



Indigent Criminal Defense and Commonwealth's Attorneys

Senate Finance and Appropriations
Committee Briefing

Study resolution

- Determine the adequacy of legal representation provided to indigent defendants
- Determine how many commonwealth's attorneys, court-appointed attorneys, and public defenders the state needs
- Assess court-appointed attorney, public defender, and commonwealth's attorney compensation

Commission study resolution approved November 7, 2022.

Adequate prosecution & defense essential for an adversarial legal system & to uphold constitution

- Vigorous prosecution and defense, overseen by an impartial judge, will result in fair and just outcomes across criminal cases
- System needs enough prosecutors and defense attorneys with sufficient time and ability
- State has constitutional obligation to provide attorneys to indigent criminal defendants
- Indigent defendants are entitled to effective representation by their state-provided attorney

State spent over \$200 million on attorneys for criminal prosecution & indigent defense in FY23

- Virginia has a hybrid system to provide attorneys to indigent criminal defendants
 - 430 public defenders across 28 offices
 - 2,000 private attorneys appointed by the court
 - state spent \$127M on indigent defense in FY23
- Virginia has 120 commonwealth's attorney offices
 - act as the state's prosecutors
 - received \$84M from the state in FY23

*Public defenders received an additional \$3.8M in local funds to supplement state salaries (FY23); Commonwealth's attorneys received more than \$50M in local funding (FY23).

In this presentation

Indigent defense case outcomes

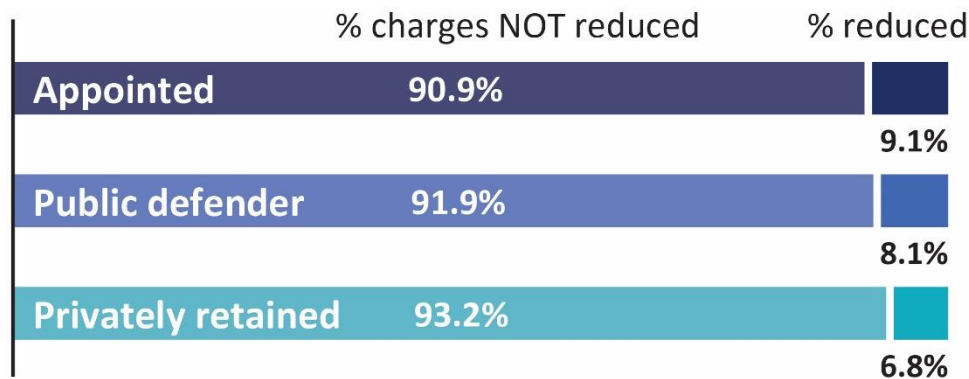
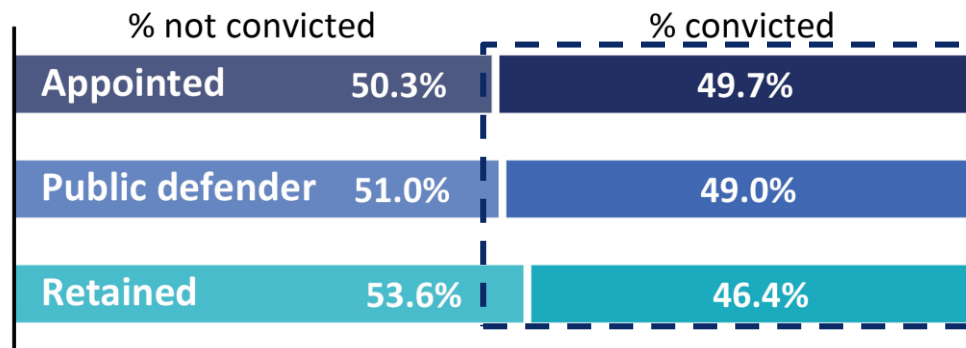
Commonwealth's attorney staffing

Court-appointed attorneys

Public defenders

Attorney salaries

Little or no systemic differences in outcomes by attorney type during last 10 years



Analysis is based on outcomes by criminal charge; some cases have more than one charge. FY13–FY22 OES circuit court data and Fairfax circuit court data. 4.4 million criminal charges included in analysis.

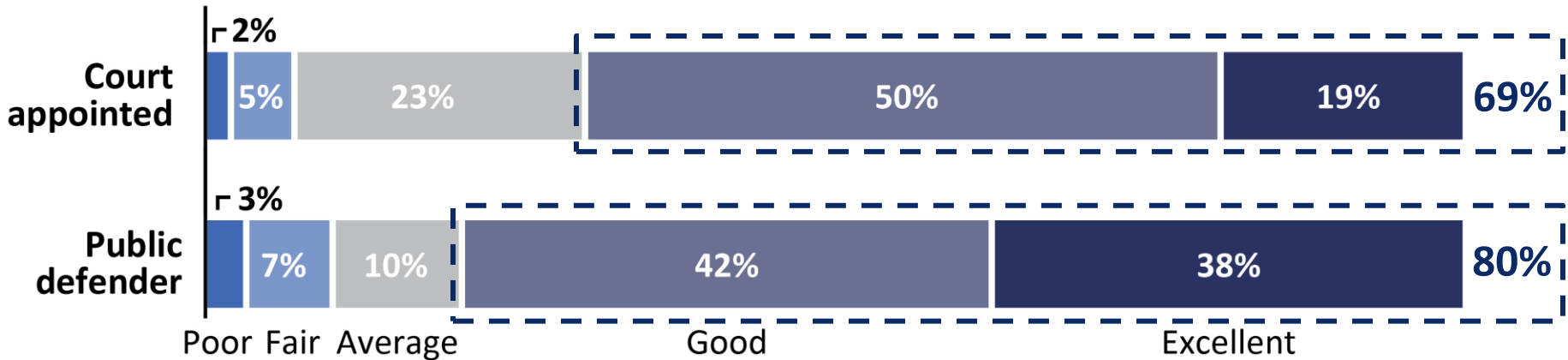
No quantifiable evidence attorney type affects how cases were resolved during last 10 years

| | % plea | % trial |
|------------------------|--------------|--------------|
| Appointed | 85.9% | 14.1% |
| Public defender | 86.5% | 13.5% |
| Retained | 85.9% | 14.1% |

JLARC analysis of FY13–FY22 OES circuit court data, Fairfax circuit court data, and Virginia Criminal Sentencing Commission sentencing guidelines data.

