School of
Government

ADMINISTRATION OF JUSTICE BULLETIN NO. 2026/05 | AUGUST 2026

Rebuttable Presumptions Against Pretrial Release

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The laws surrounding the pretrial release of criminal defendants in North Carolina have been changed in recent years. Before many of these changes, there was a general rule that a defendant charged with a noncapital offense was entitled to have conditions of release set by any judicial official. A number of laws have created exceptions to this rule, including the Pretrial Integrity Act (Session Law (S.L.) 2023-75) and Iryna's Law (S.L. 2025-93).

One categorical exception to the general rule that a defendant is entitled to pretrial release is when a *rebuttable presumption* applies. A rebuttable presumption against pretrial release is

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grounded in the premise that no condition of release will reasonably assure (1) the appearance of the defendant and (2) the safety of the community.[1] This has often been interpreted to mean that conditions of release should be denied unless the presumption is overcome.

Rebuttable presumptions against pretrial release have existed in the North Carolina General Statutes [hereinafter G.S.] for decades, the first having been enacted in 1999. The General Assembly has added variations of these statutes to G.S. Chapter 15A over time. Even so, there is no case law addressing standards for applying or overcoming the presumptions. The most recent statutory addition—the rebuttable presumption against release for violent offenses—is likely to arise much more frequently than the others given the number of crimes to which it applies. The statute leaves some gaps in terms of procedure and also raises some constitutional questions. This bulletin describes the new law in the context of existing rebuttable presumption provisions. It also examines how similar laws have been interpreted in other jurisdictions.

I. North Carolina Law

A. Rebuttable Presumption Statutes

There are several North Carolina statutes that establish rebuttable presumptions against pretrial release.[2]

1. Presumptions Triggered by Certain Findings

a. Certain Drug Trafficking Offenses

G.S. 15A-533(d)[3] establishes a rebuttable presumption against a defendant's release for certain drug trafficking offenses. The presumption applies if a judicial official makes **all** the following findings:

- There is reasonable cause to believe that the defendant committed an offense involving trafficking in a controlled substance.
- The drug trafficking offense was committed while the defendant was on pretrial release for another offense.
- The defendant has been previously convicted of a Class A through E felony or an offense involving trafficking in a controlled substance and not more than five years have elapsed since the date of conviction or the defendant's release from prison for the offense, whichever is later.

1. Other types of rebuttable presumptions exist under state law. *See*, *e.g.*, Chapter 14, Section 17 of the North Carolina General Statutes [hereinafter G.S.] (rebuttable presumption that murder is willful and premeditated when committed against a person with whom the perpetrator has a qualifying relationship); *id.* § 51.2 (rebuttable presumption of a reasonable fear of imminent death or serious bodily harm in using defensive force); *id.* § 360.1 (rebuttable presumption that a veterinarian is acting in good faith when making a report of suspected animal cruelty). These presumptions are likely to have their own evidentiary standards and burdens of proof. This bulletin addresses only the presumption against pretrial release.

2. The General Assembly has added these statutes to G.S. Chapter 15A over time. All the statutory provisions that include rebuttable presumptions against pretrial release were enacted after the Bail Reform Act of 1984 (*see infra* section II.A.1) was created and after federal courts settled on how they would treat rebuttable presumptions.

3. This provision took effect on January 1, 1999, and was enacted by S.L. 1998-208.

If all these findings are made at a defendant's initial appearance, then a magistrate may not authorize the defendant's release from custody. Under G.S. 15A-533(g), only a district or superior court judge may find that the presumption is overcome and set conditions of release. There is no specific statutory language instructing judicial officials as to how the presumption may be overcome, but G.S. 15A-533(g) requires a judge to find, before releasing a defendant, "that there is a reasonable assurance that the [defendant] will appear and release does not pose an unreasonable risk of harm to the community."

b. Certain Gang Offenses

G.S. 15A-533(e)[4] establishes a rebuttable presumption against a defendant's release for certain gang-related offenses. The presumption applies if a judicial official makes **all** the following findings:

- There is reasonable cause to believe that the defendant committed an offense for the benefit of, at the direction of, or in association with, any criminal gang, as defined in G.S. 14-50.16A(1).
- The offense was committed while the defendant was on pretrial release for another offense.
- The defendant has (1) been previously convicted of an offense described in G.S. 14-50.16 through -50.20 or (2) been convicted of a criminal offense and received an enhanced sentence for that offense pursuant to G.S. 15A-1340.16E and not more than five years have elapsed since the date of conviction or the defendant's release for the offense, whichever is later.

