

# NOTES & COMMENTS

## IMPROVING SUCCESS RATES OF BLACK MALE DEFENDANTS IN COURT ASSISTED PRETRIAL SUPERVISION (CAPS) IN THE DISTRICT OF OREGON

by

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*The approach taken by the federal court system in the District of Oregon to both select and supervise high-risk defendants for Court Assisted Pretrial Supervision (CAPS) benefits all defendants, especially Black males. CAPS is a bright spot in a criminal justice system where research demonstrates that Black males are overwhelmingly disadvantaged. This Note suggests two ways the District should focus CAPS to increase cultural awareness in order to improve communication between defendants and core CAPS personnel so that an even greater percentage of Black male defendants can meet their CAPS release conditions.*

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## I. INTRODUCTION

As part of the federal judiciary’s Administrative Office of the United States Courts, the United States Pretrial Services manages, monitors, and supervises defendants charged with federal crimes from the period

between arrest and disposition.<sup>1</sup> There are two options for defendants at the pretrial stage: detention or release.<sup>2</sup> The “primary” goal of U.S. Pretrial Services is to “releas[e] defendants on the least restrictive conditions, which will reasonably assure the defendant’s appearance and the safety of the community.”<sup>3</sup>

Developed in the District of Oregon, Court Assisted Pretrial Supervision (CAPS) is a bold extension of pretrial services “reserved only for those defendants for whom no other condition will reasonably assure their appearance or the safety of the community.”<sup>4</sup> CAPS enables the pretrial release of these high-risk defendants by requiring the input and participation of a magistrate judge, a pretrial services officer, the defendant’s attorney, and, when appropriate, the prosecutor.<sup>5</sup> CAPS defendants attend regular status hearings as set by the magistrate judge, written performance reports are submitted prior to any hearing, and each defendant’s conditions of release are modified as needed.<sup>6</sup> Since 2011, 62 defendants have been released under the CAPS program with specifically tailored CAPS conditions.<sup>7</sup> CAPS overall has a 57% success rate, with 27 successful and 20 unsuccessful defendants (the remaining 15 cases are active).<sup>8</sup> Success in CAPS means the defendant meets the conditions of his pretrial release while awaiting the disposition of his case, including appearing in court as scheduled and not reoffending.<sup>9</sup>

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<sup>1</sup> *Probation and Pretrial Services—Mission*, U.S. COURTS, <http://www.uscourts.gov/services-forms/probation-and-pretrial-services/probation-and-pretrial-services-mission> (last visited Oct. 21, 2017).

<sup>2</sup> See AMER. BAR ASS’N, CRIM. JUST. SEC. STANDARDS § 10-1.1 (2017).

<sup>3</sup> DIST. OF OR. OFFICE OF PRETRIAL SERVS., COURT ASSISTED PRETRIAL SUPERVISION (CAPS) (2017) (on file with author).

<sup>4</sup> *Id.* Judge Hubell was the first in the District to hold meetings with and supervise selected defendants awaiting sentencing (the earliest version of CAPS). Interview with PTSO C, in Portland, Or. (Feb. 15, 2017) (on file with author). The sources of information used in this Note to evaluate CAPS include data and statistics provided by the Pretrial Services Office in Portland, Oregon and anecdotal information collected by the author. To obtain anecdotal information, the author interviewed 12 individuals who are connected to CAPS. In order to achieve candor, names of interviewees have been omitted. They are instead identified by their role in CAPS: Assistant Federal Public Defender (AFPD), Assistant United States Attorney (AUSA), CAPS Participant (CP), Federal Magistrate Judge (Judge), and Pretrial Services Officer (PTSO).

<sup>5</sup> *Court Assisted Pretrial Supervision (CAPS)*, U.S. PRETRIAL SERVS., DIST. OF OR., <http://www.orpt.uscourts.gov/court-assisted-pretrial-supervision-caps> (last visited Oct. 21, 2017).

<sup>6</sup> *Id.* Magistrate judge assignments are made based on criminal duty. The magistrate judge maintains control for the case at least through dismissal or conviction. Meeting frequency is on a case-by-case basis. DIST. OF OR. OFFICE OF PRETRIAL SERVS., *supra* note 3.

<sup>7</sup> E-mail from Brian Crist, Chief U.S. Pretrial Servs. Officer, Dist. of Or., to author (Feb. 22, 2017) (on file with author).

<sup>8</sup> *Id.* The statistics reflect data collected until February 2017.

<sup>9</sup> Another way to define “success” in and of CAPS is to assess the recidivism rates post-release for defendants who successfully met their CAPS conditions. There is no

CAPS came about after U.S. Magistrate Judges in the District of Oregon asked U.S. Pretrial Services to look into applying the reentry drug court model to the pretrial supervision of defendants.<sup>10</sup> Reentry drug courts provide an alternative to detention for offenders with substance abuse issues.<sup>11</sup> The District of Oregon successfully initiated its reentry court model in 2005, (the second of its kind in the federal system) and has since helped replicate it in other districts.<sup>12</sup>

Black males are doing well in CAPS, successfully meeting their supervision conditions at a rate slightly higher than other CAPS males.<sup>13</sup> Black males benefit from CAPS because they are released rather than detained, receive individualized conditions and attention from a judge, and typically end up with a shorter sentence than they would have if detained.<sup>14</sup> CAPS presents a unique opportunity to zero in on Black, male, high-risk defendants and truly understand what motivates them to want to have and use support systems that enable them to live their lives without future contact with law enforcement. To this end, CAPS should build upon its success with Black male defendants by adding cultural awareness to its existing structures by: (1) pairing Black male defendants with culturally specific mentors, and (2) providing training in cultural consciousness to core CAPS personnel (magistrate judges and pretrial services officers).

Pairing Black male defendants with culturally specific mentors as part of their individualized release conditions will help improve outcomes by giving defendants extra support in the areas where they are most likely to violate conditions of release, such as drug abuse or gang pressures.<sup>15</sup> Cultural consciousness training of core CAPS personnel will help improve communication and, therefore, outcomes.<sup>16</sup> This training will give the magistrate judges and pretrial services officers who participate in CAPS the tools to communicate with these defendants more effectively. Because training will both facilitate better decision

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data on this. E-mail from Brian Crist, Chief U.S. Pretrial Servs. Officer, Dist. of Or., to author (Aug. 8, 2017) (on file with author).

<sup>10</sup> DIST. OF OR. OFFICE OF PRETRIAL SERVS., *supra* note 3.

<sup>11</sup> These courts manage the return to the community of drug-addicted individuals after release from prison “using the authority of the court to apply graduated sanctions and positive reinforcement and to marshal resources to support the prisoner’s reintegration . . . to promote” the sobriety of the released prisoner. OFFICE OF JUSTICE PROGRAMS, REENTRY COURTS: MANAGING THE TRANSITION FROM PRISON TO COMMUNITY 2 (1999).

<sup>12</sup> DANIEL W. CLOSE ET AL., THE DISTRICT OF OREGON REENTRY COURT: EVALUATION, POLICY RECOMMENDATIONS, AND REPLICATION STRATEGIES 1–2 (2009); *see also* Helen Jung, *Portland ‘Re-Entry Court’ a Groundbreaking Model for Bringing Sobriety to Drug, Alcohol Abusers*, OREGONIAN (Oct. 14, 2014), [http://www.oregonlive.com/portland/index.ssf/2014/10/portland\\_re-entry\\_court\\_a\\_grou.html](http://www.oregonlive.com/portland/index.ssf/2014/10/portland_re-entry_court_a_grou.html).

<sup>13</sup> *See infra* Part III.

<sup>14</sup> *See infra* Part VI.

<sup>15</sup> *See infra* Part V.

<sup>16</sup> *See id.*

making on the behalf of and create more confidence in the CAPS-related relationships for the defendant, it will also likely lead to fewer release violations. CAPS should be focused in these ways as part of a broader effort to standardize the program.<sup>17</sup>

This Note is organized in four parts. Part II describes the legislative and administrative history of CAPS as it relates to its Black male defendants. Part III connects the legislation to U.S. Pretrial Services and CAPS's aim of increasing pretrial release. Part IV discusses the benefits of CAPS for Black male defendants. Part V suggests two ways to formally add cultural awareness to the program to improve outcomes for Black male defendants.