Judges: a majority of public defenders and court-appointed attorneys are “good” or “excellent”

OVERALL: QUALITY OF REPRESENTATION



JLARC survey of judges, summer 2023. 297 responses; 67% response rate.

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Commonwealth's attorneys offices receive state funding based on “staffing standards”

- Compensation Board determines staffing allocations and funding for each commonwealth's attorney office
- In 2023, the Compensation Board and the National Center for State Courts undertook an effort to better calculate workload & staffing needs for each office
- Resulted in new “staffing standards” that will be used by the board for budget requests

Current commonwealth's attorney staffing allocation is sufficient to handle 87% of workload

- State would need to allocate 112 additional attorney positions to meet statewide felony prosecution workload
 - 15 percent increase to the 728 state-funded attorney positions currently allocated
 - estimated to cost \$9.2 million annually
- Filling existing commonwealth's attorney vacancies (6.5%) would not be enough to fully meet workload demand
 - would address less than one-half of unmet felony workload
 - nearly three-quarters of offices have no vacancies to fill but still have unmet workload

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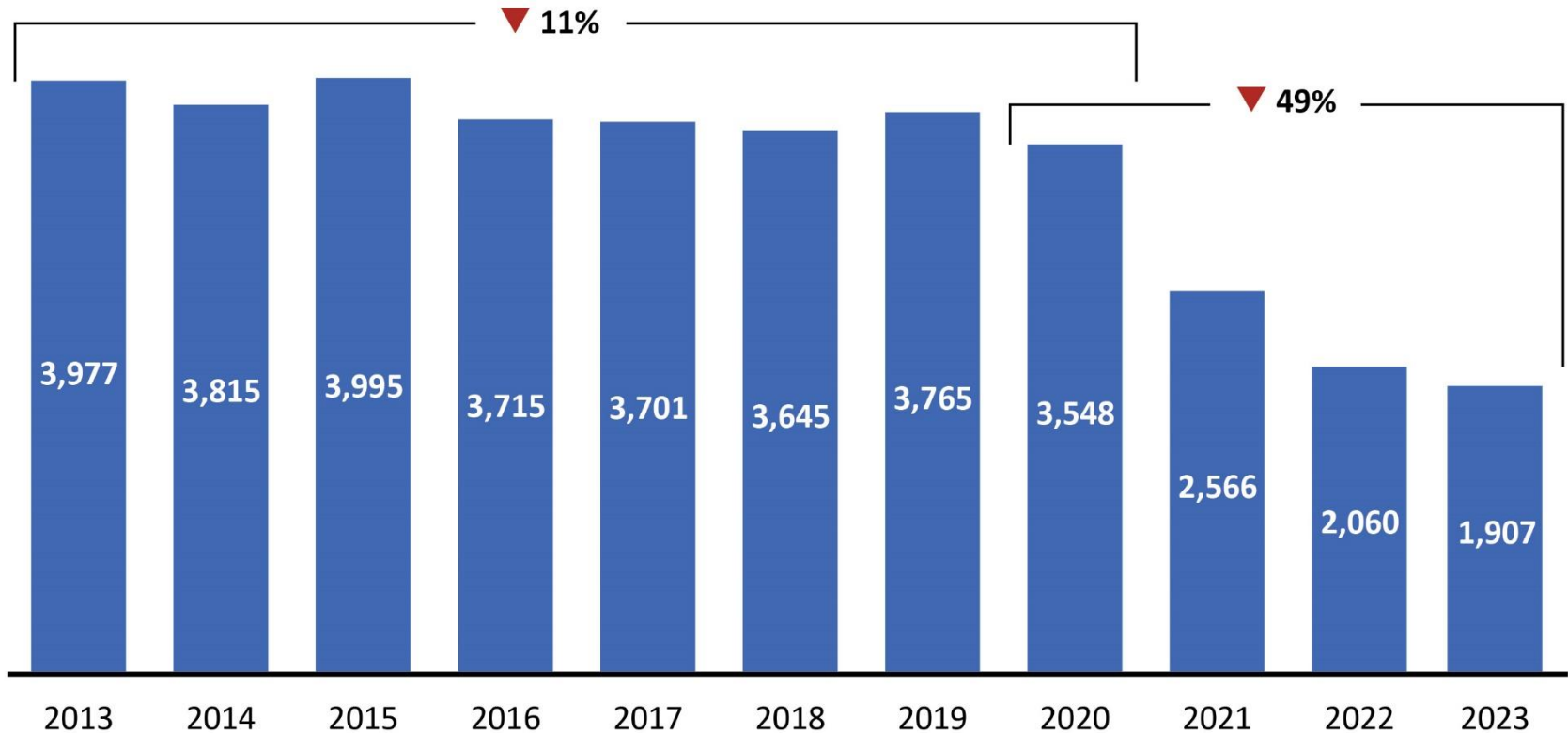
Public defenders

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Court-appointed attorneys are an integral part of the state's indigent defense system

- Court-appointed attorneys are private attorneys paid by the state for time spent providing counsel for indigent criminal defendants
- Court-appointed attorneys defended 54% of the charges for which the state provided representation

Decline in active court-appointed defense attorneys has recently accelerated



Represents the number of court-appointed attorneys receiving payment for providing court-appointed defense representation for at least one charge in a fiscal year.

