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# Accelerated Rehabilitative Disposition: The Newest Facet of the Criminal Justice System (The Allegheny County Program)

*John G. Alford\**

## I. PREFACE

Traditionally the criminal justice system in the United States has been oriented toward three objectives. Its primary objective is the deterrence of individuals from engaging in behavior patterns which have been classified as being socially unacceptable. Fortunately, the mere existence of statutes and/or court rulings is enough to deter the majority of citizens from pursuing unlawful goals.

As are all societies, ours is plagued by a segment of the populous which requires more stringent measures in order to achieve the desired compliance with current legal guidelines of tolerable behavior. A second objective of the criminal justice system, punishment, consequently arises. It is through punishment that a single individual is subjected to restrictions upon his personal freedom or financial station as a result of a court order. These restrictions are designed to avoid a repetition of the proscribed activity. Punishment is also intended to serve as an example in order to deter others from engaging in similar endeavors.

A third objective of the criminal justice system is rehabilitation. Historically, this facet has received the least attention. Its potential for enhancing deterrence is now earning, however, greater attention as a result of formal rehabilitative programs within the system itself. By properly evaluating an actor's total existence and specifically tailoring an appropriate rehabilitative probationary program for each individual, the criminal justice system can return actors to the community in a better posture than was theirs at the time of the criminal episode. Through such an approach the chances of recidivism should be reduced and future deterrence enhanced. This

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potential is the factor which provides the current luster to the diversion facet of the criminal justice system.

## II. THE PREMISES OF THE PROGRAM AND ITS RELATIONSHIP TO THE CRIMINAL JUSTICE SYSTEM

Any successful deferred prosecution program should have three goals: to protect society, to insure justice, and to correct unlawful behavior. Attainment of such goals is possible via the objectives of the criminal justice system which were identified in this article's preface. Thus, a program's direct approach and indirect impact should be such that the interests of both the state and the accused are properly accommodated.<sup>1</sup>

A basic premise of any diversion program is that all actors are not patterned criminals, and intervention to inhibit development of a criminal life style may be more productive for both the accused and for society than a purely punishment-oriented response to a criminal act. To achieve these ends, the criminal justice system must become aware of the individual person immersed in his own unique set of circumstances.<sup>2</sup> By more carefully identifying and acknowledging the individual in criminal proceedings, it may be possible to identify his special problems and construct appropriate solutions.

Another underlying premise is that intervention at a pretrial stage is the most propitious time to institute rehabilitative measures, because it is at this point that the offender is most anxious to make amends and set things right.<sup>3</sup> Offenses which are of a temporary, situational, isolated, or impulsive nature frequently reflect a problem in the actor's life situation. Such underlying problems often require as much attention as does the specific criminal episode and its consequences.<sup>4</sup>

Although rehabilitative efforts have become more common com-

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1. NATIONAL DISTRICT ATTORNEY'S ASS'N, CHICAGO, ILL., A PROSECUTOR'S MANUAL ON SCREENING AND DIVERSIONARY PROGRAMS 115 [hereinafter cited as PROSECUTOR'S MANUAL].

2. The poet John Clare wrote of a feeling of nonentity such as can engulf a defendant: "I am, yet what I am none cares or knows, my friends forsake me like a memory lost; I am the self consumer of my woes . . ." Clare, *I Am*, in THE NORTON ANTHOLOGY OF ENGLISH LITERATURE 559 (M.H. Abrahms ed. 1968).

3. See *Hearings on S. 3309 Before the Subcomm. on National Penitentiaries of the Senate Comm. on the Judiciary*, 92d Cong., 2d Sess. 30 (1972). See also Note, *Pretrial Diversion from the Criminal Process*, 83 YALE L.J. 827 & n.1 (1974).

4. See Perlman, Runcie, Singer & Vann, *Deferred Prosecution and the Citizens Probation*

ponents of correctional institutions, society as a whole has remained generally reluctant to readily reabsorb the released convict into its mainstream. Recognition of this traditional reluctance and its tendency to increase recidivism apparently led the Pennsylvania Supreme Court to encourage attempts at rehabilitating criminal offenders before they developed entrenched criminal attitudes and significant criminal records. The Pennsylvania Supreme Court Rules of Criminal Procedure pertaining to Accelerated Rehabilitative Disposition<sup>5</sup> provide the mechanism whereby county district attorneys can evaluate criminal complaints with an eye toward potential diversion of pending charges at either the pre-indictment stage<sup>6</sup> or the post-indictment stage<sup>7</sup> of the criminal proceedings. Such rules provide a significant change over past procedures in that they permit and encourage district attorneys, under lower court supervision, to attempt to achieve the rehabilitative objective of the criminal justice system prior to an adjudication of guilt; thus the name—Accelerated Rehabilitative Disposition.<sup>8</sup> Such strategic placement serves as a major incentive for an accused to successfully comply with the probationary terms which the court places upon him so that he can leave the criminal justice system without having a criminal conviction on his record. Such placement also permits valuable time to be saved and initiates the rehabilitative effort when the full impact of apprehension and possible legal and/or social consequences produce a most favorable climate for attempting behavioral change in the actor.<sup>9</sup>

Although one of the commonly stated purposes of the ARD program is to ease the court docket log jam, this is actually a secondary by-product of the program. Primarily, the ARD program is designed to provide an actor with an opportunity to prove that his criminal behavior was not the product of any ingrained, entrenched or antisocial attitudes which would likely cause repetition of the crime. Through an abbreviated hearing procedure the criminal justice system benefits by the lessening of needless expenses and the lost time and talents of police, prosecutors and judges. Such valuable re-

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*Authority: The Diversionary Process, THE PROSECUTOR No. 3, at 117 (1972) [hereinafter cited THE PROSECUTOR].*

5. PA. R. CRIM. P. 175-85.

6. *Id.* 175.