## II. PRETRIAL RELEASE FOR DEFENDANTS: FROM THE BAIL SYSTEM TO CAPS

The background and legislative history of CAPS as it relates to Black male defendants is integral to understanding that CAPS is part of a larger, broader evolution in the federal criminal justice system favoring pretrial release over custody. Since CAPS was enacted, there has been a dramatic rise in the size and scale of the federal prison system. The increase began in the 1980s with mandatory minimum sentences for drug trafficking and firearms offenses, resulting in a disproportionately large increase in the number of Black male defendants subject to pretrial detention and imprisonment in the federal system.<sup>18</sup>

This Section begins with key pieces of legislative history. The Section then covers the goals of both the Office of Pretrial Services in general, and CAPS in particular.

### A. Legislation Leading to CAPS

*Our Nation stands today at the threshold of a new era in our system of criminal justice.*

*– Pres. Lyndon Johnson's Remarks at the signing of the Bail Reform Act of 1966<sup>19</sup>*

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<sup>17</sup> Nearly all CAPS personnel interviewed for this Note suggested a need to standardize and create consistency within CAPS. *See, e.g.*, Interview with Brian Crist, Chief U.S. Pretrial Servs. Officer, Dist. of Or., in Portland, Or. (Jan. 26, 2017) (on file with author). The other suggested changes are outside the scope of this Note.

<sup>18</sup> *See* NATHAN JAMES, CONG. RESEARCH SERV., R42937, THE FEDERAL PRISON POPULATION BUILDUP: OPTIONS FOR CONGRESS (2016) (summary). “Since the early 1980s, there has been a historically unprecedented increase in the federal prison population. The total number of inmates under the Bureau of Prisons’ (BOP) jurisdiction increased from approximately 25,000 in FY1980 to over 205,000 in FY2015.” *Id.*

<sup>19</sup> Pres. Lyndon B. Johnson, *Remarks at the Signing of the Bail Reform Act of 1966*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=27666> (last visited Oct. 21, 2017).

The Bail Reform Act of 1966,<sup>20</sup> Speedy Trial Act of 1974,<sup>21</sup> and Pretrial Services Act of 1984<sup>22</sup> are the crucial statutory reforms that led to the development of the mission to release as many defendants, including Black male defendants, as possible through carefully tailored release conditions such as those used in CAPS.

### 1. *The Bail Reform Act of 1966*

The Bail Reform Act of 1966 is the first statutory precursor to CAPS, fundamentally reforming federal pretrial detention by doing away with the antiquated system that relied on bail bondsmen and expensive corporate surety bonds to secure the return of arrested defendants for court proceedings.<sup>23</sup> The Act's purpose was "to revise the practices relating to bail to assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges, to testify, or pending appeal, when detention serves neither the ends of justice nor the public interest."<sup>24</sup> The Act permitted noncapital defendants to be released on their own recognizance on terms determined by a judicial officer, such as placing the defendant in the custody of a "designated person or organization"; "plac[ing] restrictions on travel, association, or place of abode"; "requir[ing] the execution of an appearance bond"; or "impos[ing] any other conditions deemed reasonably necessary[.]"<sup>25</sup> Indeed, by "requir[ing] that the decision to release a man prior to the trial be based on facts—like community and family ties and past record, and not on his bank account[.]" the Bail Reform Act permitted more defendants to be released from custody while awaiting trial and sentencing than the corporate bail bond system that preceded it.<sup>26</sup>

### 2. *Speedy Trial Act of 1974*

Because it led to the creation of Pretrial Services, the next major legislative precursor to CAPS was the Speedy Trial Act of 1974.<sup>27</sup> The Act

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<sup>20</sup> Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 214 (codified as amended at 18 U.S.C. §§ 3041, 3141–3143, 3146–3152, 3568 (2012)).

<sup>21</sup> Speedy Trial Act of 1974, Pub. L. No. 93-619, 88 Stat 2076 (codified as amended at 18 U.S.C. §§ 3161–3174 (2012)).

<sup>22</sup> Pretrial Services Act of 1982, Pub. L. No. 97-267, 96 Stat. 1136 (codified as amended at 18 U.S.C. §§ 3152–3155 (2012)).

<sup>23</sup> 80 Stat. at 214. For a description of the evolution away from the money bail system, see BARRY MAHONEY ET AL., NAT'L INST. OF JUSTICE, NJC 181939, PRETRIAL SERVICES PROGRAMS: RESPONSIBILITIES AND POTENTIAL 7–8 (2001).

<sup>24</sup> 80 Stat. at 214.

<sup>25</sup> *Id.* An appearance bond typically requires a 10% cash deposit as one of its conditions. The deposit is refunded after the defendant makes all of his appearances. A bail bond (sometimes called a corporate surety bond) is orchestrated through a third-party agent. The 10% fee, or premium, paid to a bail bond is not refundable even when the defendant makes all of his court appearances.

<sup>26</sup> Pres. Lyndon B. Johnson, *supra* note 19.

<sup>27</sup> Speedy Trial Act of 1974, Pub. L. No. 93-619, 88 Stat 2076 (codified as amended at 18 U.S.C. §§ 3161–3174 (2012)).

created time limits for the various preconviction stages of a criminal prosecution.<sup>28</sup> The Act's purposes included reducing unnecessarily lengthy pretrial detention by requiring the defendants be timely tried.<sup>29</sup> "Title II of the Act authorized the Director of the Administrative Office of the U.S. Courts to establish 'demonstration' pretrial services agencies in 10 judicial districts."<sup>30</sup> The efficacy of these early pretrial service agencies in both reducing crime by persons released to the community pending trial and unnecessary pretrial detention led to more sweeping pretrial services legislation.

### 3. *The Pretrial Services Act of 1982*

The final legislative step enabling CAPS was the Pretrial Services Act of 1982.<sup>31</sup> The Act expanded pretrial services to include all 94 federal judicial districts.<sup>32</sup> While each pretrial services office receives national oversight and support, individual offices within the various federal districts are independently managed.<sup>33</sup> As arms of the federal court in their respective districts, each office is responsive to judges in that particular district. In some, mostly smaller districts, probation and pretrial services are one office.<sup>34</sup> The District of Oregon—the district this Note focuses on—has separate Probation and Pretrial Services offices.<sup>35</sup>

### B. *The Goals of Pretrial Services and CAPS*

The mission and philosophy of the Offices of Pretrial Services mirrors that of CAPS. Their stated goals are to "assist the federal courts in the fair administration of justice[,] "protect the community[,] and "bring about long-term positive change in individuals under supervision."<sup>36</sup> CAPS advances the fair administration of justice by

<sup>28</sup> *Id.* at 2076–77.

<sup>29</sup> *Id.* at 2076. The goal of the Act is evident from its full title: "An act to assist in reducing crime and the danger of recidivism by requiring speedy trials and by strengthening the supervision over persons released pending trial, and for other purposes." *Id.*

<sup>30</sup> 88 Stat. at 2086; *Probation and Pretrial Services History*, U.S. COURTS, <http://www.uscourts.gov/services-forms/probation-and-pretrial-services/probation-and-pretrial-services-history> (last visited Oct. 21, 2017).

<sup>31</sup> Pretrial Services Act of 1982, Pub. L. No. 97-267, 96 Stat. 1136 (codified as amended at 18 U.S.C. §§ 3152–3155 (2012)); *Probation and Pretrial Services History*, *supra* note 30.

<sup>32</sup> 96 Stat. at 1136; *Probation and Pretrial Services—Mission*, *supra* note 1. Offices are located in 93 of the 94 U.S. district courts, which include the U.S. territories. The 94th is the Northern Mariana Islands. The district of Guam provides their probation and pretrial services. *Id.*

<sup>33</sup> *Probation and Pretrial Services—Mission*, *supra* note 1.

<sup>34</sup> *Id.*

<sup>35</sup> *See, e.g.*, U.S. PRETRIAL SERVS. DIST. OF OR., <http://www.orpt.uscourts.gov> (last visited Oct. 21, 2017); U.S. PROBATION DIST. OF OR., [www.orp.uscourts.gov/locations.html](http://www.orp.uscourts.gov/locations.html) (last visited Oct. 11, 2017).