Judges have difficulty finding attorneys willing to take court appointments

- Half of judges reported it is challenging to find an attorney to appoint for an indigent defendant; most said it has gotten more difficult in the past two years
- “We are getting to the point that my staff are calling many, many lawyers before they can find one who will take the case.” - *Judge*
- “We are down to two or three attorneys willing to handle misdemeanor and felony cases. Those attorneys are so busy they are telling us not to appoint them to new cases.” - *Judge*

Decline in court-appointed attorneys hinders court efficiency and risks litigation

- Having too few court-appointed attorneys reduces court efficiency
 - court staff need more time to find an attorney to serve
 - more schedule conflicts and harder to schedule hearings
- State has potential legal exposure if indigent criminal defendants cannot be provided an attorney (lawsuits in Wisconsin and Georgia)

Judges cite lack of court-appointed attorneys as reason for delays

- “Sharing the very few [court-appointed attorneys] between six to eight courts that are running at any time in our jurisdiction is causing extensive delays in the flow of the docket.” - *Judge*
- “For the first time, we have had to continue a trial date because we could not find counsel before the court date.” - *Judge*

Low compensation is the major reason cited as why fewer attorneys take court-appointed work

- 89% of attorneys who stopped serving in court-appointed defense cited low pay as a top factor
- 91% of attorneys who were considering taking fewer cases or leaving service cited low pay as a top factor
- 94% of judges cited raising court-appointed attorney compensation as one of the top ways to address concerns with indigent defense system

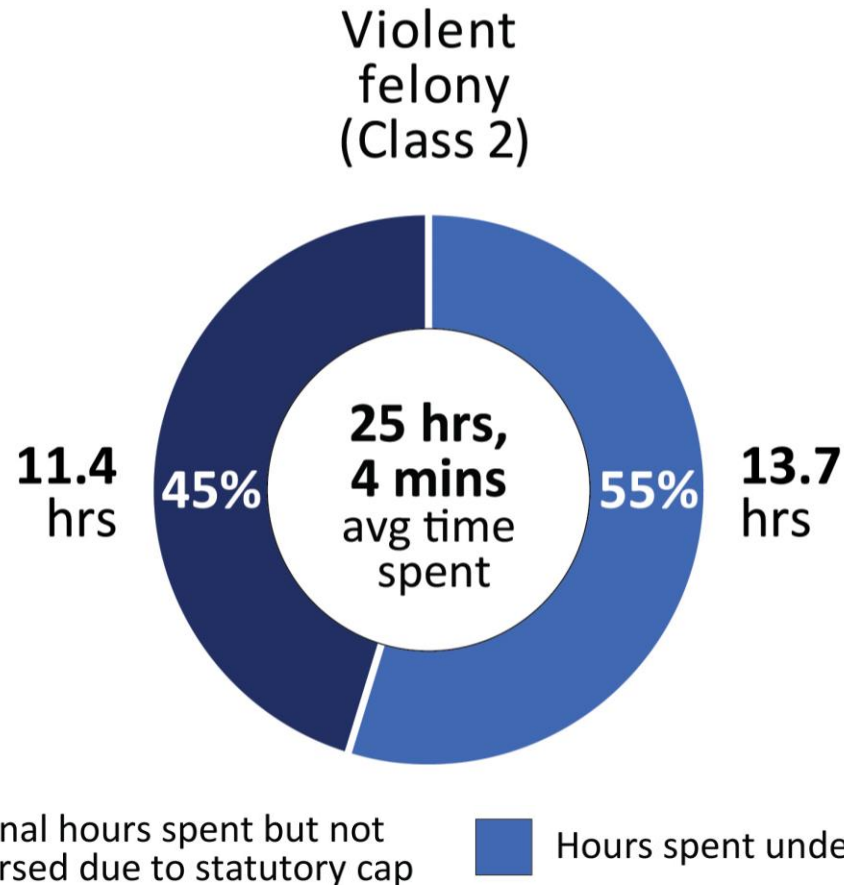
JLARC survey of current and former court-appointed attorneys, summer 2023. 580 responses; 36% response rate.

Virginia sets court-appointed attorney hourly rates and caps payment amounts

- Hourly rate for court-appointed attorneys is \$90
- Pay caps are set in statute and based on type of charge

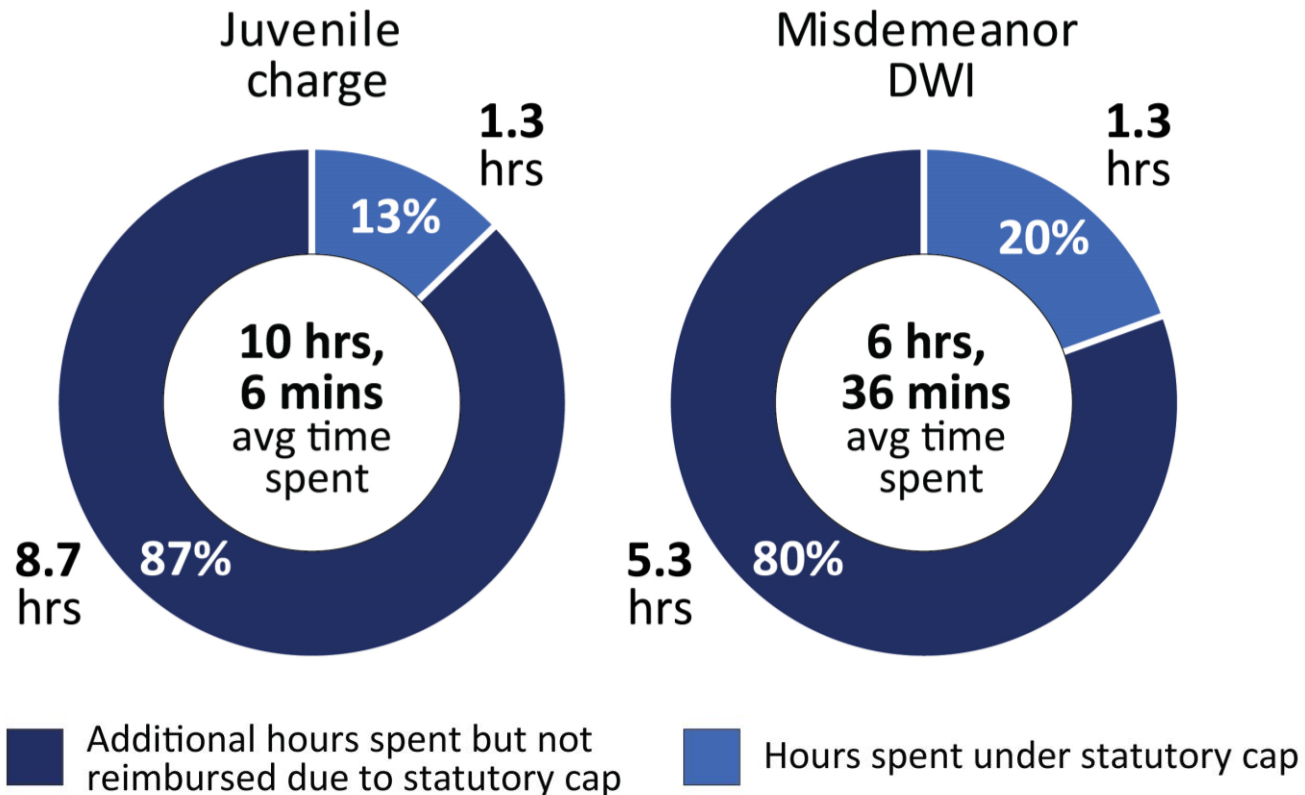
| Court | Charge type | Pay cap | Maximum supplemental waiver |
|--------------|---------------------|----------------|------------------------------------|
| JDR | Any juvenile charge | \$120 | \$650 |
| District | Misdemeanor | \$120 | \$120 |
| Circuit | Misdemeanor | \$158 | N/A |
| Circuit | Class 3 to 6 felony | \$445 | \$155 |
| Circuit | Class 2 felony | \$1,235 | \$850 |
| Circuit | Class 1 felony | None | N/A |