7. *Id.* 176.

8. Hereinafter referred to as ARD.

9. See THE PROSECUTOR, *supra* note 4, at 313.

sources, therefore, can be more appropriately focused toward adequate disposition of more serious criminal infractions which present a much more significant threat to public security.

### III. LEGAL FOUNDATIONS

The prosecutor's discretion as to whether to pursue any particular criminal case is rooted in English common law. In 1862, it was held that the Attorney General of England had unfettered power to decide whether to prosecute in criminal cases, subject only to review by the High Court of Parliament when there was an abuse of discretion.<sup>10</sup>

Although the precise limits of such discretion have not been sharply delineated due to inherent difficulties and the undesirability of doing so,<sup>11</sup> this concept of discretion has been incorporated as one of the fundamental premises of United States criminal procedure. As Chief Justice Burger wrote while still a Judge in the District of Columbia Circuit:

Few subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings . . . or whether to dismiss a proceeding once brought.<sup>12</sup>

As an incident of this discretionary power to prosecute there exists a corollary discretionary power to divert criminal cases from the traditional channels of the criminal justice system. Similarly, it is subject to limited court review.

Standard 2-2 on Diversion Procedures of the National Advisory Committee on Criminal Justice Standards and Goals specifically proposes that "the decision by the prosecutor not to divert a particular defendant should not be subject to judicial review."<sup>13</sup> Courts are beginning to promulgate enabling procedural rules which encourage the prosecutor to utilize more fully his traditional discretionary powers. Such rules recognize and honor the prosecutor's

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10. *Regina v. Allen*, 121 Eng. Rep. 929 (Q.B. 1862).

11. See K. DAVIS, *DISCRETIONARY JUSTICE* 188-91 (1969). See also *PROSECUTOR'S MANUAL*, *supra* note 1, at 123.

12. *Newman v. United States*, 382 F.2d 479, 480 (D.C. Cir. 1967).

13. NATIONAL ADVISORY COMMITTEE ON CRIMINAL JUSTICE STANDARDS AND GOALS, *COURTS* 32, 40 (1973).

14. See PA. R. CRIM. P. 179. See also N.J.R. CRIM. P. 3.28.

powers by involving a judge only after the prosecutor has decided whom he will divert.<sup>14</sup> In addition to the support being given by state courts, the American Bar Association has endorsed the pre-trial diversionary concept.<sup>15</sup>

#### IV. SELECTION PROCEDURES AND CRITERIA

Allegheny County instituted its ARD program in the summer of 1973 on an experimental basis. After eighteen months of operation, the program has experienced a failure rate which has fluctuated on a quarterly basis from a minimum of 1.7% to a maximum of 2.8%.<sup>16</sup> This low recidivism ratio is largely reflective of the selection and supervision mechanisms of the program. A critique of the selection process, therefore, is appropriate at this point.

Each criminal complaint filed either by law enforcement officials or by private citizens must eventually be scheduled for a hearing before a magistrate.<sup>17</sup> At such a hearing, provided the actor does not circumvent this step by executing a waiver,<sup>18</sup> a determination is made as to whether the case should be dismissed or forwarded to the Court of Common Pleas, Criminal Division for further proceedings.<sup>19</sup> Those complaints which are bound over for court action are initially received by the Clerk of Courts and a complaint number is assigned. Thereupon, the complaints are forwarded to the district attorney's office for appropriate action.

It is at this juncture that all the cases are screened by the ARD staff. The initial review is oriented toward selecting those cases which involve appropriate nonviolent criminal episodes. Several types of crimes can be forwarded immediately for grand jury action, *i.e.*, homicides, rape, etc. Not all cases, however, can be processed this quickly based on the charges identified on the face of the com-

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15. Such support is reflected in the ABA COMM. ON CORRECTIONAL FACILITIES AND SERVICES, BULL. NO. 17 (1973); ABA PROJECT ON STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION (1971). Both urge each party to the criminal episode to explore the availability of a noncriminal disposition, including early diversion into community-based rehabilitation programs. It is recommended that particular emphasis be placed on first-time offenders. For a comprehensive history of support of diversionary programs see Note, *Pretrial Diversion from the Criminal Process*, 83 YALE L.J. 827 (1974).