<sup>36</sup> *Probation and Pretrial Services—Mission*, *supra* note 1.

embodying the “mainstays” of Pretrial Services: “Individualized case assessment and interventions tailored by trained professionals to specific risk . . . .”<sup>37</sup> The Office of Pretrial Services protects the community by providing release conditions that carefully consider the potential safety risks each defendant poses to the community, providing support to mitigate those risks, and revoking release if those conditions are not met.<sup>38</sup>

Pretrial Services works with defendants between the time they are charged with a crime and, if convicted, through sentencing to “[h]elp ensure that defendants released to the community . . . commit no crime while awaiting trial and return to court as required.”<sup>39</sup> Before an initial appearance, pretrial services officers investigate defendants for the court by “gathering and verifying” information about their backgrounds, such as family, education, employment, finances, health, and substance abuse through means such as record checks and interviews.<sup>40</sup> After conviction, the officers conduct a similar investigation.<sup>41</sup> After an investigation, officers prepare reports, which help courts make informed decisions for the defendants.<sup>42</sup> The pretrial services report recommends and explains the reasoning behind release or detention and suggests release conditions to impose if released.<sup>43</sup> The officers also supervise the defendants who are released into the community prior to trial.<sup>44</sup>

### III. PRETRIAL RELEASE AND BLACK MALE DEFENDANTS IN CAPS

The history and mission of Pretrial Services is one of “justice” and “individual” change.<sup>45</sup> CAPS appears to fit into this mold for the Black male defendants it serves. Although the statistical sample size is small, of

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<sup>37</sup> Matthew G. Rowland, *Assessing the Case for Formal Recognition and Expansion of Federal Problem-Solving Courts*, 80 FED. PROBATION, Dec. 2016, at 3, 9.

<sup>38</sup> See DIST. OF OR. OFFICE OF PRETRIAL SERVS., *supra* note 3. The mission of the Office of U.S. Pretrial Services is in line with the recommendations of other organizations such as the Pretrial Justice Institute. See *Pretrial Justice*, CRIMINAL JUSTICE (Nov. 30, 2016), <https://criminaljusticegroup.com/2016/11/30/pretrial-justice/> (“Supervision services can greatly improve pretrial outcomes by providing appropriate conditions and services for those awaiting trial. Supervision should only be used for those who need it based on individual strengths and weaknesses. . . . Common pretrial supervision conditions include checking in with a pretrial case manager, court date reminders, drug testing, GPS supervision, and/or treatment referrals.”).

<sup>39</sup> *Probation and Pretrial Officers and Officer Assistants*, U.S. COURTS, <http://www.uscourts.gov/services-forms/probation-and-pretrial-services/probation-and-pretrial-officers-and-officer> (last visited Oct. 21, 2017).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> See *Probation and Pretrial Services—Mission*, *supra* note 1.



the 62 CAPS defendants to date, 19 have been Black men, including three cases still active.<sup>46</sup> Of the 16 defendants sentenced, eight successfully completed their conditions and eight had their conditions revoked, translating to a 50% success rate.<sup>47</sup> For comparison, of the 18 White defendants released with CAPS conditions, six were successful, eight were unsuccessful, and four are active, translating to a 43% success rate.<sup>48</sup> CAPS overall has a 57% success rate, with 27 successful, 20 unsuccessful, and 15 active cases.<sup>49</sup> Black men, therefore, fare worse when compared to all participants and marginally better than White men.<sup>50</sup>

The higher success rates overall reflect the fact that women do particularly well in CAPS. Five of five Black women met their CAPS conditions; seven of ten White women met their conditions (four cases are active).<sup>51</sup> The reasons for targeting Black men are to recognize Black men's history of disenfranchisement and to advocate the use of CAPS as a tool for decision makers such as judges and pretrial services officers (who are mostly White) to understand and mitigate their own biases.<sup>52</sup>

#### IV. REASONS WHY CAPS BENEFITS ITS BLACK MALE DEFENDANTS

The initial benefit is that the very act of providing for pretrial release instead of detention helps the Black male defendant by keeping him closer to family, community, legal, and other support systems and away from the great emotional and physical harms of incarceration.<sup>53</sup> CAPS's unique benefit over other release conditions is that its individualized release conditions are combined with the support of a federal magistrate judge, which fosters success in meeting those conditions.<sup>54</sup> Finally, meeting release conditions typically results in shorter sentences for a defendant,<sup>55</sup> thereby further reducing the negative psychological impact of prison.

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<sup>46</sup> E-mail from Brian Crist, *supra* note 7.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* The racial breakdown of the other males is: 5 Hispanic (1 successful, 1 unsuccessful, 3 active); 1 American Indian/Alaskan Native (active).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> See generally HENRY LOUIS GATES, JR., *LIFE UPON THESE SHORES: LOOKING AT AFRICAN AMERICAN HISTORY 1513–2008*, at 191–92, 363 (2011) (describing African American history from the arrival of the conquistadors to the election of President Obama).

<sup>53</sup> See *infra* Part IV.D.2; Danielle Wallace et al., *Examining the Role of Familial Support During Prison and After Release on Post-Incarceration Mental Health*, 60 *INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY* 3, 3–4 (2014).

<sup>54</sup> See *Court Assisted Pretrial Supervision (CAPS)*, *supra* note 5.

<sup>55</sup> J.C. Oleson et al., *Pretrial Detention Choices and Federal Sentencing*, 78 *FED. PROBATION*, June 2014, at 12, 14.

### A. *Release is Better Than Detention*

In the criminal justice system overall, research indicates that Black men are among the least likely to be released pretrial,<sup>56</sup> so the very fact of their CAPS release is positive because it aligns with Pretrial Services' mission of safely releasing as many defendants as possible.<sup>57</sup> CAPS defendants are those who are "borderline" (meaning they have the highest risk of violating their conditions),<sup>58</sup> so they are defendants who would, without the existence of CAPS as an option, probably remain in custody prior to trial.

The District of Oregon releases more high-risk (and, therefore, more high-risk Black male defendants) than any other federal district, and CAPS contributes to this.<sup>59</sup> Significant benefits flow from CAPS pretrial release to the defendants admitted to CAPS.<sup>60</sup> A released defendant, for example, is better able to assist his attorney in the preparation of his defense.<sup>61</sup> Being jailed before trial harms the defendant in ways such as enforcing or reinforcing criminal behavior.<sup>62</sup> Pretrial detention is not designed to treat the underlying problems that caused the defendant to commit the crime, instead, it is just a short-term stay in a jail until trial and adjudication of guilt or innocence, putting criminal defendants "out of sight—out of mind."<sup>63</sup> CAPS addresses the underlying problems of the defendant by setting up success "at the front end[,]"<sup>64</sup> dealing in "the

<sup>56</sup> See, e.g., THOMAS H. COHEN & BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, NJC 214994, PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS 6 (2007); Jan Ransom, *Minorities More Likely to Be Ordered Held Awaiting Trial, Study Says*, BOS. GLOBE (Sept. 30, 2015), <https://www.bostonglobe.com/metro/2015/09/29/black-defendants-more-likely-held-before-trial-than-whites-some-counties-study-finds/BP2z3aZYHkvUhy5NNxHaxL/story.html>.

<sup>57</sup> *Probation and Pretrial Services—Mission*, *supra* note 1.

<sup>58</sup> See *Court Assisted Pretrial Supervision (CAPS)*, *supra* note 5.

<sup>59</sup> William Hicks, Jr., Pretrial Serv. Adm'r at Admin. Office of the U.S. Courts, *Risk Assessment and the PTRAs (Pretrial Risk Assessment)*, Presentation at U.S. Pretrial Services Oregon (Feb. 13, 2017) (on file with author) ("In reviewing the results of Pretrial Risk Assessments (PTRAs), Oregon led the nation, releasing the highest percentage of high risk PTRAs 4 and 5 defendants. The defendants released under CAPS contributed to this." A PTRAs score of 5 is the highest score, representing the highest risk of pretrial release failure.); see also OR. FED. BAR ASS'N, DISTRICT OF OREGON 2016 ANNUAL REPORT 10–12 (2016).

<sup>60</sup> See LAURA & JOHN ARNOLD FOUND., PRETRIAL CRIMINAL JUSTICE RESEARCH 3 (2013).

<sup>61</sup> See GEORGE F. COLE ET AL., THE AMERICAN SYSTEM OF CRIMINAL JUSTICE 362 (13th ed. 2013).

<sup>62</sup> Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L.J. 1344, 1354 (2014).

<sup>63</sup> Arthur R. Angel et al., *Preventive Detention: An Empirical Analysis*, 6 HARV. C.R.-C.L. L. REV. 300, 352 (1971).