If all these findings are made at a defendant's initial appearance, then a magistrate may not authorize the defendant's release from custody. Under G.S. 15A-533(g), only a district or superior court judge may find that the presumption is overcome and set conditions of release. There is no specific statutory language instructing judicial officials as to how the presumption may be overcome, but G.S. 15A-533(g) requires a judge to find, before releasing a defendant, "that there is a reasonable assurance that the [defendant] will appear and release does not pose an unreasonable risk of harm to the community."

c. Certain Firearm Offenses

G.S. 15A-533(f)[5] establishes a rebuttable presumption against a defendant's release for certain firearm offenses. The presumption applies if a judicial official (1) finds that there is reasonable cause to believe that the defendant committed a felony or Class A1 misdemeanor offense involving the illegal use, possession, or discharge of a firearm and (2) makes **at least one** of the following findings:

- The offense was committed while the person was on pretrial release for another felony or Class A1 misdemeanor offense involving the illegal use, possession, or discharge of a firearm.
- The defendant has previously been convicted of a felony or Class A1 misdemeanor offense involving the illegal use, possession, or discharge of a firearm and not more than five years have elapsed since the date of conviction or the defendant's release for the offense, whichever is later.

4. This provision took effect on December 1, 2008, and was enacted by S.L. 2008-214.
5. This provision took effect on December 1, 2013, and was enacted by S.L. 2013-298.

If the relevant findings are made at a defendant's initial appearance, then a magistrate may not authorize the defendant's release from custody. Under G.S. 15A-533(g), only a district or superior court judge may find that the presumption is overcome and set conditions of release. There is no specific statutory language instructing judicial officials as to how the presumption may be overcome, but G.S. 15A-533(g) requires a judge to find, before releasing a defendant, "that there is a reasonable assurance that the [defendant] will appear and release does not pose an unreasonable risk of harm to the community."

d. Certain Methamphetamine Offenses

G.S. 15A-534.6[6] establishes a rebuttable presumption against a defendant's release if the State shows, by clear and convincing evidence, that

- the defendant was arrested for a violation of G.S. 90-95(b)(1a) (manufacture of methamphetamine) or 90-95(d1)(2)b. (possession of precursor chemical knowing that it will be used to manufacture methamphetamine) and
- the defendant is dependent on or has a pattern of regular illegal use of methamphetamine and the violation was committed or attempted to maintain or facilitate the defendant's dependence or use.

There is no specific statutory language instructing judicial officials as to how the presumption may be rebutted. The standard set forth in G.S. 15A-533(g) does not expressly apply to the rebuttable presumption for methamphetamine offenses. However, judicial officials might consider using the provision as a guidepost in finding a presumption overcome in those cases.

2. Presumption Triggered by the Offense Only

G.S. 15A-534(b1)[7] establishes a rebuttable presumption against release for any defendant charged with a violent offense as defined by G.S. 15A-531(9). Violent offenses include

- "[a]ny Class A through G felony that includes assault, the use of physical force against a person, or the threat of physical force against a person, as an essential element of the offense"[;][8]
- any felony offense requiring registration as a sex offender, "whether or not the person is currently required to register"[;][9]
- "an offense under G.S. 14-17, and any other offense listed in G.S. 15A-533(b)"[;][10]
- "an offense under G.S. 14-18.4, 14-34.1, 14-51, 14-54(a1), 14-202.1, 14-277.3A, or 14-415.1, or an offense under G.S. 90-95(h)(4c) that involves fentanyl"[;][11] and
- attempts to commit any offense described in G.S. 15A-531(9).[12]

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6. Originally codified as G.S. 15A-736.1, this provision took effect on January 15, 2006, and was enacted by S.L. 2005-434.
7. This provision took effect on December 1, 2025, and was enacted by S.L. 2025-93.
8. G.S. 15A-531(9)a.
9. *Id.* § (9)b.
10. *Id.* § (9)c.
11. *Id.* § (9)d.
12. *Id.* § (9)e.

Unlike the presumptions that apply in connection with the offenses mentioned in the sections above, this rebuttable presumption applies based solely on the charging of the offense—a judicial official does not need to make any additional findings to trigger the presumption.

The provision governing violent offenses does not include language that limits the authority to set release conditions to judges. In the absence of limiting language, it appears that magistrates and clerks have authority to set conditions if the presumption is overcome. The standard set forth in G.S. 15A-533(g) does not expressly apply to the rebuttable presumption for violent offenses. However, judicial officials might consider using the provision as a guidepost in finding a presumption overcome in those cases.

G.S. 15A-533(b) establishes a rebuttable presumption against a defendant's release for the offenses listed in that subsection.[13] The list of offenses is a subset of the "violent offense" category as described above, so the same rules apply. The only exception is that a magistrate is not able to set conditions of release for these offenses because they are subject to the preexisting limiting rule that only a judge may do so.[14]

B. No Clear Standards for Finding a Presumption Overcome

As mentioned above, the North Carolina statutes do not include language instructing judicial officials as to how a presumption against pretrial release may be overcome, short of the requirement in G.S. 15A-533(g) for a judge to find, prior to releasing a defendant, "that there is a reasonable assurance that the [defendant] will appear and release does not pose an unreasonable risk of harm to the community." The statutes do not offer a clear standard for rebuttal, and they do not set forth facts that have been deemed sufficient for rebuttal. There also does not exist any North Carolina case law that would help to fill in these gaps.

