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Prosecutorial Discretion and the Current Status and Applicability of Accelerated Rehabiliative Disposition Under the Pennsylvania Criminal Justice System

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Comments

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I. INTRODUCTION

"Go not in and out in the courts of justice so that thy name may not stink."[1] That comment by an ancient Egyptian philosopher captures some of the present day askance with which our criminal justice system is sometimes viewed by those who come into contact with the system and those who view it with a more critical eye. Further, besides the stigma associated with a conviction or perhaps even of being so much as the target of law enforcement officials in some manner, punishment has traditionally appeared to be the primary focus of the criminal justice system. However, it has modernly been the case that rehabilitation goes side by side with punishment as a goal of the criminal justice system.[2]

As part of, or perhaps in response to the rehabilitative goal, there has emerged an attempt by the legislature, courts and prosecutors to remove certain "eligible" defendants from the traditional criminal justice process and divert them into what has now come to be commonly known as pre-trial intervention or diversion (hereafter diversion). Diversion has been most accurately defined as the practice of withholding criminal prosecution or incarceration in favor of some rehabilitative and/or restitutional activity.[3] Further, the goal of diversion programs has been specifically articulated as correctional reform and social restoration of offenders.[4] Apart from

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1. A. ERMAN, THE LITERATURE OF THE ANCIENT EGYPTIANS (A. Blackman trans. 1927).

2. Note, *Judicial Control of Prosecutorial Discretion in Pre-trial Diversion Programs*, 31 BUFFALO L.R. 909 (1982); *see also* Alford, *Accelerated Rehabilitative Disposition: The Newest Facet of the Criminal Justice System (The Allegheny County Program)*, 13 DUQ. L. REV. 499 (1975).

3. R. NIMMER, THE SEARCH FOR ALTERNATIVE FORMS OF PROSECUTION, 3 (1974).

4. NATIONAL ADVISORY COMMISSION OF CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS 77 (1973).

this rehabilitative goal, however, diversion has the related but distinct and concrete purpose of serving to ease the burdenous caseloads of trial courts by allowing the courts to concentrate on, and give more considered attention to, more serious criminal cases.

Pennsylvania's diversion program is known as Accelerated Rehabilitative Disposition (ARD) and is embodied in the Rules of Criminal Procedure, promulgated by the Pennsylvania Supreme Court.[5] That diversion in Pennsylvania serves to ease the trial courts' burden is beyond dispute. For example, in 1984 in Allegheny County alone, 3,476 individual cases were disposed of through the ARD program.[6] That figure takes on particular significance in the context of the other dispositions made by that same criminal court division; except for guilty pleas (5,912), the number of cases disposed by ARD exceeded dispositions by non-jury trials (2,387) jury trials (455), and *nolle prosse* (1,058).[7] Thus, diversion through the ARD program presently comprises approximately 38% of the total cases disposed of by the criminal courts in Allegheny County. The benefits of its implementation and operation in terms of reducing the trial workload of the criminal courts cannot be denied.[8]

However, despite the success of ARD in clearing trial calendar and the low rate of recidivism for persons placed on ARD[9] the program has spawned certain problems. In connection with this consideration, this comment will discuss the legislative and judicial history of ARD and whether the judicial interpretations properly apply the legislative intent.

II. Legislative History of Accelerated Rehabilitative Disposition

The beginnings of the ARD program in Pennsylvania can be traced to a Pre-Indictment Probation program instituted, with approval of the Pennsylvania Supreme Court, in Philadelphia County in 1971.[10] As then envisioned, that program comported with the

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5. Pa. R. Crim. P. 175-85.

6. 1984 Annual Report 7, Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division, Robert E. Dauer, Administrative Judge, Criminal Division.

7. *Id.* Appendix.

8. Administrative Judge Dauer was effusive in his praise of the ARD program. "The superb success of the ARD program is largely due to screening, interrogation and investigation of the fine staff of the ARD section of the District Attorney's Office . . . ." *Id.* at 7.

9. *Id.*

10. Specter, *Diversion of Persons from the Criminal Process to Treatment Alternatives*, 44 Pa. B.A.Q. 690 (1973). The author is presently the junior senator from Pennsylvania.

general philosophical, as well as tangential, goals of diversion as it then existed in the United States. The Philadelphia program was designed for first offenders charged with non-violent crimes, with the hope of channelling those persons into a rehabilitative treatment modality before they fell into a pattern of criminal activity.[11] Perhaps of equal import with the goal of rehabilitation was the express desire to relieve court congestion by permitting diversion of "non-hardened" defendants from the trial calendar.[12]

The success of that program apparently led the Pennsylvania Supreme Court to consider and subsequently enact, by order of May 24, 1972, the currently operative ARD program.[13] The Rules are accompanied by comments authored by the Supreme Court Criminal Procedural Rules Committee[14] (hereafter Rules Committee), wherein is noted the dual focus of the program: the elimination, in minor cases, of lengthy motions and trials, and the elimination of other court proceedings where the defendant suffers more from behavioral or social problems rather than criminality *per se*.[15] Likewise, the comments indicate that the rehabilitative emphasis of the program and the desire for prompt disposition of charges led to the title "accelerated rehabilitative disposition."[16]

Similarly, the Comment notes that the Rules do not specify those classes of offenses or offenders which are eligible or ineligible for inclusion in the ARD program.[17] As envisioned and operated, the Philadelphia program excluded all crimes of violence, and pri-

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11. *Id.* at 692.

12. *Id.* The author notes that "[t]he program was designed . . . [to] free court time for the trial of repeaters and violent criminals." *Id.* Continuing, the author states:

> The District Attorney's office employs a full-time assistant district attorney and supporting paralegal and clerical personnel to screen all cases initiated by arrest to determine appropriateness for the ARD Program. Exceptional cases and requests by defense counsel for reconsideration are specially reviewed by the chief of the ARD Unit. Upon being accepted, both the defendant and the complainant are advised of participation in the program by letter. If the terms of the program are agreeable to both, the case is listed for an ARD hearing before [the] judge. . . .

Id.

13. PA. R. CRIM. P. 185, Comment. The comment states, *inter alia*, that "Rules 175 through 185, inclusive are based upon the presently existing practice in Philadelphia County where a program of pre-indictment accelerated rehabilitative disposition exists under an order of the Supreme Court of Pennsylvania entered January 6, 1971." *Id.*

14. The Committee is an appointed body comprised of members of the trial bench, defense bar and prosecution. Criminal Procedural Rules Committee, Supreme Court of Pennsylvania, Law Center, 1919 N. Broad Street, Philadelphia, Pennsylvania, 19122.