<sup>64</sup> Interview with AUSA B, in Portland, Or. (Feb. 3, 2017) (on file with author).

currency of real human lives,”<sup>65</sup> and “throw[ing] resources at those who need more attention.”<sup>66</sup>

### B. *Individualized Release Conditions*

CAPS’s individualized supervision plan is designed to and helps Black male defendants meet their release conditions. The magistrate judge, pretrial services, the defendant’s attorney, and, when appropriate, the prosecutor participate in creating a CAPS release plan.<sup>67</sup> CAPS uses a variety of methods to help a defendant overcome personal problems, or whatever other barriers he has to success, which are reviewed and adjusted as needed at status hearings.<sup>68</sup> If the defendant has a history of alcohol or illegal drug abuse, which is not uncommon, treatment is often part of the plan as well as drug testing.<sup>69</sup> The plan also includes a workforce development coordinator and may also include meeting educational goals such as working towards a G.E.D.<sup>70</sup> Measures such as addiction treatment, employment support, and education help Black male defendants by providing the tools and structures needed to meet their release conditions.<sup>71</sup>

### C. *Magistrate Judge Interaction Motivates CAPS Defendants to Meet Their Release Conditions*

An essential element of CAPS’s success for Black males is what separates it from the ordinary pretrial release scenario: federal magistrate judge involvement. For most defendants, CAPS hearings are the first time that they have had positive, “prosocial” interaction with and feedback from an authority figure within the criminal justice system.<sup>72</sup> CAPS Participant (CP) B said that before CAPS he “was not too fond of judges,” but his judge accepted him “from the start” and guided him with advice such as “not to be troubled” if he made a mistake.<sup>73</sup> According to Judge A, CAPS is about “building relationships” of “trust and respect.”<sup>74</sup> Judge A does this by starting the process in the courtroom and then, if the defendant excels on release for several months, inviting the defendant into his chambers as an “acknowledgement of effort.”<sup>75</sup> As Pretrial

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<sup>65</sup> Interview with AFPD A, in Portland, Or. (Feb. 6, 2017) (on file with author).

<sup>66</sup> Interview with Judge B, in Portland, Or. (Feb. 7, 2017) (on file with author).

<sup>67</sup> See *supra* Part I.

<sup>68</sup> *Court Assisted Pretrial Supervision (CAPS)*, *supra* note 5.

<sup>69</sup> E-mail from Brian Crist, Chief of Pretrial Servs., Dist. of Or., to author (Nov. 3, 2017) (on file with author).

<sup>70</sup> *Court Assisted Pretrial Supervision (CAPS)*, *supra* note 5.

<sup>71</sup> *Id.*

<sup>72</sup> Interview with PTSO B, in Portland, Or. (Feb. 10, 2017) (on file with author).

<sup>73</sup> Interview with CP B, in Portland, Or. (Aug. 10, 2017) (on file with author).

<sup>74</sup> Interview with Judge A, in Portland, Or. (Feb. 6, 2017) (on file with author).

<sup>75</sup> *Id.*; E-mail from Judge A to author (Apr. 11, 2017) (on file with author).

Services Officer (PTSO) D stated, “one of my favorite things” is that at first “you see a wall” between the defendant and the judge—the defendant has “no smile” and is “stiff.”<sup>76</sup> After a while, (such as the point when a defendant is invited into Judge A’s chambers), “everything softens,” and this is “so powerful.”<sup>77</sup> Recently, after a 20-minute meeting with his judge, PTSO D had a beaming Black male defendant tell her that he had “never been talked to like that before” (meaning that a judge had never talked to him with such kindness).<sup>78</sup> Driven by a desire to maintain a positive relationship with their judge, such interactions motivate defendants, including Black men, to meet their release conditions. CP B reported that knowing he had to check in with his judge “kept [him] on his toes[,]”<sup>79</sup> while CP A credits his judge with “keeping [him] on the straight and narrow.”<sup>80</sup> CP A remarked that before CAPS, he had “never seen a judge in regular clothes before. Seeing a judge in regular clothes let me know that judges are regular human beings.”<sup>81</sup>

### D. Shorter Sentences Are Better Than Longer Sentences

Shorter sentences are one tangible, yet somewhat unexpected, benefit of CAPS for Black male defendants.<sup>82</sup> Successfully adhering to CAPS conditions demonstrates to the court, his attorney, the prosecutor, and himself a willingness to correct the behavior that resulted in criminal changes *before* he is found guilty (or negotiates a guilty plea) and sentenced, signaling to the sentencing judge that a reduced sentence may be appropriate. A reduced sentence, in turn, reduces the potential for incarceration-related psychological damage.<sup>83</sup>

#### 1. How Good Performance in CAPS Can Lead to a Shorter Sentence

Meeting CAPS conditions signals to the sentencing judge that the defendant has the potential to meet the challenges of life after prison, which generally tends to encourage the judge to grant a shorter sentence.<sup>84</sup> CAPS personnel communicate their beliefs that a defendant is suited to life outside of prison to the sentencing judge in several ways.

<sup>76</sup> Interview with PTSO D, in Portland, Or. (Feb. 15, 2015) (on file with author).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> Interview with CP B, *supra* note 73.

<sup>80</sup> Interview with CP A, in Portland, Or. (Aug. 10, 2017) (on file with author).

<sup>81</sup> *Id.*

<sup>82</sup> Although shorter sentences are not an express goal of CAPS or pretrial services, it is well documented that defendants who are released before trial receive shorter sentences than those who do not. See LAURA & JOHN ARNOLD FOUND., *supra* note 60, at 3; Oleson et al., *supra* note 55, at 14.

<sup>83</sup> CRAIG HANEY, THE PSYCHOLOGICAL IMPACT OF INCARCERATION: IMPLICATIONS FOR POST-PRISON ADJUSTMENT 79 (2002).

<sup>84</sup> See Timothy P. Cadigan & Christopher T. Lowenkamp, *Preentry: The Key to Long-Term Criminal Justice Success?*, 75 FED. PROBATION, Sept. 2011, at 74, 77 (discussing the positive long-term effects of pretrial release for defendants).

First, the presentence report prepared by the pretrial services office describes the defendant's progress and potential.<sup>85</sup> Second, the defendant's success can be used effectively by defense counsel at time of sentencing.<sup>86</sup> Third, the magistrate judge often demonstrates support for a shorter sentence for their CAPS defendants by speaking at the hearing or writing a letter to the U.S. district judge who is sentencing the defendant.<sup>87</sup>

Statistical evidence suggests that pretrial release generally tends to result in shorter sentences for similarly situated defendants.<sup>88</sup> Professor Christopher Lowenkamp described this correlation in the report, *Investigating the Impact of Pretrial Detention on Sentencing Outcomes*: "When other relevant statistical controls are considered, defendants detained until trial or case disposition are 4.44 times more likely to be sentenced to jail and 3.32 times more likely to be sentenced to prison than defendants who are released at some point pending trial."<sup>89</sup>

Although a shorter sentence is not the express purpose of CAPS, and there are "no guarantees" of a reduced sentence,<sup>90</sup> anecdotal evidence indicates that successful pretrial release under CAPS can have a "significant impact on the ultimate sentencing."<sup>91</sup> This effect may be even greater than the statistical correlation between any type of pretrial release and length of sentences observed by Lowenkamp. In this regard, Judge B stated that "sentence times are generally reduced."<sup>92</sup> Some of his CAPS defendants who would normally have received prison time instead received probation.<sup>93</sup> One of his cases was dismissed.<sup>94</sup> AFPD A and AUSA B stated that their successful CAPS defendants received shorter sentences,<sup>95</sup> which are the result of relationships created and defendants'

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<sup>85</sup> See *id.* at 76.

<sup>86</sup> See *id.* at 77.

<sup>87</sup> See E-mail from Judge E to author (Mar. 22, 2017) (on file with author). Sometimes the prosecutor will do the same. See Tom Hallman, *He Was a Gangster. She Was His Prosecutor. Now Their Unlikely Friendship Is Changing Lives*, OREGONIAN, reprinted in READER'S DIG., <http://www.rd.com/true-stories/inspiring/felon-prosecutor-friendship/> (last visited Oct. 21, 2017).

<sup>88</sup> See *supra* note 82 and accompanying text.

<sup>89</sup> CHRISTOPHER T. LOWENKAMP ET AL., INVESTIGATING THE IMPACT OF PRETRIAL DETENTION ON SENTENCING OUTCOMES 10 (2013). "Detained . . . high-risk defendants were about 3 times more likely to be sentenced to prison than similar defendants who were released prior to pretrial." *Id.* at 17.

<sup>90</sup> Interview with PTSO B, *supra* note 72.

<sup>91</sup> Interview with AFPD A, *supra* note 65. Although CAPS's mission is not to reduce sentence times, it is known that "[e]ven a small amount of detention results in a longer sentence." Sarah Valdez Hoffer, Senior U.S. Probation Officer, Presentation at U.S. Pretrial Services Oregon (Feb. 13, 2017) (on file with author).