II. Other Jurisdictions

A. The Federal Scheme

Federal courts, in applying the federal Bail Reform Act of 1984,[15] have repeatedly considered arguments regarding presumptions against pretrial release, including applicable burdens of proof and appropriate factors to consider in finding a presumption overcome. The federal statutory scheme may offer some guidance in conducting a rebuttable presumption analysis under North Carolina law.

1. Bail Reform Act

The Bail Reform Act of 1984 is the federal statute governing pretrial release or detention of any person charged with a federal crime. The default position of the law is that a defendant should be

13. The offenses are commonly known as the "Pretrial Integrity Act" felonies. The Pretrial Integrity Act, enacted under S.L. 2023-75, took effect on October 1, 2023. The law amended G.S. 15A-533(b) to expand the list of offenses for which only a judge may consider conditions of pretrial release. Previously, this provision applied only to first-degree murder cases. It now applies to several other felonies, including kidnapping, rape, sexual offenses, and robbery.

14. G.S. 15A-533(b) ("A judge shall determine in the judge's discretion whether a defendant charged with any of the following crimes may be released before trial[.]").

15. 18 U.S.C. §§ 3141–3150.

released pending trial.[16] However, that position is modified for certain offenses for which the Act creates a rebuttable presumption. Specifically, when a "judicial officer finds that there is probable cause to believe" that a defendant committed one of the crimes listed in Section 3142(e)(3) of the Act (including certain serious drug, gun, and terrorism crimes), there is a presumption in favor of detention: "Subject to rebuttal by the person, it shall be presumed that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community[.]"[17]

2. Rebutting the Presumption

a. Burdens of Proof

i. Defendant

A defendant who is charged with an offense that triggers a rebuttable presumption against pretrial release has the burden of production to rebut that presumption.[18] The defendant meets a burden of production by coming forward with some evidence that he or she does not pose a danger to the community or a risk of flight.[19]

ii. Government

In a case involving a rebuttable presumption, the government retains the ultimate burden of persuasion of showing—by clear and convincing evidence—that no condition or set of conditions of pretrial release will ensure the safety of the community.[20] The government also retains the ultimate burden of persuasion of showing—by the lesser standard of a preponderance of the evidence—that no condition or set of conditions will ensure the appearance of the defendant.[21]

b. Evidence and Factors to Consider

As mentioned above, a defendant who is facing a rebuttable presumption against release bears a limited burden of production to rebut that presumption by coming forward with evidence that he or she does not pose a danger to the community or a risk of flight.[22] For example, a defendant might argue that he has never missed a court date or that he has substantial ties to the community.[23] One circuit court has suggested, however, that a defendant's failure to offer rebuttal evidence is not, by itself, an adequate reason to order detention.[24] Rather, in a court's

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16. United States v. Stone, 608 F.3d 939, 945 (6th Cir. 2010).

17. 18 U.S.C. § 3142(e)(3).

18. *See* United States v. Portes, 786 F.2d 758, 764 (7th Cir. 1985); United States v. Jessup, 757 F.2d 378, 381 (1st Cir. 1985); United States v. Chimurenga, 760 F.2d 400, 404 (2d Cir. 1985); United States v. Fortna, 769 F.2d 243, 250 (5th Cir. 1985).

19. *See Stone*, 608 F.3d at 945 (citing United States v. Mercedes, 254 F.3d 433, 436 (2d Cir. 2001); United States v. Stricklin, 932 F.2d 1353, 1355 (10th Cir. 1991); and United States v. Rodriguez, 950 F.2d 85, 88 (2d Cir. 1991)).

20. *Mercedes*, 254 F.3d at 436 (citing *Rodriguez*, 950 F.2d at 88).

21. *Id.* (citing United States v. Martir, 782 F.2d 1141, 1144 (2d Cir. 1986), and *Chimurenga*, 760 F.2d at 405).

22. *Id.*

23. *See Martir*, 782 F.2d at 1146 (finding that the defendant rebutted a presumption against flight "by coming forward with information concerning his record of attendance in the state criminal proceeding, family ties and other matters").

24. *See* United States v. Wilks, 15 F.4th 842, 846–47 (7th Cir. 2021) (citing United States v. Dominguez, 783 F.2d 702, 706–07 (7th Cir. 1986)).

release-or-detain determination, the presumption is considered together with other relevant statutory factors. Those factors include

- the nature and circumstances of the offense charged, including whether the offense is a crime of violence, a sex trafficking offense, or a federal crime of terrorism or whether it involves a minor victim or a controlled substance, firearm, explosive, or destructive device;
- the weight of the evidence against the defendant;
- the history and characteristics of the defendant, including
  - his or her character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings and
  - whether, at the time of the current offense or arrest, the defendant was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under federal, state, or local law; and
- the nature and seriousness of the danger to any person or to the community that would be posed by the defendant's release.[25]

Any evidence favorable to a defendant that relates to any of the statutory factors can affect the operation of one or both prongs of the presumption (dangerousness and flight risk), including evidence of a defendant's marital, family, and employment status; ties to and role in the community; and clean criminal record.[26]

