumptions and those who were not, including the nature of the charges, differences in release rates across localities, the defendants' demographics, and other aspects. To isolate the specific role of presumptions in leading to more pretrial detention, we control for all of the aforementioned factors, including the Virginia Criminal Code category of the most serious charge (i.e., 63 distinct categories, such as assault, larceny, etc.),<sup>28</sup> as well as whether the contact

event involved a felony or only misdemeanor offenses (or both). To account for other factors associated with the defendant's criminal records, we also control for the PSA risk rating assigned to each defendant.<sup>29</sup>

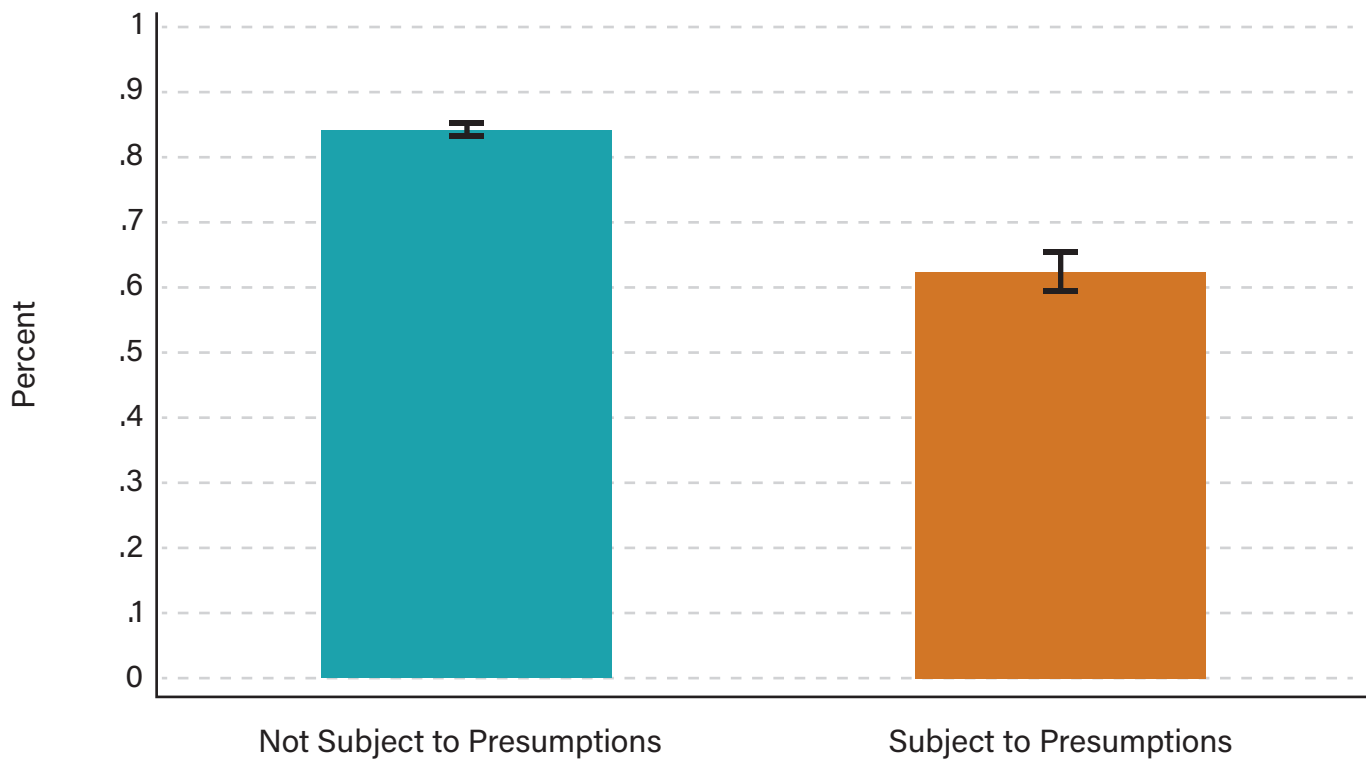
The results, displayed in Figure 7, continue to show a large gap in release rates between defendants subject to presumptions (60%) and those who were not (84%). That is, holding constant the other factors surrounding each defendant's contact event, the presumptions themselves meant defendants subject to them were much more likely to be detained for the full pretrial period. For example, a 30-year-old, white, male defendant whose most serious charge was an assault against a family

28. The offense category is an important determinant of presumptions—49% of the variation in presumptions can be explained by the 63 categories of VCC charge prefixes. There are 7 charge prefixes within which presumptions incidence varies.

29. We implement linear regression models with fixed effects for the most serious VCC charge prefix (63 categories), VPRAI risk level (7 categories), court type (4), overall offense type (5), locality (127), and the defendant's age group (6), gender (2), race (5), and indigency status (2). Standard errors are clustered by locality. We also confirm these results are robust to the use of logit models for binary outcomes.



Figure 7: Share of Defendants Released Pretrial (adjusted for other factors)



Sample includes all defendants arrested for jailable offense (N = 11,487). Each bar reflects the share of defendants who were released during the pretrial period, adjusted for other factors using linear models described in footnote 29. Confidence intervals (95%) shown for each estimate.

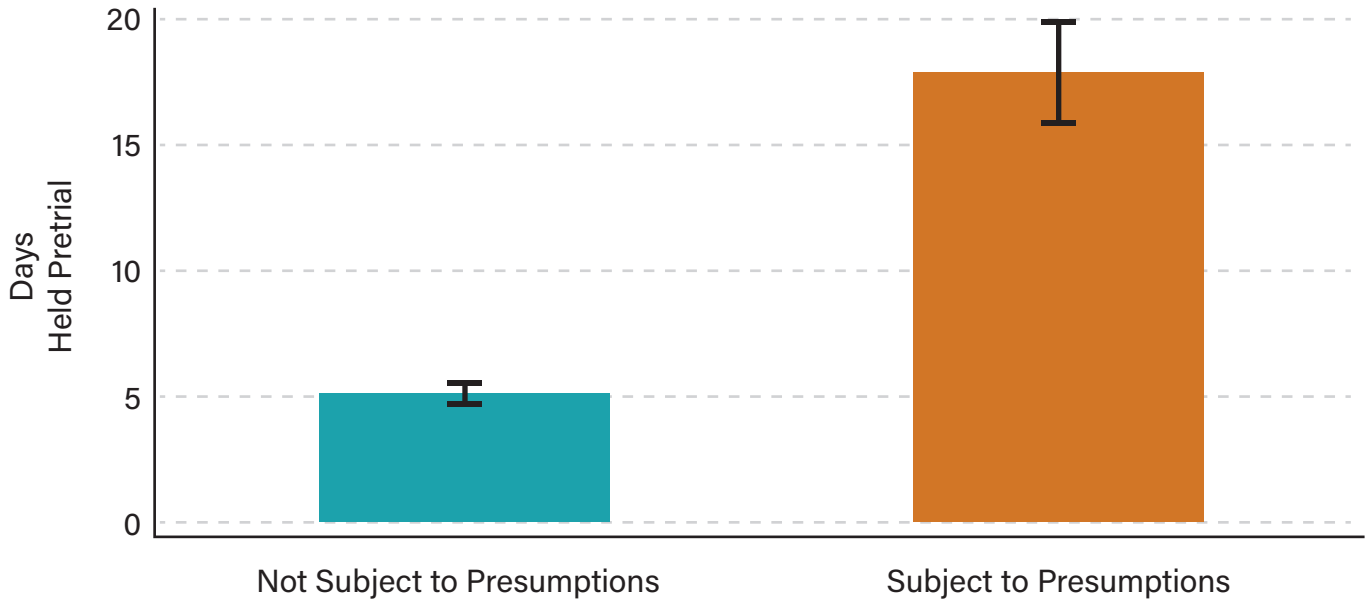
member that triggered a presumption was far more likely to be detained for the entire time until his trial than a similar 30-year-old white man with a similar criminal record whose most serious charge was also an assault but instead one against a neighbor and thus not one that triggered a presumption. This is possible because, in some cases, presumptions are narrowly defined in terms of the specific charge, allowing us to find similar charges that do not trigger presumptions.

The dramatically lower release rates among those subject to presumptions also mask another important dimension: many of those subject to presumptions who were eventually released were nonetheless detained for long periods of time. As Figure 8 illustrates, defendants who were subject to presumptions

but who were eventually released were held, on average, for 13 more days than those who did not face presumptions and were released. While Figure 8 only plots the average days held for each presumptions category, there are also differences throughout the cumulative distribution of days held. For example, approximately 76% of defendants subject to presumptions who are eventually released are detained for a week or longer; only 26% of individuals not subject to presumptions are held a week or longer.

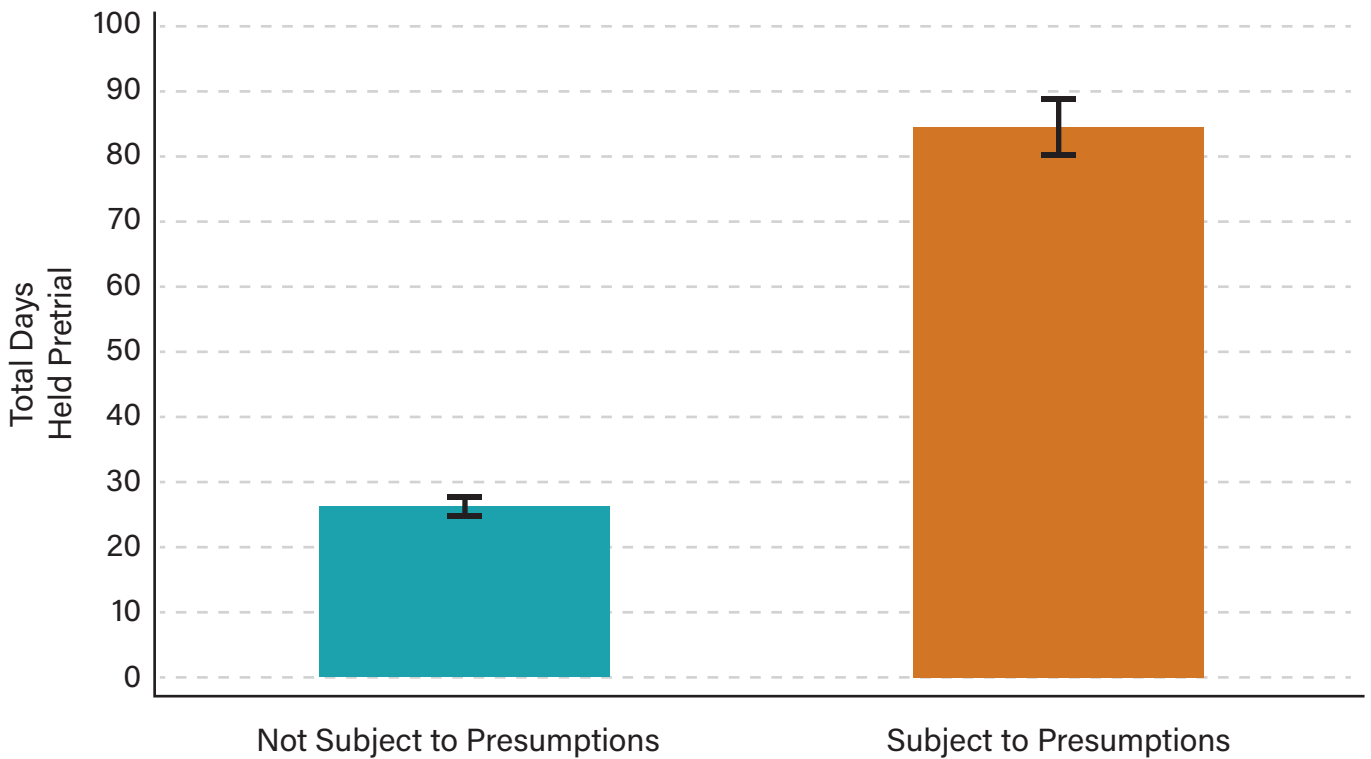
Taken together, these findings indicate that presumptions impose much longer detention on defendants subject to these charges than similarly situated peers. As Figure 9 shows, among all defendants charged with jailable offenses (including those released pretrial