16. These percentages reflect the number of people placed on the program who fail to complete their probationary period.

17. PA. R. CRIM. P. 140.

18. *Id.*

19. *Id.* 143.

plaint. Since complaints frequently contain inflated charges, many that might be summarily rejected by crime type are, in fact, reviewed by the ARD staff. Such scrutiny permits the assistant district attorneys to determine whether there is a major discrepancy between that which could be proved in court and that which was alleged.<sup>20</sup>

In addition to initially screening cases relative to the violence inherent in the allegation contained in the complaint, some non-violent types of cases have been deemed inappropriate for ARD and are quickly forwarded to the grand jury. All complaints which relate to financing organized crime are summarily rejected (operating lottery cases). Additionally, all drug cases are forwarded to the grand jury. In this regard, Pennsylvania's Controlled Substance, Drug, Device and Cosmetic Act<sup>21</sup> is viewed as controlling. Contained therein are sections with specific guidelines for probation without verdict dispositions and dispositions in lieu of trial.<sup>22</sup>

Once a complaint passes initial muster, the actor's name is referred to the Bureau of Criminal Identification for a complete record check. Those whose records disclose prior adult convictions for misdemeanors and/or felonies are rejected from further consideration if the most recent conviction has occurred within the immediately preceding twelve years. If the record discloses a conviction for a misdemeanor and/or a felony which is beyond the twelve year period and is dissimilar in nature when compared to the current offense, the actor will remain a viable candidate for ARD.<sup>23</sup> Any summary conviction also permits continued viability as an ARD candidate.

Allegheny County also restricts the opportunity to participate in the program to those who have not previously participated. Consequently, if an actor, upon successful completion of the program, is involved in a subsequent criminal episode that is in all respects qualified for the program, he will not be given a second opportunity

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20. One example could be a disorderly conduct episode which was labeled either aggravated assault and battery or a riot. Note also that some deflated charges are received. A disorderly conduct charge, which may appear to be classifiable as nonviolent on its face, may in actuality be a riot entailing considerable violence. Similar in-depth screening and investigation would disclose the factual inappropriateness of diversion on this end of the criminal scale also.

21. PA. STAT. ANN. tit. 35, §§ 780-101 to -144 (Supp. 1974).

22. *Id.* §§ 780-117, -118.

23. For example, if an actor is currently thirty-eight years of age and is charged with driving while intoxicated, and the actor's record discloses a thirteen-year-old record for receiving stolen property, such facts permit the actor to continue through ARD processing.

to participate. The Pennsylvania Supreme Court Rules establishing the program are silent concerning the number of times that a person is eligible for the program. If, however, an actor were permitted constant re-entry, the deterrent effect would be minimal at best, and there would be little protection of societal interests.

Upon the record check verifying the lack of disqualifying adult convictions, an in-depth investigation into each complaint is undertaken. The assigned investigator<sup>24</sup> begins the inquiry by contacting the Commonwealth's witnesses. The usual procedure is to review the criminal episode with the arresting officer, investigating officers, lay witnesses, and the victim, if any. Their evaluations and recommendations are solicited by the investigator. It should be recognized, however, that the diversion decision rests with the district attorney's office and, although opinions are sought from those who may have been involved in the episode, they are not binding on the district attorney.<sup>25</sup> If meritorious reasons which indicate diversion is not appropriate are brought to the attention of the district attorney's representative, they will be honored.<sup>26</sup> If, on the other hand, a party recommends against ARD purely because of vindictiveness, such a recommendation will be disregarded.

If the investigation discloses a nonviolent episode, but the criminal activity involved a series of preparatory events which are indicative of ingrained criminal intent from which the actor refused to relent, the case will be rejected and referred for grand jury action. Examples are possession of counterfeiting equipment, embezzlement, etc. In cases such as phone harassment, however, where a psychological problem underlies the criminal activity, the continuing pattern of the case will not preclude ARD if necessary treatment is undertaken.

Upon determining that the criminal episode is an appropriate one for potential diversion, the district attorney's representative then focuses his/her attention on the defendant.<sup>27</sup> Both the actor and his/her attorney are contacted in order to arrange for a personal

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24. The Allegheny County District Attorney's office has four full-time investigators.

25. PA. R. CRIM. P. 175-76.

26. *E.g.*, one driving-while-intoxicated case which involved no accident or property damage was denied ARD on the basis that the actor had subsequently evidenced utter contempt for authority through numerous attempts to bribe and coerce the officer into killing the case.

27. See Appendix A *infra* for a copy of the profile from which the investigator develops his conclusions throughout the interview.



interview. This sets the stage for the development of a complete personal profile for the actor.

At the outset of this encounter the district attorney's investigator reviews with the actor the charges that have been lodged against him. This review is followed by a thorough explanation of the various options available to the actor, including a complete description of the ramifications of an ARD probation.<sup>28</sup>

If the actor indicates an interest in ARD, the investigator will then develop a thorough personal profile which will be the basis of appropriate probationary recommendations for the court's review and approval. During this phase of the interview, the staff investigator remains alert for any potential deficiencies or problems which may be related to the actor's life style and behavior patterns. Whenever possible, rehabilitative measures are outlined to the actor for his pursuit. For example, if a high school education has not been attained, arrangements are made for either reentry into school or enrollment in a GED program. Successful compliance with such a probationary condition will insure that the actor is released from the criminal justice system with both a conviction-free record and a degree, thereby enhancing his chances in the job market.

