

## **Racial and Ethnic Impact Statement**

### **2024 General Assembly Session**

**Bill number:** SB 356; Court-appointed counsel; raises limitation of fees that counsel can receive for representation.

**Review requested by:** Chairman Surovell; Senate Committee for Courts of Justice

**Date:** January 24, 2024

### **JLARC Staff Assessment of Potential for Disproportionate Impact**

SB 356 would increase the maximum payment amounts that court-appointed attorneys can receive for representing indigent criminal defendants across various types of offenses in district and circuit courts.

Increasing payment caps for court-appointed attorneys would have two primary criminal justice impacts. First, defendants with court-appointed attorneys would benefit from increasing payment caps, to the extent that it would result in more attorneys being willing to serve in a court-appointed role. However, increasing payment caps would increase court costs for all convicted defendants with a publicly provided attorney (including both court-appointed attorneys and public defenders), because they are obligated to pay back the cost of their publicly provided legal defense upon conviction.

Both of these impacts would disproportionately affect Black persons because, relative to the proportion of Black persons in Virginia's population, (1) a higher proportion of defendants represented by court-appointed attorneys are Black; and (2) a higher proportion of convicted individuals with a publicly provided attorney (either a court-appointed attorney or public defender) are Black.

*An explanation of the JLARC staff review is included on the pages that follow.*

## Bill summary

SB 356 would increase the maximum payment amounts that court-appointed attorneys can receive for representation on various offenses in district and circuit courts. Court-appointed attorneys represent indigent criminal defendants in localities without a public defender or when a public defender is unable to handle the case because of workload or a conflict of interest. Court-appointed attorneys are paid by the state for each charge for which they provide representation. The payment is based on an hourly rate set by the Supreme Court of Virginia (currently \$90) and maximum payment amounts set in statute. SB 356 would increase maximum payment amounts for each category of offense (Table 1).

**TABLE 1**

**Current statutory payment caps for court-appointed attorneys and proposed caps under SB 356**

<b>Offense type</b>	<b>Current payment cap</b>	<b>Proposed payment cap under SB 356</b>
Violent felony	\$1,235	\$2,256
Nonviolent felony	445	1,112
Misdemeanor	120	440
Misdemeanor DWI	120	597
Juvenile	120	906

SOURCE: Office of the Executive Secretary of the Supreme Court of Virginia and SB 356.

NOTE: The current cap for misdemeanors in circuit court is slightly higher at \$158, but would similarly increase to \$440 should SB 356 be enacted. DWI=driving while intoxicated/driving under the influence.

## Impact on aggregate criminal justice outcomes

Increasing payment caps for court-appointed attorneys could have several impacts on indigent criminal defendants. By increasing payment caps for court-appointed attorneys, SB 356 would likely increase the number of attorneys willing to serve in this role. Having more court-appointed attorneys should allow cases to be resolved more quickly and increase the quality of representation that defendants receive. However, SB 356 would also increase court costs for all convicted indigent criminal defendants, who are obligated to pay back the cost of their publicly provided legal defense as part of their court costs.

***SB 356 would likely increase the number of attorneys willing to serve as court-appointed attorneys, which should allow cases to be resolved more quickly and improve the quality of representation***

Increasing payment caps for court-appointed attorneys under SB 356 would likely increase the number of attorneys who are willing to serve in this role. In a 2023 study of Indigent Criminal Defense and Commonwealth’s Attorneys, JLARC staff found that the number of attorneys serving as court-appointed attorneys in Virginia has declined by more than half, from nearly 4,000 attorneys in FY13 to about 1,900 in FY23. The most common reason attorneys cited for their decision to stop serving as court-appointed attorneys was low compensation. Increasing the pay caps would likely increase the number of attorneys willing to serve in a court-appointed role. Having more court-appointed attorneys should allow cases to be resolved more efficiently if attorneys can be appointed to cases more quickly.

Increasing payment caps for court-appointed attorneys should also improve the quality of representation that defendants receive. The decline in the number of attorneys serving in a court-appointed defense role means that attorneys remaining in the role take more cases. Attorneys with higher workloads are not necessarily delivering lower quality representation, but they inevitably have less time available to provide all aspects of quality representation. To the extent that raising payment caps incentivizes more attorneys to serve in this role, court-appointed attorneys may have fewer cases on average, which could better enable them to fully provide all aspects of quality representation across all their cases. (The JLARC study did not find systemic evidence that court-appointed attorneys provide lower quality representation than public defenders or privately retained attorneys.)