Figure 8: Average Days Held Pretrial Among Released (adjusted for other factors)



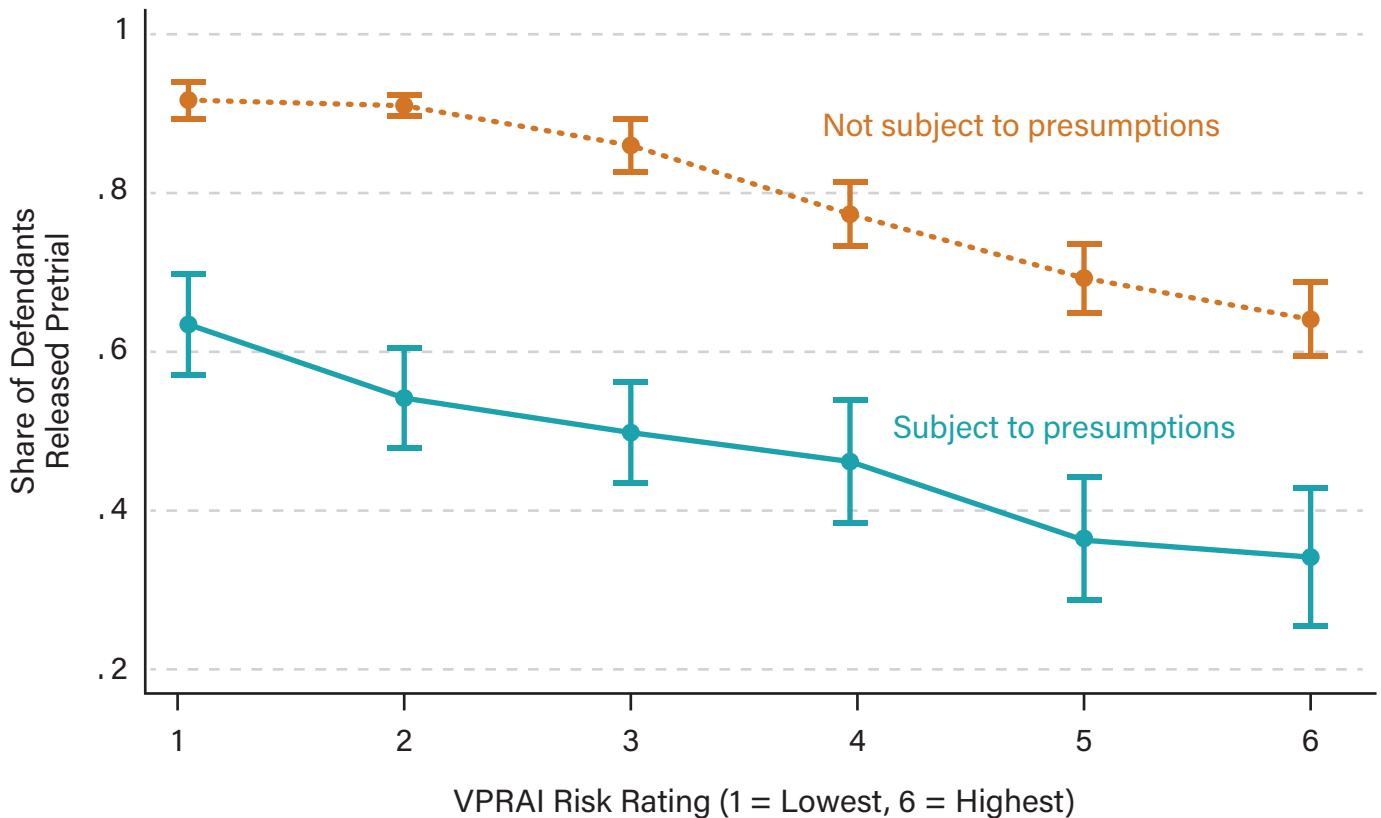
Sample includes all defendants arrested for jailable offense who were released pretrial (N = 9,404). Each bar reflects the average days held during the pretrial period for each presumptions category, adjusted for other factors using linear models described in footnote 29. Confidence intervals (95%) shown for each estimate.

Figure 9: Average Days Held Pretrial Among All Defendants (adjusted for other factors)



Sample includes all defendants arrested for jailable offense (N = 11,487). Each bar reflects the average days held pretrial for each presumptions category, adjusted for other factors using linear models described in footnote 29. Confidence intervals (95%) shown for each estimate.

Figure 10: Share of Defendants Released Pretrial by Risk Rating Level (adjusted for other factors)



Sample includes all defendants arrested for jailable offense (N = 11,487). Each bar reflects the share of defendants who were released during the pretrial period, adjusted for other factors using linear models described in footnote 29. Confidence intervals (95%) shown for each estimate.

and those not released<sup>30</sup>), those subject to presumptions were held for an average of 85 days, while those who were not were held for an average of only 27 days.

As we note above, roughly half of defendants who were subject to presumptions were nonetheless released. One might theorize that if defendants subject to presumptions represented greater risks to public safety, detaining them more frequently could be a rational response on the part of judicial officers. In the next section, we examine whether there is any evidence that these individuals actually represented greater risks to their communities based on whether they

were charged with new criminal offenses when they were released. Here, however, we offer an additional piece of evidence: the criminal records and accompanying risk assessment scores that were available to judicial officers when determining pretrial release. In Figure 10, we show the rates at which defendants were released for each of the VPRAI risk rating levels (where 1 represents the lowest risk and 6 the highest). The estimates in the figure control for all the aforementioned demographic, charge, and other variables. The points represent the estimated share, with vertical bars denoting the 95% confidence intervals (i.e., margins

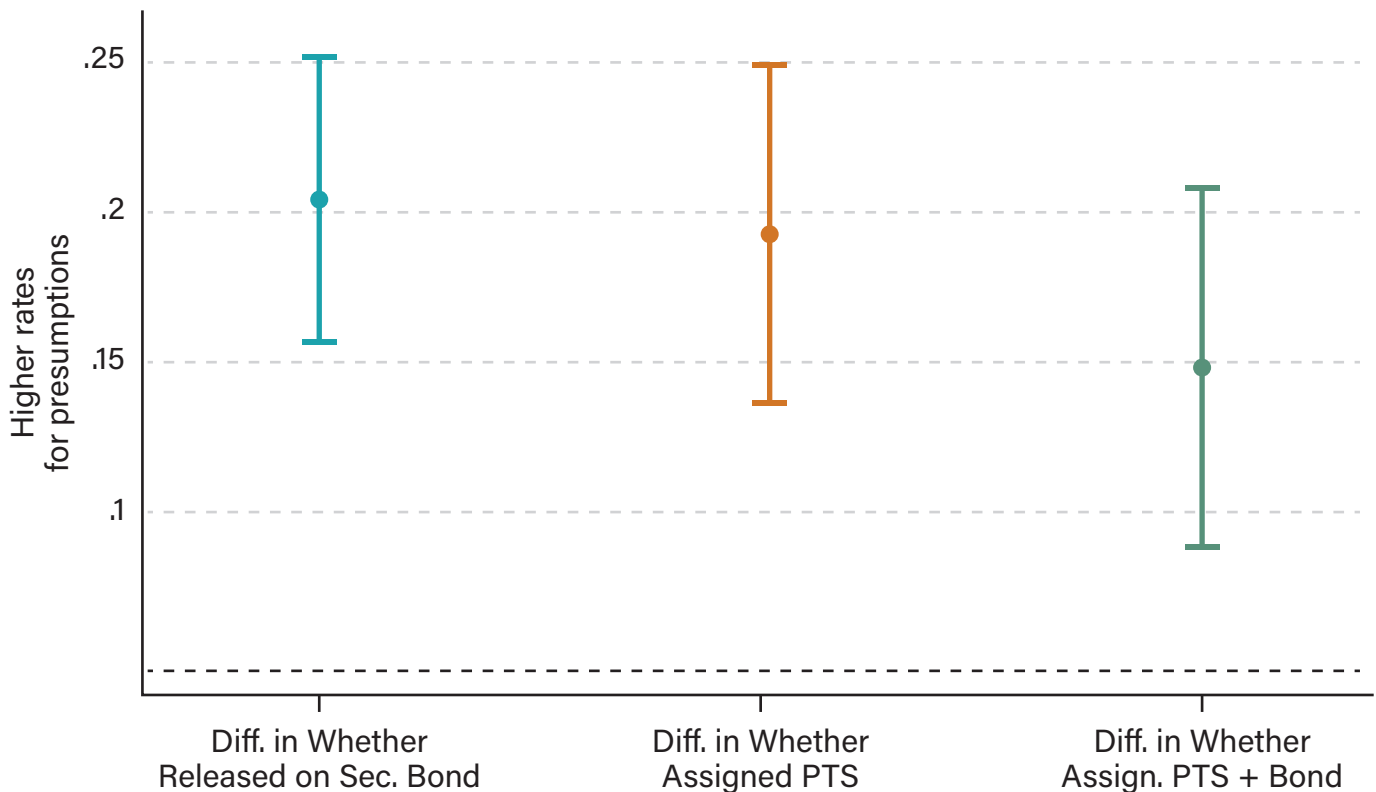
30. For defendants who were not released, we impute the days held as the time between their contact event and the case disposition.

of error). From the data we can readily see that for both those subject to presumptions and those not subject to them, the likelihood of release decreases as risk rating increases. However, even those with the lowest risk ratings were much less likely to be released when they were subject to presumptions. In fact, only approximately 60% of those who face presumptions but are rated as having the lowest risk ratings are released pretrial. Our results show the gap in release due to presumptions is at least as large among this lowest-risk group as among the highest ones. This data suggests that being subject to presumptions led even lower-risk defendants to face greater barriers to being released pretrial.

Other conditions of release also differed markedly for those subject to presumptions.

Figure 11 highlights the differences in frequencies of these conditions (again controlling for the other factors discussed above). Among those defendants who were released on either secured or unsecured bond, those subject to presumptions were approximately 20 percentage points more likely to be given secured rather than unsecured bonds. Similarly, those subject to presumptions were nearly 20 percentage points more likely to be assigned pretrial supervision by an agency than otherwise similar defendants who did not face presumptions. Even among defendants

Figure 11: Secured Bond and Supervision Differences due to Presumptions (*adjusted for other factors*)



Each point reflects the difference in each outcome associated with whether the defendant was subject to presumptions (adjusted for other factors using linear models described in footnote 29). The leftmost estimate reflects the difference in whether a defendant was released on secure bond (among all defendants, N = 11,487). The center estimate reflects the difference in whether the defendant was assigned pretrial services (PTS) among all defendants who were released on either secured or unsecured bond (N = 9,125). The rightmost estimate reflects the difference in whether the defendant was assigned PTS among only defendants who were released on secured bond (N=4,127). Confidence intervals (95%) shown for each estimate. The horizontal red line reflects the benchmark for which zero differences are associated with presumptions.

who were given secured bonds, those subject to presumptions were 15 percentage points more likely to be assigned to supervision.