15. PA. R. CRIM. P. 185, comment. *See infra* note 27.

16. *Id.* In light of those considerations, the Committee declined to adopt, as the title of the program, "pre-indictment probation" or "deferred disposition." *Id.*

17. *Id.*

marily accepted minor property crimes and small scale narcotics offenses; however, the commentators indicated that the promulgated Rules contemplated wide prosecutorial discretion.[18]

Indeed, the only specific and express limitation on the prosecutor's discretion arose under the 1982 Pennsylvania drunk driving law.[19] Therein the prosecuting attorney is prohibited from submitting a charge for ARD if the defendant has within the previous seven years been adjudged guilty of or participated in ARD for the infraction of driving under the influence of alcohol or a controlled substance; has violated any specific offense pursuant to the revocation of a habitual offender's license;[20] or, has, in connection with the present offense, killed or maimed a third person.[21]

Beyond this relatively recent limitation, however, the parameters of the prosecutor's discretion have not, at either the time of the 1972 origin or until more recently been the subject of an articu-

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18. *Id.* As the Committee indicated, "no attempt has been made in these Rules to specify what cases or classes of cases should be eligible for inclusion in the program. It is believed that the district attorney should have discretion with respect to which crimes he wishes to prosecute . . . ." *Id.*

19. 75 PA. CONS. STAT. ANN. § 3731 (Purdon 1977)(Supp. 1985).

20. *Id.* at (d)(2). 75 PA. CONS. STAT. ANN. § 1542 (Purdon 1977) provides:

§ 1542. Revocation of habitual offender's license.(a) General rule. — The department shall revoke the operating privilege of any person found to be a habitual offender pursuant to the provisions of this section. A "habitual offender" shall be any person whose driving record, as maintained in the department, shows that such person has accumulated the requisite number of convictions for the separate and distinct offenses described and enumerated in subsection (b) committed after the effective date of this title and within any period of five years thereafter.(b) Offenses enumerated. — Three convictions arising from separate acts of any one or more of the following offenses committed either singularly or in combination by any person shall result in such person being designated as a habitual offender:

(1) Any offense set forth in section 1523 (relating to revocation or suspension of operating privilege).(2) Operation following suspension of registration as defined in section 1371 (relating to operation following suspension of registration).(3) Making use of or operating any vehicle without the knowledge or consent of the owner or custodian thereof.(4) Utilizing a vehicle in the unlawful transportation or unlawful sale of alcohol or any controlled substance.(5) Any felony in the commission of which a court determines that a vehicle was essentially involved.(c) Accelerative Rehabilitative Disposition as an offense. — Acceptance of Accelerative Rehabilitative Disposition for any offense enumerated in subsection (b) shall be considered an offense for the purposes of this section.

(d) Period of revocation. — The operating privilege of any person found to be a habitual offender under the provisions of this section shall be revoked by the department for a period of five years.

(e) Additional offenses. — Any additional offense committed within a period of five years shall result in a revocation for an additional period of two years.

Id. 1976, June 17, P.L. 162, No. 81, § 1 eff. July 1, 1977 (footnote omitted).

21. 75 PA. CONS. STAT. ANN. § 3731 (Purdon 1977)(Supp. 1985).

lated proscription by the Pennsylvania Supreme Court or legislature. However, in response to an increasing amount of controversy at the trial level, the Rules Committee published recommended changes to the ARD Rules and in regard to prosecutorial discretion recommended that an introduction to the Rules be added which would, in part, clearly state that it is the district attorney, as part of his or her charging function, who is to determine which cases will be recommended for entry into the ARD program.[22] Owing at least in part to correspondence voicing the opinion that the lack of uniform statewide standards was causing confusion, the Rules Committee reaffirmed the prosecutorial discretion in this area. "Although the Committee has several times considered the matter at length, ultimately, a majority of the Committee remains of the view that designating eligibility or ineligibility for pre-trial diversion is substantive and therefore beyond the court's rule-making authority."[23]

The issue of the district attorney's discretion arises from Rules 175 and 176, which provide that it is the district attorney, exclusively, who may move that the case be considered for ARD.[24] Although the Rules specify that a defendant may request that the district attorney move his case for ARD, nowhere do the Rules provide that the defendant himself may request that the court place him in the ARD program; nor do the Rules specify that the court of its own volition, in the absence of prosecutorial initiative or in the presence of prosecutorial opposition, may undertake to place a defendant into the ARD program.[25]

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22. 480 A.2d XLVIII, XLIX (1984). The Committee goes on to note the statutory exception discussed previously, see *supra* notes 18-21 and accompanying text.

23. *Id.* at LX.

24. PA. R. CRIM. P. 175. Rule 175 states:

> After a defendant is held for court by an issuing authority, the attorney for the Commonwealth, upon his own motion or upon request of the defendant's attorney, may submit the transcript returned by the issuing authority to a judge empowered to try cases on information or indictment and may move that the case be considered for accelerated rehabilitative disposition.

Id.

Rule 176 states:

> After an information or indictment, the attorney for the Commonwealth upon his own motion or upon request of the defendant's attorney may submit the information or indictment to a judge empowered to try cases on information or indictment, and may move that the case be considered for accelerated rehabilitative disposition.

Id.

25. *Id.* Indeed, with respect to persons charged with drunk driving, the Superior Court has stated that a defendant has no right to demand acceptance into an accelerated rehabilitative disposition, and that Rules 175-85 make such acceptance contingent upon the prose-

Thus, the situation may be partially summarized as absent a very narrow area of legislative prescription,[26] the prosecutor, theoretically at least, has unfettered discretion in choosing what person or what classes of offenses will be eligible for the ARD program. As a result, moreover, as will be subsequently discussed, an offense qualifying in one county for ARD disposition may not qualify in another county; and the defendant, if rejected by reason of the type of offense he committed, or for any other independent reason, is left with the choice of: (1) proceeding to a guilt determination phase; (2) pleading guilty with the hope of receiving the most lenient sentence available under Pennsylvania sentencing law; (3) requesting that the court direct that the district attorney move for his admission into the ARD program; or, (4) requesting that the court itself, in the face of prosecutorial inaction or opposition, place the defendant into the ARD program.

With respect to this latter statement, it should be noted that the original comment accompanying the 1972 enactment of rules implementing ARD, in addition to broadly defining the discretion given the district attorney, stated that "the presence of the judge in the program, along with the defendant and his attorney, precludes any danger that such discretion may be abused."[27] Nevertheless, despite the existence of such a safeguard, it is clear from the cases considered by the Pennsylvania appellate courts that since its inception in 1972, the ARD program has spawned a host of problems owing in large part to the broad existence and exercise of prosecutorial discretion. This article will survey those cases that reflect most poignantly the problems that have arisen, been considered, and in some part remain unresolved despite a clear trend to reaffirm and even enlarge prosecutorial discretion in this area.

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cution's motion therefore. Commonwealth v. Boerner, 268 Pa. Super. 168, 407 A.2d 883 (1979), *appeal dismissed*, 491 Pa. 416, 421 A.2d 206 (1980). *See also infra* note 172 and accompanying text.

26. *See supra* notes 18-23 and accompanying text; 480 A.2d at XLIX-L.

27. PA. R. CRIM. P. 185, comment. Continuing, the official comment, discussing the experience of Philadelphia County with ARD, notes: It has been the practice of the district attorney of Philadelphia County to notify the victim, if any, that he may be heard in person or by letter. This principle has been incorporated in Rules 177, 178, and 179, which also provide for notice in writing to any victim of when a hearing is to be held on a motion to admit a defendant to A.R.D. This provision further helps to guarantee against any abuse of discretion by the district attorney.

Id.

III. Judicial Interpretation of Accelerated Rehabilitative Disposition

Any point of inquiry into the judicial interpretation of ARD must begin with *Commonwealth v. Kindness*,[28] which serves as a starting point both in terms of constitutional and pragmatical problems regarding diversion.