Even when a defendant has met his or her burden of production relating to danger and flight, the presumption favoring detention does not disappear entirely.[27] In other words, a defendant who proffers evidence against flight risk and danger is not automatically entitled to conditions of release. Rather, the presumption remains a factor to be considered among the other statutory factors listed above in determining whether there exists a condition of release that would reasonably assure the defendant's appearance and the safety of the community.[28]

B. New Jersey

New Jersey has perhaps one of the most robust state-level schemes for rebuttable presumptions of detention. There, a rebuttable presumption of detention exists in only two circumstances: (1) when a court finds probable cause to believe that a defendant has committed murder, or (2) when a court finds probable cause to believe that a defendant has committed a crime that carries a sentence of life imprisonment.[29] The State may also seek to detain a defendant charged with certain other offenses. In either circumstance, the relevant New Jersey statutes outline various procedural safeguards that apply.

First, a defendant can rebut the presumption of detention by a preponderance of the evidence.[30] The prosecutor may then try to establish that detention is justified. A court must

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25. *See* 18 U.S.C. § 3142(g).

26. *See Dominguez*, 783 F.2d at 707.

27. *Mercedes*, 254 F.3d at 436; *Dominguez*, 783 F.2d at 707; United States v. King, 849 F.2d 485, 488 (11th Cir. 1988).

28. *Mercedes*, 254 F.3d at 436; United States v. Portes, 786 F.2d 758, 764 (7th Cir. 1985).

29. *See* State v. Mercedes, 183 A.3d 914, 921 (N.J. 2018).

30. N.J. Stat. Ann. § 2A:162-19(e)(2).

hold a hearing on a motion for pretrial detention no later than the defendant's first appearance or three days from the date of the motion.[31] The court may grant a continuance of three days on the prosecutor's motion, or five days on the defendant's motion.[32] The defendant is held in jail pending the hearing unless the defendant had previously satisfied any conditions of release that were authorized in the case.[33]

At a detention hearing, a defendant has the right to counsel or, if indigent, to court-appointed counsel.[34] The defendant also has the right "to testify, to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise."[35] If a grand jury has not returned an indictment at the time of a detention hearing, "the prosecutor shall establish probable cause that the eligible defendant committed the predicate offense."[36] To decide whether detention is warranted—that is, whether any combination of conditions will reasonably guard against the risk of flight, danger, or obstruction—a court may (but is not required to) consider a number of factors, including the following: the nature of the offense, the weight of the evidence, the defendant's history and characteristics, the nature of the risk of danger and obstruction the defendant poses, and the recommendation of release offered by the state pretrial services program.[37]

III. North Carolina Statutes Through the Federal Lens

A. The Framework

While federal case law interpreting the Bail Reform Act informs some of the procedures required for the detention of a defendant subject to a rebuttable presumption against release, the North Carolina appellate courts have not yet adopted the federal framework. One readily identifiable challenge in doing so is that North Carolina pretrial proceedings are not structured the same way as pretrial proceedings in federal court.

1. Burdens of Proof

While not bound by federal case law, the North Carolina appellate courts might consider adopting the burdens of proof established by the federal courts in cases involving rebuttable presumptions. In doing so, a defendant in North Carolina who is charged with an offense that triggers a rebuttable presumption against pretrial release would have the burden of production to rebut that presumption and need only to come forward with "*some credible evidence* forming a basis for his contention that he will appear and will not pose a threat to the community."[38]

In the federal realm, the government retains (1) the burden of persuasion to show by **clear and convincing evidence** that no condition or set of conditions of pretrial release will ensure the safety of the community and (2) the burden of persuasion to show by a **preponderance of**

31. *Id.* § (d)(1).
32. *Id.*
33. *Id.* § (d)(2).
34. *Id.* § (e)(1).
35. *Id.*
36. *Id.* § (e)(2).
37. *See* State v. Ingram, 165 A.3d 797, 803 (2017) (citing N.J. Stat. Ann. § 2A:162–20(a)–(f)).
38. United States v. Carbone, 793 F.2d 559, 560 (3d Cir. 1986) (emphasis added).

the evidence that no condition or set of conditions will ensure the appearance of the defendant. North Carolina appellate courts might choose to apply the two different standards of proof or to adopt one legal standard to apply to both prongs (dangerousness and flight risk) of their release-or-detain determinations. In taking the latter approach, a court might consider the position taken by federal courts that "congressional silence means acquiescence in the traditional preponderance of the evidence standard."[39]

2. Evidence and Factors to Consider

As previously discussed, whether or not rebuttable evidence has been tendered by a defendant, a presumption is usually considered together with other relevant factors in a determination as to whether the defendant should be released or detained. Those factors, found in G.S. 15A-534(c), are as follows:

- criminal history;
- the nature and circumstances of the offense charged;
- the weight of the evidence against the defendant;
- the defendant's family ties, employment, financial resources, character, housing situation, and mental condition;
- whether the defendant is intoxicated to such a degree that he or she would be endangered by being released without supervision;
- the length of the defendant's residence in the community;
- the defendant's history of flight to avoid prosecution or failure to appear at court proceedings; and
- any other evidence relevant to the issue of pretrial release.