***SB 356 would increase court costs for convicted indigent criminal defendants***

Raising court-appointed attorney payment caps would also increase court costs for convicted indigent criminal defendants. Indigent defendants convicted of a charge are obligated to pay back the cost of their publicly provided legal defense as part of their court costs—whether they are represented by a court-appointed attorney or public defender. (The public defender legal defense costs are based on the court-appointed attorney fees.) The extent of the increased court costs would depend on the type of charge for which a defendant was convicted. For example, a defendant convicted of a misdemeanor could owe up to \$320 more in court costs under SB 356, but a defendant convicted of a violent felony could owe up to \$1,021 more, depending on whether their attorney billed up to the full amount of the new cap. Attorney fees are billed *per charge*, so the additional amount a person could owe may be substantial depending on the

number of charges for which they are convicted. Many individuals do not immediately pay these costs upon conclusion of their case for a variety of reasons, such as if they are incarcerated or do not otherwise have the financial ability to do so. However, a convicted person who does not pay their court costs in a timely manner can have that debt referred for collection, have a financial judgment against them in court, or be kept on probation until the costs are paid.

### **Evidence of disproportionate impacts on racial or ethnic subgroups**

To estimate whether there would be disproportionate racial impacts if SB 356 were enacted, JLARC staff compared the racial composition of Virginia's population to (1) the racial composition of individuals represented by a court-appointed attorney who were charged with each type of offense for which the payment cap would increase; and (2) the racial composition of individuals represented by a court-appointed attorney or a public defender who were convicted of each type of offense for which the payment cap would increase.

Black persons would be disproportionately affected by both impacts of SB 356, in that they would be more likely to benefit from an increase in the number of attorneys willing to serve in a court-appointed role, but would also be more likely to have higher court costs as a result of increasing payment caps.

#### ***SB 356 would disproportionately impact Black persons because a higher proportion of defendants represented by court-appointed attorneys are Black relative to the proportion of Black persons in Virginia's population***

Defendants represented by a court-appointed attorney are more likely to be Black relative to their proportion of Virginia's population across all five offense types for which payment caps would increase, ranging from 1.5 times more likely for misdemeanor DWIs to 2.4 times more likely for violent felonies (Table 2). This suggests that Black individuals would disproportionately benefit from increasing payment caps for court-appointed attorneys if SB 356 were enacted, to the extent that higher caps would increase the number of court-appointed attorneys and allow cases to be resolved more quickly and/or increase the quality of representation that defendants receive.

**TABLE 2**

**Individuals represented by a court-appointed attorney are more likely to be Black relative to the proportion of Black persons in Virginia’s population**

<b>Offense type</b>	<b>Rate of disproportionality</b>		
	<b>White</b>	<b>Black</b>	<b>All other races<sup>a</sup></b>
Violent felony	0.31	2.43	0.75
Nonviolent felony	0.09	1.68	0.83
Misdemeanor	0.19	1.98	0.66
Misdemeanor DWI	0.04	1.46	0.67
Juvenile	0.38	2.17	0.16

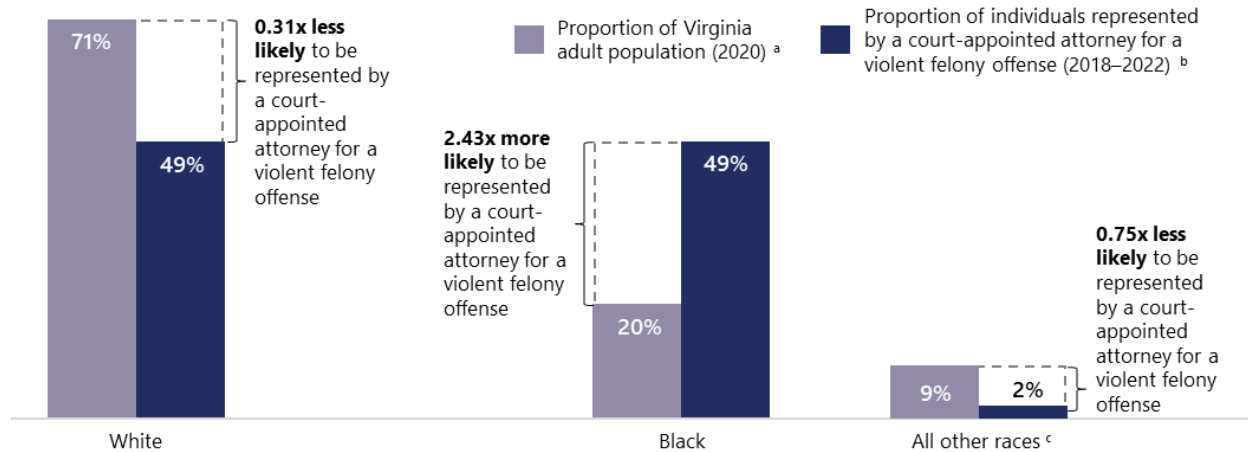
SOURCE: Office of the Executive Secretary of the Supreme Court of Virginia general district (2018–2022), circuit (2018–2022), and J&DR (2016–2020) court data. 2020 U.S. Census Virginia population estimates.