In *Kindness*, the defendant, after his arraignment on charges of driving under the influence of alcohol[29] (hereafter DUI), filed a motion with the court requesting consideration for ARD.[30] Pursuant to the court's direction, the Commonwealth's answer alleged that the recommendation of a case for ARD consideration was discretionary on the part of the district attorney, and that therefore, it need not be submitted.[31] On appeal, Kindness asserted that prosecutorial consent, as a prerequisite to ARD admission, was unconstitutional in that such a prerequisite would necessarily involve an improper delegation of a judicial function [32]

Writing for the majority, Judge Cercone[33] first stated that regardless of a prosecutor's decision not to approve a particular case for ARD, no delegation of sentencing power occurred because the court could ultimately place the defendant on probation even in

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28. 247 Pa. Super. 99, 371 A.2d 1346 (1977).

29. 75 Pa. Cons. Stat. Ann. § 3731 (Purdon 1977). Section 3731, in parts pertinent to the present discussion, states:(a) Offense defined — A person shall not drive, operate or be in actual physical control of the movement of any vehicle while:

(1) under the influence of alcohol to a degree which renders the person incapable of safe driving;

. . . .

(3) under the combined influence of alcohol and any controlled substance to a degree which renders the person incapable of safe driving; or

(4) the amount of alcohol by weight in the blood of the person is 0.10% or greater.

Id.

30. 247 Pa. Super. at 103, 371 A.2d at 1347.

31. *Id.*, 371 A.2d at 1348. Moreover, the district attorney, in support of his discretion, indicated that, in light of the Dauphin County Court's request that DUI offenses not be considered for ARD treatment and his personal belief that the public, burdened with the problem of drunk drivers, would be ill served by submitting such cases to ARD, he would not submit the instant case for ARD consideration. *Id.*

The lower court, agreeing with the Commonwealth, denied the motion, and set the case for trial. The appellant was found guilty, fined $300, and placed on probation for one year. *Id.*

32. *Id.*

33. Judge Cercone was joined by President Judge Watkins and Judges Jacobs, Price and Van der Voort. *Id.* at 102, 371 A.2d at 1347. Judge Hoffman concurred with the analysis advanced by the majority but stated that the appellant had not properly preserved the issue for appeal. *Id.* at 111, 371 A.2d at 1352. Judge Spaeth filed a concurring and dissenting opinion. *Id. See infra* notes 57-78 and accompanying text.

the event of a guilty verdict or guilty plea.[34]

The *Kindness* court also rejected a separation of powers argument that appellant Kindness had based on California case law. The appellant argued that the decision to divert a defendant into a rehabilitation program is an exercise of a judicial power and could not constitutionally be subordinated to the veto of a prosecutor.[35] The *Kindness* court noted, however, that the power of a California court to divert was granted by the legislature in the state penal code,[36] and that the diversion power vested in the California courts stemmed, as the California courts acknowledged, "from the historical powers of *nolle prosequi* which were traditionally vested in the Attorney General of England and in the prosecuting attorneys in the American states."[37]

The *Kindness* court then looked closely at where the power to *nolle prosequi* lies in Pennsylvania. The superior court determined that although the legislature stated that it was necessary that the prosecutor obtain court approval to do so,[38] it was nevertheless clearly the law of Pennsylvania that a *nolle prosequi* could only be entered by the prosecuting officer, or with his consent.[39] The court then extended its support of prosecutorial discretion with regard to criminal charges by stating that, aside from those instances where it was necessary for the court to dismiss charges to vindicate a procedural right,[40] the Pennsylvania courts do not have power to dismiss a prosecution unless the legislature expressly empowers it to

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34. 247 Pa. Super. at 104, 371 A.2d at 1348. The court noted that such prosecutorial discretion created "no interference with the judicial power to determine the mode of correction to which a particular defendant [would] be subjected." *Id.* Thus, the majority reasoned, with the sentencing power firmly within the province of the court, no unconstitutional delegation of sentencing power occurred. *Id.*

35. *Id.* The appellant relied upon People v. Superior Court of San Mateo County, 11 Cal. 3d 59, 520 P.2d 405, 113 Cal. Rptr. 21 (1975), wherein the California court stated:The judicial power is compromised when a judge, *who believes that a charge should be dismissed in the interests of justice, wishes to exercise the power to dismiss* but finds that before he may do so he must bargain with the prosecutor. The judicial power must be independent, and a judge should never be required to pay for its exercise.
Id. at 25, 520 P.2d at 409 (emphasis in original).

36. 247 Pa. Super. at 103, 371 A.2d at 1348 (citing CAL. PENAL CODE § 1385 (West 1977)).

37. 247 Pa. Super. at 105, 371 A.2d at 1349 (quoting People v. Gonzales, 235 Cal. App. 2d Supp. 887, 890, 46 Cal. Rptr. 301 (1965)).

38. 247 Pa. Super. at 106, 371 A.2d at 1349 (citing 19 PA. CONS. STAT. ANN. § 492 (Purdon 1964)).

39. 247 Pa. Super. at 106, 371 A.2d at 1349 (quoting Commonwealth v. Reed, 65 Pa. Super. 91, 99 (1916)).

40. 247 Pa. Super. at 107, 371 A.2d at 1349. As an example, the court cited PA. R. CRIM. P. 1100 (right to a speedy trial).

do so.[41]

With that background, the court then considered the Pennsylvania Supreme Court's general authority to enact procedural rules such as Pennsylvania Rules of Criminal Procedure 175-85.[42] Judge Cercone stated that the court's rule-making powers emanated from, and were limited by, Article V, § 10(c) of the Pennsylvania Constitution which states that "[S]uch rules [must be] consistent with this Constitution and neither abridge, enlarge, nor modify, the substantive rights of any litigant."[43] Judge Cercone indicated that the court was limited in its rule- making by the constitutional doctrine of separation of powers and could not, in the first instance, even create a diversion program without requiring prosecutorial initiative.[44]

The court then considered two equal protection claims advanced by appellant Kindness. First, the court noted that Kindness had been rejected pursuant to the district attorney's policy that denied to all members of his class, drunk drivers, admission into the ARD program.[45] The court indicated that, in light of the life endangering threat created by drunk driving, the classification was neither unreasonable nor arbitrary, and thus rejected the argument that ARD discriminated against intoxicated persons.[46]

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41. *Kindness*, 247 Pa. Super. at 107, 371 A.2d at 1349. The court enumerated those legislatively defined areas: (1) where the aggrieved party has a civil remedy and satisfaction has been made to that party (19 PA. CONS. STAT. ANN. § 491 (Purdon 1964), PA. R. CRIM. P. 745; (2) where the court finds that the offense falls into a statutorily defined "de minimis" category (18 PA. CONS. STAT. ANN. § 312 (Purdon 1983)); (3) where the court finds that a prosecution for conduct charged to constitute criminal attempt solicitation or conspiracy, but determined to be so unlikely to achieve its objective that the actor and his conduct may be considered harmless (18 PA. CONS. STAT. ANN. § 905(b) (Purdon 1983)). 247 Pa. Super. at 107 n.5, 371 A.2d at 1349 n.5.