These factors are similar to those contemplated by the Bail Reform Act, which federal courts have deemed necessary to consider alongside any presumption against release.[40]

Even when a defendant has met his or her burden of production by presenting sufficient evidence, the presumption favoring detention does not disappear entirely. In other words, a defendant who proffers evidence against flight risk and danger is not automatically entitled to conditions of release. Rather, the presumption remains a factor to be considered among the other statutory factors listed above in determining whether there exists a condition of release that would reasonably ensure the defendant's appearance and the safety of the community.[41] Weight given to the relevant factors is within the discretion of judicial officials, and there is no formula or case law to suggest that some factors are to be weighed differently than others.[42]

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39. United States v. Portes, 786 F.2d 758, 765 (7th Cir. 1985); *see also* United States v. Orta, 760 F.2d 887, 891 n.20 (8th Cir. 1985) (asserting in a footnote that "[t]he statute does not expressly state the appropriate evidentiary standard necessary to support a finding of propensity for flight, indicating the preponderance of evidence standard usually applied in pretrial proceedings is appropriate" and citing *United States v. Freitas*, 602 F. Supp. 1283 (N.D. Cal. 1985)).

40. *See* 18 U.S.C. § 3142(g).

41. United States v. Mercedes, 254 F.3d 433, 436 (2d Cir. 2001); *Portes*, 786 F.2d at 764.

42. *See generally* United States v. Stone, 608 F.3d 939 (6th Cir. 2010) (conducting an individualized analysis of relevant factors for five defendants).

B. Procedural Considerations

In Bail Reform Act cases, the appearance before the judicial official usually involves the defendant, the government, and the proffer of evidence,[43] making the appearance the type of adversarial hearing contemplated by the statute. In North Carolina, however, neither an initial appearance nor a first appearance involves this type of adversarial hearing because, normally, counsel has not yet been appointed at these stages.[44] Therefore, the mechanics of rebutting an applicable presumption against release may look different in our state courts.

1. Rebuttal Evidence

As a threshold matter, there may be some concern about an unrepresented defendant's ability to properly advocate for himself or herself at this stage. A defendant subject to a rebuttable presumption against release is unlikely to be familiar with applicable burdens of proof or with the need to offer specific information that would be sufficient to rebut the presumption. To such a defendant, it may appear as though only two options exist: (1) invoke the right to remain silent at the risk of remaining in custody or (2) advocate for themself at the risk of divulging incriminating information. Though federal courts have not expressly addressed this dilemma, one circuit court has suggested that a defendant's failure to offer rebuttal evidence is not, by itself, an adequate reason to order detention.[45]

There is a significant distinction between the presumption provision of the federal Bail Reform Act and the presumption provision found in the North Carolina statutes. Under federal law, the presumption is "subject to rebuttal by the person."[46] North Carolina rebuttable presumption statutes do not include the same language, stating only that "there shall be a rebuttable presumption."[47] This construction suggests that it is not necessary for a defendant to proffer rebuttal evidence for a presumption to be overcome, especially where that evidence is available by other means. This interpretation may reduce the risk of an unrepresented defendant inadvertently divulging incriminating information.

2. Initial Appearance

Magistrates typically glean information related to some of the G.S. 15A-534(c) factors by making an inquiry of the defendant,[48] asking about matters such as the defendant's family ties, employment, financial resources, housing situation, and length of residence in the community. Consequently, it is arguably appropriate for a magistrate to determine that elicited responses to such questions suffice in meeting the burden of production, even if a defendant does not offer this information on his or her own initiative. Additionally, it can be argued that some rebuttal evidence is implicitly proffered on the basis of available documents.[49] For example, a criminal history report could include favorable information related to a defendant's history

43. 18 U.S.C. § 3142(f).
44. *See generally* G.S. 15A-603.
45. United States v. Wilks, 15 F.4th 842, 846–47 (7th Cir. 2021) (citing United States v. Dominguez, 783 F.2d 702, 706–07 (7th Cir. 1986)).
46. 18 U.S.C. § 3142(e)(3).
47. *See* G.S. 15A-533(b), (d), (e), (f); *id.* § 534(b1).
48. *See* State v. Labinski, 188 N.C. App. 120, 123 (2008); State v. Haas, 131 N.C. App. 113, 117 (1998).
49. *See* United States v. Vasconcellos, 519 F. Supp. 2d 311, 316 (N.D.N.Y. 2007) ("Realistically, such 'evidence' is actually or implicitly proffered by defense counsel on the basis of information gleaned from the Pretrial Services Report or charging instrument.").

of flight to avoid prosecution or his or her failure to appear at court proceedings. Thus, it would be unnecessary to require a defendant to argue that he or she has never missed a court date. Regardless of the details elicited from a defendant and gleaned from a criminal history report, adoption of the federal approach would mean that the magistrate remains obligated to consider the information alongside the other statutory factors, which may include unfavorable information from the criminal history report and from the arresting officer.