Court-appointed attorneys work substantial time for which they are not paid on a typical case



Average time based on 2023 National Center for State Courts Virginia public defender case time estimates.

Court-appointed attorneys work substantial time for which they are not paid on a typical case (cont.)



Average time based on 2023 National Center for State Courts Virginia public defender case time estimates.

Pay caps should be raised so payment more closely reflects the time attorney spends

- Certain approaches are not advisable
 - having no pay caps
 - setting caps without a sound analytical basis (e.g., doubling the current caps)
- Estimated average time a defense attorney *in Virginia* spends on a case should be the basis for setting pay caps

Recommendation

The General Assembly may wish to consider amending the Code to set higher pay caps for court-appointed criminal defense attorneys representing indigent clients.

Offense categories should be changed so pay caps more closely align with time spent by attorney

- Pay caps differ by offense category; current offense categories often do not align with the workload associated with each type of charge
- Attorney survey and case time analysis show misalignment between current categories used to set pay caps and time required for defense attorney
- Example: Violent felony and DWI take attorneys far more time on average than is compensated under current pay caps

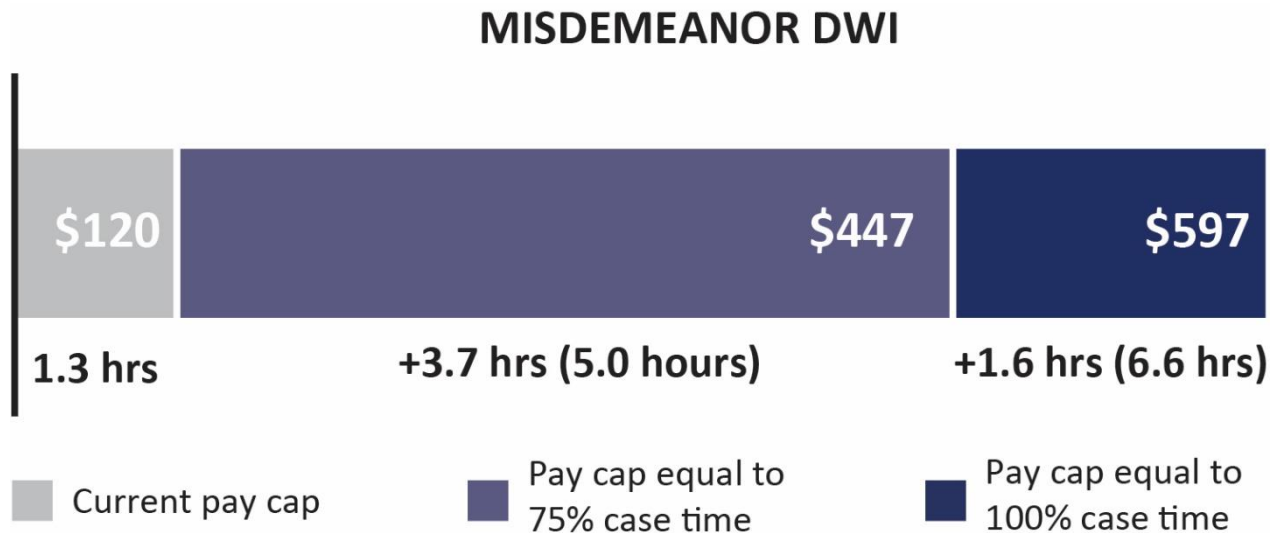
Recommendation

If the General Assembly increases court-appointed criminal defense attorney pay caps, it may wish to consider amending the Code to establish the following new offense categories for payment:

- (i) violent felonies,
- (ii) nonviolent felonies,
- (iii) misdemeanor DWIs,
- (iv) non-DWI misdemeanors, and
- (v) juvenile charges.

Amount of additional payment would depend on which caps are raised and by how much

- Pay caps could be raised for all types of charges or target certain types of charges
- Example: set cap to 75% or 100% of average time spent