These results show the many ways in which those individuals charged with an offense which triggered presumptions against bail were treated differently when courts considered pretrial release. These individuals were detained at far higher rates and were far more likely to be detained for the entire pretrial period. Even among those who were released, their release came after longer periods in detention and often carried more severe bond and supervision requirements. Again, these differences are not due to other factors that may be correlated with presumptions cases, as our analysis accounts for a robust set of these potential confounding factors.

These additional burdens on individuals facing presumptions were theoretically justified by the General Assembly because they were assumed to be balanced by the reductions in risk to the public. We thus turn to the question of whether presumptions against bail actually improved public safety.

## **PRESUMPTIONS AND PUBLIC SAFETY**

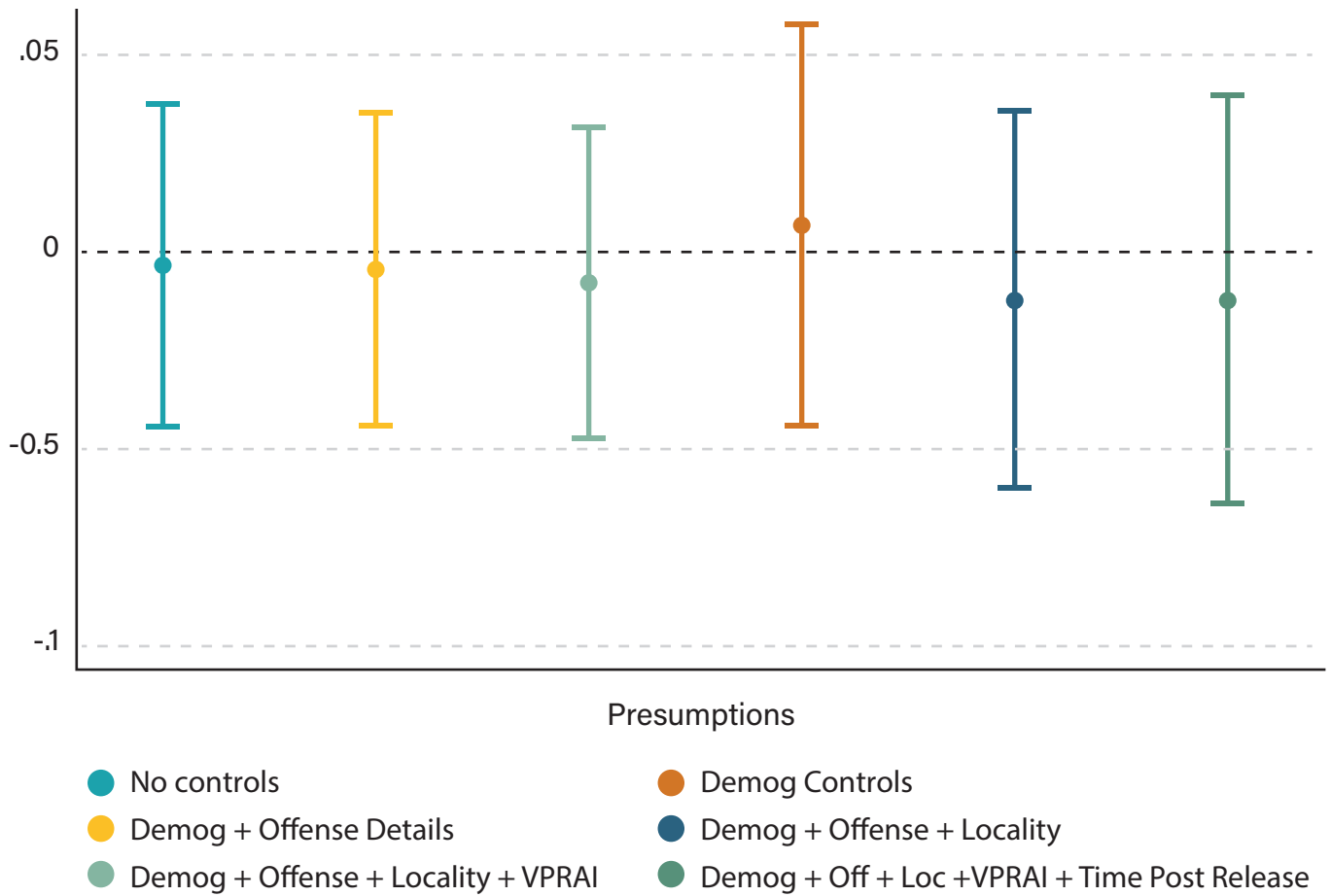
To assess the impacts of presumptions against bail on public safety, we compare the rates of new arrests during the pretrial period for those defendants who were subject to presumptions with those who were not. While many defendants subject to presumptions were detained for the full period, roughly half were not, providing us with a sample of released individuals whose new criminal arrest is observed in the PDP data. We thus limit our sample to only those defendants who were released during the pretrial period (including those who were subject to presumptions and those who were not).

As we noted above, it is possible that defendants subject to presumptions who were nonetheless released may have posed

selectively lower risks to public safety than defendants subject to presumptions who were not released. In other words, the subset of individuals subject to presumptions who were released may have had other compensating factors that lowered their risks to public safety. We might therefore not expect to find any difference in rearrest rates between the sets of released individuals subject and not subject to presumptions. Such a situation would not allow us to infer the true risks posed by the full set of individuals subject to presumptions.

To account for this possibility, we use an approach based on a large array of control variables that may have affected a defendant's post-release criminal activity. These variables include the defendants' demographics, the details of the original offense (including the VCC prefix and category of the offense), average rearrest rates for each locality, the VPRAI risk assessment scores, and the length of time between a person's release and case disposition. By adding these factors sequentially, we can assess whether our estimated differences in rearrest rates for presumptions vary based on the set of control variables included. If there were indeed selective release for defendants subject to presumptions on the basis of their risk, we would expect to find differences in rearrest rates emerge only as we control for a larger set of these variables. That is, the set of released defendants subject to presumptions and not subject to them may experience similar rearrest rates, but this similarity may be in part due to the compensating factors that are being taken into account when release decisions are made. For example, a defendant subject to presumptions who has only a brief criminal history record may be as likely to be released as a defendant who is not subject to presumptions but who has a more extensive record. However, if presumptions did in fact lead to such selective release, once we adjust for factors such as criminal records, the rearrest rates for those subject to and not subject to presumptions would diverge.

Figure 12: Differences in New Arrests Due to Presumptions



Each point reflects the difference in the rate of new arrests associated with whether the defendant was subject to presumptions, adjusted for other control variables described in the legend and estimated via a linear regression. The sample includes all defendants who were released during the pretrial period (N = 9,404). Confidence intervals (95%) shown for each estimate.

In Figure 12, we plot these estimated differences in new arrests between those subject to and not subject to presumptions. The leftmost point reflects these differences with no control variables included in the model, while subsequent points add successively greater numbers of control variables. To reflect the uncertainty of these estimates, vertical bars around each point reflect 95% confidence intervals.

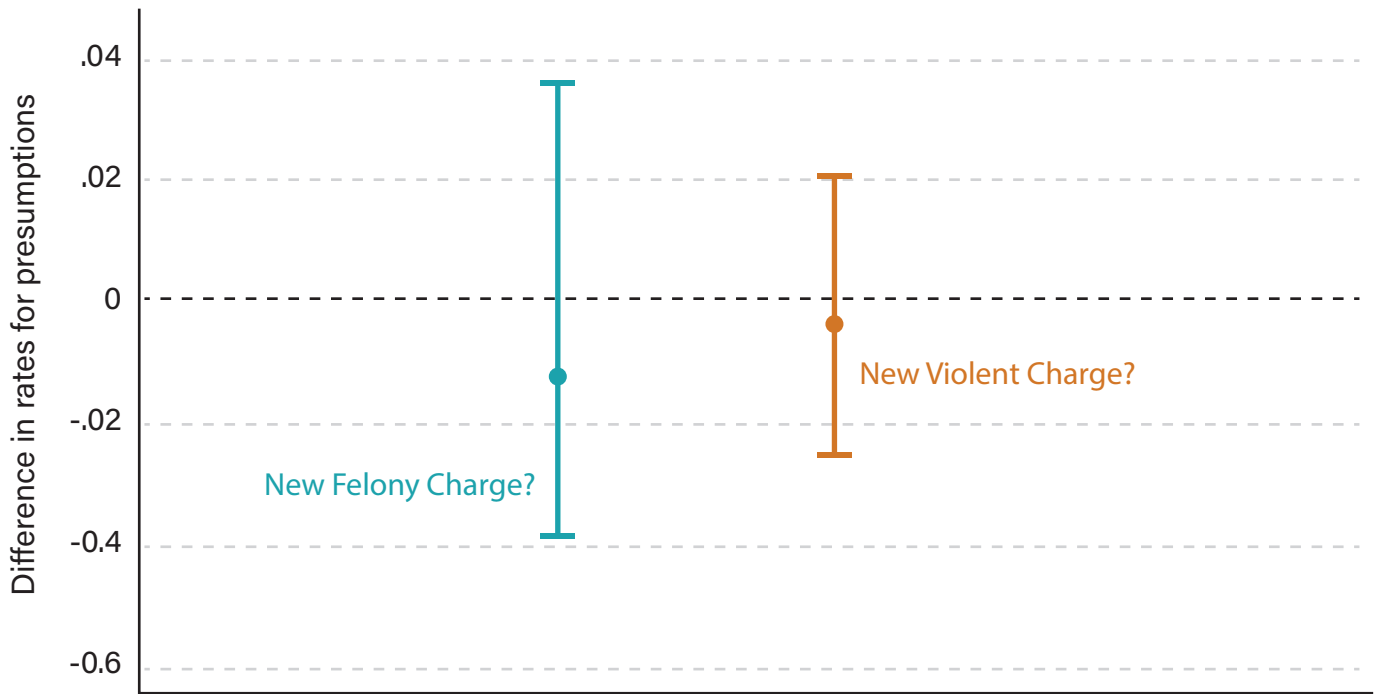
We find no evidence of any differences in new arrest rates between defendants subject to presumptions and those who were not. In fact, our estimate is consistently zero differences due to presumptions, with fairly narrow confidence intervals, irrespective of which

set of control variables we include. The upper end of our confidence intervals in almost all of these models is 4%. That is, we can confidently say that defendants subject to presumptions were not more than 4 percentage points more likely to be arrested for a new offense than otherwise similar defendants not subject to presumptions, and that the most likely difference between these groups is zero.

The consistency of results across these control variable sets also suggests two important corollary findings. First, there is no evidence that the release of defendants subject to presumptions was selective on the basis of their risk. In other words, it is not likely that the similarity in rearrest rates between



Figure 13: Differences in New Felony and Violent Charges Due to Presumptions (adjusted for other factors)



Each point reflects the difference in each outcome associated only with whether the defendant was subject to presumptions (adjusted for other factors using linear models described in footnote 29). The left estimate reflects the difference in whether a defendant was charged with a new felony offense, while the right estimate reflects the difference in whether the defendant was charged with a new violent offense (as categorized by the VCSC using the PSA violent offense definition). Sample includes all defendants released during the pretrial period (N = 9,404). Confidence intervals (95%) shown for each estimate.

