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MEMORANDUM CONCERNING ARD ELIGIBILITY IN DUI CASES

Subsequent to the Pennsylvania Supreme Court's (SCOPA's) decision in *Commonwealth v. Shifflett*, 335 A.3d 1158 (Pa. 2025), I temporarily suspended making DUI cases eligible for ARD. I did this so that our office could perform a comprehensive review of the ARD program and determine how best to proceed going forward in light of *Shifflett*. Based upon the results of this analysis, our office shall resume processing DUI cases for ARD consideration under our prior guidelines with some eligibility modifications.

On December 28, 2021, our office, under previous District Attorney Dave Sunday, established the ARD eligibility requirements for DUI cases. In that memorandum, we noted the great danger that DUI recidivists pose to the safety of our society. Our office was able to admit a broad array of DUI cases onto ARD due to these offenses counting as a prior DUI offense for sentencing purposes. As we specifically stated:

75 Pa.C.S. § 3806(a) provided a balancing of those interests for our office. We included all 1st 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 public safety by considering the new DUI crime as a 2nd offense for sentencing purposes.

Memorandum p.3, 12/28/21.

SCOPA ended this rationale with its decision in *Shifflett*. In *Shifflett*, SCOPA held that the provision of Section 3806(a) making acceptance of ARD a prior offense for DUI sentencing purposes was unconstitutional. Removal of this provision eliminates the public safety basis for allowing broader eligibility for DUI offenses, as outlined in the December 2021 memorandum.

This new circumstance required us to review what our ARD eligibility requirements for DUI offenses should be going forward. The starting point for this analysis was a comprehensive review of recidivism rates for individuals with DUI offenses accepted onto ARD. We chose three years to specifically review: 2017, 2019, and 2023. This sampling allowed us to generally analyze both short-term and long-term effectiveness of our ARD program. We further focused our review on Tier 3 DUI offenses, which include 0.16 and greater BAC levels, DUI-drug charges, and search warrant refusal cases. Tier 3 offenses are our most common cases and have potentially the most problematic DUI offenders.

The results of this extensive data review establish that the York County ARD program is an overwhelming success concerning DUI offenses. Success is defined as lack of DUI recidivism, in that the offender did not commit a subsequent DUI after ARD placement:

In 2017, 696 individuals completed ARD for DUI offenses, with 484 being Tier 3 offenders. Of the 696, 619 did not reoffend (88.94% success rate). Of the 484 Tier 3 offenders, 421 did not reoffend (86.98% success rate).

In 2019, 541 individuals completed ARD for DUI offenses, with 389 being Tier 3 offenders. Of the 541, 499 did not reoffend (92.24% success rate). Of the 389 Tier 3 offenders, 356 did not reoffend (91.52% success rate).

In 2023, 606 individuals completed ARD for DUI offenses, with 418 being Tier 3 offenders. Of the 606, 591 did not reoffend (97.52% success rate). Of the 418 Tier 3 offenders, 407 did not reoffend (97.37% success rate).

These results prove that our ARD eligibility criteria, screening process, and program requirements are successful at identifying and working with low risk/low need offenders. Most importantly, our ARD program is making our York community safer by preventing the serious danger posed by repeat DUI offenders.

Based upon these extremely positive success rates, I am reinstating our current ARD program and eligibility requirements, effective immediately. To best guarantee public safety and that ARD is truly serving low risk/low need offenders, I am adopting some eligibility modifications at this time.

First, we shall require drug and alcohol evaluation results with the ARD application for Tier 3 DUI offenses. This allows for greater and more timely consideration of the drug and alcohol evaluation during the eligibility process, which in turn will allow appropriate consideration of whether the rehabilitation needs of the ARD applicant can be best met through the ARD program.

Second, certain DUI-drug cases shall be ineligible for ARD. These include, but are not limited to, the presence in toxicology of or proof of impairment from opioids, methamphetamine, xylazine, PCP, ketamine, methylone, butylone, and MDMA. This also includes derivatives and metabolites of such substances. Additionally, all DUIs due to huffing are not eligible for ARD.

Individuals committing DUI offenses involving substances such as these may have a higher risk of DUI recidivism, presenting a greater public safety risk, and/or higher need of more intensive treatment than is appropriate for the ARD program. Without Section 3806(a) being constitutional or the present ability to use a validated DUI-drug risk/needs assessment tool, the interests of public safety demand that these specific DUI-drug offenses be excluded from ARD eligibility.

Third, CDL or CPL drivers are no longer eligible for ARD, as ARD in Pennsylvania does not comply at this time with federal regulations. This is a consequence of Section 3806(a) being unconstitutional.

Federal regulations prohibit masking convictions for offenses that impact the qualifications of an individual to hold a CDL or CPL. 49 C.F.R. § 384.226 expressly states:

The state must not mask, defer imposition of judgment, or allow an individual to enter into a diversion program that would prevent a CLP or CDL holder's conviction for any violation, in any type of motor vehicle, of a State or local traffic control law (other than parking, vehicle weight, or vehicle defect violations) from appearing on the CDLIS driver record, whether the driver was convicted for an offense committed in the State where the driver is licensed or another State.

With Section 3806(a) being deemed unconstitutional, ARD is now a diversion program without a conviction equivalence for DUI purposes. This becomes a non-adjudication process, an outcome that violates the federal prohibition against masking.

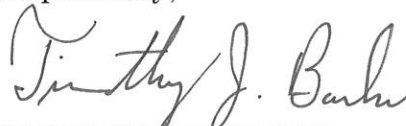
The consequences of masking can be severe. 49 C.F.R. § 384.401—384.405 outlines consequences of a state failing to comply with federal CDL regulations, including masking requirements, and may lead to decertification of the state CDL program or withholding of federal-aid highway funds from the state.

I will not authorize our office to engage in practices that violate federal regulations and may lead to significant penalties for Pennsylvania. Accordingly, CDL and CPL drivers are ineligible for ARD concerning DUI offenses, regardless of whether they were operating a commercial motor vehicle while committing the DUI violation. In addition, anyone charged with 75 Pa.C.S. § 3802(f) violations related to

operation of commercial or school vehicles while DUI is ineligible for ARD. I will be constrained to deem CDL and CPL drivers ineligible for ARD unless and until the Legislature amends Pennsylvania's ARD statutory scheme to constitutionally allow ARD to count as a prior conviction for DUI purposes.

These additions to our current ARD eligibility and program requirements for DUI offenders enable us to continue to operate our highly successful ARD program. Additionally, imposition of these requirements continues to demonstrate our strong commitment to public safety by fighting the scourge of impaired driving in York County. I thank you for your time, attention, and cooperation in this matter.

Respectfully,

Handwritten signature of Timothy J. Barker in cursive script.

TIMOTHY J. BARKER

District Attorney

July 23, 2025