NOTE: DWI=driving while intoxicated/driving under the influence. <sup>a</sup> Includes American Indian or Alaskan Native, Asian or Pacific Islander, Hispanic, and other/unknown race.

For example, Black individuals are 2.4 times (143 percent) more likely to be represented by a court-appointed attorney for a violent felony offense relative to the proportion of Black persons in Virginia’s adult population. Forty-nine percent of individuals represented by a court-appointed attorney for a violent felony offense from 2018–2022 were Black, and 20 percent of Virginia adults are Black (Figure 1). Conversely, 49 percent of individuals represented by a court-appointed attorney for a violent felony offense from 2018–2022 were white, and 71 percent of Virginia adults are white, so white persons are 0.31 (31 percent) less likely to be represented by a court-appointed attorney for a violent felony offense relative to the proportion of white persons in Virginia’s adult population.

**FIGURE 1**

**Black individuals are 2.4 times more likely to be represented by a court-appointed attorney for a violent felony offense relative to Virginia’s population age 18 and older**

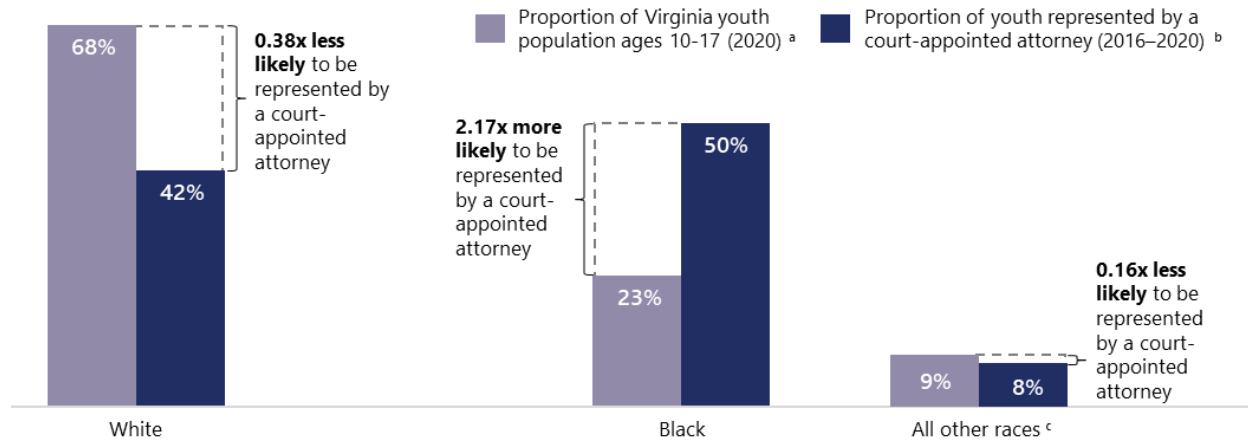


SOURCE: JLARC staff analysis of circuit court data from the Office of the Executive Secretary of the Virginia Supreme Court (2018–2022).  
NOTE: <sup>a</sup> Population data from Virginia 2020 Census estimates of adult population over 18 years of age. <sup>b</sup> Includes individuals represented by a court-appointed attorney who were charged with at least one Class 2 felony offense in circuit court from 2018–2022 (~4,100 charges).  
<sup>c</sup> American Indian or Alaskan Native, Asian or Pacific Islander, Hispanic, and other/unknown race in circuit court data.

Similarly, Black youth petitioned in J&DR court are 2.2 times (117 percent) more likely to be represented by a court-appointed attorney relative to their proportion of Virginia’s youth population. This is because 50 percent of youth petitioned in J&DR court who were represented by a court-appointed attorney from 2016–2020 were Black, and 23 percent of Virginia’s youth population is Black (Figure 2). Conversely, 42 percent of youth petitioned in J&DR court who were represented by a court-appointed attorney from 2016–2020 were white, and 68 percent of Virginia’s youth population is white, so white youth are 0.38 (38 percent) less likely to be represented by a court-appointed attorney relative to their proportion of Virginia’s youth population.