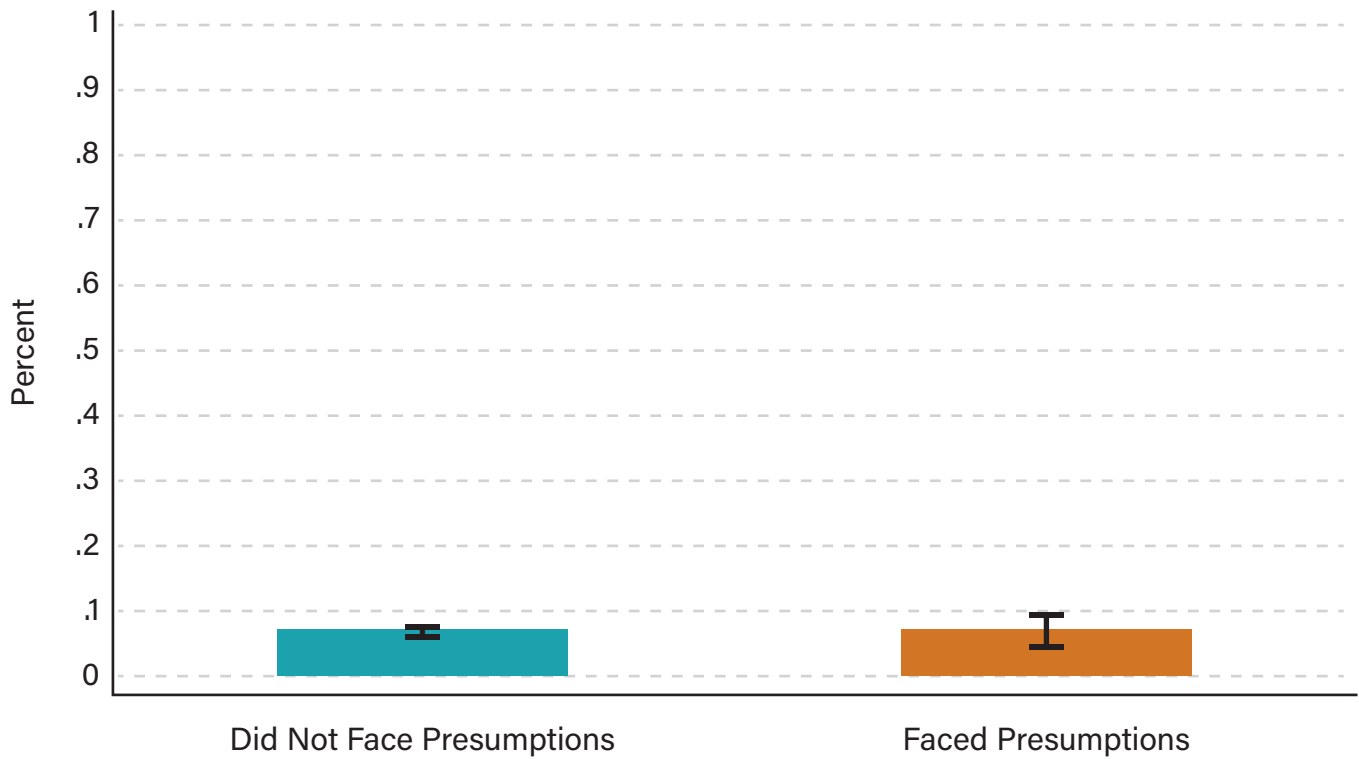
presumptions groups is because those subject to presumptions were more closely scrutinized in terms of their risk. Again, if that were the case, we would find differences emerging once we adequately control for other risk factors. We do not. Second, it is unlikely that adding further controls for other unobserved factors would alter our main findings. The stability of our estimates along the many factors we already include strongly suggests these same findings would remain even were we to add further controls.

A final important point can be drawn from Figure 12. Because individuals subject to presumptions were typically held in detention

longer than those not subject to them, there was less time during which they may have been arrested when released prior to trial. This may potentially mask the higher risk these individuals posed. However, the rightmost estimate in the figure thus controls for the amount of time post-release.<sup>31</sup> Even when we control for the amount of time a person is at liberty, our results continue to show no significant differences in new arrests associated with presumptions. In other words, those defendants who were subject to presumptions were no more likely to be charged with new offenses in any given period than those not subject to presumptions.

31. We include these controls as fixed effects for 30-day bins of the time between pretrial release and December 31, 2018.

Figure 14: Shares of Defendants Released Who Are Charged with a New Violent Offense (adjusted for other factors)



Each bar reflects the share of defendants charged with a new violent offense (as categorized by the VCSC using the PSA violent offense definition), adjusting for all other control variables specified in footnote 27. Sample includes all defendants released during the pretrial period (N = 9,404). Confidence intervals (95%) shown for each estimate.

While the rate of any new offense type may not have differed between those subject to presumptions and those not, it is possible the types of offenses did exhibit differences. We therefore use the same estimation approach to examine the effects of presumptions on the rate of new felony charges, as well as new violent offense charges. Figure 13 shows the results for these estimations (adjusted for demographics, offense details, locality, and VPRAI risk assessment score). They again show no distinguishable differences in new felony or violent charges for those subject to presumptions. In fact, if anything, our findings suggest they were slightly less likely to be charged with these offenses.

For perspective, very few defendants who are released pretrial are subsequently charged

with a new violent offense (<5%). As Figure 14 shows, this rate is essentially identical for those individuals who were subject to presumptions. We find no evidence that these individuals pose a greater risk to public safety than others, including others whose initial offense was not violent.

It is possible that the greater use of pretrial supervision associated with presumptions compensated for the higher risk.

Why do presumptions against bail not identify high-risk individuals who are more likely to be arrested for new crimes when released? One major reason is that the risk of engaging in additional criminal activity is not closely correlated with the initial offense with which an individual is charged. Throughout our analysis of new criminal arrests, the

maximum R2 we find in our estimations is 0.12, even when we include the full set of control variables. This indicates that all of these variables can only explain roughly 12% of the variation in new arrests. In essence, the likelihood of a new criminal arrest is not well-predicted by all of these factors. Thus, an approach like presumptions against bail—which primarily uses the charge to determine pretrial release—is not effective in identifying high-risk individuals.

## BENEFIT-COST ANALYSIS

When originally enacted, the statute on presumptions against bail was motivated by the hoped-for reduction in public harm, which was thought to outweigh the burdens to the individual defendants and the costs to the state. As we find above, however, there appear to be no meaningful benefits in terms of reduced risk of new criminal offenses associated with presumptions. We therefore turn to the costs borne by the state, localities, and other actors and the burdens imposed on the defendants.

Table 3 lays out the additional jail costs due to the presence of presumptions for our 2017 sample. As noted above, the total annualized number of defendants known to have faced presumptions was 13,000, with an additional 32,000 defendants that may have faced these (line 1 below). We previously estimated in Figure 9 that the presumptions were associated with an increase in the average number of days held pretrial of 58 days per defendant (line 2). Taken together, these results indicate that at least 754,000 and as many as 2.6M additional jail days annually were due to the presence of presumptions in 2017. For perspective, the Commonwealth of Virginia Compensation

Board’s FY18 Report to the General Assembly<sup>32</sup> indicates there were approximately 10.5M inmate days across all 59 Virginia jails in FY18<sup>33</sup> (inclusive of both pretrial and post-trial days). Thus, our findings suggest that approximately 7% (and potentially as much as 25%) of **all** inmate jail days were due to the presence of presumptions. These are the *additional* days of detention due to the presence of presumptions, accounting for the number of days these same defendants would likely have been held in the absence of presumptions.

According to reports, in FY18, total jail operating costs per inmate day were \$87.20 (line 4), with the Commonwealth itself funding 35% of these costs. Given the additional jail days due only to presumptions, the total additional costs imposed by the use of presumptions in known cases were \$65.7M and may have been over \$200M accounting for cases where presumptions may have been in place. The Commonwealth paid for at least \$23M of these costs, and potentially as much as \$80M, with localities absorbing the remainder of these expenses.

Finally, we also note that the use of presumptions imposed other major costs. Chief among these are the costs borne by the individual defendants and their families, including the impacts on their own well-being, as well as their lost income and other costs. Although difficult to estimate, these financial and personal harms are real and likely to be large. For example, one recent study found that being released pretrial increases the likelihood of being employed three to four years later by as much as a quarter. The 24% statewide reduction in pretrial release we estimate is due to presumptions could contribute to a substantially higher unemployment rate among

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32. Commonwealth of Virginia Compensation Board, “FY18 Jail Cost Report,” accessible at <https://www.scb.virginia.gov/docs/fy-18jailcostreport.pdf> [accessed January 19, 2023].

33. Fiscal Year 2018 included October 2017, so most closely coincides with our PDP sample period.

Table 3: Additional Jail Costs Due to Presumptions

1	Number of defendants subject to presumptions annually	13,000 – 45,000
2	Average additional jail days due to presumptions per defendant (Figure 9)	58
3	Total number of additional jail days due to presumptions annually (= 1 x 2)	754,000 – 2.6M
4	Jail operating expenses per inmate day (FY18)	\$87.20
	<b>Total jail operating expenses due to presumptions (=3 x 4)</b>	<b>\$65.7 M - \$228M</b>
	<b>Total jail operating expenses due to presumptions paid by Commonwealth of VA</b>	<b>\$23M - \$80M</b>

those who faced these presumptions.<sup>34</sup> Again, many other costs are not estimable given the data currently available in Virginia. It is also possible that other legal system costs may increase, such as the costs of community supervision for a share of those released due to the removal of presumptions. However, in many cases, we expect the net savings on these averted and increased costs would likely still be substantial and could well exceed the sizable direct costs of jail.

## CONCLUSIONS

In the quarter-century since their introduction in Virginia, presumptions against bail were dramatically expanded to cover a wide-ranging set of charges and circumstances. Our study finds that these presumptions applied in many more cases than may have been known, with

at least 10% of defendants and as many as one in three of all defendants in our study sample potentially subject to presumptions.

As a result, far fewer defendants were released pretrial. Even when released, these defendants were typically held for longer periods until their release and more frequently faced more challenging release conditions, including secured rather than unsecured bonds and pretrial supervision.

The detention burdens borne by these defendants likely caused additional harms to the long-term well-being of these individuals, their families, and their communities. Moreover, the costs to the Commonwealth, localities, and the federal government of incarcerating these individuals were far larger than may have been understood. The combination of

34. Dobbie, Will, Jacob Goldin, and Crystal S. Yang. "The effects of pretrial detention on conviction, future crime, and employment: Evidence from randomly assigned judges." *American Economic Review* 108, no. 2 (2018): 201-40.

higher detention rates and longer detention periods for those subject to presumptions meant that as many as approximately 7% (and as much as 25%) of all inmate days in Virginia's jails were due only to the presence of presumptions. The operating costs associated with the days for defendants known to have been subject to presumptions exceeded \$65M annually, with Virginia's state budget bearing more than \$23M of these costs. Accounting for other defendants who may have faced presumptions increases these costs by a factor of 4 to \$80M borne by the state.