Other examples of the importance of identifying collateral personal problems relate to alcohol and drug abuse. If either condition affects an actor, appropriate corrective measures are outlined. Drug dependent actors are referred to various community treatment organizations. Alcohol abusers, particularly actors charged with driving while intoxicated, are referred for professional evaluation to the St. Francis Hospital Alcoholic Clinic. The recommendation of the staff at the clinic determines the extent to which treatment is required.<sup>29</sup>

Additionally, all cases are assigned a citizen probation sponsor who agrees to work on a voluntary and personal basis with the actor during his probation. Such citizen sponsors are normally active members in some community service organization, and generally

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28. This notice will be repeated by an assistant district attorney in court as part of the hearing. See Appendix B *infra* for the explanation of ARD which is given by the assistant district attorney at the court hearing.

29. Based on these recommendations arrangements can be made for Alcoholics Anonymous affiliation, mental health/mental retardation treatment, out-patient clinic treatment at a hospital, or even temporary residency at a hospital or live-in program such as Gateway Rehabilitation Center or Chit/Chat Farm.

have a genuine concern and a personal commitment to other people. These sponsors play a central role in that they infuse an otherwise sterile probation with intensive personal contact that underwrites the criminal justice system's interest in the actor's personal rehabilitative progress. Through the sponsor an actor, hopefully, can establish relationships that can be meaningful and helpful in re-establishing himself in the community as a productive contributing member.

The portion of the ARD court order which relates to the citizen sponsor criteria normally requires that the actor report to a citizen sponsor on a weekly basis for counseling, consultation, or constructive community involvement not to exceed four hours per week. This language is specifically designed to permit a flexibility which permits an actor and sponsor to mutually agree on a timetable which can change from time to time depending upon their respective work and vacation schedules, sick periods and any emergencies that may arise.

This sponsorship factor also assists the professional probation officer in charge of the case. The function of citizen sponsors is not to reduce the probation officer's caseload, but does serve to telescope his effectiveness.<sup>30</sup> Through weekly contact, potential problems can often be identified at an earlier stage than monthly formal probation office appearances would permit. Corrective actions can be instituted before any problem becomes overpowering. Such intensive contact can also disclose difficulties which might be successfully hidden during a monthly probation office visit. This citizen sponsor concept also fits into LEAA's<sup>31</sup> concept that community based offender reintegration projects should be encouraged to redirect criminal offenders into respectable and productive lives. It also serves to enhance all three objectives of the criminal justice system outlined in this article's preface. Not only does it enhance the rehabilitative objective, but it is an impingement on an actor's time, albeit productively designed, which may be viewed by some of those who leave the criminal justice system as a consequence to be avoided. Thus future unlawful actions may be deterred.

Cases involving a loss of or damage to property have the addi-

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30. See Farrell, *Citizen Volunteers: Workable Solution to Probation Problems*, 45 FLA. B.J. 476, 478 (1971).

31. Law Enforcement Assistants Administration.

tional requirement of restitution by the accused to the victim as a condition of entry into the program. If, for example, the accused is charged with larceny, he must agree to return the property or pay for the loss. The restitution should be made as soon as possible, preferably on the date of the accused's ARD hearing. The time for making restitution, however, has been extended to the end of the probationary period in order to accommodate indigent applicants.

Once an actor has qualified for and is accepted into the program, and the period and terms of probation are set at an ARD hearing, he must successfully complete his probation before the charges against him will be dismissed. There are generally two reasons for an unsuccessful probation. Either the actor technically violates the terms of his probation (not reporting to his sponsor as required, failure to make restitution, not continuing the required medical treatment), or he is convicted of a criminal offense. If accused of technically violating the terms of his probation, he is served with notice and a hearing is held before a judge. If he is found to have in fact violated his probation, he may be removed from the program, or in cases involving relatively minor violations, the probationary period may be extended. Conviction of a criminal offense, however, will result in removal from the program.

Upon removal from the program, the criminal complaint filed against the actor is forwarded to the grand jury for possible indictment and subsequent trial if the actor entered the program at the pre-indictment stage of the criminal process. If the actor entered the program after indictment, but before trial, removal from the program will result in his case being forwarded for trial.

## V. CONSTITUTIONAL AND LEGAL PARAMETERS

### A. *The Right to Counsel*

One of the premises upon which the ARD concept is grounded is that any individual can consent to reasonable restriction of his/her liberty and adhere thereto under the supervision of governmental authority. Such a premise immediately brings into focus the importance of an accused's right to assistance of counsel.<sup>32</sup> The exercise of

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32. U.S. CONST. amend. VI. The fourteenth amendment makes this right applicable in state proceedings in which the actor faces potential imprisonment. *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

this fundamental right is strongly encouraged by Allegheny County ARD personnel at two stages of the proceedings—when the decision as to whether to participate in the program is under consideration, and when any necessary subsequent proceeding is initiated to revoke a participant's probation.

The assistance of competent counsel<sup>33</sup> is invaluable to an actor in determining whether he should forego trial and elect the ARD alternative, and whether any probationary conditions imposed are legal and reasonable.

Since participation in the program imputes a tacit acceptance of responsibility for the criminal act charged, an actor who seriously maintains innocence should not be dissuaded or deprived of his/her day in court.<sup>34</sup> Assistance of counsel, therefore, can help to prevent pretrial intervention from being a technique for imposing the control of the criminal justice system on the "socially deprived" or "maladjusted."<sup>35</sup> Counsel might, however, be presented with a difficult dilemma if the defendant is not guilty, but faces a financial situation which makes the substantially more economical ARD proceeding more attractive than risking a jury trial on the merits.