In federal cases, once a defendant has offered evidence to rebut the presumption against release, the government bears the burden of persuasion of showing that the defendant presents a danger to the community and a risk of flight. In North Carolina, the State is not a party to initial appearance proceedings, though the officer who arrested the defendant provides the magistrate with relevant evidence about the nature of the charged offense or characteristics of the arrestee that may support detention.

There is an argument that a defendant who produces rebuttal evidence should be released since there is no State representative to challenge the proffer at this stage. However, the presumption may still need to be weighed against the other statutory factors listed in G.S. 15A-534(c). The rebuttable presumption applicable to violent offenses (except for those listed in G.S. 15A-533(b)) allows a magistrate to consider these factors. If, taken as a whole, those factors weigh in favor of detention and the magistrate finds that no conditions would assure the defendant's appearance or the safety of the community, then the magistrate may lawfully order detention without imposing any conditions of release. The chart in Appendix A delineates the possible outcomes of a rebuttable presumption analysis.

3. *First Appearance*

At a defendant's first appearance, the judge must review or determine the defendant's eligibility for release.[50] In some circumstances, the judge might be considering release for the first time (i.e., if the offense is subject to G.S. 15A-533(b), (d), (e), or (f)). In other circumstances, the judge might only be reviewing the denial of bail as imposed by a magistrate. In either scenario, if the federal approach applies, the defendant still bears the burden of production to rebut the presumption against release.

Because a defendant is unlikely to have counsel at the first appearance (unless the defendant has retained counsel), there again arises the concern about an unrepresented defendant's ability to properly advocate for himself or herself at this stage. However, the judge conducting the first appearance retains the ability to inquire into the relevant factors in a way that might elicit information that is sufficient for the defendant to meet his or her burden of production. Applying the federal case law, regardless of whether or not the defendant produces rebuttal evidence, the judge remains obligated to consider the presumption alongside the other statutory factors to be weighed in deciding whether a defendant should be detained.[51]

At the first appearance, the State is usually present to offer evidence that the defendant presents a danger to the community and a risk of flight. Even if the State is able to demonstrate that the defendant is a flight risk or presents a danger to the community, the burden does not stop there. The State would also need to show that there are no set of pretrial release conditions

50. G.S. 15A-605(3).
51. United States v. Martir, 782 F.2d 1141, 1144 (2d Cir. 1986).

that would be appropriate to protect against that danger or risk of flight.[52] Federal case law suggests that if the State does not carry its burden to justify detention, the judge must order the defendant's release pending trial, subject to the least restrictive combination of conditions that will reasonably assure the defendant's appearance and the safety of the community.[53] The chart in Appendix A delineates the possible outcomes of a rebuttable presumption analysis.

4. Mechanisms for Review

The North Carolina General Statutes allow both a defendant and the State to move for a modification of release conditions. A defendant who has been detained, or who objects to the conditions required for his or her release that were imposed or allowed to stand by order of a district court judge, may apply in writing to a superior court judge to modify the order.[54] Alternatively, a defendant may petition the superior court for a writ of habeas corpus.[55] A prosecutor may at any time apply to an appropriate district court judge or superior court judge for modification or revocation of an order of release.[56]

5. Constitutionality of the Statutes

The setting of bail may be delayed or denied only if authorized by statute and within constitutional limits.[57] The best guidance on the constitutional parameters of a preventative detention scheme comes from the United States Supreme Court's decision in *United States v. Salerno*, in which the constitutionality of the Bail Reform Act was upheld.[58] Although the *Salerno* decision did not fully define the constitutional parameters of a preventative detention scheme, it held that the federal statute "fully comports with constitutional requirements."[59]

Several North Carolina statutes authorize some degree of pretrial preventative detention. Given the procedures and parameters discussed in *Salerno*, it is unclear whether the rebuttable presumption statutes, as written, are constitutional. The statutes do not offer guidance on when judicial officials can deny pretrial release and when they cannot, and they do not offer all the same procedural protections as the Bail Reform Act. The North Carolina statutes also do not offer the kind of prompt adversarial hearing contemplated by the Act, and there could be significant periods of time before a defendant in the state has a subsequent bond hearing with

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52. *See* United States v. Berrios-Berrios, 791 F.2d 246, 250 (2d Cir. 1986) ("Before preventive detention may be ordered . . . the court is obliged to determine both whether the defendant is likely to flee the jurisdiction if released, and whether any conditions of release will be reasonably certain to guard against this propensity to flee."); United States v. Hir, 517 F.3d 1081, 1092 (9th Cir. 2008) ("Even where a defendant poses a danger, he must still be released if there is a 'condition or combination of conditions [that] will reasonably assure . . . the safety of any other person and the community.'")

53. 18 U.S.C. § 3142(c)(1)(B). United States v. Wilks, 15 F.4th 842, 846–47 (7th Cir. 2021).

54. G.S. 15A-538.

55. *See id.* § 547 (pretrial release statutes do not abridge right of habeas corpus). A defendant may also seek appellate review of a superior court's pretrial release order, but such relief may be difficult to obtain. *See generally* G.S. 7A-32 (setting out types of remedial writs); *In re* Reddy, 16 N.C. App. 520 (1972) (treating motion to review bond in appellate court as petition for writ of habeas corpus).