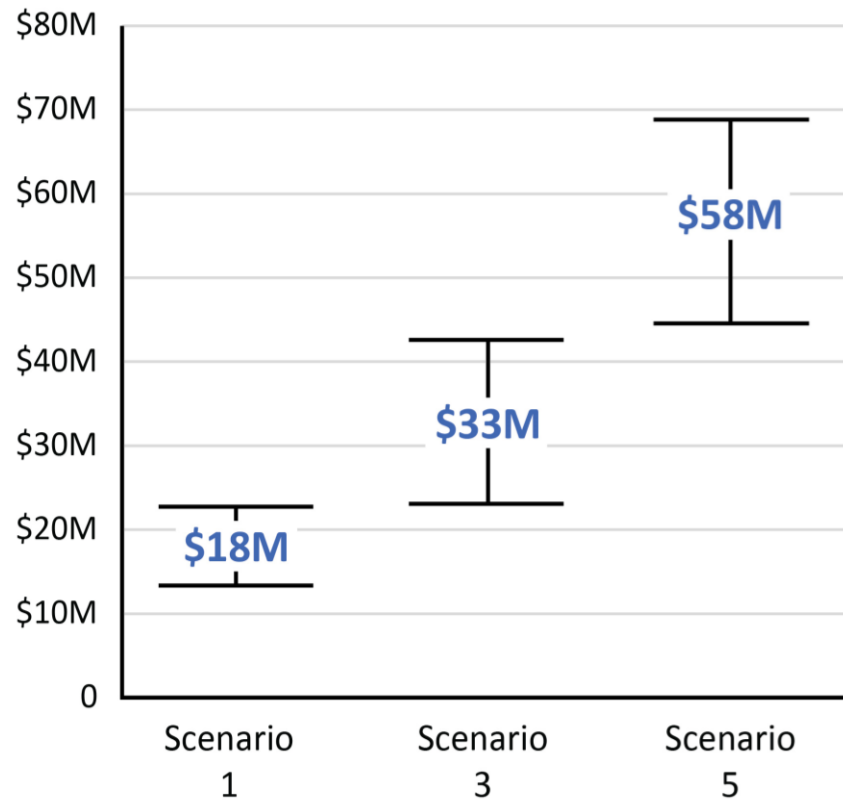


Examples of setting pay caps by different offense categories and amounts

- *Target* raising pay caps only for offenses with greatest disparity between average time spent and current pay cap; set caps to 75% of average time spent (Scenario 1)
- Set pay caps for *all* offense categories to 75% of average time spent (Scenario 3)
- Set pay caps for all offense categories to 100% of average time spent (Scenario 5)

See pages 28 and 29 of report for more detail about additional scenarios.

Fiscal impact to state would depend on which caps are raised and by how much



See pages 28 and 29 of report for more detail about additional scenarios. Dollar value represents midpoint of estimated range of net new spending. FY23 spending was ~\$53m.

Recent criminal fund surplus balances could partially offset fiscal impact of increasing caps

- The criminal fund:
 - is the funding mechanism for appropriating funds to courts to compensate court-appointed attorneys
 - received ~\$130 million appropriation for FY23
- State spent ~\$50 million on court-appointed attorneys for indigent defendants in FY23*
- The criminal fund will revert ~\$38m of surplus balance to the general fund at the end of FY24

*An additional \$5.1 million is appropriated each year for supplementing pay to court-appointed attorneys, pending judge approval, in cases where hours worked exceed payment cap.

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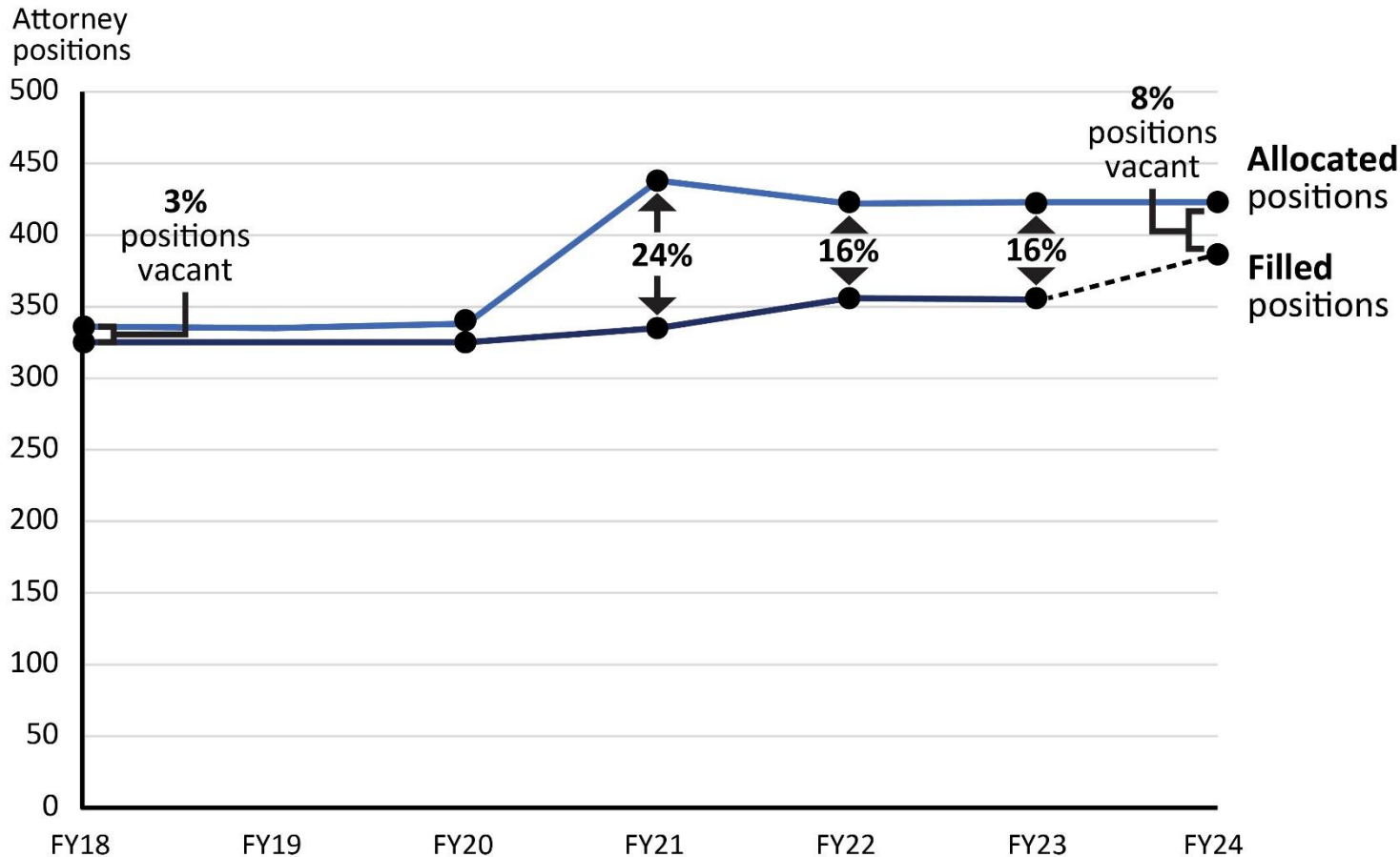
Public defenders

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Public defenders play a critical role in the state's indigent defense system