If presumptions led to avoided violence or harm to the public, it could be suggested that these costs might be balanced by the societal benefits. However, our examination of the data finds those subject to presumptions were no more likely to be arrested for a subsequent criminal offense during the pretrial period than those who did not. Fewer than 5% of defendants who faced presumptions but were ultimately released were charged with a new violent offense in the pretrial period, nearly identical to the share among those who did not face presumptions. This is true even when we account for other differences between the two groups. Therefore, the data demonstrates that presumptions against bail come with substantially high costs while providing no tangible or real benefits.

Taken together, our findings suggest that the 2021 repeal of presumptions saved tens of millions of dollars in jail costs and prevented harms to tens of thousands of Virginians and their families.



## PART 3:

# RACIAL DIFFERENCES IN PRETRIAL CONDITIONS

### EXECUTIVE SUMMARY

- We examine the extent to which defendants of different races experience different pretrial conditions using the 2018 PDP data.
- African-Americans comprise nearly 40% of the defendants charged with an offense punishable by incarceration in 2018, double their share of the overall population (20%).
- African-Americans are much more likely to be held without bail by a magistrate than defendants of other races, and much less likely to be assigned an unsecured bond (which does not require cash or upfront payment).
- These disparities are not simply due to differences in the types of offenses with which African-Americans are charged relative to others, to different conditions in localities with higher African-American populations, or other demographic factors.

- The largest factor explaining these disparities appears to be the difference in the criminal history records of African-Americans relative to other defendants, which could itself reflect prior disparities experienced by African-Americans. However, even this factor does not eliminate the disparities exhibited in most of the pretrial release conditions we examine.

The PDP also offers a unique opportunity to investigate the extent to which defendants of different races experience different pretrial conditions. African-Americans are vastly over-represented in the pretrial system; as Table 4 shows, they comprise nearly 40% of the defendants charged with an offense punishable by incarceration in 2018, double their share of the overall population (20%).

There are many reasons that contribute to this disparity in arrest rates, many of which

Table 4: Race Composition of Defendants and Total Population of Virginia

Race	Share of defendants charged with offense punishable by incarceration (PDP 2018)	Share of total population (2020 Census)
African-American	39.7%	20.0%
White	56.0%	68.5%
Asian	1.1%	7.3%
Unknown or other	3.1%	4.2%

are part of larger policy discussions. But what the PDP allow us to examine is the extent of disparities in the pretrial system after arrests occur. We begin by analyzing whether pretrial release rates differ for African-Americans and then examining whether these defendants are charged with failure-to-appear at different rates.

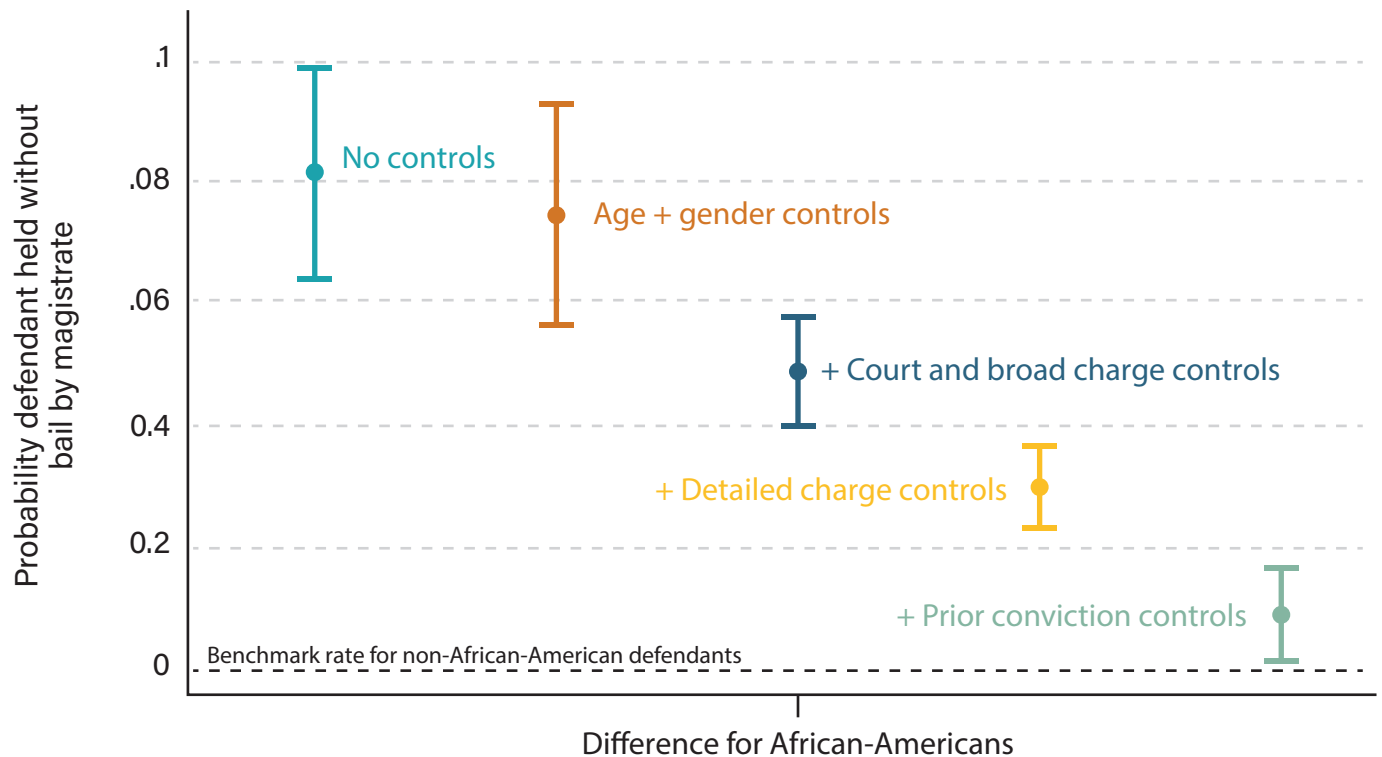
## RACE AND PRETRIAL RELEASE

We analyze the PDP microdata by defendant race to assess the extent of differences at each stage of the potential release process. We first examine the overall (unadjusted) differences in rates for African-American and non-African-American defendants. We then add additional “control” variables that

could vary across race and be correlated with release rates.

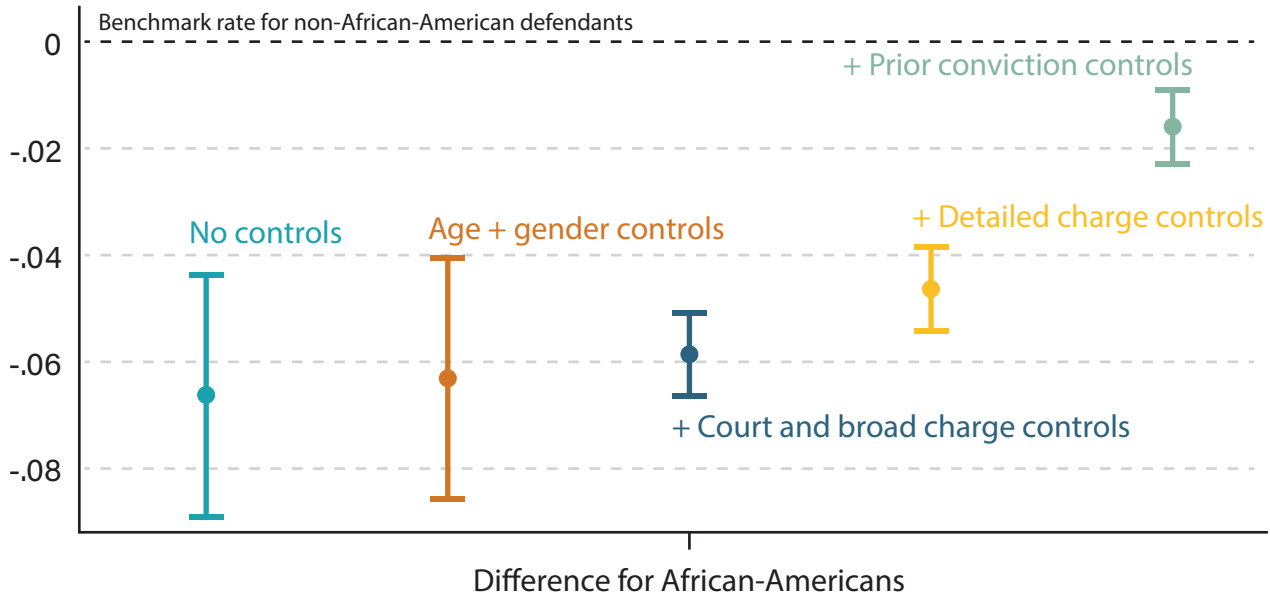
We begin by analyzing differences in one of the first decisions over pretrial detention: whether a defendant is held without bail by the magistrate. Overall, 24.9% of all defendants charged with an offense punishable by incarceration are held without bail by the magistrate. As Figure 15 below shows, this rate is 8 percentage points higher for African-Americans (i.e., nearly 33%). Adding control variables for age (in 10-year groups) and gender does not materially change this difference. We then add additional control variables accounting for the average rates for each of the 127 localities, court type (circuit, general district, JDR), and broad offense

Figure 15: Differences in Being Held Without Bail by Magistrate



The sample for this figure includes all defendants in the PDP charged with an offense punishable by incarceration during 2018 (N = 101,493). Each dot represents the difference in average outcomes for African-American defendants relative to all non-African-American defendants. Bars plot the 95% upper and lower confidence intervals. The leftmost plot shows the differences with no control variables. The second from the left includes controls for 10-year age group and gender indicators. The third plot adds locality, court type, and broad offense category controls to those in the second plot. The fourth plot adds detailed offense category controls, while the fifth further adds control indicators for the number of prior convictions on each defendant’s criminal history record.

Figure 16: Differences in Being Released on Unsecured Bond



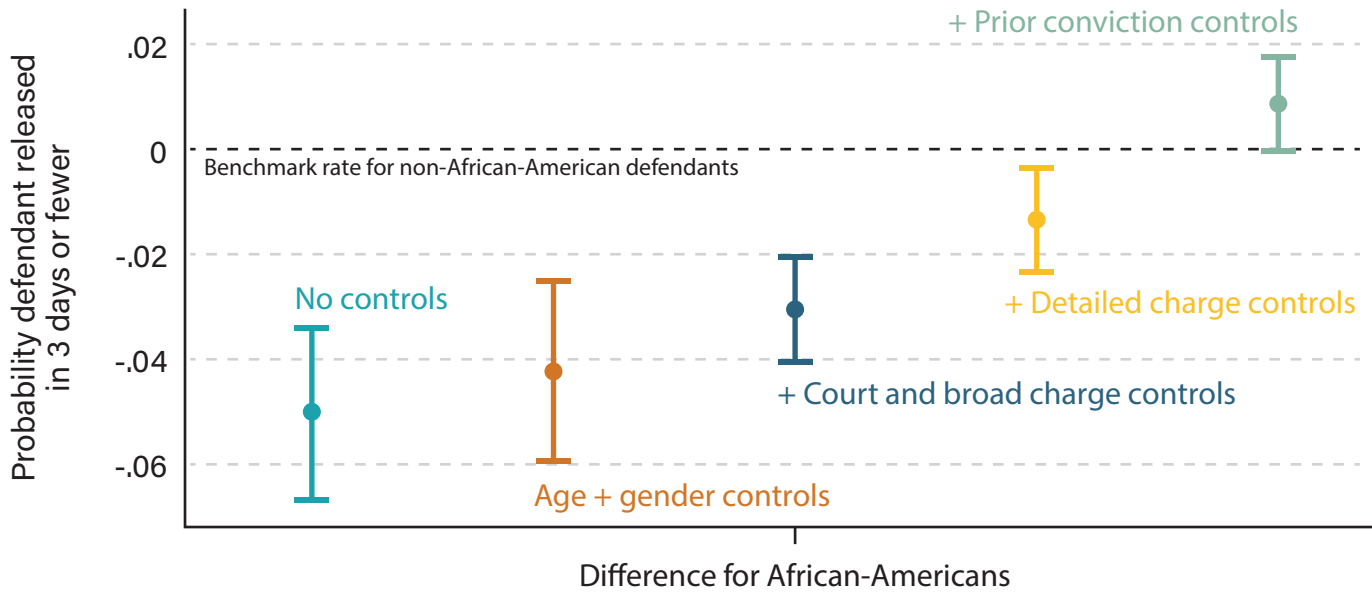
The sample for this figure includes all defendants in the PDP charged with an offense punishable by incarceration during 2018 who were released on either secured or unsecured bond (N = 82,037). Each dot represents the difference in average outcomes for African-American defendants relative to all non-African-American defendants. Bars plot the 95% upper and lower confidence intervals. The leftmost plot shows the differences with no control variables. The second from the left includes controls for 10-year age group and gender indicators. The third plot adds locality, court type, and broad offense category controls to those in the second plot. The fourth plot adds detailed offense category controls, while the fifth further adds control indicators for the number of prior convictions on each defendant's criminal history record.