Counsel's assistance is also of value in determining the appropriateness of the proposed probation conditions. Such assistance can assure that the probation term is both fair and applicable. Through counsel's study of the criminal statutes, a determination can be made on the actor's behalf as to whether the suggested term comports with the Pennsylvania requirement that the maximum term not exceed two years,<sup>36</sup> or the maximum penalty for that offense, whichever is less. Additionally, counsel can help to assure that the probation conditions do not violate any express constitutional protections, such as freedom of religion or speech, and are not so vague as to fail to provide due process of law.<sup>37</sup>

The importance of the sixth amendment right to counsel is also accentuated in cases where it is possible to avoid probationary con-

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33. The Pennsylvania Supreme Court has ruled, by a divided court, that inherent in the sixth amendment guarantee is the right to be represented by counsel unburdened by any conflict of interest. *Commonwealth v. Breaker* 456 Pa. 341, 318 A.2d 354 (1974).

34. See Skoler, *Protecting the Rights of Defendants in Pretrial Intervention Programs*, 10 CRIM. L. BULL. 473 (1974) [hereinafter cited as Skoler].

35. *Id.* at 487.

36. PA. R. CRIM. P. 182.

37. Examples of patently unconstitutional probationary conditions which counsel can help to avoid, can be seen in recent rulings in the state of Washington. In *Spokane v. Farmer*,

ditions which are so vague and/or indefinite that they cannot be understood or followed by a defendant. Infusing the court order with the requisite clarity can potentially avoid a subsequent violation hearing for the actor. Counsel can protect his client from being faced with a situation similar to that in *People v. Turner*,<sup>38</sup> where the defendant was to report to a specified physician and hospital for treatment. After several months he left the institution without the physician's consent. On appeal, the court ruled that the lower court had no authority to revoke his probation simply because he terminated his therapy without his doctor's advice since same was not an express probationary condition and could not be implied as a condition.

The availability of counsel at the intake stage serves another important function. *Townsend v. Burke*<sup>39</sup> found sentencing to be a critical stage in a criminal prosecution; the right to counsel is therefore applicable.<sup>40</sup> Although entering into the ARD program is not a true sentencing, entry does, as stated above, place certain restrictions on the freedom of the individual. In order to avoid a possible challenge to the program on the basis of a lack of representation, and to allow the applicant an opportunity to present himself to the court in the most effective manner, counsel is required.

### B. *Due Process*

This right mandates that an accused be fully and adequately informed of his/her alternatives in a timely fashion. If an actor elects to participate in the ARD program such action requires that the

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5 Wash. App. 25, 486 P.2d 296 (1971), a defendant's conviction for zoning violations was followed by a sentence of 30 days in jail, but was suspended upon the condition that he remove all items from his property which were not necessary to operate his primary business of housemoving. This condition was voided by the appellate court as an unconstitutional taking of property without compensation since no provision had been made for items which pertained to his second lawful business of building demolition. In *State v. Gitchel*, 5 Wash. App. 93, 486 P.2d 328 (1971), the court noted that probationary conditions requiring that the actor serve one year in solitary confinement and thereafter leave the state permanently (both these conditions were removed at request of the prosecution prior to the appeal) were unconstitutional as cruel and unusual punishment. See *Brown, Probation Revocation: A Survey of Constitutional Rights Since Mempa v. Rhay*, 8 GONZAGA L. REV. 110 (1972) for a more detailed description of these cases.

38. 27 App. Div. 2d 141, 276 N.Y.S.2d 409 (1967).

39. 334 U.S. 736 (1948).

40. This interpretation of *Townsend* was stated by the Supreme Court in *Mempa v. Rhay*, 389 U.S. 128 (1967).

Commonwealth's attorney advise the actor that the current charges may potentially be revived if he fails to adhere to the probationary conditions. This is necessitated by the fact that the due process concept has been held to require that an actor have an adequate opportunity to prepare his defense while the evidence against him is fresh.<sup>41</sup> Courts have been concerned regarding potential prejudice to actors because of inability to recall details which might be relevant to a defense against the charge,<sup>42</sup> the unavailability of witnesses who are critical to an adequate defense,<sup>43</sup> and purposeful government delay in order to gain tactical advantages.<sup>44</sup>

To insure that the Commonwealth does not jeopardize society's interests in any particular case, an actor is required to execute a waiver of his right to a speedy trial. Under the due process concept, however, an essential element of an effective waiver of a constitutional right is knowledge of the possible consequences. As was indicated in *Johnson v. Zerbst*,<sup>45</sup> to be valid under the due process clause a waiver must be an intentional abandonment of a known right or privilege. Therefore, an effective waiver requires that the defendant know and understand that he must be tried in Pennsylvania state courts within 180 days of the filing of the complaint.<sup>46</sup> He must also know, prior to the docketing of the court's order, what the terms of the probation will be.<sup>47</sup>

Due process also requires that an actor be informed of his right to a jury trial. In Pennsylvania an actor must also be told that he can participate in the selection of that jury.<sup>48</sup> This serves to place an actor on notice that a trial, which can be delayed by almost two years if he violates his probation, may not necessarily be as accurate as when the evidence and memories of witnesses are fresher. An actor thus has ample opportunity to weigh the potential prejudice he may incur due to voluntary delay. Without being aware of the possibility of ultimately being charged on the original offense, an

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41. See *Ross v. United States*, 349 F.2d 210 (D.C. Cir. 1965).