**FIGURE 2**

**Black youth are 2.2 times more likely to be represented by a court-appointed attorney relative to Virginia’s population ages 10–17**



SOURCE: JLARC staff analysis of J&DR data from the Office of the Executive Secretary of the Virginia Supreme Court (2016–2020).

NOTE: <sup>a</sup> Population data from Virginia 2020 Census estimates of youth population ages 10–17. <sup>b</sup> Includes youth represented by a court-appointed attorney who were petitioned in J&DR court from 2016–2020 (~83,100 offenses). <sup>c</sup> American Indian or Alaskan Native, Asian or Pacific Islander, Hispanic, and other/unknown race in J&DR court data.

***SB 356 would disproportionately impact Black persons because a higher proportion of convicted individuals with a publicly provided attorney (and who are obligated to pay back their court costs) are Black relative to the proportion of Black persons in Virginia’s population***

Convicted individuals with a publicly provided attorney (including both court-appointed attorneys and public defenders) are more likely to be Black relative to the proportion of Black persons in Virginia’s population across all five offense types for which payment caps would increase, ranging from 1.8 times more likely for misdemeanor DWIs to 2.6 times more likely for violent felonies (Table 3). This suggests that Black individuals would be disproportionately affected by higher court costs as a result of increasing payment caps under SB 356.

**TABLE 3**

**Convicted individuals with a publicly provided attorney (either a court-appointed attorney or a public defender) are more likely to be Black relative to the proportion of Black persons in Virginia’s population**

<b>Offense type</b>	<b>Rate of disproportionality</b>		
	<b>White</b>	<b>Black</b>	<b>All other races <sup>a</sup></b>
Violent felony	0.35	2.55	0.71
Nonviolent felony	0.15	1.94	0.85
Misdemeanor	0.32	2.41	0.63
Misdemeanor DWI	0.15	1.83	0.65
Juvenile	0.41	2.27	0.17

SOURCE: Office of the Executive Secretary of the Supreme Court of Virginia general district (2018–2022), circuit (2018–2022), and J&DR (2016–2020) court data. 2020 U.S. Census Virginia population estimates.

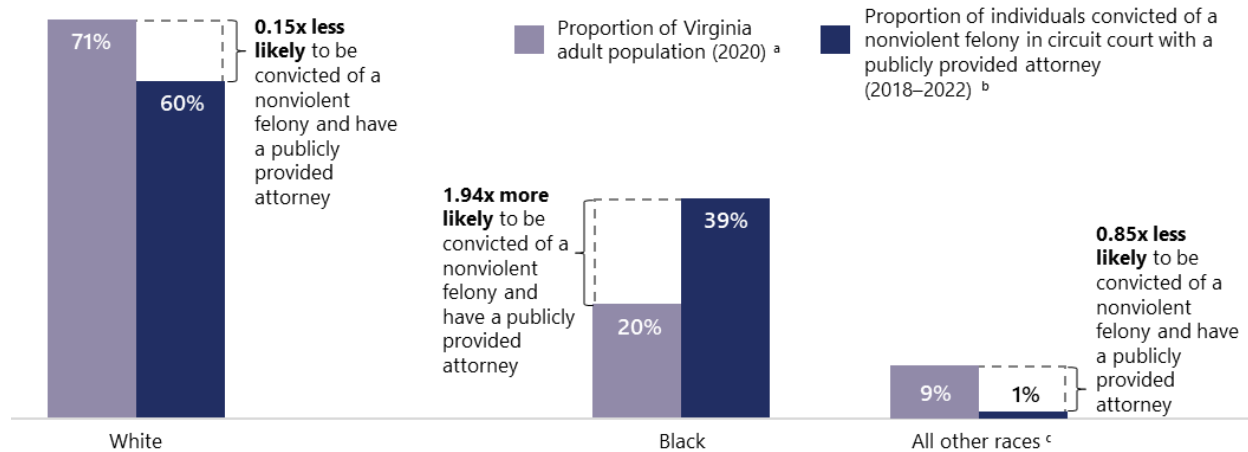
NOTE: DWI=driving while intoxicated/driving under the influence. <sup>a</sup> Includes American Indian or Alaskan Native, Asian or Pacific Islander, Hispanic, and other/unknown race.