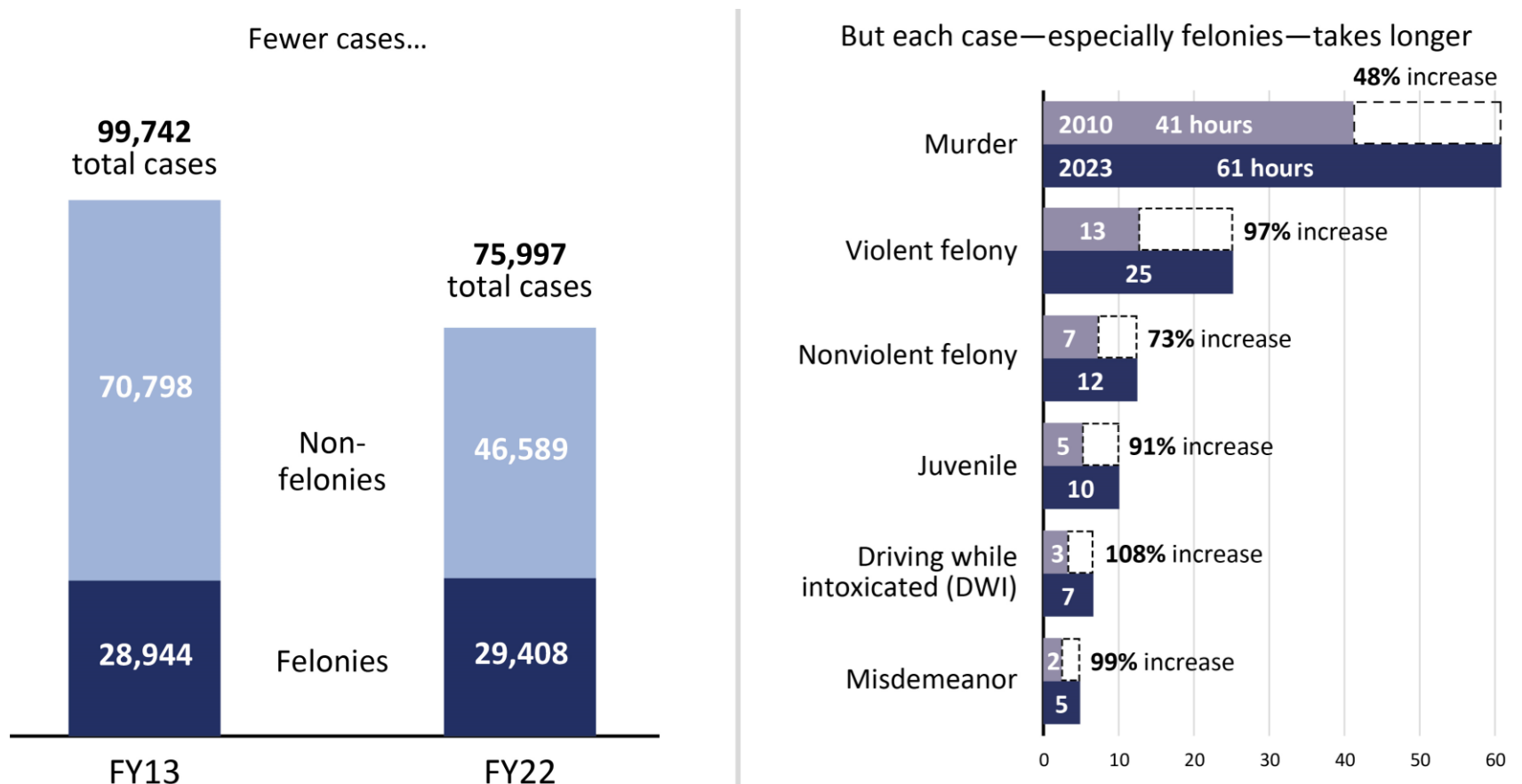
- Attorneys are state employees who receive salary and full state-provided benefits (e.g., health insurance, retirement, leave, etc.)
- Public defenders defended 46% of the charges for state-provided representation
- Public defender offices also employ non-attorney support staff

Vacant positions rose substantially in recent years; recent recruitment efforts are helping



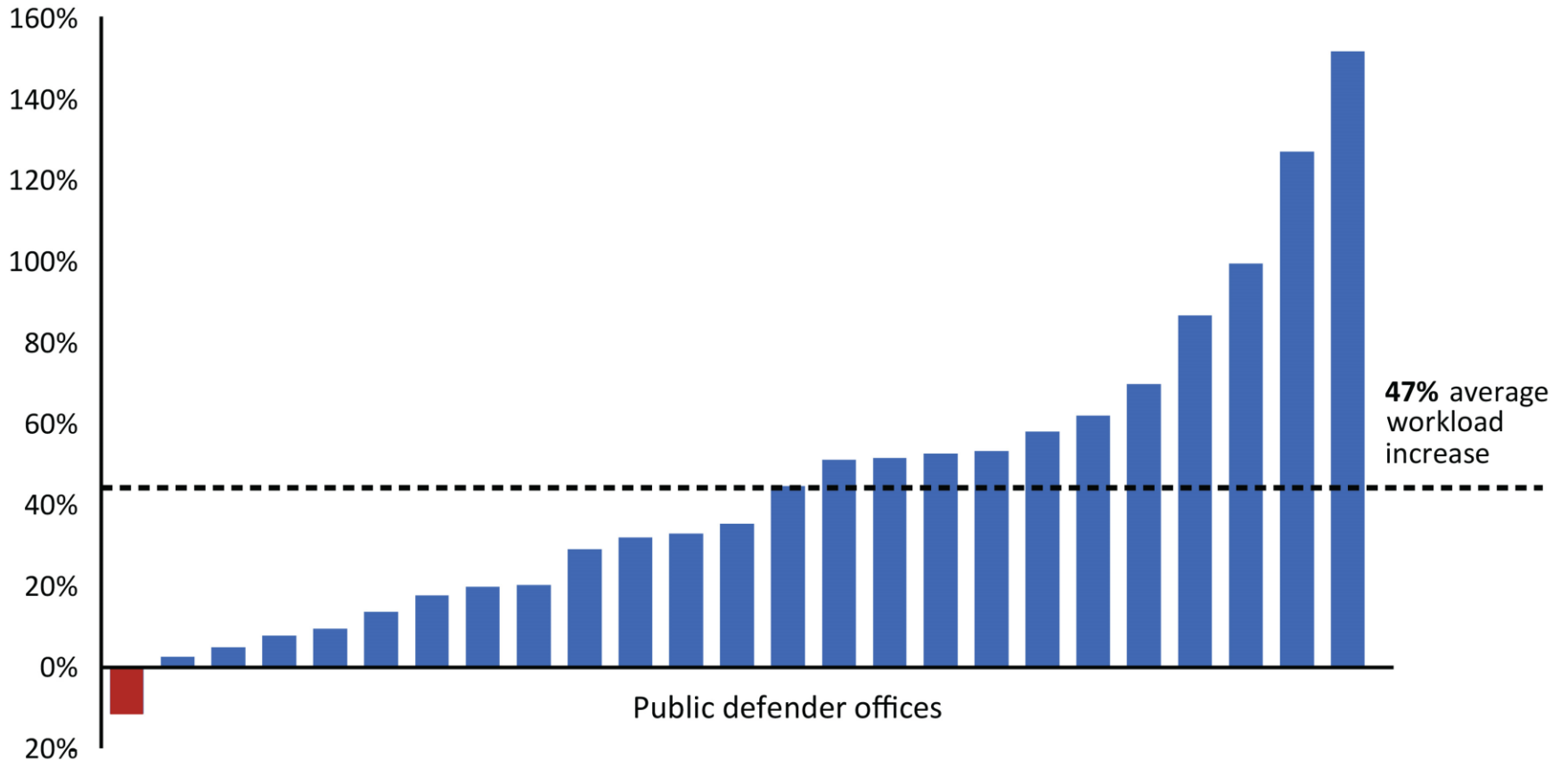
NOTE: 16 capital defender positions were reallocated to support staff positions.