56. G.S. 15A-539.

57. *See* United States v. Salerno, 481 U.S. 739 (1987) (discussing circumstances in which preventative detention, without bond, is permissible).

58. *Id.*

59. *Id.* at 741.

counsel present. While the lack of detail is not dispositive on the issue of constitutionality, it can be argued that the statutes deviate substantially from the Act.

On the other hand, the state statutes arguably may comport with *Salerno* because they permit judicial officials to make individualized determinations about a defendant's right to pretrial release, as opposed to requiring officials to impose an automatic detention for defendants charged with qualifying crimes. While our statutes do not track every issue addressed in *Salerno*, they may withstand a constitutional challenge because, among other factors, the statutes (1) serve a regulatory purpose in preventing danger to the community, rather than a penal purpose; (2) offer a prompt detention hearing—though not an adversarial one—because defendants are entitled to a first appearance within seventy-two hours of arrest; and (3) are limited in their application to only a set list of offenses.[60]

IV. Challenging Untimely Proceedings

A. In General

A defendant who is detained pursuant to a rebuttable presumption remains entitled to a timely first appearance in accordance with G.S. 15A-601. These in-custody defendants must be brought before a district court judge in the district in which the crime is alleged to have been committed within seventy-two hours of arrest or at the first regular session of district court in the district, whichever occurs first.[61] If the courthouse is closed for longer than seventy-two hours (for example, on holiday weekends), the defendant's first appearance before a district court judge must be held within ninety-six hours after arrest.

The failure to hold a timely first appearance and consider conditions of release, as required by G.S. 15A-601, could violate due process in the same way that a failure to meet the specific time limits in domestic violence cases has historically been found by North Carolina courts to violate due process.[62] Whether our courts would extend this holding beyond the domestic violence context is uncertain—but, based on the cases discussed below, it is unlikely. Also uncertain is whether a delay in a defendant's first appearance for offenses subject to rebuttable presumptions, at which a judge might ultimately deny pretrial release altogether, is comparable to cases in which a defendant has the right to pretrial release conditions. In any event, these defendants should be brought before a judge as soon as practicable to effectuate and reduce the risk of violating their rights.

1. United States v. Montalvo-Murillo

The U.S. Supreme Court resolved at least one of the questions posed in the text immediately above in *United States v. Montalvo-Murillo*,[63] in which the Court held that a failure to comply with the Bail Reform Act's prompt hearing provision does not require the release of a defendant

60. For a more detailed discussion of these parameters, see Jessica Smith, *Bail Reform in North Carolina: Pretrial Preventative Detention*, N.C. Crim. L. Blog (Apr. 17, 2019), https://nccriminallaw.sog.unc.edu/2019/04/17/bail-reform-in-north-carolina-pretrial-preventative-detention/.

61. G.S. 15A-601(c) (first appearances).

62. *See* State v. Thompson, 349 N.C. 483, 492 (1998).

63. 495 U.S. 711, 713 (1990).

who should otherwise be detained.[64] In this case, defendant Montalvo-Murillo was held in pretrial custody on federal criminal charges. His detention hearing was not held until thirteen days after his initial arrest because of the need to transfer him, the passage of two weekends, a federal holiday, and the fact that government attorneys were unprepared. At his detention hearing, the federal district court determined that the delays violated the timeliness-of-proceedings requirement in the Bail Reform Act. To remedy the untimeliness of the pretrial proceedings, the district court ordered that the defendant be released. Montalvo-Murillo fled upon his release. The U.S. Court of Appeals for the Tenth Circuit affirmed the district court's ruling and held that the government's failure to uphold the Act's directions for a timely hearing justified Montalvo-Murillo's release.

On review, the U.S. Supreme Court concluded that automatic release contravenes the statutory purpose of providing fair bail procedures while protecting the public's safety and assuring a defendant's appearance at trial. The Court further explained that

> [a]n order of release in the face of the Government's ability to prove at once that detention is required by the law has neither causal nor proportional relation to any harm caused by the delay in holding the hearing. When a hearing is held, a defendant subject to detention already will have suffered whatever inconvenience and uncertainty a timely hearing would have spared him. Release would not restore these benefits to him.[65]

Thus, once the government discovers that the relevant time limits have expired, it may ask for a prompt detention hearing and make its case to detain. Here, detention was harmless because Montalvo-Murillo, as an individual likely to flee, would have been detained if his hearing had been held upon his first appearance rather than a few days later. The Court, however, declined to consider potential remedies available to a person who is detained beyond the statutory limit and is later found eligible for release.