42. *Id.* at 215.

43. *United States v. Hauff*, 395 F.2d 555 (7th Cir. 1968).

44. *United States v. Parrott*, 248 F. Supp. 196 (D.D.C. 1965).

45. 304 U.S. 458 (1938).

46. PA. R. CRIM. P. 1100.

47. *Cf. Von Moltke v. Gillies*, 332 U.S. 708 (1948), which requires that the defendant know the maximum penalty which can be imposed if he pleads guilty to a crime.

48. *Commonwealth v. Williams*, 454 Pa. 368, 312 A.2d 597 (1973).

actor's decision to opt for ARD and waive his sixth amendment right to a speedy trial can scarcely be made intelligently.<sup>49</sup>

### C. *Privilege Against Self-Incrimination*

The privilege against self-incrimination is found in the fifth amendment of the Constitution and is applicable to the states via the due process clause of the fourteenth amendment.<sup>50</sup> This privilege is reinforced by specific reference in rule 179 of the Pennsylvania Rules of Criminal Procedure, which proscribes any use of a defendant's statements made during the ARD hearing in any subsequent civil or criminal proceeding. The staff person responsible for the evaluation of an actor's case and for setting the appropriate conditions, therefore, is not required to give an actor any *Miranda* warnings.<sup>51</sup> This enables the lines of communication to remain fully vented. Since the prime purpose of an ARD program is rehabilitation, it is important to maintain a relationship of confidence and full disclosure. To give *Miranda* warnings would be counter-productive to such a relationship.<sup>52</sup>

### D. *Equal Protection*

Equal protection does not mandate that all persons are to be dealt with identically, but does require that the distinctions which are developed have some reasonable relevance to the purpose for which the classification is made.<sup>53</sup>

The fundamental classifications that underlie the ARD program of Allegheny County are that candidates must have engaged in non-

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49. The right to a speedy trial is guaranteed by the sixth amendment of the Constitution and is applicable to the states via the fourteenth amendment. *Klopfer v. North Carolina*, 386 U.S. 213 (1967). The remedy for denial of this right is a complete dismissal of the criminal charges. *Strunk v. United States*, 412 U.S. 434 (1973). In Pennsylvania the right to a speedy trial attaches upon the formal filing of a criminal complaint, and the permissible, nonprejudicial period has been set at 180 days. PA. R. CRIM. P. 1100. Compare this rule with other jurisdictions where the right can easily be waived and is presumed waived in the absence of a demand by the defendant for a speedy trial. *E.g.*, *People v. Foster*, 261 Mich. 247, 246 N.W. 60 (1933); *People v. Kennedy*, 23 Mich. App. 6, 178 N.W.2d 144 (1970). The United States Supreme Court has made it clear that fixed time limits established by states do not delineate the boundaries of the constitutional right to a speedy trial. *Barker v. Wingo*, 407 U.S. 514 (1972); *Dickey v. Florida*, 398 U.S. 30 (1970).

50. *Malloy v. Hogan* 378 U.S. 1 (1964); *cf.* *Guffino v. California*, 380 U.S. 609 (1965).

51. *Miranda v. Arizona*, 384 U.S. 436 (1966).

52. PROSECUTOR'S MANUAL, *supra* note 1, at 148.

53. *See, e.g.*, *Baxstrom v. Herold*, 383 U.S. 107 (1966); *Walters v. St. Louis*, 347 U.S. 231 (1954).

violent criminal episodes and must also be first-time offenders or possess a conviction for a dissimilar offense which is at least 12 years old. There is no case law to suggest that violent offenders or recidivist classifications raise any equal protection issues absent some arbitrary enforcement standards such as race or religion.<sup>54</sup> The most recent decision by the United States Supreme Court in this regard resulted in a rejection of an equal protection challenge to a recidivist exclusion in the statutory eligibility requirements for civil commitment under the Federal Narcotic Addict Rehabilitative Act of 1966.<sup>55</sup>

One area where an equal protection issue might exist is in the realm of restitution. In the criminal context, the United States Supreme Court has indicated that the equal protection clause may be violated when a statute, which is fair on its face and is nondiscriminatorily administered, leads to one result for the wealthy and another result for the poor.<sup>56</sup> Relative to an ARD case, the Commonwealth must be cautious in this area so that an otherwise eligible offender is not automatically denied participation in the program solely because of his inability to make instant restitution. Such a procedure could raise an equal protection issue were it to lead to one result for a wealthy actor and a different result for an indigent actor.

The restitution factor is a legitimate facet of an ARD case<sup>57</sup> and may be a necessary part of the rehabilitative program which functions to remind the probationer of his wrongdoing and so increase his awareness of an obligation to society.<sup>58</sup> Payment should be made as soon as possible, preferably on the day of the ARD hearing. Payment schedules, however, are often mandated by practical considerations and they serve to avoid equal protection difficulties. In exceptional instances a waiver of the two year probation period has been accepted by the Commonwealth to enable an indigent to fully repay an obligation within the probationary period. Such processing avoids the issue of whether an otherwise referable indigent is denied equal protection of the law by an ARD procedure that would permit a similarly situated person with financial means to remain eligible for the program.

