



## YORK COUNTY DISTRICT ATTORNEY

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### **UPDATED MEMO REGARDING ARD ELIGIBILITY, PROCEDURES, AND REQUIREMENTS IN DUI CASES**

Following the issuance of the published opinion in *Commonwealth v. Chichkin*, 232 A.3d 959 (Pa.Super. 2020), by a panel of the Superior Court, I issued a memo on behalf of the District Attorney's Office concerning changes to ARD procedures and requirements. Those procedures and requirements remain in effect as cited below from the original memo:

"Accordingly, I approved the attached Stipulation and Waiver form to be implemented as a condition precedent for our office to accept and recommend a DUI offender for ARD. This Stipulation and Waiver is not an admission of guilt to be used as evidence against a defendant on the pending ARD case should the matter become a trial. Such a use is expressly prohibited. Rather, this is used for the limited purpose of establishing a prior offense beyond a reasonable doubt at a future sentencing hearing.

Additionally, nothing in this Stipulation and Waiver will impact the ability of a successful ARD participant to receive reductions in license suspension or expungement. All license suspension and expungement procedures will remain as is.

We also revised how ARD documents are delivered and processed by our office. For decades, ARD documents were sent by this office to defendants, and defendants with counsel were expected to then take these documents to their attorneys.

Going forward, ARD documents will be sent directly to defendants only when they are pro se, with the exception of the ARD hearing notice, which will be sent directly to all defendants with a copy to attorneys as well. Otherwise, counsel for defendants will be receiving the ARD documents and will be expected to ensure that all deadlines are met for the return of ARD paperwork. **Failure to meet deadlines will result in our office rejecting and removing a defendant from being placed onto ARD."**

As a reminder, the following are the required timeframes within the ARD process:

ARD Acceptance letters are sent at least 4 weeks prior to the scheduled ARD Court date. The deadline to return the required documentation is 5 business days prior to the ARD Court Hearing (Example: ARD Court 1/11/22, deadline is 1/4/22).

The required documents consist of:

1. **Stipulation of Facts / Waiver**
2. **Driver's License Suspension Notice**
3. **Wage Attachment / Payment Agreement**
4. **Community Service COVID Waiver**
5. **Drug and Alcohol Evaluation, Where Required**

Since I issued this memo, litigation surrounding *Chichkin* remains increasingly unsettled throughout Pennsylvania. Judge King, joined by Judge McClaughlin,, emphasized this uncertainty as a part of the Concurring Memorandum in the memorandum panel decision of *Commonwealth v. Richards*, \_\_\_ A.3d \_\_\_, 2021 Pa.Super.Unpub. LEXIS 2731 (Pa.Super. 2021). Judge King recognized that the complications faced by the Commonwealth in establishing a prior DUI based on ARD pursuant to *Chichkin* and, depending upon its interpretation, may have a chilling effect on ARD being offered to first-time offenders.

Judge King also encouraged the Superior Court to provide guidance to the Commonwealth in future decisions. The Superior Court most likely will provide this guidance in 2022. Notably, the Superior Court recently ordered in *Commonwealth v. Moroz* that it will hear *en banc* the following question in addition to all other issues at hand: **“Whether a defendant’s previous acceptance of an Accelerated Rehabilitative Disposition (ARD) for Driving Under the Influence (DUI) fails to qualify as a ‘prior offense’ for purposes of the DUI sentencing enhancement provision at 75 Pa.C.S. § 3804 pursuant to *Commonwealth v. Chichkin*, 232 A.3d 959 (Pa.Super. 2020), or whether the three-Judge Panel’s conclusion in *Chichkin*, that 75 Pa.C.S. § 3806(a)(1) is unconstitutional, must be overruled?”**

Absent the passage of any legislation to remedy this matter, the decision in *Moroz* should settle the unresolved issues and provide the necessary guidance regarding how to establish a prior DUI offense based upon a prior acceptance of ARD. The reality, however, is that the *Moroz* litigation and decision will not be complete until sometime in the spring or summer of 2022. Again, absent the immediate passage and enactment of legislation, the current state of jurisprudence will remain throughout the upcoming months.

Given this present uncertainty surrounding *Chichkin*, I and my office conducted a further review of what steps we should take regarding these critical public safety questions surrounding DUI offenses. The first step was to temporarily hold the placing of DUI offenses on ARD while we engaged in this analysis. I summarized our guiding principles for our review of ARD eligibility for DUI offenses in my prior memo, which I again reemphasize here:

“I greatly appreciate the important role that ARD plays in allowing low risk/low need DUI offenders to have the opportunity to receive a diversionary disposition that allows the offender to receive a lesser license suspension and expungement of their offense. We understand that on average approximately 75% of those individuals successfully completing ARD in York County for a DUI offense will not reoffend. We do not exclude individuals beyond those expressly listed by statute based upon tier of offense, nature of intoxicant, degree of impairment, or nature of impaired driving. This is intentionally done so that we can capture as many 1<sup>st</sup> time DUI offenders under this umbrella based upon a substantial 75% success rate.