42. 247 Pa. Super. at 107, 371 A.2d at 1350.

43. *Id.*, 371 A.2d at 1350 (quoting PA. CONST. art. V, §§ 7, 10(c)).

44. 247 Pa. Super. at 107, 371 A.2d at 1350. Specifically, the court held that:The supervisory powers of the Pennsylvania Supreme Court are limited by Article V, § 10(c) of the Pennsylvania Constitution, which grants that Court its procedural rule-making powers but qualifies that grant by stating: "[S]uch rules [must be] consistent with this constitution and neither abridge, enlarge, nor modify the substantive rights of any litigant." The Court was thus limited to working within the existing framework of separation of powers, and therefore could not create a diversion program without requiring prosecutorial initiative, as the Commonwealth is indisputably a litigant and possesses a substantive right to insist on seeking a conviction. It follows that this court cannot do so either. While there is something to be said for allowing a court to overrule a prosecutor and order diversion, it should be said to the General Assembly.
Id.

45. *Id.* at 108, 371 A.2d at 1350.

46. *Id.* The court specifically noted that the statute *did not* deal with intoxication *per se*. Rather, it dealt with the activities of a person in an intoxicated position. By analogy, the

The second aspect of Kindness' equal protection argument was that the exclusion of drunken drivers from ARD in Dauphin County, but not in other counties, was a violation of his constitutional rights, in that residence in a particular county was an unreasonable basis for classification.[47] In response, the court intimated that while uniformity within the state, for ARD admission, might be preferable, such a requirement was not necessary for the statute to be constitutionally sound.[48]

In support of this position, albeit in two instances somewhat dated, Judge Cercone stated that the fourteenth amendment does not unequivocally preclude diversities of law in different parts of the same state;[49] that the Constitution does not forbid the state from using disparate methods for different counties;[50] and, that only arbitrary decisions can be declared void under the fourteenth amendment.[51] Thus, the court concluded that both prosecutorial discretion and differential treatment between counties, as embodied in the Pennsylvania ARD program, were constitutional.

Although he agreed with the disposition of this particular case, now President Judge Spaeth resoundingly criticized the majority's reasoning and its vote of confidence in the ARD rules as enacted.[52] In a concurring and dissenting opinion, Judge Spaeth addressed many of the tender spots then present; problem areas that remain largely unremedied as of this writing. In an exhaustive opinion, Judge Spaeth first traced the history and development of the ARD program, and indicated his firm belief in, and support of, diversion generally.[53]

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court indicated that while an intoxicated driver would be equally as dangerous as a sober burglar, an intoxicated driver is much more dangerous than a sober driver. *Id.*

47. *Id.* at 110, 371 A.2d at 1350.

48. *Id.* Indeed, the court noted that while "differences among counties in the treatment of particular types of offenders may breed resentment among the more harshly treated defendants and may contribute to an image of the criminal justice system as one in which decisions are made arbitrarily and inequitably [,] . . . not everything that is desirable is constitutionally required." *Id.*

49. *Id.* at 109, 371 A.2d at 1351 (quoting Missouri v. Lewis, 101 U.S. 22, 31 (1879)).

50. 247 Pa. Super. at 110, 371 A.2d at 1351 (quoting Kaelin v. Warden, 334 F. Supp. 602, 608 (E.D. Pa. 1971)).

51. 247 Pa. Super. at 110-11, 371 A.2d at 1351 (quoting Metropolis Theatre Co. v. Chicago, 228 U.S. 61, 69-70 (1913)). Specifically, the *Metropolis Theatre* Court held that: "[t]o be able to find fault with a law is not to demonstrate its invalidity. It may seem unjust and oppressive, yet be free from judicial interference. The problems of government are practical ones and may justify, if they do not require, rough accommodations." *Id.*

52. 247 Pa. Super. at 111-16, 371 A.2d at 1352-54 (Spaeth, J., concurring in part and dissenting in part).

53. *Id.* at 116-17, 371 A.2d at 1354-55 (Spaeth, J., concurring in part and dissenting in

Initially, Judge Spaeth took the majority to task for accepting the premise that diversion is a species of prosecutorial discretion; rather, as he believed, diversion is unmistakeably a judicial decision.[54] Judge Spaeth conceded that the prosecutor has the discretion of arrest and charging, but he indicated that once a defendant is held for court, the prosecution's discretion has been exercised. "[T]he prosecutorial die has long since been cast" and consequent disposition is at the court's discretion as part of its sentencing prerogative.[55] Judge Spaeth, relying heavily on the diversion experience of California and New Jersey in demonstrating the judicial nature of diversion, readily pointed out that the California Supreme Court had rejected as unconstitutional a statutory enactment that the decision to divert is an extension of the charging process and thus within the prosecutor's discretion.[56] Judge Spaeth also found support in the Supreme Court of New Jersey which had determined that "the decision not to divert a given case was 'judicially cognizable.' "[57]

Armed with the belief that he had established that diversion is a form of sentencing and thus a judicial decision, Judge Spaeth stated that the fundamental invalidity of the rules—an unconstitutional delegation to the district attorney of the exclusive judicial responsibility of sentencing—was obvious.[58] Indeed, in his dissent,

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part). It is interesting to note that while Judge Spaeth believed diversion to be both humane and efficient, he was convinced that as presently structured, the Pennsylvania ARD program was fundamentally invalid, carrying with it great dangers. *Id.*

54. *Id.*

55. *Id.* at 118, 371 A.2d at 1355-56 (Spaeth, J. concurring in part and dissenting in part) (quoting People v. Superior Court of San Mateo County, 11 Cal. 3d 59, 520 P.2d 405, 113 Cal. Rptr. 21 (1974)).

56. 247 Pa. Super. at 120, 371 A.2d at 1357 (Spaeth, J. concurring in part and dissenting in part) (citing *San Mateo County*, 11 Cal. 3d 59, 520 P.2d 405, 113 Cal. Rptr. 21 (1974)).

57. 247 Pa. Super. at 121, 371 A.2d at 1357 (concurring in part and dissenting in part) (quoting State v. Leonardis, 71 N.J. 85, 363 A.2d 321, 334 (1976)). *But see* State v. Leonardis, 73 N.J. 360, 376, 375 A.2d 607, 615 (1977). *See also* State v. Sutton, 668 S.W.2d 678 (Tenn. Crim. App. 1984); State v. Hammersly, 650 S.W.2d 352 (Tenn. 1983); State v. Smith, 92 N.J. 143, 455 A.2d 1117 (1983); Cleveland v. State, 417 So.2d 653 (Fla. 1983); State v. Collins, 90 N.J. 449, 434 A.2d 628 (1981); State v. Collier, 627 S.W.2d 143 (Tenn. Crim. App. 1982); State v. Dalgish, 86 N.J. 503, 432 A.2d 74 (1981); Blackwell v. State, 605 S.W.2d 832 (Tenn. Crim. App. 1980); Pace v. State, 566 S.W.2d 861 (Tenn. 1978); Dearborne v. State, 575 S.W.2d 259 (Tenn. 1978).