<sup>92</sup> Interview with Judge B, *supra* note 66.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> Interview with AFPD A, *supra* note 65; Interview with AUSA B, *supra* note 64. "While all defendants benefit from [the resources provided by Pretrial Services], their

proof that they can follow rules and show a genuine desire to leave what AUSA A and others call “the life,” meaning the life of criminality of their cohorts in the neighborhood.<sup>96</sup> In a profound example of the shorter sentence phenomenon, after meeting his CAPS conditions, Black male defendant DeQuandre Davis received probation rather than the federal mandatory minimum sentence of 10 years in prison that would have otherwise been called for based on his conviction.<sup>97</sup>

## 2. *Why Shorter Sentences Are Better Than Longer Sentences: The Psychological Impact of Incarceration*

Shorter sentences are preferable because time in prison has psychological consequences for the prisoner.<sup>98</sup> The process of psychological change is a gradual one.<sup>99</sup> Therefore, the longer the time of incarceration, “the more significant the nature of the institutional transformation.”<sup>100</sup> Psychological adaptations can include “[d]ependence on institutional structure and contingencies”; “[h]ypervigilance, interpersonal distrust and suspicion”; “[e]motional over-control, alienation, and psychological distancing”; “[s]ocial withdrawal and isolation”; “[d]iminished sense of self-worth and personal value”; and “[p]ost-traumatic stress reactions to the pains of imprisonment.”<sup>101</sup> The converse, of course, is true; less incarceration—a likely consequence of CAPS—mitigates these adverse effects.

The psychological consequences of incarceration hinder post-prison adjustment. According to psychologist Craig Haney, such consequences “may interfere with the transition from prison to home, impede an ex-convict’s successful re-integration into a social network and employment setting, and may compromise an incarcerated parent’s ability to resume

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incorporation into the Court Assisted Supervision has assisted the judges’ familiarity with the defendants’ performance in treatment and a greater understanding of their overall lifestyle.” *Court Assisted Pretrial Supervision (CAPS)*, *supra* note 5.

<sup>96</sup> Interview with AUSA A, Portland, Or. (Feb. 3, 2017) (on file with author). AAFP A prefers to call “the life” the “life struggles and accomplishments” of these defendants. E-mail from AAFP A to author (Apr. 11, 2017) (on file with author). “Far too often sentencing becomes a cold process of ascribing a number (months or years) to represent a person value or devalue when sentencing arrives. The CAPS program tends to cause everyone involved in it to actually see the participant as a human being. It is harder to simply ascribe a number to someone you have begun to know and understand.” *Id.*

<sup>97</sup> Hallman, *supra* note 87.

<sup>98</sup> HANEY, *supra* note 83, at 77; see also Shelley Johnson Listwan et al., *Victimization, Social Support, and Psychological Well-Being: A Study of Recently Released Prisoners*, 37 CRIM. JUST. & BEHAVIOR 1140, 1142 (2010) (“Research has explored the structural aspects of prison (loss of control, inadequate living conditions) and its effect on emotions such as anxiety and depression as well as hostility and personality functioning.”).

<sup>99</sup> HANEY, *supra* note 83, at 80.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 81–83.

his or her role with family and children.”<sup>102</sup> Shorter sentences, therefore, help Black male defendants in CAPS by giving them less time in the psychologically taxing and counter-productive prison environment.

#### V. IMPROVE CULTURAL AWARENESS ABOUT OF BLACK MALE DEFENDANTS IN CAPS BEFORE EXPANDING IT TO OTHER DISTRICTS

*I learned a lot about the law at Harvard Law School. But no one taught me about why a 20-year-old black male in a tough neighborhood feels like he needs to be armed. No one taught me about what attracts kids to join gangs. I knew the law, and I could apply the law. But it is difficult to stand in judgment of other human beings without understanding human beings.*

- Hon. Stacie Beckerman, Federal Magistrate Judge, D. Or.<sup>103</sup>

Black males’ history of disenfranchisement, coupled with the fact that they are well-served by CAPS, provide compelling reasons to refine CAPS.<sup>104</sup> CAPS needs greater consistency amongst magistrate judges, including focusing CAPS more finely on becoming culturally aware with regard to the Black male CAPS defendant. The goal of specific improvements for Black male defendants is to increase the percentage of this group who successfully meet their CAPS conditions to more than what it is currently—50%.<sup>105</sup>

Labeling and implementing race-related changes targeted to a particular group within a program such as CAPS can be done in a multitude of ways.<sup>106</sup> Federal Magistrate Judges, AFPDs, and PTSOs already receive some training in implicit bias.<sup>107</sup> Implicit bias training focuses on uncovering “the bias in judgment and/or behavior that results from subtle cognitive processes (e.g., implicit attitudes and implicit stereotypes) that often operate at a level below conscious awareness and without intentional control.”<sup>108</sup> Such training is typically voluntary and not as targeted as needed to achieve greater standardization within CAPS and effect change in the percentage of Black male CAPS defendants

<sup>102</sup> *Id.* at 86.

<sup>103</sup> Hallman, *supra* note 87.

<sup>104</sup> *See supra* note 53.

<sup>105</sup> *See supra* Part III.

<sup>106</sup> Cultural competence and implicit bias training are two examples. *See generally* MARILYN PETERSON ARMOUR ET AL., EDUCATING FOR CULTURAL COMPETENCE: TOOLS FOR TRAINING FIELD INSTRUCTORS (2006); IMPLICIT RACIAL BIAS ACROSS THE LAW (Justin D. Levinson & Robert J. Smith eds., 2012).

<sup>107</sup> E-mail from AFPD C to author (May 13, 2017) (on file with author); E-mail from Judge E to author (May 13, 2017) (on file with author) (“We received training on implicit bias at our initial national training weeks . . . and then at our annual national training workshop.”); E-mail from PTO B to Author (May 13, 2017) (on file with author).

<sup>108</sup> PAMELA M. CASEY ET AL., HELPING COURTS ADDRESS IMPLICIT BIAS: RESOURCES FOR EDUCATION, at B-2 (2012).

meeting their conditions.<sup>109</sup> Judge E, for example, stated “oftentimes the complaint is that the training identifies that we all have implicit bias, but does not offer practical solutions on how to address it.”<sup>110</sup> Judge D commented that while psychologist-led presentations (she has attended two) were “incredibly helpful,” they were “optional—and—not sufficient in terms of time spent on this issue.”<sup>111</sup>

Formally implementing methods to address awareness of the culture of Black male defendants is one way to implement change targeted to this group. The term “cultural awareness” is used here and includes race as part of Black male CAPS defendant culture. The definition of “culture” means a “system of learned behavior patterns that is characteristic of the members of any given society. Culture refers to the total way of life for a particular group of people. It includes what a group of people thinks, says, does and makes . . . .”<sup>112</sup>

Adding cultural awareness to CAPS for Black male defendants will improve communication between core CAPS personnel and improve the CAPS model for serving this group. This will result in increased defendant confidence in the judge and judicial system, which will then further encourage the defendant to meet his CAPS release conditions. That better communication leads to better outcomes has not been studied in the pretrial release context, but it is well accepted in other fields, such as medicine.<sup>113</sup>

There are two principal ways to tailor CAPS to improve communication through cultural awareness. First, provide culturally specific mentors for Black male CAPS defendants, chosen to target the specific areas where a particular defendant is most likely to violate his conditions.<sup>114</sup> Second, upskill the core CAPS personnel, magistrate judges and pretrial services officers who set CAPS conditions and supervise the released CAPS defendants in cultural consciousness.<sup>115</sup>

<sup>109</sup> E-mail from AFPD C, *supra* note 107; E-mail from Judge D to Author (May 15, 2017) (on file with author); E-mail from PTSO B, *supra* note 107.

<sup>110</sup> E-mail from Judge E, *supra* note 107.

<sup>111</sup> E-mail from Judge D, *supra* note 109.

<sup>112</sup> U.S. ARMY WHITE PAPER: CROSS-CULTURAL COMPETENCE 3 (2015).

<sup>113</sup> See, e.g., Jonathan E. Gordon et al., *Let's Talk About Improving Communication in Healthcare*, COLUM. MED. REV., May 2015, at 23, 24 (“[H]igh-quality communication between care team members and patients has been shown to have a positive influence on patient health outcomes.”); Sherrie H. Kaplan et al., *Assessing the Effects of Physician-Patient Interactions on the Outcomes of Chronic Disease*, 27 MED. CARE S110, S125 (1989) (“We conclude that the physician-patient relationship is a primary bond that may act as a form of social support to influence patients’ health status.”).