Total cases have declined, but each case now takes longer to defend



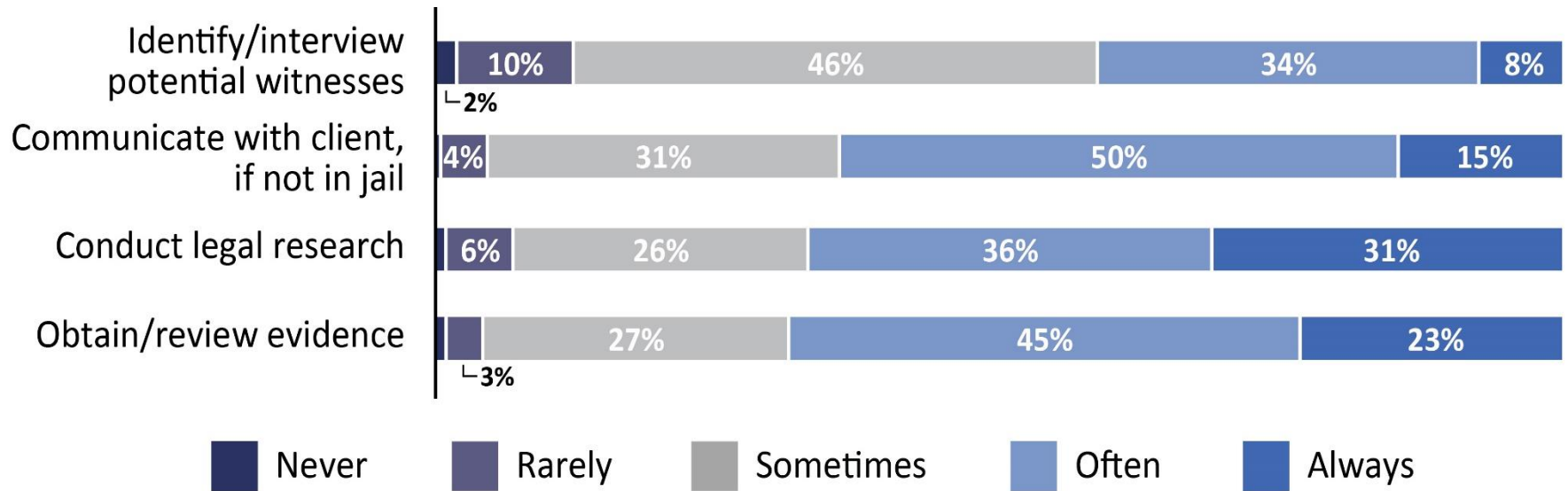
NOTE: Based on 2023 National Center for State Courts Virginia public defender “case weights.”

Workload increased 47% on average across public defender offices (FY13–FY22)



NOTE: Based on 2023 National Center for State Courts Virginia public defender case times. Changes in public defender workload account for changes in both the number and nature of cases for each office.

Public defenders report not always having enough time for important tasks*



- Judges expressed concern about the imbalance between workload and the number of public defenders
- Six offices paused taking new cases during past year

*Public defenders were asked: “across all my cases, I generally have sufficient time to...”

Many public defender offices have only 1 of each support staff position, even some very large offices

- Several of state's largest offices have only 1 paralegal

| Office | Attorneys | Paralegals |
|----------------|-----------|------------|
| Fairfax | 25 | 1 |
| Prince William | 24 | 1 |
| Richmond | 34 | 1 |
| Virginia Beach | 30 | 1 |

- National Association for Public Defense recommends 4 attorneys to 1 paralegal; current statewide ratio is 13 to 1

Additional support staff could be cost-effective way to mitigate public defender office workload

- Support staff can do administrative tasks and other tasks that do not require a law degree, freeing up attorney staff time
- Chief public defenders report it is easier to fill support staff positions than attorney positions; there are low vacancy rates system wide for support staff
- Support staff have lower average salaries than attorneys and therefore are less costly to employ

Recommendation

The General Assembly may wish to consider funding additional mitigation specialist and paralegal positions to help lessen public defender attorney workload.

Estimated range of fiscal impacts shown in Table 4-1 of written report.

Adding more attorney positions or expanding coverage could be considered in the future

- Increased support staff does not directly address having too few attorneys
- Filling all 430 allocated attorney positions sufficient to handle just 87% of workload
- After full impacts of recent salary increases and recruitment efforts are clear
 - re-evaluate total allocated attorney positions
 - assess need for and feasibility of expanding coverage to additional localities

NOTE: See Appendix H of the JLARC report *Indigent Criminal Defense and Commonwealth's Attorneys* for additional Considerations for expanding public defender coverage.