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54. See Skoler, *supra* note 34, at 482.

55. *Marshall v. United States*, 414 U.S. 417 (1974).

56. *Tate v. Short*, 401 U.S. 395 (1971); *Williams v. Illinois*, 399 U.S. 235 (1970); *Douglas v. California*, 372 U.S. 353 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956).

57. PA. R. CRIM. P. 182.

58. PROSECUTOR'S MANUAL, *supra* note 1, at 137.



## VI. CONCLUSION

The Accelerated Rehabilitative Disposition program is premised, in part, on the concept that an individual can consent to governmentally imposed restrictions on his/her liberty. Such restrictions should be appropriately matched to the nature of the criminal episode and, most importantly, to the rehabilitative needs of the participant. In order to attain an appropriate probationary recommendation, the district attorney's staff must carefully investigate the criminal episode, evaluate the strengths and deficiencies of the accused individual, and channel the accused into correlated rehabilitative programs.

An endeavor of this type requires the cooperation of the prosecutor, the judges, and the legal community in general. Specifically tailored probationary conditions and adequate supervision take the place of mere chastisement. Through attempting to identify the underlying problems a major step is taken toward preventing initial infractions from becoming major problems.

The program is aimed at providing an opportunity to an individual to prove that his criminal infraction is not indicative of any ingrained, established antisocial attitude. It is a program which is available to the prominent as well as the poor. If the opportunity is seized and used to good advantage, all the parties will benefit. The individual will be assured that future opportunities will remain available which otherwise might be irrevocably closed by a conviction. Society will benefit by added members who can continue to strive and achieve unhampered by a conviction which might easily encourage stagnation and even recidivism. The criminal justice system itself benefits from a reduction in overcrowded court calendars thereby allowing precious resources to be applied to cases which involve repeat offenders and crimes of violence.

VII. APPENDICIES

Appendix A

ACCELERATED REHABILITATIVE DISPOSITION

Case History

Date:

Interviewer

Charges:

CC

CI

- 1. Name
- 2. Alias
- 3. I have had no Federal or State convictions prior to this arrest and have not been granted ARD in any other county at any other time.  
Date: \_\_\_\_\_ Signed: \_\_\_\_\_
- 4. Attorney — (Name, Address & Phone No.)
- 5. Summary of Criminal Episode — (Be explicit as to details of the episode.)  
  
Breathalyzer requested? \_\_\_\_\_ Refused? \_\_\_\_\_ Reading \_\_\_\_\_  
Where is the weapon now? (Make sure a confiscation order is prepared.)  
Any injuries or property damage? \_\_\_\_\_no, \_\_\_\_\_ yes
- 6. Is there a cross-suit pending? (Explain)
- 7. Any outstanding Federal Charges pending? (Explain)
- 8. Co-actors — (Names, Addresses & Phone Nos.)
- 9. Status of charges, if any, against co-actors who were involved in this episode.
- 10. Are any co-actors severed for trial?
- 11. Age:            Birthdate \_\_\_/\_\_\_/\_\_\_            Sex:
- 12. Social Security No.
- 13. Present Address & Phone No.
- 14. Previous Address & Phone No.
- 15. Allegheny County Resident for:
- 16. Description:  
Height:    Weight:    Hair Color:    Eye Color:    Eye Glasses:  
Identifying Marks — Scars, Tattoos, etc.
- 17. Health
- 18. Marital Status:
- 19. Living Together?
- 20. No. of Children

21. Children — (Names, Addresses, Phone Nos. & Ages)
22. Family Synopsis — (Names, Addresses & Phone Nos. of Parents or Guardians)
23. Religion:
24. Synopsis of Educational History  
 School: (Grade Level Completed)  
 College:  
 Graduate School:
25. Military Status
26. Presently Employed by — (Name, Address & Phone No.) How Long?
27. Description of Job
28. Previously Employed by — (Name, Address & Phone No. ) How Long?
29. Description of Job
30. Reason for Leaving Job
31. If Unemployed, How Supported?
32. References — (Names, Addresses, Phone Nos. & Relationships)
33. Commonwealth Witnesses Contacted:  
 Police   /  /  ; Attitude Toward ARD    Favorable    Unfavorable  
 If Unfavorable, State Reason.  
 Victim   /  /  ; Attitude Toward ARD    Favorable    Unfavorable  
 If Unfavorable, State Reason.
34. Are the Commonwealth witnesses aware of other recent complaints which may be pending?  
 Explain.
35. Did you, as the District Attorney's Investigator, promise any particular recommendation for the length of probationary period?    no,    yes (Explain)
36. Recommendation:

Is restitution required?

In what amount?; To Whom?; What payment schedule?

37. Type of probation supervision recommended:  
 Intensive (weekly)    Close (twice monthly)     
 Regular (monthly)    Quarterly     
 Semi-Annually    Annually     
 Administrative (by mail)    yes,    no
38. On Bond (State Amount):  
 O.R.    Cash Deposit    Surety Bond    Cash

NOTE: INDICATE BELOW THE ADDRESSES WHERE THE SUBPOENA SHOULD BE SENT *IF* THE CASE IS APPROVED FOR ARD.