<sup>114</sup> Sheila K. Grant-Thompson & Donald R. Atkinson, *Cross-Cultural Mentor Effectiveness and African American Male Students*, 23 J. BLACK PSYCHOL. 120, 127–29 (1997).

<sup>115</sup> Jennifer K. Giancola et al., *An Organizational-Development Approach to Implementing Mentoring Partnerships: Best Practices from Physician Programs*, 68 CONSULTING PSYCHOL. J. 208, 212–13 (2016) (discussing the structural makeup of a successful mentor program).



A. *Arranging Culturally Specific Mentors for Black Male Defendants*

CAPS's pretrial release conditions are individualized for each defendant.<sup>116</sup> A Black male defendant's conditions could be further individualized by pairing each with a culturally specific mentor targeted to particular areas where he is likely to violate his conditions. Such mentors should not be mandatory but rather a well-developed option that core CAPS personnel can choose when creating and adjusting release conditions. Mentoring is when one person (the mentor) acts "in a non-professional helping capacity to provide support that benefits one or more areas of the mentee's development."<sup>117</sup> Mentoring can have "significant positive impacts" because it "guarantees [the mentee] that there is someone who cares about them, assures them they are not alone in dealing with day-to-day challenges, and makes them feel like they matter."<sup>118</sup> Research demonstrates that formal mentoring for at-risk youth enhances the prospects for positive outcomes such as an increased chance of going on to higher education and a decreased chance of alcohol and drug use.<sup>119</sup> Research also suggests that ex-prisoners who meet with a mentor are more likely to find and retain jobs and less likely to recidivate than those without mentors.<sup>120</sup> It follows that mentored Black male CAPS defendants will be more likely to meet their release conditions.

A study of Black male student mentoring in higher education indicated that "the optimal faculty mentor for African American male students is an ethnically similar, culturally responsive mentor."<sup>121</sup> The reason for this is that "many African Americans have adapted to discrimination by developing a pervasive attitude of mistrust toward European Americans."<sup>122</sup> Black male CAPS defendants, ideally, should be matched with culturally specific mentors. For example, a defendant who is likely to violate because of drug use should be paired with a culturally specific mentor with experience overcoming substance abuse. These mentors will empathize with the defendants' experiences and then act as a conduit between defendants and judges. The sensitivity to Black culture

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<sup>116</sup> See generally *id.* (sharing an organizational development approach to a successful formal mentoring program).

<sup>117</sup> *What Is Mentoring? Mentoring Defined*, NAT'L MENTORING RES. CTR., <http://www.nationalmentoringresourcecenter.org/index.php/what-works-in-mentoring/what-is-mentoring.html> (last visited Oct. 21, 2017).

<sup>118</sup> *Mentoring Impact*, MENTOR, <http://www.mentoring.org/why-mentoring/mentoring-impact/#1442263051104-6ca77555-c66a1be4-a01f> (last visited Oct. 21, 2017).

<sup>119</sup> *Id.*

<sup>120</sup> RENATA COBBS FLETCHER ET AL., *MENTORING FORMER PRISONERS: A GUIDE FOR REENTRY PROGRAMS* 3–4 (2009). Ex-prisoner mentoring has not been studied extensively. "Few social programs have attempted to provide high-risk adults—and, particularly, ex-prisoners—with mentors." *Id.* at 5.

<sup>121</sup> Grant-Thompson & Atkinson, *supra* note 114, at 131.

<sup>122</sup> *Id.* at 123.

“allows participants to authentically engage and address barriers that have previously limited their physical, emotional, spiritual and economic wellness.”<sup>123</sup> Culturally sensitive mentors for Black defendants in CAPS, then, will help allow this group to address barriers to their success with the judge with the aid of a mentor.

In one example of effective mentoring, Judge E stated she has “received positive feedback” about one mentor who mentors gang members and is a former gang member himself, because “he understands our CAPS defendants’ life experiences—he ‘gets it.’”<sup>124</sup> By providing individually tailored, culturally sensitive mentoring for Black males in CAPS, these defendants can feel like CAPS “gets it,” which, in turn, will encourage them to meet their conditions and avoid having their pretrial release revoked. CP A received a culturally matched mentor and reported that the mentor helped him “a lot.”<sup>125</sup> He was not assigned the mentor until late in his 20 months of CAPS participation, and, reflecting upon the experience, stated that “it would have been better to have a mentor from the start [of CAPS].”<sup>126</sup> CP B did not have a mentor while in CAPS but has had mentors in the past.<sup>127</sup> He stated that having a mentor at the outset of CAPS would have “taken the stress off” learning “basic things” like how “to talk to the judge and how to be with [the judge].”<sup>128</sup>

Within the existing CAPS program, some commendable work has already occurred in this direction. On occasion, CAPS currently uses the Empowerment Clinic to provide mentoring for drug-related issues or Volunteers for America as a mentor source for former Black male gang member mentors.<sup>129</sup> But a culturally sympathetic mentoring program should be made more consistent and focused in order to improve outcomes.<sup>130</sup>

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<sup>123</sup> The Imani Center created by Central City Concern in Portland, Oregon provides an instructive model. The Imani Center “provides culturally specific and responsive Afrocentric approaches to mental health and addictions treatment, peer support and case management” and “consists of African American leadership and staff who provide group and individual supports, and pro-social activities in a culturally safe environment.” *Imani Center*, CENT. CITY CONCERN, <http://www.centralcityconcern.org/Default.aspx?PageID=16681454&A=SearchResult&SearchID=30130489&ObjectID=16681454&ObjectType=1> (last visited Oct. 21, 2017).

<sup>124</sup> E-mail from Judge E, *supra* note 107.

<sup>125</sup> Interview with CP A, *supra* note 80.

<sup>126</sup> *Id.*

<sup>127</sup> Interview with CP B, *supra* note 73.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* See also *Mission: To Provide Life Improvement Services to Disadvantaged Populations*, EMPOWERMENT CLINIC, <http://www.empowermentclinic.com> (last visited Oct. 21, 2017); *Volunteers of America Current News*, VOLUNTEERS OF AM. OR., <https://www.voao.org/> (last visited Oct. 21, 2017).

<sup>130</sup> “We can be better about forming these relationships and making sure they are meaningful relationships.” E-mail from Judge E, *supra* note 87.

In order to provide Black male CAPS defendants with a relevant mentor, the Pretrial Services Office (PTSO) should establish a list of mentors by reaching out to public, nonprofit groups as well as individuals who are willing to act in a mentoring capacity for the duration of pretrial detention. The PTSO would take responsibility for vetting the potential volunteers to make sure they have the appropriate background and experience. A recommended way to implement mentoring is to have a “key [officer] . . . champion and oversee the program . . .”<sup>131</sup> Utilizing its vetted list, the PTSO would then advise the magistrate judge as to who would be an appropriate mentor for the particular defendant.<sup>132</sup>

*B. Training of Core CAPS Personnel in Black Male Cultural Consciousness*

Training CAPS personnel in cultural consciousness is another important way to improve the effectiveness of CAPS for Black male defendants. CAPS already exposes its decision makers, especially magistrate judges and pretrial services officers (CAPS’s core personnel), to the lives of their Black male defendants and fosters positive relationships between them that “can’t be faked.”<sup>133</sup> The consistent interaction between the magistrate judge and the pretrial services officer gives defendants self-confidence and motivates them not to violate their release conditions.<sup>134</sup>

Further fortifying these relationships for Black male defendants requires consciously moving CAPS’s core personnel away from the idea of racial “colorblindness” and towards color consciousness.<sup>135</sup> Of those interviewed for this Note, three stated that they “saw color” when with their Black male CAPS defendants.<sup>136</sup> The other nine described versions of a colorblind theory of race, variously stating that CAPS is an “individualized program” that does “not have a racial focus,”<sup>137</sup> the “law

<sup>131</sup> Giancola et al., *supra* note 115, at 210.

<sup>132</sup> This is similar to how the federal indigent defense panel, which serves when the Federal Public Defenders Office has a conflict, is put together. See generally NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, FEDERAL INDIGENT DEFENSE 2015: THE INDEPENDENCE IMPERATIVE (exploring the federal indigent defense system in light of 2015 budget cuts).

<sup>133</sup> Interview with Judge C, Dist. of Or., in Portland, Or. (Feb. 13, 2017) (on file with author). See *supra* Part IV.C. for a description of the role of judicial involvement in CAPS.

<sup>134</sup> Interview with Judge D, Dist. of Or., in Portland, Or. (Feb. 8, 2017) (on file with author).