58. 247 Pa. Super. at 122, 371 A.2d at 1357-58. Specifically, Judge Spaeth stated:

> [U]nder the present rules the district attorney is given the absolute discretion to decide whether a case shall or shall not be submitted to the court; he need not state in advance what sort of cases he will consider to possible submission, nor what factors in any given case will weigh for or against submission; nor need he state why he has

Judge Spaeth became almost vehement in his attack, stating that the Rules must fall because even the most principled district attorney had unfettered discretion; bounded by neither standards nor constraints, criteria or procedure.[59]

Judge Spaeth did not stop with his criticism of the majority opinion and ARD as it then existed, but rather, to his credit, he urged the supreme court to amend the ARD Rules to incorporate requirements that in his opinion must be part of the ARD program in order to assume constitutional integrity.[60] Judge Spaeth then pointed to four areas of concern, which to date have been left unanswered.

The first suggested requirement was that there be promulgated a definition of what sort of cases be eligible for diversion.[61] Judge Spaeth noted that pursuant to a New Jersey Supreme Court decision, defendants accused of *any* crime were eligible for diversion.[62] It has been noted hereinabove that the Pennsylvania Rules Committee has recently rejected the notion of a uniform statewide standard for eligible or ineligible offenses.[63] The wisdom of the Rules Committee's decision is questionable, for the lack of more precise guidelines has led to problems. While the New Jersey ap-

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decided that a given case shall not be submitted. By enacting such rules, the Supreme Court has in my judgment unconstitutionally delegated to the district attorney the exclusively judicial responsibility of sentencing.

Id.

59. 247 Pa. Super. at 129, 371 A.2d at 1360 (Spaeth, J. concurring in part and dissenting in part). According to Judge Spaeth:

> Under Pa. R. Crim. P. 175-185, a district attorney's discretion is unfettered; thus he is compelled to make arbitrary choices. His choices will always be arbitrary, no matter how principled he may be, for with no objective standard to guide and restrain him, they must be personal choices; and they may be arbitrary in a far more invidious sense than that.The rules say that a district attorney "may" decide whether a "case" should or should not be considered by the court for accelerated rehabilitative disposition. Pa. R. Crim. P. 175-76. What kind of "case?" The rules do not say. Having decided—in whatever manner—upon the kind of case (forgeries, for example), how is the district attorney to decide which case should and which case should not be considered by the court? What criteria is he to consider? What fact finding procedure is he to follow to see if these criteria are met? The rules do not say.

Id. (Spaeth, J. concurring in part and dissenting in part).

60. *Id.* at 130, 371 A.2d at 1361 (Spaeth, J. concurring in part and dissenting in part).

61. *Id.*

62. *Id.* Quoting from *Leonardis*, 71 N.J. at 121, 363 A.2d at 340, the court noted that before *Leonardis*, the practice in New Jersey was very similar to that of Pennsylvania, in that no uniform definition of what cases should be considered for diversion existed. After *Leonardis*, however, all defendants were eligible for diversion. 247 Pa. Super. at 130, 371 A.2d at 1361 (Spaeth, J. concurring in part and dissenting in part).

63. *See infra* notes 24-25 and accompanying text.

proach may be too extensive,[64] it is at least a logical starting point.

The second requirement suggested by Judge Spaeth was a compilation of the various criteria applicable in determining whether a certain case would be eligible for ARD treatment.[65] Except for the legislative proscription of offering ARD to certain DUI offenders,[66] this proposition has not been addressed in Pennsylvania.[67]

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64. *See, e.g.*, State v. White, 145 N.J. Super. 257, 367 A.2d 469, 471 (1976). In *White*, a woman accused of murder applied for and, although eventually rejected, was given, by virtue of mandatory diversion guidelines, the opportunity to present any facts or materials demonstrating amenability to the rehabilitative process. *Id.*

65. 247 Pa. Super. at 129, 371 A.2d at 1361 (Spaeth, J. concurring in part and dissenting in part).

66. *See infra* notes 18-20 and accompanying text.

67. *Cf.*, Cal. Penal Code § 1000(a)(1)-(6), N.J.R. Crim. P. 3:28. In contrast to the Pennsylvania ARD program, both California and New Jersey provide for a list of criteria that determine whether a specific crime is diversion-eligible. Under the Cal. Penal Code § 1000(a) (West Supp. 1985) the following criteria are to be used by the district attorney in determining a defendant's eligibility for diversion:

> (1) The defendant has no conviction for any offense involving controlled substances prior to the alleged commission of the charged divertible offense.(2) The offense charged did not involve a crime of violence or threatened violence.(3) There is no evidence of a violation relating to narcotics or restricted dangerous drugs other than a violation of the sections listed in this subdivision.(4) The defendant's record does not indicate that probation or parole has ever been revoked without thereafter being completed.(5) The defendant's record does not indicate that he has ever been diverted pursuant to this chapter within five years prior to the alleged commission of the charged divertible offense.(6) The defendant has no prior felony conviction within five years prior to the alleged commission of the charged divertible offense.

Id. § 1000(a)(1)-(6).

The New Jersey statute, N.J.S.A. 2C: 43-12(e)(1)-(17) (1982), lists the following criteria:

> (e) Referral. At any time prior to trial but after the filing of a criminal complaint, or the filing of an accusation or the return of an indictment, with the consent of the prosecutor and upon written recommendation of the program director, the assignment judge or a judge designated by him may postpone all further proceedings against an applicant and refer said applicant to a program supervisory treatment approved by the Supreme Court. Prosecutors and program directors shall consider in formulating their recommendation of an applicant's participation in a supervisory treatment program, among others, the following criteria:(1) The nature of the offense;(2) The facts of the case;(3) The motivation and age of the defendant;(4) The desire of the complainant or victim to forego prosecution;(5) The existence of personal problems and character traits which may be related to the applicant's crime and for which services are unavailable within the criminal justice system, or which may be provided more effectively through supervisory treatment and the probability that the causes of criminal behavior can be controlled by proper treatment;(6) The likelihood that the applicant's crime is related to a condition or situation that would be conducive to change through his participation in supervisory treatment;(7) The needs and interests of the victim and society;(8)The extent to which the applicant's crime constitutes part of a continuing pattern of anti-social behavior;(9) The applicant's record of criminal and penal violations and the extent to which he may present a substantial danger to others; (10) Whether or not the crime is of an assaultive or violent nature, whether in the criminal act itself or in the possible injurious conse-

The third suggested requirement would create an orderly procedure by which satisfaction of the various criteria might be validated. Judge Spaeth relied on practices in California and New Jersey which afforded rejected diversion candidates a written statement of reasons for denying diversion.[68] Again in Pennsylvania, the district attorney of each county is left without guidance from the rules as to the extent, if any, of his obligation to inform a disappointed ARD applicant with the reasons for his rejection.[69]

The fourth requirement was that there must be a hearing before a judge who decides whether or not the defendant is acceptable for diversion.[70] Pennsylvania complies with the suggested requirement only insofar as the district attorney decides to "move" a case for ARD consideration. As Judge Spaeth indicated, however, there is no requirement in the Rules that the judge give a statement of reasons for acceptance or rejection of the defendant.[71] Despite his stern criticism of ARD as it exists in Pennsylvania, Judge Spaeth then concluded his dissent by indicating his strong belief in diversion as a humane and efficient form of criminal justice.[72]

In the concurring portion of his opinion, Judge Spaeth agreed with the majority that Kindness' appeal should be rejected, but for a vastly different reason. He believed, based upon his discussion of

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quences of such behavior;(11) Consideration of whether or not prosecution would exacerbate the social problem that led to the applicant's criminal act;(12) The history of the use of physical violence toward others;(13) Any involvement of the applicant with organized crime;(14) Whether or not the crime is of such a nature that the value of supervisory treatment would be outweighed by the public need for prosecution;(15) Whether or not the applicant's involvement with other people in the crime charged or in other crime is such that the interest of the State would be best served by processing his case through traditional criminal justice system procedures;(16) Whether or not applicant's participation in pretrial intervention will adversely affect the prosecution of codefendants; and (17) Whether or not the harm done to society by abandoning criminal prosecution would outweigh the benefits to society from channeling an offender into a supervisory treatment program.