category (i.e., narcotics, larceny, or one of 7 other major categories). In other words, we draw comparisons only for defendants within the same localities, court types, and broad offense categories. The third plot in Figure 15 shows that the difference for African-Americans is 5 percentage points accounting for these controls. This is because defendants charged in circuit court and those charged with violent offenses are more likely to be held without bond, and African-Americans are over-represented among such defendants. The fourth plot supplements these controls with those for detailed offense categories (63 categories). The difference for African-Americans is now 3 percentage points. This suggests that even within broad offense categories (i.e., assault, narcotics, larceny, etc.), the specific offenses with which African-Americans are charged differ from those of other defendants, and are more likely to be associated with being held without bail by

a magistrate. Finally, we also add specific controls for the number of prior felony convictions for each defendant (0, 1-5, 6-10, 11+), as well the number of prior misdemeanor convictions. The difference for African-American defendants is now approximately 1 percentage point. Put differently, approximately two-thirds of the difference observed for African-Americans relative to other defendants is associated with differences in criminal history records (i.e. 3% - 1%). These differences in criminal histories may themselves reflect disparate prior experiences with the criminal legal system. At the same time, there continues to be a substantial difference between African-Americans and other (largely White) defendants, even after controlling for all of these other factors.

As many defendants initially held without bond by magistrates are subsequently released by judges, we next assess the type of

Figure 17: Differences in Being Released Within 3 Days



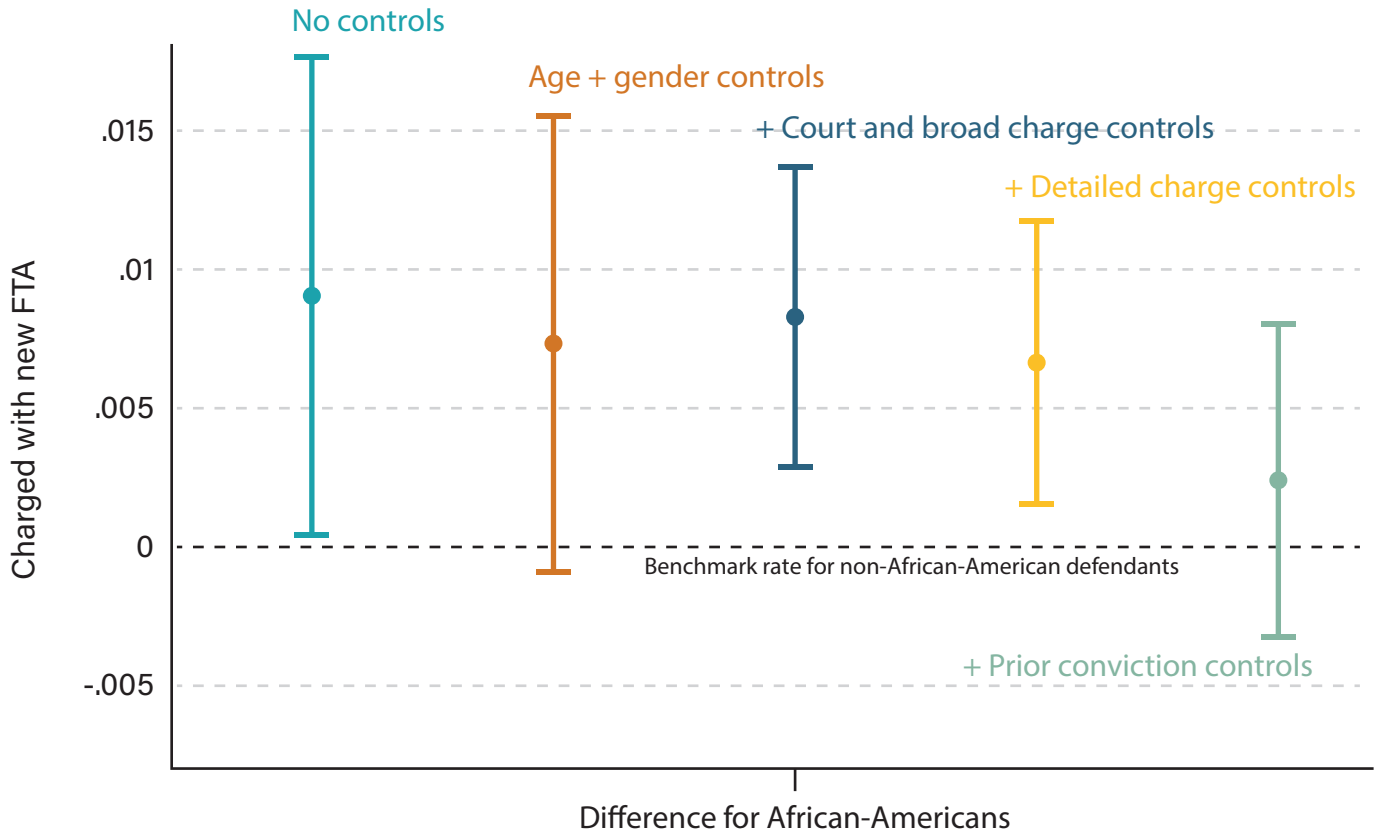
The sample for this figure includes all defendants in the PDP charged with an offense punishable by incarceration during 2018 (N = 101,493). Each dot represents the difference in average outcomes for African-American defendants relative to all non-African-American defendants. Bars plot the 95% upper and lower confidence intervals. The leftmost plot shows the differences with no control variables. The second from the left includes controls for 10-year age group and gender indicators. The third plot adds locality, court type, and broad offense category controls to those in the second plot. The fourth plot adds detailed offense category controls, while the fifth further adds control indicators for the number of prior convictions on each defendant’s criminal history record.

bond among all defendants who are released. Approximately 42% of these defendants are released on secured bond (i.e., cash bail), while 58% are released on unsecured bond. As Figure 16 shows, the share released on unsecured bond is approximately 6 percentage points lower for African-Americans. Accounting for age, gender, locality, court type and offense categories only slightly reduces this difference. Once we add controls for the numbers of prior felony and misdemeanor convictions in the rightmost plot, the difference for African-Americans shrinks by about two-thirds to approximately 2 percentage points. As before, this means that much of the observed difference in the use of unsecured bonds across race is likely due to differences in criminal histories (although again, these could themselves be products of prior disparities in the criminal legal system). Even after accounting for prior convictions, the PDP data shows African-Americans are released on unsecured rather

than secured bonds **significantly less often** than are other defendants.

Being assigned secured bonds more frequently could lead African-Americans to spend more time in detention before being released. In Figure 17, we show differences in the probability of being released within three days for African-American defendants relative to all other defendants. While 75% of non-African-American defendants are released within three days of arrest, as the leftmost plot below shows, that rate is **nearly 5 percentage points lower** for African-Americans. Controlling for age group, gender, locality, court type, and broad offense categories in the third plot shrinks this difference to approximately 3 percentage points, while including detailed offense controls in the fourth plot further reduces this gap to 1.5 points. Finally, including the counts of prior felony and misdemeanor convictions as control variables eliminates

Figure 18: Differences in Being Charged with Failure-to-Appear



The sample for this figure includes all defendants in the PDP charged with an offense punishable by incarceration during 2018 (N = 101,493). Each dot represents the difference in average outcomes for African-American defendants relative to all non-African-American defendants. Bars plot the 95% upper and lower confidence intervals. The leftmost plot shows the differences with no control variables. The second from the left includes controls for 10-year age group and gender indicators. The third plot adds locality, court type, and broad offense category controls to those in the second plot. The fourth plot adds detailed offense category controls, while the fifth further adds control indicators for the number of prior convictions on each defendant's criminal history record.

the gap between African-American and other defendants (if anything, now suggesting African-Americans may be more likely to be released in 3 days or less, conditional on all of the aforementioned factors). In other words, the observed difference in the length of time to release pretrial appears to be largely driven by the differences in the specific charges and criminal history records. Again, the latter difference in such records could well be a product of prior disparities experienced by African-Americans in the criminal legal system.

We find similar patterns in the difference in the probability of being released in only 1 day, as well as in being released within 7 days. African-Americans are significantly less likely

to be released within each period, a difference that is eliminated only when we include controls for prior convictions.

## RACE AND FAILURE-TO-APPEAR CHARGES

Pretrial release is often conditioned on defendants' appearance at subsequent court hearings. In situations where defendants do not appear at these hearings, judges may issue bench warrants or order a *capias* for a person's arrest as a means to compel them to appear. Alternatively, judges may issue these defendants new failure-to-appear (FTA) charges, which stand independently of the original charges associated with a particular

offense. As the PDP do not include variables on whether defendants appear in court or the number of court hearings in a case, we cannot directly assess the rates at which judges issue new FTA charges. However, we can examine whether a defendant is issued a new FTA charge in cases where s/he is not convicted of the original offense. That is, these defendants are either acquitted of their original offense or their case is dropped or withdrawn (i.e., *nolle prosequi*), but are nonetheless issued new charges for missing court hearings. Approximately 8.5% of defendants who are not convicted of the initial criminal charge are nonetheless charged with FTA; this rate is 1 percentage point higher for African-Americans, as shown in Figure 18. Even after controlling for age group, gender, locality, court type, and offense categories, this rate remains statistically, significantly higher for African-Americans than other defendants. Finally, in the rightmost plot of the figure below, the difference shrinks to approximately 0.25 percentage points after controlling for prior convictions (i.e., 9.0% of African-Americans compared to 8.75% of non-African-Americans).

## CONCLUSIONS

Taken together, these results exhibit significant racial disparities in key elements of pretrial release conditions. These disparities are not simply due to differences in the types of offenses with which African-Americans are charged relative to others, or to different conditions in localities with higher African-American populations. The largest factor explaining these differences appears to be the difference in the criminal history records of African-Americans relative to other defendants, which could itself reflect prior disparities experienced by African-Americans. However, even this factor does not eliminate the disparities exhibited in most of the pretrial release conditions we examine.