<sup>135</sup> Colorblindness is largely attributed to those who are not “of color.” See Afie-Odelia E. Scruggs, *Colorblindness: The New Racism?*, TEACHING TOLERANCE (Fall 2009), <http://www.tolerance.org/magazine/number-36-fall-2009/feature/colorblindness-new-racism>.

<sup>136</sup> Interview with AFPD B, in Portland, Or. (Feb. 17, 2017) (on file with author); Interview with Judge C, *supra* note 133; Interview with Judge D, *supra* note 134. The interviewees racially identified themselves as follows: one Hispanic, one mixed race, ten White.

<sup>137</sup> Interview with Judge B, *supra* note 66.

treats everyone the same” and is “race- . . . neutral,”<sup>138</sup> and color “doesn’t matter” because we “are trained to be objective.”<sup>139</sup>

1. *Why the “Colorblind” Theory of Race Harms Black Male CAPS Defendants*

Colorblindness is a common framework for understanding racial issues today, but recent scholarship suggests that the ideology of colorblindness may have the unintended effect of perpetuating racism and racial disparities.<sup>140</sup> According to Professor Adia Wingfield in her article, *Color-Blindness Is Counter-Productive*, the reason for this is as follows:

Everyone wants to be treated as an individual and recognized for their personal traits and characteristics. But the colorblindness that sociologists critique doesn’t allow for this. Instead, it encourages those who endorse this perspective to ignore the ongoing processes that maintain racial stratification in schools, neighborhoods, health care, and other social institutions.<sup>141</sup>

Colorblindness on the part of core CAPS personnel “hinders the exploration of conflicts related to race, ethnicity, and culture.”<sup>142</sup> Core CAPS personnel who are colorblind do not “see the whole picture,” and they need to “hear and ‘see’ everything [the defendant] is communicating on many different levels,” even if those things cause them discomfort.<sup>143</sup> They “should not be blinded either, especially to something as critical as a person’s culture or racial identity.”<sup>144</sup> Colorblindness in the CAPS setting harms the defendant by not allowing for a full exploration of the interplay of race and culture into the reasons behind their motivation to commit crime and challenges to meeting CAPS conditions. Among the racial and cultural commonalities between Black male CAPS defendants to explore are the reasons why most (15 out

<sup>138</sup> Interview with AUSA A, *supra* note 96.

<sup>139</sup> Interview with PTSO B, *supra* note 72.

<sup>140</sup> Adia Harvey Wingfield, *Color-Blindness Is Counterproductive*, ATLANTIC MONTHLY (Sept. 13, 2015), <https://www.theatlantic.com/politics/archive/2015/09/color-blindness-is-counterproductive/405037/>.

<sup>141</sup> *Id.*; see also Scruggs, *supra* note 135 (“The core of ‘I don’t see color,’ is ‘I don’t see my own color, I don’t see difference because my race and culture is the center of the universe.’”); Zach Stafford, Opinion, *When You Say You ‘Don’t See Race,’ You’re Ignoring Racism, Not Helping to Solve It*, GUARDIAN (Jan. 26, 2015), <https://www.theguardian.com/commentisfree/2015/jan/26/do-not-see-race-ignoring-racism-not-helping> (“‘Colorblindness’ doesn’t acknowledge the very real ways in which racism has existed and continues to exist, both in individuals and systemically. By professing not to see race, you’re just ignoring racism, not solving it.”).

<sup>142</sup> Monnica T. Williams, *Colorblind Ideology Is a Form of Racism*, PSYCHOL. TODAY (Dec. 27, 2011), <https://www.psychologytoday.com/blog/culturally-speaking/201112/colorblind-ideology-is-form-racism>.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

of 19) of their convictions are for felon in possession of a firearm,<sup>145</sup> and why nearly all (eight of nine) of Black male CAPS defendants who did not meet their CAPS conditions were convicted of the same.<sup>146</sup> Making the connection between race, culture, and firearms convictions would help core CAPS personnel understand what would motivate these defendants to meet their CAPS conditions and “provide a more authentic opportunity to understand and resolve the client’s problems.”<sup>147</sup>

### 2. *How Cultural Consciousness Can Help Black Male CAPS Defendants*

Color consciousness, the research demonstrates, “can lead to more understanding of our racially stratified society and can give rise to a willingness to work for change.”<sup>148</sup> This Note uses the term cultural consciousness rather than color consciousness. Cultural consciousness, broadly defined, means “being aware of your culture[,] . . . able to understand other cultures and the differences that exist between them.”<sup>149</sup> The type of cultural consciousness specifically addressed in this Note, Black male CAPS defendant cultural consciousness, assumes color consciousness is integral to cultural consciousness in the context of the relationship between these CAPS defendants and core CAPS personnel.

Formalizing training in cultural consciousness will help CAPS magistrate judges and pretrial services officers attribute meaning to their Black male defendants’ behavior and thus improve communication between them. The improved communication will create greater incentive for defendants to meet their release conditions.<sup>150</sup> Because cultural consciousness is a way of thinking that takes a conscious decision and concerted effort to implement, it cannot be imposed upon CAPS core personnel. The work of creating cultural consciousness is difficult, time consuming, and on-going. The change requires a commitment far beyond a couple of workshops, and it needs to be voluntary.

### 3. *How to Upskill Core CAPS Personnel in Cultural Consciousness*

The Administrative Office of the Federal Courts, through the Federal Judicial Center, together with national headquarters for the pretrial services offices, should collaborate in developing a pilot Black male CAPS defendant cultural consciousness training program for the

<sup>145</sup> E-mail from Brian Crist, *supra* note 7. The other crimes were drugs (2), destruction of property (1), and sex trafficking (1).

<sup>146</sup> *Id.* The ninth had a drug conviction.

<sup>147</sup> Williams, *supra* note 142. Some questions to consider are: What are the factors that might lead a defendant to carry a firearm? What is the effect of structural inequality, i.e., systemic disparities in schools, employment, housing, healthcare, and discriminatory policing upon this group?

<sup>148</sup> Wingfield, *supra* note 138.

<sup>149</sup> Willie Maul, *Cultural Conscious*, MIXED NATION, <http://mixednation.com/cultural-conscious/> (last visited Oct. 21, 2017).

<sup>150</sup> See generally Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33, 35 (2001) (providing a guide to help identify and change culturally oppressive behaviors).

District of Oregon's magistrate judges and pretrial services officers. As the pioneer of CAPS, the District of Oregon judiciary and pretrial services office should be at the forefront of the effort to reinforce procedural justice and play an important role in developing this cultural consciousness training program.

Black male defendant cultural consciousness is a desired mindset that would improve CAPS. While there is no right way or guaranteed method to achieve this mindset, it requires intent and commitment. In her article, *Multicultural Lawyering: Teaching Psychology to Develop Cultural Self-Awareness*,<sup>151</sup> Carwina Weng provides an instructive framework that revolves around three "domains" through which those who are motivated towards cultural awareness must work: "attitudes and beliefs, knowledge, and behavioral skills."<sup>152</sup> The framework is "not linear in nature but rather identifies issues" that core CAPS personnel encounter as they acknowledge themselves as "cultural being[s]."<sup>153</sup>

*a. Domain #1: Self-Awareness of One's Own Culture, Attitudes, and Beliefs*

The first domain requires CAPS personnel to think about their own attitudes and beliefs.<sup>154</sup> The purpose of this domain is to create a baseline for making effective comparisons between the Black male defendant's culture and their own.<sup>155</sup> Because most CAPS personnel are White (from the dominant culture), this first domain makes sure that all personnel recognize that they have a culture that is "recognizable as a culture to others and ultimately to [them]selves."<sup>156</sup> Cultural self-awareness and the feelings they may trigger will "pay dividends" for Black male defendant interaction by helping to create more empathy for them, "which in turn can enhance rapport and information gathering, to understand [defendants'] goals and interests, and to provide more comprehensive representation."<sup>157</sup>

A method to do this is through asking and answering questions about cultural self-awareness. Affirmative answers to the initial set of questions indicate the existence of cultural self-awareness. Examples of such questions are:

<sup>151</sup> Carwina Weng, *Multicultural Lawyering: Teaching Psychology to Develop Cultural Self-Awareness*, 11 CLINICAL L. REV. 369 (2005).

<sup>152</sup> *Id.* at 397.

<sup>153</sup> *Id.*

<sup>154</sup> *See id.* at 398 ("First, the student ponders her own attitudes and beliefs . . .").

<sup>155</sup> *See id.* at 398–99.