Id.

68. 247 Pa.Super. at 130, 371 A.2d at 1361-62 (Spaeth, J. concurring in part and dissenting in part) (citing Cal. Penal Code § 1000(b) (West 1970) (Supp. 1985), and *Leonardis*, 71 N.J. Super. at 115-19, 363 A.2d at 337-39).

69. *See generally* PA. R. CRIM. P. 175-85 (1985). Indeed, the Pennsylvania ARD program provides only for notification if a defendant is accepted into the program. Rule 177 is illustrative on this point. "When accelerated rehabilitative disposition proceedings are initiated, the attorney for the Commonwealth shall advise the defendant and his attorney of his intention to present the case to an appropriate judge. Notice of the proceeding shall be sent also to any victim or victims of the offense charged." *Id.*

70. 247 Pa. Super. at 130-31, 371 A.2d at 1362 (Spaeth, J. concurring in part and dissenting in part).

71. *Id.*

72. *Id.*

the four factors noted above, that the Pennsylvania program was constitutionally infirm.[73] In consideration thereof, perhaps the best explanation for his lengthy dissent was his emphatic hope that the Pennsylvania Supreme Court would take the steps necessary to remedy the infirmities that he had attributed to the program.[74]

Judge Spaeth, who had so vehemently pressed the position that the ARD program was riddled with constitutional infirmity, acknowledged in *Commonwealth v. Joines*,[75] in perhaps a slip of the pen, or resolved to the holding of *Kindness*, that, "[p]articipation in an ARD program is conditioned on the district attorney's motion to the court that a defendant's case receive an accelerated disposition; without that motion, a defendant will not qualify."[76]

The constitutional issue of equal protection of the laws and prosecutorial discretion was raised again, however, in *Commonwealth v. Boerner*,[77] where the court relied on the holding in *Kindness*, and reviewed the wording of the Rules themselves in determining that the discretion to submit a case to ARD is vested in the prosecutor.[78]

The majority in *Boerner* quickly rejected the constitutional claims raised by the appellant.[79] Boerner had been charged with DUI and was notified by the district attorney that his case would be considered for ARD.[80] A hearing date was set, but before that date, Boerner was again arrested for drunk driving. As a result, the district attorney withdrew his case from consideration for the program and the scheduled hearing date was cancelled. Subsequently, however, Boerner was acquitted of the second charge and sought, but was refused, reconsideration for the ARD program.[81] In the superior court, Boerner advanced a constitutionally based argument that the district attorney's actions had denied him his equal protection of the laws and due process rights.[82] In response, the supe-

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73. *Id.*

74. *Id.* at 131, 371 A.2d at 1362 (Spaeth, J. concurring in part and dissenting in part) (citing Leonardis). *See supra* note 57 and accompanying text.

75. 264 Pa. Super. 281, 399 A.2d 776 (1979) (trial court erred in not allowing defendant to cross-examine Commonwealth witness on that witness' withdrawal of his guilty plea and placement into ARD program).

76. *Id.* at 285, 399 A.2d at 779.

77. 268 Pa. Super. 168, 407 A.2d 883 (1979).

78. *Id.* at 171-72, 407 A.2d at 885.

79. *Id.*

80. *Id.* at 170, 407 A.2d at 884-85.

81. *Id.*

82. *Id.* at 171, 407 A.2d at 885. The appellant also proffered a second argument in which he alleged that the breathalyzer machine had not, at the time of his arrest, obtained

rior court, relying on *Kindness*, stated that the ARD Rules themselves made it clear that it was wholly within the district attorney's discretion to submit a person for ARD consideration,[83] and that the intent of the Rules was to focus upon three participants: the district attorney, the defendant, and the hearing judge, each having a specific role.[84]

The court, after affirming prosecutorial discretion in the area of ARD generally, went on to specifically state that Boerner's equal protection argument was erroneous because he had never been accepted into ARD; consequently, he had no right to demand reacceptance since he was not similarly situated with persons who had been accepted into the program.[85] Judge Spaeth authored a concurring and dissenting opinion unrelated to the constitutional issues discussed above.[86] Nevertheless, in that opinion he placed a footnote wherein he merely stated his view that the ARD program is an unconstitutional delegation of power. He then directed the reader to his concurring and dissenting opinion in *Kindness*.[87]

In addition to *Kindness* and *Boerner*, another major case, *Shade v. Commonwealth, Department of Transportation*,[88] addresses the role of the prosecutor and the extent of his discretion in ARD matters. In *Shade*, the plaintiff requested that the district court declare unconstitutional the ARD program due to its alleged excessive grant of discretion in both the prosecuting attorney and the county courts, and its discriminatory administration.[89]

In responding to these assertions, the district court indicated that ARD is essentially a *quid pro quo*, whereby the Commonwealth suspends formal criminal proceedings and the defendant reciprocates in some manner such as making restitution, participat-

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the necessary certification. The court noted that although it was error to have submitted the breathalyzer results, it was harmless in view of other testimony concerning the appellant's intoxication. *Id.*

83. *Id.*

84. *Id.* According to the court, the district attorney, in his discretion, initiates the proceeding; the defendant must knowingly accept the conditions imposed by the district attorney; and, the hearing judge assesses the case and may grant the motion. *Id.*

85. *Id.*

86. *Id.* at 173, 407 A.2d at 886 (Spaeth, J. concurring in part and dissenting in part).

87. *Id.* at 173, 407 A.2d at 886 (Spaeth, J. concurring in part and dissenting in part).

88. 394 F. Supp. 1237 (M.D. Pa. 1975). In *Shade*, both plaintiffs in 1974 pled guilty to a DUI charge, received a $200 fine and six months probation, and had their licenses revoked for one year. *Id.* In addition to their main constitutional argument, the plaintiffs also sought a preliminary and permanent injunction to enjoin the Department of Transportation from revoking their licenses, until such time as the ARD rules were applied equally to all Pennsylvania residents. Finally, the plaintiffs requested the reinstatement of their licenses. *Id.*

89. *Id.* at 1239.

ing in a rehabilitation program, undergoing psychiatric treatment, holding certain employment, or otherwise modifying his behavior.[90] To reach this level, however, the court noted that a step-by-step procedure is involved under the Rules, whereby the district attorney at his discretion may either *sua sponte* or upon defendant's request submit the issue for ARD treatment or insist on prosecuting the defendant for the offense.[91]

The district court, in dictum, also rejected the contention that the ARD Rules are unconstitutional on their face because of the alleged unfettered prosecutorial discretion in determining which cases will receive ARD treatment.[92] The court stated that such a contention was "wholly without merit" and looked for support to several decisions which recognized the exercise of discretion of the prosecutor in analogous settings.[93] One of those cases, *Newman v. United States*,[94] noted that few subjects are less adapted to judicial review than executive discretion in determining the institution, charging and dismissal of criminal proceedings.[95]

Weighing even more strongly in favor of the notion that the prosecutor possesses broad powers of discretion in ARD and may exercise them in such a manner that, in the normal course, does not violate equal protection safeguards, was the holding in the

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90. *Id.* at 1240.