While there is considerable variation across localities and courts in pretrial release practices, the racial disparities we observe appear widespread. These disparities are not due to a limited number of jurisdictions exhibiting particularly severe disparities; if they were, controlling for locality indicators would eliminate or more substantively shrink the observed racial differences.



# OVERALL CONCLUSIONS

Until recently, debates about policy changes in the pretrial criminal legal system in Virginia had rarely been supported by reliable, quantitative evidence on the likely impacts of the potential changes. One of the main challenges to such evidence had been the absence of micro-level (i.e., defendant-level) data on many linked aspects of the pretrial system. The regular release of the PDP now provides a major new source of evidence to inform these debates. The present report aims to demonstrate how new analyses can leverage the PDP data to create such evidence.

Our study of the 2018 felony larceny reforms shows how quasi-experimental approaches can generate reliable evidence by assessing changes over time in a cohort that is affected by the policy changes compared with a non-affected cohort. Our first chapter further highlights how linking many distinct data for an individual defendant can yield unexpected results. For example, because the PDP links the defendant's pretrial detention data with case outcome information, we find important downstream effects on convictions and case outcomes from the felony threshold reform.

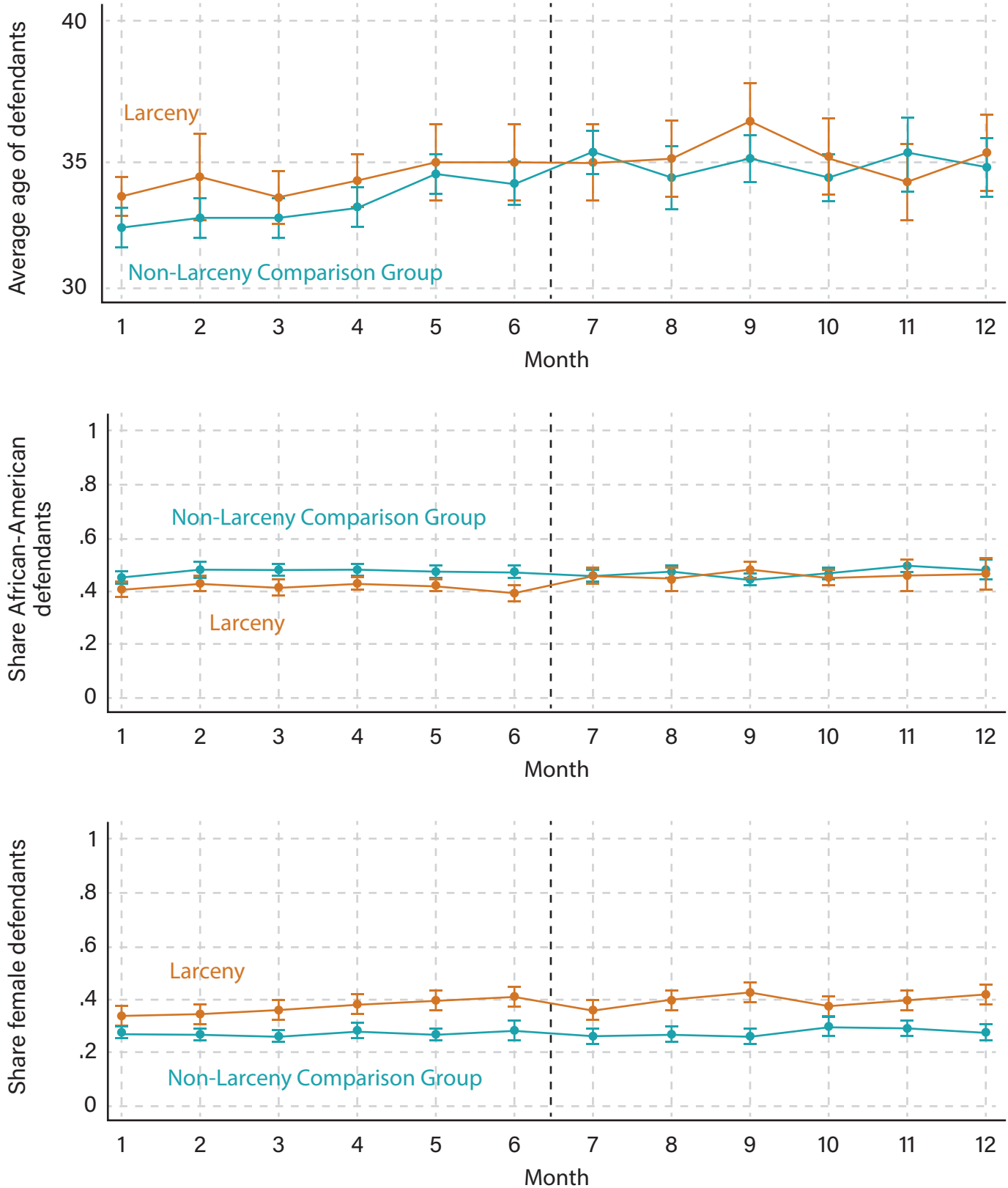
Our chapters on the impacts of rebuttable presumptions and on racial disparities further show the role that defendants' criminal history records play in shaping their pretrial conditions. Many presumptions were triggered by a combination of specific charges and the defendant's criminal histories, and these presumptions led to much higher detention rates. Similarly, differences in criminal histories account for major portions of the disparities in pretrial conditions between African-American and White defendants. Yet, these criminal histories themselves are shaped by prior

interactions with the criminal legal system, creating a recursive cycle through which an early engagement with the system (such as a larceny charge) can lead to worsening conditions over time. Changes within the system itself—such as the increase in the felony larceny threshold and its associated reduction in felony convictions—could plausibly slow this worsening.

Finally, while the PDP provides a slew of important data for these analyses, further improvements can still be made to extend its power dramatically. First, the PDP does not currently provide data on individual pretrial hearings or court appearances. These could be particularly helpful in understanding the pretrial process in finer detail. Second, the PDP is not currently linked with any other data outside the pretrial legal system, such as data on defendants' employment, housing, or education. The Virginia Longitudinal Data System (VLDS) is a protected platform for linking distinct state agency datasets for research uses by verified researchers. If authorized by legislation, the VCSC could contribute the PDP to the VLDS and thus could provide linked, anonymized data to researchers while continuing to protect individual defendants' confidentiality. Such data could enable us to understand how aspects of the pretrial legal system in Virginia impact the economic and social well-being of both individual defendants and their communities.

# APPENDIX

Figure 19: Differences in Demographics Between Those Charged with Larceny and Comparison Group