For example, individuals convicted of a nonviolent felony who have a publicly provided attorney are 1.9 times (94 percent) more likely to be Black relative to the proportion of Black persons in Virginia’s adult population. This is because 39 percent of individuals with at least one nonviolent felony conviction and who had a publicly provided attorney from 2018–2022 were Black, and 20 percent of Virginia adults are Black (Figure 3). Conversely, 60 percent of individuals with at least one nonviolent felony conviction and who had a publicly provided attorney from 2018–2022 were white, and 71 percent of Virginia adults are white, so white persons are 0.15 (15 percent) less likely to be convicted of a nonviolent felony and have a publicly provided attorney relative to the proportion of white persons in Virginia’s adult population.



**FIGURE 3**

**Individuals convicted of a nonviolent felony who have a publicly provided attorney are 1.9 times more likely to be Black relative to Virginia’s population age 18 and older**

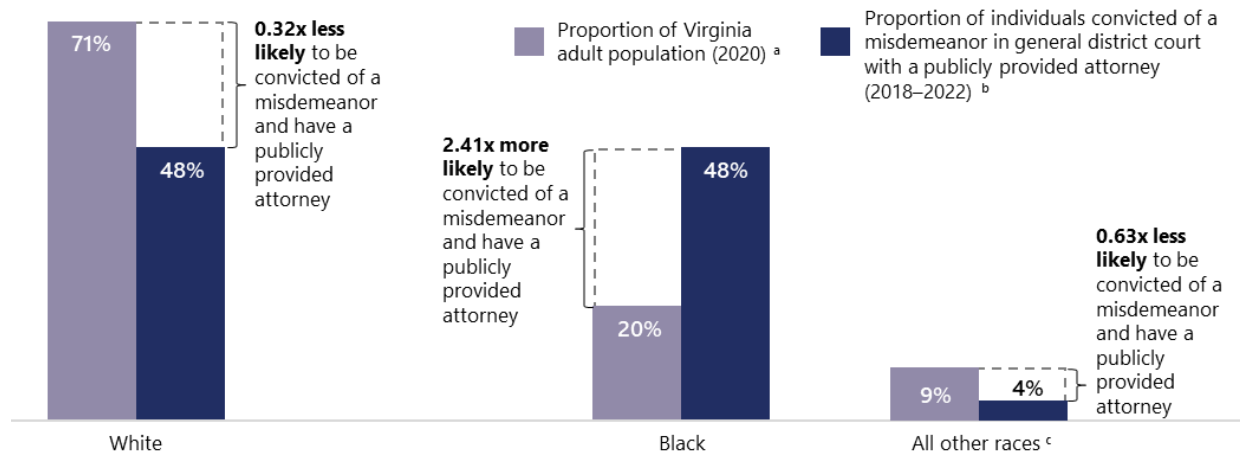


SOURCE: JLARC staff analysis of circuit court data from the Office of the Executive Secretary of the Virginia Supreme Court (2018–2022).  
NOTE: <sup>a</sup> Population data from Virginia 2020 Census estimates of adult population over 18 years of age. <sup>b</sup> Includes individuals represented by a public defender or a court-appointed attorney who had at least one Class 3–6 felony conviction in circuit court from 2018–2022 (~52,500 charges). <sup>c</sup> American Indian or Alaskan Native, Asian or Pacific Islander, Hispanic, and other/unknown race in circuit court data.

Similarly, individuals convicted of a misdemeanor (excluding DWI offenses) who have a publicly provided attorney are 2.4 times (141 percent) more likely to be Black relative to the proportion of Black persons in Virginia’s adult population. Forty-eight percent of individuals with at least one misdemeanor conviction and who had a publicly provided attorney from 2018–2022 were Black, and 20 percent of Virginia adults are Black (Figure 4). Conversely, 48 percent of individuals with at least one misdemeanor conviction and who had a publicly provided attorney from 2018–2022 were white, and 71 percent of Virginia adults are white, so white persons are 0.32 (32 percent) less likely to be convicted of a misdemeanor and have a publicly provided attorney relative to the proportion of white persons in Virginia’s adult population.

**FIGURE 4**

**Individuals convicted of a misdemeanor who have a publicly provided attorney are 2.4 times more likely to be Black relative to Virginia’s population age 18 and older**



SOURCE: JLARC staff analysis of general district court data from the Office of the Executive Secretary of the Virginia Supreme Court (2018–2022).

NOTE: <sup>a</sup> Population data from Virginia 2020 Census estimates of adult population over 18 years of age. <sup>b</sup> Includes individuals represented by a public defender or a court-appointed attorney who had at least one misdemeanor conviction (excluding DWI offenses) in general district court from 2018–2022 (~73,900 charges). <sup>c</sup> American Indian or Alaskan Native, Asian or Pacific Islander, Hispanic, and other/unknown race in general district court data.

**Patron:** Senator Russet Perry

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