With that said, a 75% success rate means that 25% of DUI offenders on ARD do commit a 2<sup>nd</sup> offense or greater. These recidivists cause a great danger to all people in York County. As retired Judge John S. Kennedy emphasized regarding the need for the establishment of the Target 25 initiative regarding repeat/multiple offenders within 10 years, no crime is as great a random danger of causing death or injury to the public at large as the offense of DUI. And no individual committing DUI is as dangerous as the repeat DUI offender.

75 Pa.C.S. § 3806(a) provided a balancing of those interests for our office. We included all 1<sup>st</sup> offense DUI offenders under the large umbrella of eligibility to give them the opportunity of diversion. Should we be unsuccessful and the individual commits a subsequent DUI offense, we knew that we were protecting the public and promoting the public safety by considering the new DUI crime as a 2<sup>nd</sup> offense for sentencing purposes.”

Should either the Legislature by statute or the *Moroz* court overturn or narrow *Chichkin*'s impact, then we can continue our approach of using our large umbrella approach to ARD eligibility for DUI offenses. If *Chichkin* is either expanded or construed in a manner that substantially limits the ability of the Commonwealth to prove ARD admission as a prior DUI offense, then the interests of public safety demand that we restrict which DUI offenses would be eligible for ARD. Given the current state of uncertainty, we must proceed with caution and place additional requirements on certain DUI violations in order to be eligible for ARD.

In accordance with this assessment, I am announcing additional considerations for admission of DUI offenses into the ARD program based upon the nature of the DUI offense. First, the following DUI offenses will receive the traditional case-by-case assessment employed for ARD:

- 1. General Impairment Violations Without Accident or Refusal under 75 Pa.C.S. § 3802(a)(1);**
- 2. BAC of 0.08 % But Less Than 0.10% Violations under 75 Pa.C.S. § 3802(a)(2);**
- 3. BAC of 0.10% But Less Than 0.16% Violations under 75 Pa.C.S. § 3802(b);**
- 4. Violations by Minors under 75 Pa.C.S. § 3802(e); and**
- 5. Commercial or School Vehicle Violations under 75 Pa.C.S. § 3802(f)(1).**

The remaining DUI offenses will receive a heightened scrutiny based upon the increased public safety concerns caused by the underlying conduct. These offenses include:

- 1. General Impairment Violations With Accident or Refusal under 75 Pa.C.S. § 3802(a)(1);**
- 2. BAC of 0.16% or Higher Violations under 75 Pa.C.S. § 3802(c);**
- 3. Controlled Substance or Drug Violations under 75 Pa.C.S. § 3802(d);**
- 4. Commercial or School Vehicle Violations under 75 Pa.C.S. § 3802(f)(2), (3), or (4);**

**5. An individual having any prior lifetime DUI's outside of the 10 year lookback window regardless of age of the offense.**

While admission for these offenses will occur on a case-by-case basis, it will be viewed with disfavor and subject to a higher scrutiny out of concern for the safety of the public. Any ARD applicant falling within this category must be prepared to provide documentation supporting a substantial and compelling rationale that admission onto ARD outweighs the potential for increased risk of harm to the public. **This additional supporting documentation must be presented to the District Attorney's Office with the ARD application.**

These additional ARD eligibility considerations and procedures apply to all prospective applicants and those pending applicants who have not previously received notice of acceptance onto ARD. All ARD applicants who were notified of acceptance into the ARD program will be scheduled for an ARD Court date. Other pending ARD applicants will be subjected to these additional considerations. Defense counsel should provide our office any additional materials for our review of pending applications as soon as possible.

As with the prior modifications, these adjustments do not impact the requirements of a defendant once placed on ARD by the Court of Common Pleas. Additionally, a defendant placed upon ARD may need to communicate with the ARD Supervisor and/or other member of the District Attorney's Office regarding ARD requirements and compliance issues. These communications will not involve a discussion of underlying facts or issues concerning the criminal charges, and are solely to effectuate appropriate supervision while on ARD.

As I previously emphasized, protection of people travelling on our roadways from the grave danger posed by DUI offenders, particularly those with prior offenses, will always be a priority for this office. These measures are the best way to ensure this overriding public safety interest while the uncertainty surrounding *Chichkin* remains. A most-welcome remedy to this issue may come from the Legislature, which is actively considering these greatly needed amendments to the DUI statute.

We will continue to monitor all changes to and about the law in this area. I am prepared to revisit these measures and make further adjustments to ARD eligibility, procedures, and requirements based upon any legal developments. Thank you for your consideration of these important additions that, as with the prior modifications, will promote the overarching goals of public safety and justice.

Respectfully,

A handwritten signature in dark ink, appearing to read 'David W. Sunday, Jr.', with a large, stylized initial 'D'.

DAVID W. SUNDAY, JR.  
District Attorney

December 28, 2021