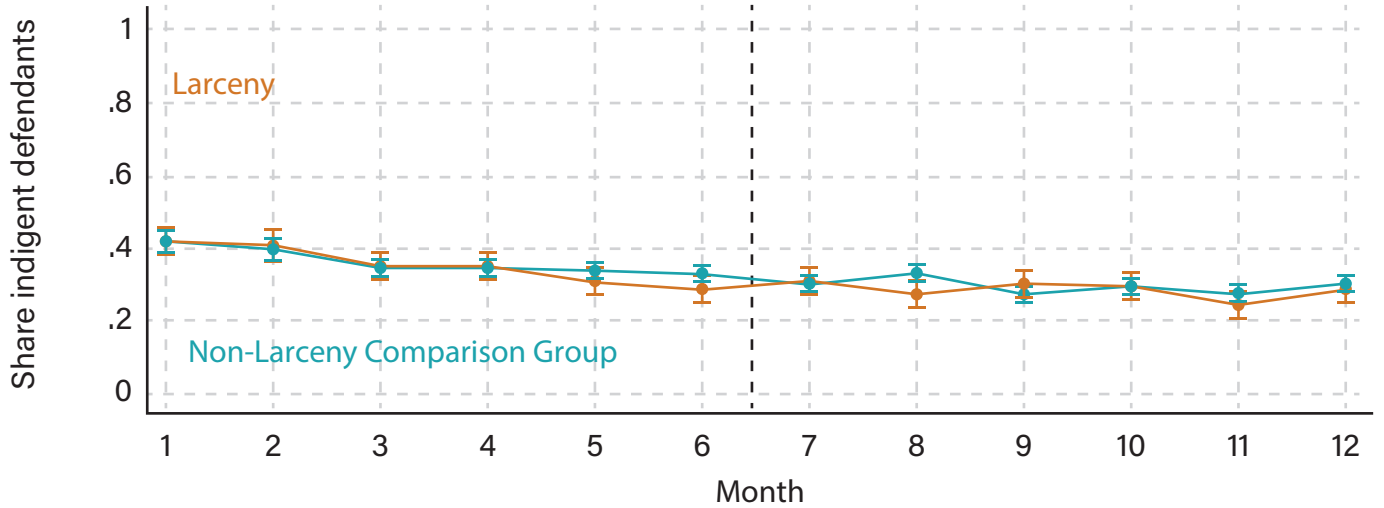
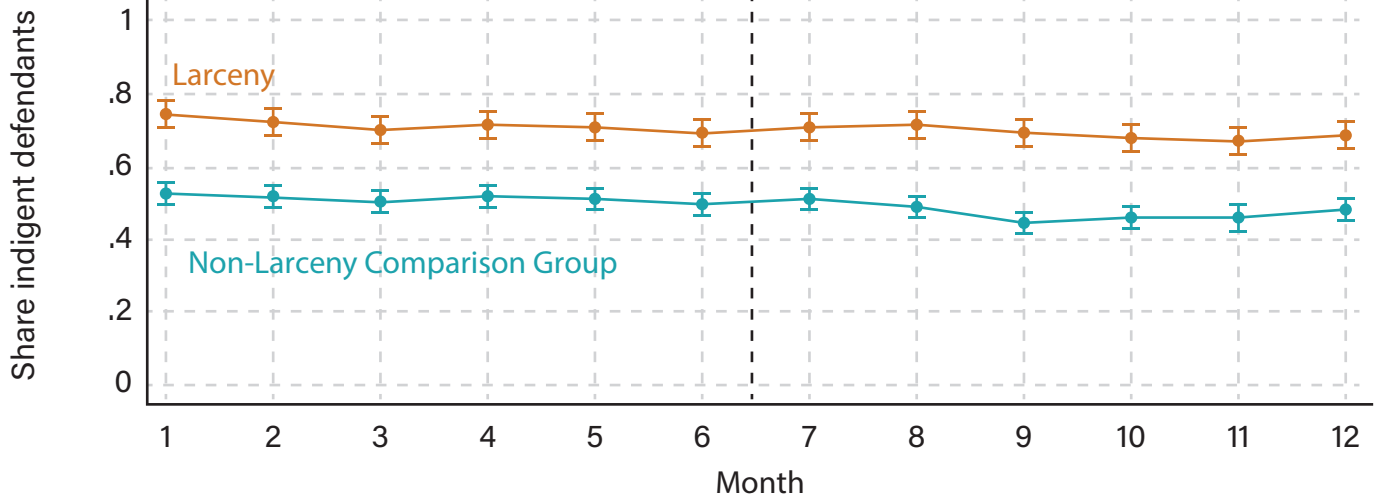
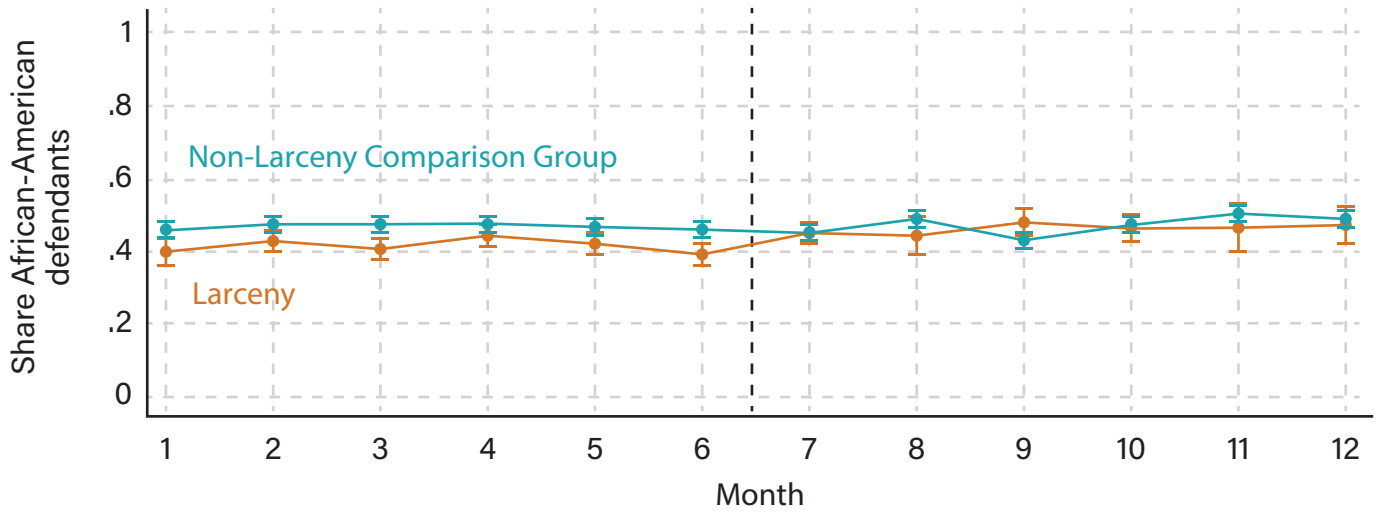
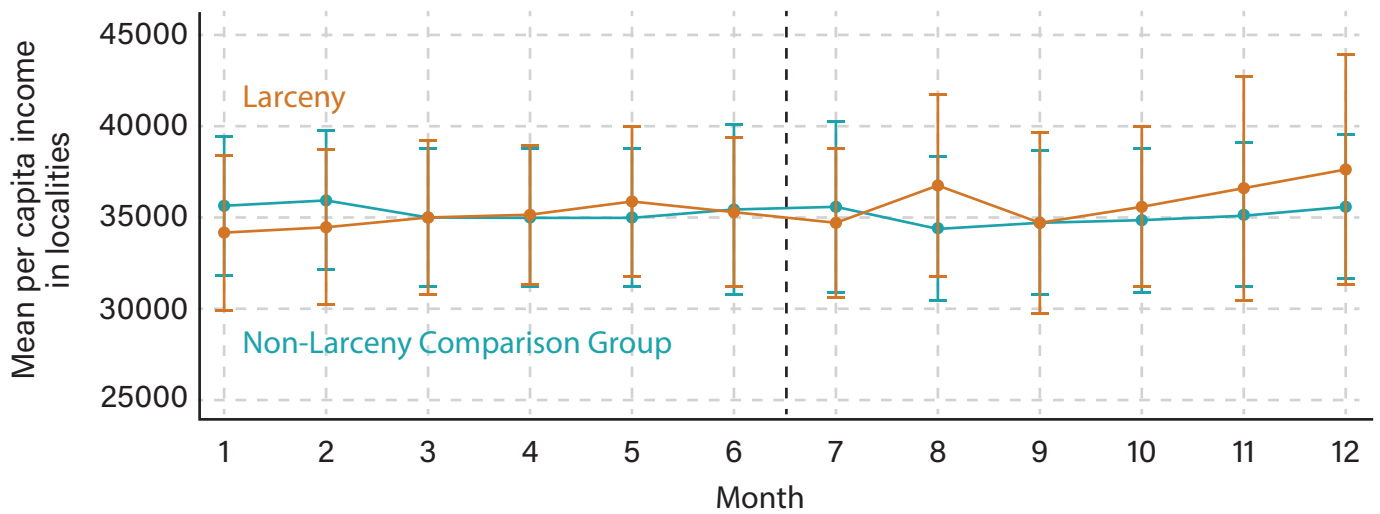
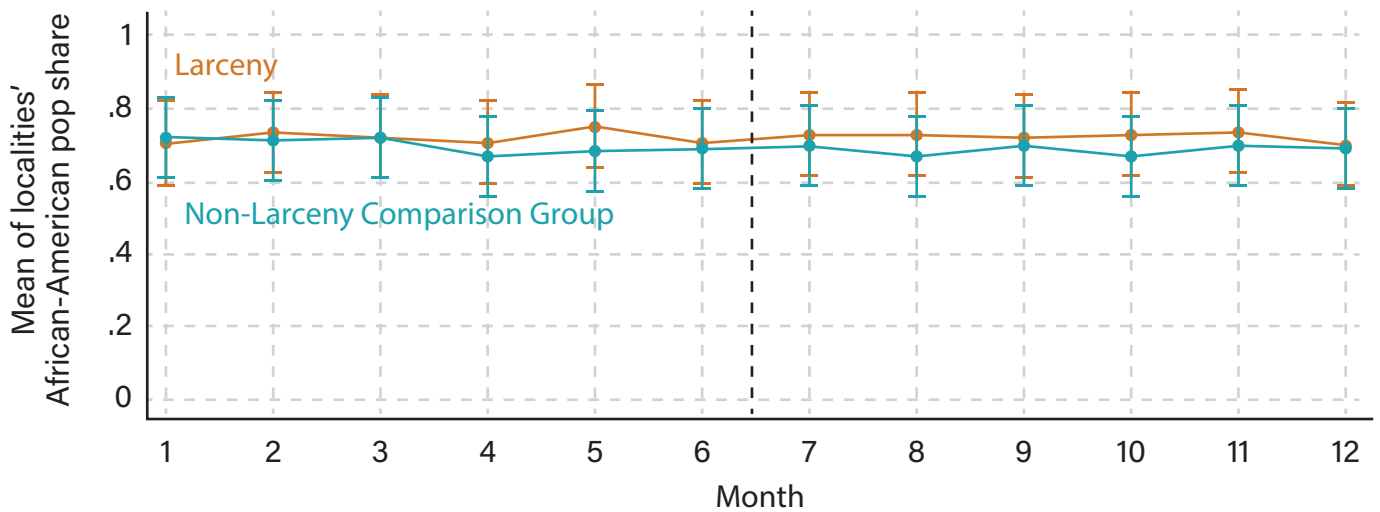
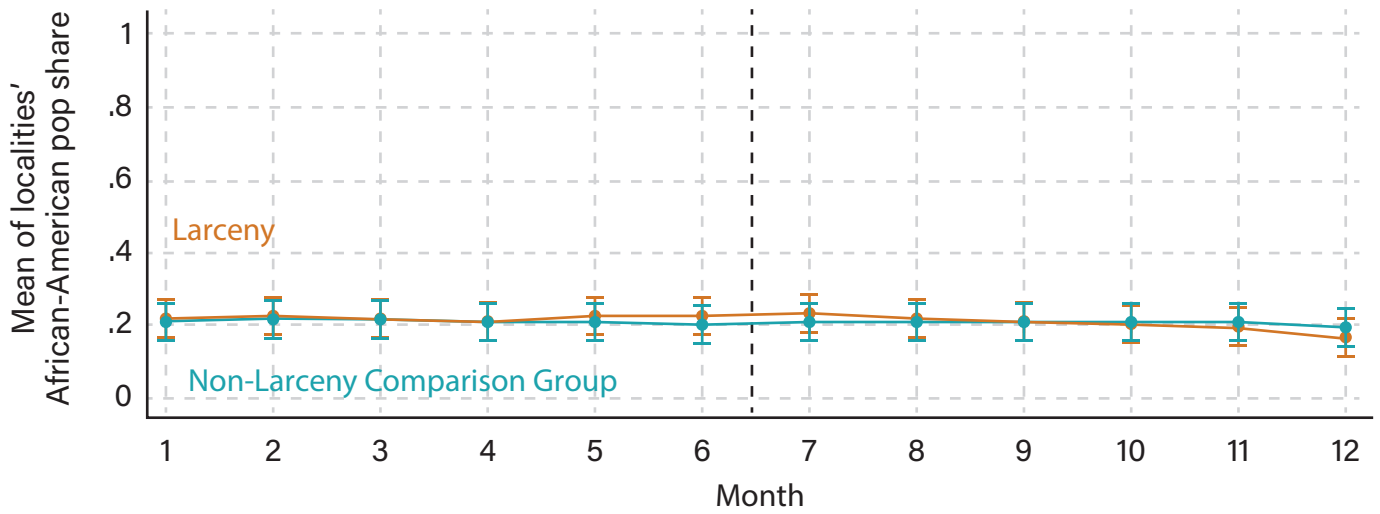
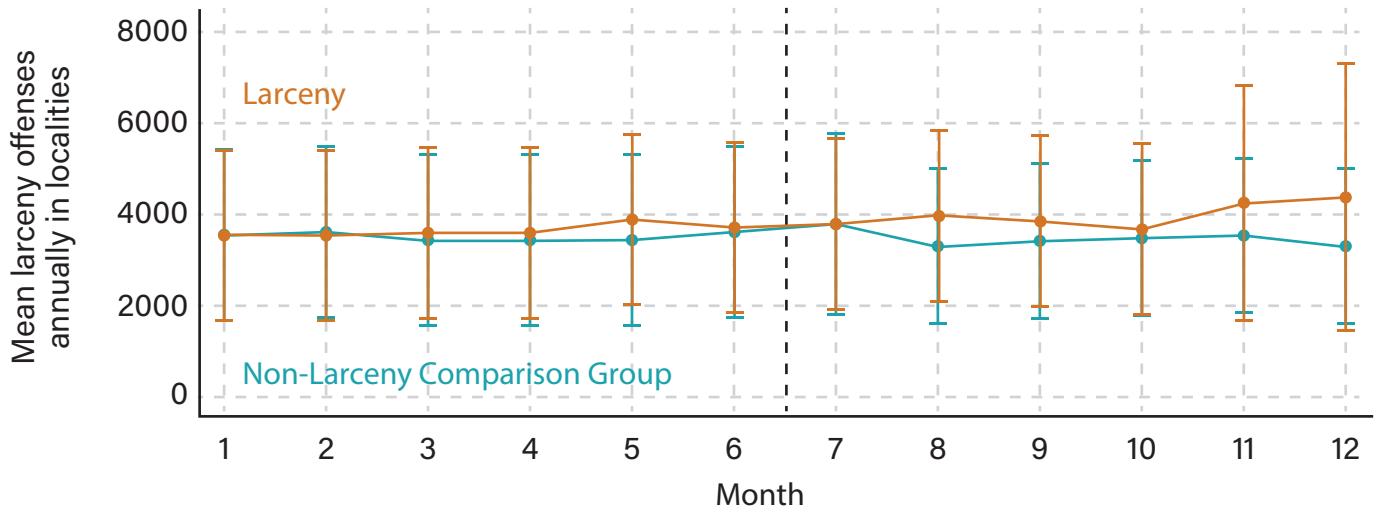


Figure 20: Differences Across Localities' Characteristics Between Those Charged with Larceny and Comparison Group





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