91. *Id.* (citing PA. R. CRIM. P. 175 and 176).

92. 394 F. Supp. at 1240-41.

93. *Id.* Citing United States v. Bland, 472 F.2d 1329, 1335 (U.S. App. D.C. 1972) (concept of prosecutorial discretion in charging is long standing and widely accepted, deriving from the constitutional principle of separation of powers); United States v. Cox, 342 F.2d 167, 171 (5th Cir. 1965) (although as a member of the bar the attorney for the United States is an officer of the court, he is nevertheless an executive official of the government, and it is as an officer of the executive department that he exercises a discretion as to whether or not there shall be a prosecution in a particular case; thus it follows as an incident of the constitutional separation of powers that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions).

94. 382 F.2d 479 (D.C. Cir. 1967). Although *Newman* preceded the institution of ARD in Pennsylvania by several years, the issue involved therein was basically of the same nature. In *Newman*, the sole issue for decision was whether the appellant had suffered a denial of his constitutional rights when the United States Attorney accepted appellant's co-defendant's guilty plea for a lesser offense while refusing to accept the same plea for appellant. *Id.*

The Newman Court, per Burger, J., concluded that the identical treatment of every offender and every offense would be an impossible task. As the court stated: "Two persons may have committed what is precisely the same legal offense but the prosecutor is not compelled by law, duty or tradition to treat them the same as to charges." *Id.* at 481-82.

95. *Id.* at 480.

United States Supreme Court case, *Oyler v. Boles*,[96] relied upon by the *Shade* court.[97] The *Oyler* Court stated that conscious selectivity is not necessarily violative of the constitution,[98] and that while statistics may indicate selective enforcement is occurring, equal protection is not offended unless the selective enforcement is deliberately based upon an unjustifiably arbitrary classification standard such as race or religion.[99] Relying on these precedents, the *Shade* court intimated that judicial review of prosecutorial discretion may occur only when such discretion evidences a deliberate use of suspect and arbitrary classifications. In the absence thereof, however, neither due process nor equal protection under the fourteenth amendment will have been violated.[100] Further, the *Shade* court emphasized that ARD was merely one of several discretionary methods[101] for the disposition of criminal charges and that ARD does not diminish the traditional power and discretion of the prosecuting attorney to choose which crimes he wishes to prosecute.[102]

In Pennsylvania, therefore, the prosecutor's ability to determine which cases will be submitted for ARD treatment is well founded; attacks on prosecutorial discretion in this area have been unsuccessful. *Kindness, Boerner* and *Shade* all establish this wide breadth of prosecutorial discretion.[103]

Aside from the constitutionality of prosecutorial discretion, a second major issue concerning ARD is the expungement of an ar-

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96. 368 U.S. 448 (1962). *Oyler* involved the constitutionality of a West Virginia statute that provided for a mandatory life sentence upon a third conviction of a crime punishable by confinement in a penitentiary. Appellant and several others had each been three times convicted of such crimes. Appellant, however, was the only party to receive a life sentence. Appellant alleged, *inter alia*, that unless all persons in his situation were punished with a life sentence, then the statute was being unconstitutionally applied. The Court disagreed. The Court noted that the statistics did not establish that failure to seek the more severe penalty was based upon race, religion or some other arbitrary classification. In light thereof, then, "the conscious exercise of some selectivity in enforcement [on the part of the state was] not in itself a federal constitutional violation." *Id.* at 449, 455-56.

97. 394 F. Supp. at 1242.

98. 368 U.S. at 456.

99. *Id.*

100. 394 F. Supp. at 1242.

101. Others listed by the *Shade* Court were *nolle pros*, whether or not to arrest, indict, release, prosecute, dismiss, plea bargain or accept a guilty plea. *Id.*

102. *Id. See also* Sutherland v. Commonwealth, 45 Pa. Commw. 490, 407 A.2d 1364 (1979); Freed v. Commonwealth, 48 Pa. Commw. 178, 409 A.2d 1185 (1979) (automatic license revocation under 75 PA. CONS. STAT. § 616(a) following DUI conviction).

103. *See also* Commonwealth v. Armstrong, 495 Pa. 506, 434 A.2d 1205 (1981), wherein the court stated: "Our rules give district attorneys broad discretion to select which crimes and which individuals qualify for diversion into ARD." *Id.* at 512, 434 A.2d at 1208.

rest record after the successful completion of the program. This matter initially arose before the superior court in *Commonwealth v. Briley*.[104] Briley, a young college student, was one of many persons involved in a street corner celebration of the Philadelphia Flyers Hockey Team's victory in the Stanley Cup finals.[105] He was subsequently arrested, held for court and charged with aggravated assault upon a police officer, resisting arrest and failure of a disorderly person to disperse.[106] He was admitted into the ARD program and satisfactorily completed the conditions imposed and agreed upon.[107] Thereafter Briley filed a petition for expungement of his record. This was opposed by the district attorney. The charges were then dismissed but the court, after hearing, denied the expungement request, and Briley appealed.[108] The superior court, per Judge Spaeth, writing for the near unanimous court,[109] engaged in an extensive analysis involving an individual's substantive due process right, in certain circumstances, to have his arrest record expunged.[110] The superior court analyzed the expungement issue under traditional criteria,[111] and determined that Briley's circumstances presented a convincing case for expungement.[112] The court rejected the district attorney's argument that maintaining the arrest record was necessary because ARD was designed for first-time offenders and the Commonwealth, in the absence of the record, would be unable to determine who would be eligible for ARD. The court indicated that other administrative procedures were available that would enable the Commonwealth to limit ARD

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104. 278 Pa. Super. 363, 420 A.2d 582 (1980).

105. *Id.* at 365, 420 A.2d at 584.

106. *Id.*, 420 A.2d at 584.

107. *Id.* at 366, 420 A.2d at 584. Briley served 18 months probation and paid a $200 fine. *Id.*

108. *Id.*

109. Judge Price wrote a brief dissent wherein he indicated his concern that while this particular defendant evoked a sympathetic response from the court, this case would serve as a forerunner of blanket expungement of criminal records. *Id.* at 374, 420 A.2d at 588 (Price, J., dissenting).

110. *Id.* at 366, 420 A.2d at 584.

111. *Id.*, 420 A.2d at 584. The court indicated that substantive due process requires a balancing of the Commonwealth's interest in maintaining the arrest record against the defendant's interest in having his record expunged. According to the court, expungement would occur if the harm against the defendant were unwarranted that justice would compel no less. *Id.* at 366-67, 420 A.2d at 584-85.