39. Letter sent to Victim: Date:  
 Name: Phone No.:  
 Address:

40. Letter sent to Prosecuting Witnesses:  
 Name: Phone No.:  
 Address:  
 Name: Phone No.:  
 Address:
41. Date of Letter sent to Actor:
42. Hearing Date:

## *Appendix B*

### ACCELERATED REHABILITATIVE DISPOSITION PROCEEDINGS

1. Ladies and Gentlemen, you have been summoned by the Commonwealth of Pennsylvania to respond to certain criminal allegations which have been lodged against you.
2. As the Representative for the Commonwealth, it is my duty to advise you that the United States Constitution guarantees that you have a right to a speedy trial on these charges.
3. If you were to elect to go to trial on these charges, on the day of your trial, you would have a right to participate in the selection of a jury of your peers. This jury would consist of twelve members from this community and would collectively act as the ultimate fact-finder in your case. They would render a final, unanimous verdict of your being either guilty or not guilty.
4. At such a trial, were you to elect to go to trial, the Commonwealth would be required to prove you guilty beyond a reasonable doubt. This burden does not have to be met in this hearing today.
5. However, the Commonwealth is tentatively prepared to offer you an alternative to going to trial. This alternative is the opportunity to undergo ARD.
6. Under this ARD Program you can potentially earn a dismissal of these charges.
7. To earn a dismissal of these charges which currently face you, you must contractually agree with the District Attorney and this Court to undergo a consensual period of probation which lasts for two years.
8. During this period you must abide by the conditions imposed by this Court and all appropriate conditions imposed by the Allegheny County Probation Office.
9. You must voluntarily waive the Statute of Limitations which attaches to the criminal act with which you have been charged and you must voluntarily waive your right to a speedy trial under any and all applicable Federal and State Constitutional provisions, statutes, or rules of Court during the entire period of your enrollment in the Program.
10. During this time the Commonwealth will not present your complaint for Grand Jury action. If you have already been indicted, the Commonwealth will not present your case for trial.
11. If you successfully complete your probation by satisfactorily, faithfully, and diligently adhering to all the conditions set here today, you will eventually be notified by the District Attorney's Office that your probationary period is about to terminate. On the termination date, you can request that these charges be dismissed. At that time you must have presented to the District Attorney:
  - A) A receipt for your court costs and;
  - B) A letter from the Probation Office showing you have reported as required;
  - C) If a citizen probation sponsor is assigned you will also need a letter from your citizen sponsor indicating that you have complied with court order.

D) If restitution is ordered in your case you should make sure you get a receipt for any and all installments because these also must be presented to the District Attorney.

E) A certificate indicating you have attended State Police Film on date notified by the District Attorney as ordered by this court in your case.

Upon the supplying of this information to the District Attorney, this Office can then begin the process leading to the formal dismissal of these charges.

12. If you fail to abide by any of the conditions set forth here today, or those imposed by the Probation Office, or you get in any additional criminal difficulty, your ARD probation will be revoked and your present case will be either sent for Grand Jury action or will be listed for trial if an indictment has already been approved.
13. Remember, nothing you say today can be used later against you in any subsequent criminal or civil action.
14. Shortly, we will begin to hear each case in the Judge's chambers. While you are waiting for your particular case to be called, you should discuss with your attorney the implications which these warnings have for your case today. Please be prepared to indicate in chambers whether you wish to proceed with the ARD hearing. If you intend to proceed with this hearing please sign the waiver and present it to me in chambers.<sup>59</sup>
15. After your case is concluded in chambers, return to this courtroom and take a seat in the jury box to wait for a representative from the Clerk of Courts Office to take you to pay your costs.

Following your stop at the Clerk of Courts Office you must go to the Allegheny County Probation Office at 311 Ross Street. There you will meet your probation officer and make arrangements for future monthly reporting.

#### IN CHAMBERS PROCEDURE

1. SIGN THE WAIVER.
2. Identify Defendant to Judge.
3. Mr., Mrs., Miss \_\_\_\_\_, do you understand that you have been charged in criminal (indictment or complaint) number \_\_\_\_\_ with having violated the Penal Laws of the Commonwealth of Pennsylvania in that it is alleged that you . . .
4. Were you present in the courtroom when the Assistant District Attorney explained ARD and the various constitutional rights involved in participation in the program?
5. Did you understand all of what was said?
6. Have you had the opportunity to discuss the ARD Program with your attorney?
7. Based upon his counsel and your own understanding of ARD, are you willing to waive your rights and have your case considered for ARD?
8. Have you signed the waiver form to indicate this?
9. Have any of the material facts with which you provided the ARD investigator at the time of the initial interview changed?

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59. Originally all ARD hearings were conducted in open court. The procedure was changed so that each applicant would have his individual case heard in chambers for three reasons: (1) it is more organized and avoids having twenty or more applicants in the room at the same time; (2) it allows a more personal contact with the judge and hopefully will impress upon the applicant the opportunity he is being afforded; (3) conducting hearings in chambers does not allow the applicants to compare probationary terms.

10. Have you been arrested on any subsequent charge *after* your ARD interview? If so, what is the charge and who made the arrest?
11. On behalf of the Commonwealth, I move that CC/CI \_\_\_\_\_ be considered for ARD, (Pre or Post) Indictment, as per Supreme Court Rule (175, 176) of Criminal Procedure.
12. Move that the record be closed.
13. State facts.
14. Reopen record for conditions by Judge.