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Attorney compensation consists of state, and in some localities, local funding

- Commonwealth's attorneys are state-funded employees of the elected commonwealth's attorney
- Public defenders are state-funded, *state* employees
- Localities can supplement salary for public defenders and/or commonwealth's attorneys in their jurisdiction

State substantially increased attorney compensation in the last two fiscal years

- Across-the-board state salary increases in FY23 and FY24
- Public defenders (\$3.7M) and commonwealth's attorneys (\$3.9M) received additional funding for salaries in FY24*
 - average public defender salary will increase by ~\$12K
 - average commonwealth's attorney salary will increase by ~\$11K

NOTE:*Annualized to \$7.4M and \$7.9M in future years.

Salaries historically below local and private attorneys, but new funding will likely narrow gap

- In FY23, average public defender and commonwealth's attorney salaries—including local supplements—were 33% and 20% less than local government attorneys
- Also lower on average than private sector attorneys within the same region
 - 43% less for public defenders and 24% less for commonwealth's attorneys in FY23
- Steps taken to increase salaries in FY24 will narrow compensation gaps to some extent

State salary pay scales for public defenders and commonwealth's attorneys are identical for FY24

| | FY23 salary | FY24 salary | % increase |
|--------------------|-------------|-------------|------------|
| Comm. Attorney I | \$62,509 | \$73,500 | 17% |
| Comm. Attorney II | 62,509 | 82,488 | 32% |
| Comm. Attorney III | 79,267 | 94,472 | 19% |
| Comm. Attorney IV | 79,267 | 104,955 | 22% |

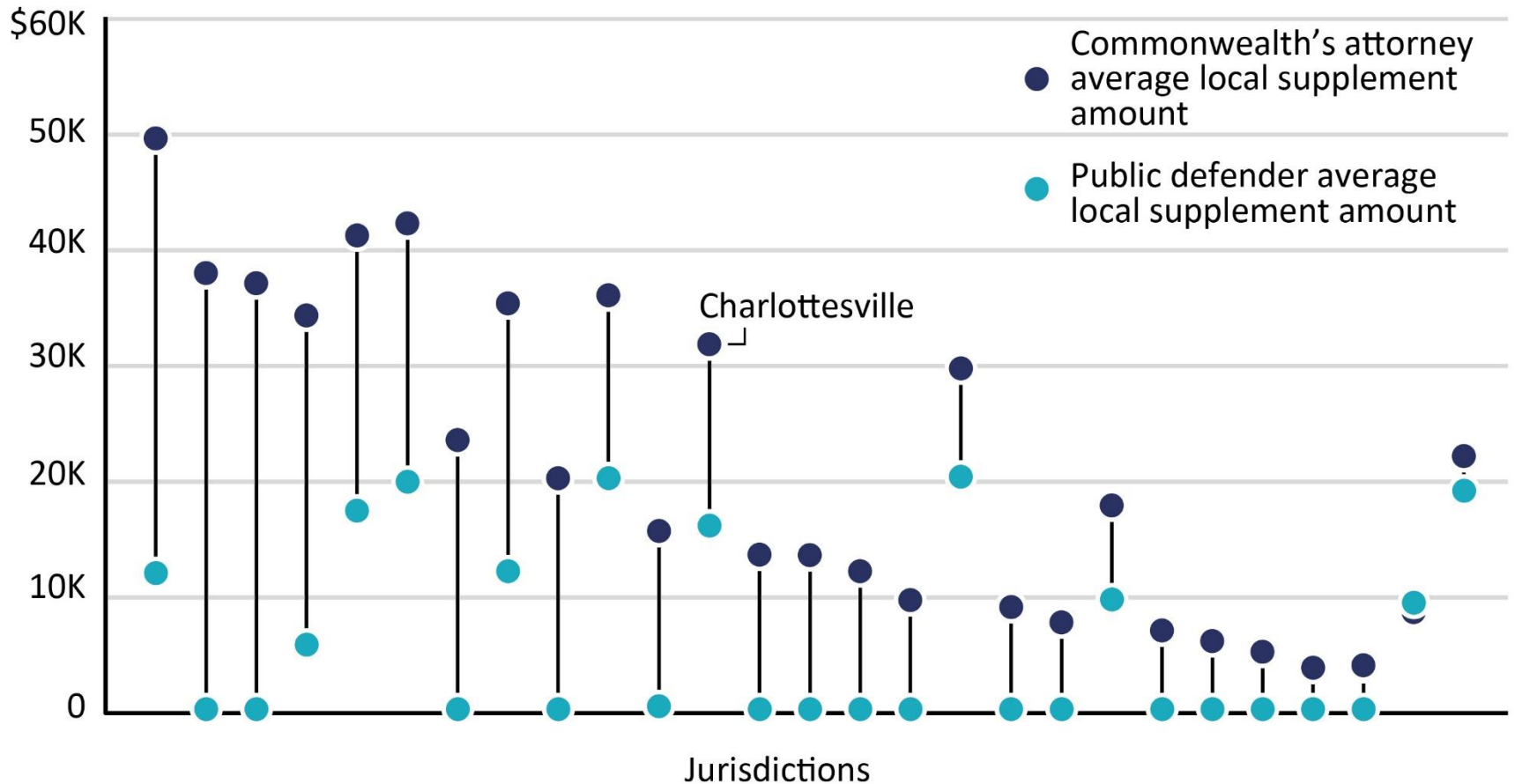
| | FY23 salary | FY24 salary | % increase |
|--------------------|-------------|-------------|------------|
| Public Defender I | \$58,492 | \$73,500 | 26% |
| Public Defender II | 67,052 | 82,488 | 23% |
| Senior Asst. PD | 78,465 | 94,472 | 20% |
| Deputy Public PD | 88,449 | 104,955 | 19% |

NOTES: FY24 salary scales as of December 2023 / January 2024. Public defenders in Northern Virginia localities receive higher state salary for each position

Local supplements explain differences in public defender and commonwealth's attorney pay

- Localities generally choose to provide more supplemental funding to commonwealth's attorneys
 - Nearly all commonwealth's attorney offices that share jurisdiction with public defenders offer a local supplement, averaging about \$21,000 per attorney
 - In contrast, only about half (13) of public defender offices receive local supplements, averaging about \$15,000 per attorney in those offices
- Commonwealth's attorney and public defender offices with larger supplements have fewer vacancies

Public defenders receive smaller local supplements on average than commonwealth's attorneys



Policy options

The General Assembly could appropriate funds to:

- expand the number of existing positions designated as senior trial attorney positions across public defender offices.
- establish pay bands for public defender attorney positions.

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