2. *State v. Tucker*

North Carolina courts have been reluctant to order dismissal for delays in setting pretrial release conditions without a showing of prejudice by the defendant.[66] However, our statutes provide that a trial court must dismiss a charge against a defendant if the court determines that the "defendant's constitutional rights have been flagrantly violated and there is such irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution."[67]

A defendant can demonstrate prejudice by showing that he or she would have been released earlier had he or she received a pretrial hearing. In *State v. Tucker*,[68] the defendant was arrested and indicted on several charges, resulting in a $250,000 bond. The defendant remained in custody for six months on a kidnapping charge subject to the release provisions set out in G.S. 15A-534.1 without having a pretrial release hearing before a judge. The defendant filed a motion to dismiss his kidnapping charge, arguing that G.S. 15A-534.1 required dismissal. The

64. *Id.*
65. *Id.* at 721.
66. *See*, *e.g.*, State v. Pruitt, 42 N.C. App. 240 (1979) (disapproving of the failure to hold a timely first appearance for a defendant charged with a felony and incarcerated for almost a month, but finding no prejudice by the denial of his first appearance rights).
67. G.S. 15A-954(a)(4) (grounds for dismissal).
68. 291 N.C. App. 379 (2023).

kidnapping charge was consolidated with the other charges for which he was indicted into one set of pretrial release conditions and a combined bond of $250,000. The defendant did not post bond and remained in custody. On appeal, the North Carolina Court of Appeals explained that the State's inadvertent failure to produce the defendant for his pretrial release hearing did not excuse the State. Rather, the absence of a flagrant constitutional violation was the relevant factor in the court's ultimate determination. The court noted that the defendant did not post bond after his initial arrest, and "even if the State had held a timely pretrial release hearing on the kidnapping charge, the defendant would not have been released."[69] As a result, the court found that the defendant could not show irreparable prejudice to the preparation of his case.

3. *Case for Dismissal*

Dismissal of charges is a drastic remedy—one our courts may be unwilling to extend without a showing of prejudice. Even if the courts are willing to order dismissal, defendants held pursuant to a rebuttable presumption who do not have an appearance or who have a delayed appearance before a judge may have to show that they would have been released earlier had they received a timely pretrial hearing. This showing may be difficult to make in cases in which the defendant is ultimately subject to an extremely high bond or is ultimately not afforded bond.[70]

V. Conclusion

There has yet to be any North Carolina case law surrounding rebuttable presumptions against release, though the most recently enacted statute could be a catalyst in charting a path forward in the appellate courts. Only one jurisdiction, the District of Columbia, has expressly adopted the federal framework,[71] and New Jersey has repeatedly drawn parallels to case law surrounding the Bail Reform Act in interpreting its own statutes.[72] Even though North Carolina statutes do not mirror exactly the provisions of the Bail Reform Act, application of the federal framework might (1) give state judicial officials a better sense of what is required when presiding over cases involving rebuttable presumptions, (2) provide defendants with greater procedural protections, and (3) to the extent that it clarifies when some defendants subject to a rebuttable presumption may be released, help to reduce the jail capacity issues that the state's new pretrial release laws have exacerbated.[73]

69. *Id.* at 387–88.

70. *See*, *e.g.*, *Tucker*, 291 N.C. App. 379; *Montalvo-Murillo*, 495 U.S. 711.

71. *See* Johnson v. United States, 302 A.3d 499 (D.C. 2023) (holding that *United States v. Jessup*, 757 F.2d 378 (1st Cir. 1985) (*see supra* 18), applies to the rebuttable presumption of detention under the local statute).

72. *See* State v. Pinkston, 233 N.J. 495, 187 A.3d 113 (2018).

73. *See* Heidi Kirk, *Wake County Jail Exceeds Capacity, Experts Worry Iryna's Law Could Worsen the Issue*, WRAL.com (Apr. 21, 2026), https://www.wral.com/news/local/wake-county-jail-exceeds-capacity-irynas-law-impact-april-2026/; Katy Solt, *Iryna's Law Leading to Overcrowding at Jails in Charlotte Region*, WBTV.com (Apr. 30, 2026), https://www.wbtv.com/2026/04/30/irynas-law-leading-overcrowding-jails-charlotte-region/.

Appendix A. Possible Outcomes Following a Rebuttable Presumption Analysis

Determination 1	Determination 2	Course of Action
The defendant does not present a danger to the community and is not a flight risk.	[N/A]	Authorize the least restrictive release conditions (or combination of release conditions) permitted by statute.
The defendant is a flight risk but does not present a danger to the community.	There are release conditions (or a combination of release conditions) that will assure the defendant's appearance.	Authorize the least restrictive release conditions (or combination of release conditions) permitted by statute.
	There are no release conditions (or combination of release conditions) that will assure the defendant's appearance.	Deny release and order detention.
The defendant presents a danger to the community but is not a flight risk.	There are release conditions (or a combination of release conditions) that will assure the safety of the community.	Authorize the least restrictive release conditions (or combination of release conditions) permitted by statute.
	There are no release conditions (or combination of release conditions) that will assure the safety of the community.	Deny release and order detention.
The defendant presents a danger to the community and is a flight risk.	There are release conditions (or a combination of release conditions) that will assure the safety of the community and the defendant's appearance.	Authorize the least restrictive release conditions (or combination of release conditions) permitted by statute.
	There are no release conditions (or combination of release conditions) that will assure the safety of the community and the defendant's appearance.	Deny release and order detention.