<sup>156</sup> *Id.* at 399. *See supra* note 136 for a racial breakdown of CAPS personnel interviewed for this Note. The offices of CAPS personnel are mostly White. The racial composition of the PTSOs in the district, for example, is: 8 White, 4 Hispanic, 1 Asian, and 1 Native American. E-mail from Brian Crist, Chief Pretrial Services Officer, D. Or., to author (Mar. 10, 2017). Of the 23 AFPDs, 1 is Black, 1 is Hispanic and the rest are White. E-mail from Susan Russell, Assistant Fed. Pub. Def., Dist. of Or., to author (Mar. 20, 2017) (on file with author).

<sup>157</sup> Weng, *supra* note 151, at 398.

Do you recognize that you have a culture?

Do you believe that cultural self-awareness is important?

Are you aware of how your culture shapes your attitudes, values, biases, and assumptions . . . ?

Do you recognize the limits of your own multicultural competency?

Are there aspects of working with cultural difference that make you uncomfortable?<sup>158</sup>

A next level of questions have no “right” answers and are intended to help the core CAPS personnel reflect upon their own cultures more deeply and provide tools for comparison with a Black male defendant. Examples of questions of this type are:

How do you spend your Friday nights, Saturdays, and Sundays?<sup>159</sup>

What is in your refrigerator?<sup>160</sup>

What do your answers to these questions tell you about your culture? How do you imagine your defendant would answer this question?<sup>161</sup>

Using questions to enable and ensure cultural self-awareness is essential because CAPS personnel must be conscious of their own culture—the source of their own attitudes and beliefs—so that they can better understand the culture of their assigned Black male defendants.

*b. Domain #2: Knowledge*

The second domain requires those who are working towards cultural consciousness to consider “knowledge” gleaned from personal experiences.<sup>162</sup> An example of this is having CAPS personnel recognize that the way they interact with Black male defendants is “culturally learned and culturally specific.”<sup>163</sup> CAPS personnel already acknowledge and meet cultural differences to some degree. Judge A, for example, recognizes that these defendants often come from cultures with no knowledge of “systems, how they work, and how to make them work for us.”<sup>164</sup> In one instance, Judge A supervised a 19-year-old Black male defendant who had trouble showing up to hearings on time.<sup>165</sup> When Judge A asked him if he had a calendar, the defendant responded: “What’s a calendar?” The Judge provided him with information as to

<sup>158</sup> *Id.*

<sup>159</sup> *Describe Your Culture*, RESPECT, RELATIONSHIPS, RECONCILIATION, <http://rrr.edu.au/unit/module-1/topic-2/activity-culture/> (last visited Oct. 21, 2017).

<sup>160</sup> *Cultural Curiosity Is the Key to Success on the Global Business Landscape*, D’AMORE-MCKIM SCH. BUS. NE. U. (Dec. 4, 2014), <http://www.damorecmckimleadersatworkblog.com/cultural-curiosity-key-success-global-business-landscape/>.

<sup>161</sup> *Id.*

<sup>162</sup> Weng, *supra* note 151, at 399.

<sup>163</sup> *Id.* at 399–400.

<sup>164</sup> Interview with Judge A, *supra* note 74.

<sup>165</sup> *Id.*

where to buy an affordable calendar. The defendant thereafter made it to his meetings on time.<sup>166</sup> With a current CAPS defendant Judge A is focusing on “self care . . . about basics such as getting enough sleep and the importance of going to sleep before midnight compared to after midnight.”<sup>167</sup>

A method to increase cultural knowledge in this domain is to “start with personal experience, looking for patterns of behavior or of client reactions and then to trace the patterns to their cultural sources.”<sup>168</sup> This can be accomplished by asking CAPS core personnel, magistrate judges, and PTOS to engage in an exercise in which each lists their Black male CAPS defendants and analyzes the challenging and positive aspects of each relationship, and then reviews the list for patterns.<sup>169</sup> An example of this would look like:

CAPS Defendant X

Challenges: figuring out if he was telling me the truth, keeping him sober

Positives: gaining consistent eye contact, connecting over the arrival of his new baby

Some, such as Judge C, already make such lists informally, describing a White female CAPS defendant as “easy” because Judge C is also a White woman and a Black male CAPS defendant as “challenging” and wondering if they “can even have a relationship” because of their cultural differences.<sup>170</sup>

This exercise should be taken a step further. Each CAPS personnel member should list their Black male defendants and the challenges and triumphs of each experience and look for patterns among the lists. Teaching all CAPS personnel to think about what challenges working with Black male defendants pose for them and then having them reevaluate their approaches in ways that “take into account their culture, the individual defendant’s culture, and the interactions between the two” cultures is an essential component to improving communication and, therefore, release conditions outcomes for Black male CAPS defendants.<sup>171</sup>

### c. Domain #3: Behavioral Skills

The third domain requires CAPS core personnel to acquire behavioral skills such as “detour spotting[.]”<sup>172</sup> and curiosity that enhance cultural consciousness and to “seek[] out opportunities to practice

<sup>166</sup> *Id.*

<sup>167</sup> E-mail from Judge A, *supra* note 75.

<sup>168</sup> Weng, *supra* note 151, at 400.

<sup>169</sup> *Id.*

<sup>170</sup> Interview with Judge C, *supra* at note 133.

<sup>171</sup> *Id.*

<sup>172</sup> Jona Olsson, *Detour-Spotting for White Anti-Racists*, CULTURAL BRIDGES TO JUSTICE (Jan. 2011) <http://www.culturalbridgestojustice.org/resources/written/detour>.



them.”<sup>173</sup> These behavioral skills will help CAPS personnel to continue the process of understanding themselves “as cultural being[s], limitations and all”<sup>174</sup> and as people who are conscious and act with the purpose of understanding their Black male defendants.

*i. Detour Spotting*

One example of an important behavioral practice is recognizing a “detour” into racialized behavior that is not helpful, such as a “knight” or “missionary” attitude, meaning that the CAPS decision makers think they know what is best for their Black male defendants.<sup>175</sup> Some generic examples of this are: “We (white people) know just where to build your new community center[,]” and “[w]e (white people) organized a used clothing drive for you, where do you want us to put the clothes?”<sup>176</sup> This behavior takes control away from Black male defendants and halts progress towards cultural awareness.<sup>177</sup>

*ii. Curiosity*

After CAPS personnel stop assuming that they know what is best for their Black male defendants, the next behavioral skill to learn is curiosity. As explained by Judge Darleen Ortega of the Oregon Court of Appeals, practicing curiosity “about what is really going on” means expecting that the Black male CAPS defendant “experiences challenges in entering and being heard in these spaces” (for example, the judge’s courtroom) that the core CAPS personnel “do not and cannot understand or know about.”<sup>178</sup> If, for example, the Black male CAPS defendant “sounds angry or inarticulate or is not making sense,” the CAPS personnel present “should include among the possible explanations that they are traumatized or frustrated or having trouble translating what they need to express . . . .”<sup>179</sup> The practice of curiosity and being willing to seek clarification and strive to understand a Black male defendant’s trauma or frustration is the essence of improving communication between defendant and core CAPS personnel and motivating him to meet his release conditions.

*iii. Seeking Opportunities to Practice*

These behaviors should be acquired and reinforced through ongoing discussion, supervision, and professional development as administered by the cultural consciousness work of the Federal Judicial Center in conjunction with the national headquarters for Pretrial Services Offices.

<sup>173</sup> Weng, *supra* note 151, at 401; *see also supra* note 150.

<sup>174</sup> Weng, *supra* note 151, at 401.

<sup>175</sup> Olsson, *supra* note 172.

<sup>176</sup> *Id.*

<sup>177</sup> *See id.*

<sup>178</sup> E-mail from J. Darleen Ortega, Or. Ct. App., to Author (Apr. 7, 2017) (on file with author).

<sup>179</sup> *Id.*

## VI. CONCLUSION

In a criminal justice system where research demonstrates that Black males are disadvantaged, this Note suggests that CAPS helps high-risk, Black male defendants, possibly even more than other demographic groups. CAPS embodies the mission of the Offices of Pretrial Services by making release possible for these defendants and providing them with the tools to meet their conditions. It helps them by releasing them rather than detaining them, providing them with individualized release conditions overseen by judges, and then, often for the successful defendant, resulting in a shorter sentence than would have otherwise been meted out. The District of Oregon should further focus CAPS by embedding cultural awareness for Black male defendants within it in order to provide even better communication between them and CAPS-associated personnel. Once CAPS adopts improved culturally aware approaches as part of a broader effort to standardize the program, not only will the relationships between Black male defendants and their largely non-Black decision makers improve, but all relationships between these decision makers and their defendants will improve.