See also Commonwealth v. Malone, 244 Pa. Super. 62, 366 A.2d 584 (1976); Commonwealth v. Iancino, 270 Pa. Super. 350, 411 A.2d 754 (1979) (balancing test between state's interest in retention and harm to individual that may result from retention).

112. 278 Pa. Super. at 370, 420 A.2d at 586.

to first-time offenders.[113]

Briley, however, is interesting more for the attitude which the court embraced. The court again explicitly recognized the district attorney's discretion,[114] and his entrustment with the evaluation of a defendant's suitability for ARD. Thus, with a view towards expungement, the court noted that the exercise of discretion demonstrated a belief on the part of the Commonwealth that the interests of society would be better served if the defendant were speedily diverted out of the criminal justice system.[115]

More importantly, however, the superior court noted that a person who enters the ARD program most likely believes, in light of the consequent "dismissal" of the charges upon successful comple-

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113. *Id.* at 371, 420 A.2d at 586. The court noted, as an example, that in Philadelphia the court is required to keep a "monthly updated confidential list of completed expungements." *Id.*

114. *Id.* at 370, 420 A.2d at 586. Appellant was not tried because the district attorney of Montgomery County, in the exercise of his discretion under PA. R. CRIM. P. 176, believed that appellant was a good candidate for placement in the ARD program and accordingly moved the lower court for appellant's admission into the program. *Id.*

115. 278 Pa. Super. at 370, 420 A.2d at 586. To reach this determination, the court relied on Commonwealth v. Iancino, 270 Pa. Super. 350, 411 A.2d 754 (1979) (expungement of defendant's record ordered where indictments for conspiracy and narcotics later *nol pros'd* by district attorney), Commonwealth v. Rose, 263 Pa. Super. 349, 379 A.2d 1243 (1979) (expungement ordered where Commonwealth failed to establish defendant's guilt of retail theft before district magistrate), and Wert v. Jennings, 249 Pa. Super. 467, 378 A.2d 390 (1977) (due process requires compelling evidence to justify retention of arrest record where defendant's indictment by grand jury for perjury and conspiracy eventually *nol pros'd* by district attorney for lack of evidence). The court noted that while recommendation for ARD treatment is not the equivalent to an acquittal, the practical effect was the same. That is, under both sets of circumstances (acquittal/*nolle prosse* and ARD) the Commonwealth would be forever barred from convicting the defendant on the initial charges against him. Moreover, in all of these circumstances, it had been the district attorney's actions that resulted in either acquittal, *nolle prosse*, or ARD treatment. 278 Pa. Super. at 369, 420 A.2d at 586. The court then noted that in light of its holdings in *Iacino*, *Rose*, and *Wert*, the burden was upon the Commonwealth to justify the retention of defendant's arrest record after the successful completion of ARD. *Id.* at 370, 420 A.2d at 586.

The *Briley* court distinguished Commonwealth v. Mueller, 258 Pa. Super. 219, 392 A.2d 763 (1978), wherein the Commonwealth had made out a *prima facie* case against the accused, only to have the charges dropped when the accused secured his release pursuant to PA. R. CRIM. P. 1100. According to the *Briley* court, the *Mueller* court had placed the burden of expungement upon the accused because of its conclusion that the defendant's interest in having his arrest record expunged was far outweighed by the:

> Commonwealth's interest in retaining the arrest record of a person whom it believed should have been prosecuted and convicted, whose guilt was indicated by evidence produced at the preliminary hearing, and who was not tried only because of his reliance upon a technical rule that in no way bore upon his guilt or innocence of the charges against him.

Id. at 370-71, 420 A.2d at 585.

tion of the program, that he would have a "clean" record.[116] Maintaining the arrest record, in the court's opinion, would be misleading in light of the explicit, or implicit, indication that a clean record might be obtained.[117] Further, the court indicated that the district attorney's opposition to expungement after a person successfully completes the program fosters a bitterness on the part of the person, as well as providing a strong motivation for persons to pursue acquittal at trial rather than diversion. The court indicated that such a situation would encompass the disappointment of "legitimate" expectations, and would undermine the purpose and goals of the ARD program; thus the court ordered that Briley's record be expunged.[118]

The view of the *Briley* court was relied upon less than a month later in *Commonwealth v. Welford,*[119] where the appellant, a twenty-year-old college student, was arrested for drunk driving.[120] Welford successfully completed the program, graduated from college and successfully petitioned the lower court to direct expungement of his criminal record.[121] The district attorney of Montgomery County appealed, asserting, as the court phrased it, "only its general policy of opposing expunction in all cases wherein the accused was discharged for reasons unrelated to guilt or innocence . . . [and] a general interest in maintaining accurate records regarding those accused of crime . . . ."[122] The court determined that such an interest was not persuasive, finding that retention of the record would hamper Welford in securing future employment and that this interest demanded expungement in this factual setting.[123]

With that background, it was a year later in *Commonwealth v. Armstrong*[124] that the Pennsylvania Supreme Court faced the ex-

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116. *Id.* at 373, 420 A.2d at 588.

117. *Id.* at 373 n.6, 420 A.2d at 588 n.6. The letter initially sent to a defendant concerning ARD, explicitly offered the defendant the possibility of obtaining a "clean record." *Id.*

118. *Id.* at 373-74, 420 A.2d at 588. The court also restated the purpose of ARD as it applied to this defendant, "The ARD program was created, in large part, to keep persons such as this high-spirited college student out of the criminal justice system, to rehabilitate those who are generally law-abiding, and to protect them from lasting damage because of an isolated, relatively minor infraction of the law." *Id.*

119. 279 Pa. Super. 300, 420 A.2d 1344 (1980).

120. *Id.* at 302, 420 A.2d at 1344.

121. *Id.*, 420 A.2d at 1344.

122. *Id.* at 303, 420 A.2d at 1345.

123. *Id.*, 420 A.2d at 1345.

124. 495 Pa. 506, 434 A.2d 1205 (1981). As with *Briley*, the issue was whether the

act circumstance pointed to in *Briley*. Armstrong was arrested for and charged with theft by deception and was selected, as a first-time offender, to participate in the Bucks County ARD program. She successfully completed the program and the charge was dismissed.[125] Armstrong then petitioned to have her arrest record expunged. A hearing was held on that petition and the trial court denied the petition.[126] After a grant of allocatur, the Pennsylvania Supreme Court noted that the Commonwealth had failed to present any evidence at the expungement hearing. The court then looked closely at Armstrong's situation to determine whether expungement should have been granted.[127] According to the court, the appellant's factual circumstances indicated thatabsent an overriding state interest, expungement should have followed her successful completion of the ARD program. Armstrong, at the time of her expungement petition, was employed as a part-time file clerk earning eighty-five dollars bi-weekly.[128] She was, however, "first in line" for a full-time position that would have more than tripled her salary. But, as a pre-requisite for the position, it was necessary that Armstrong be "bonded;" something that her arrest record prevented.[129] The supreme court then examined the interests of the Commonwealth in maintaining her records. The court noted that while the private interests of the bonding company might justify retention of the arrest record, the Commonwealth had failed to advance any state interest to override the private interests involved. Thus, Armstrong's specific interest in clearing her record was held to be more substantial.[130] The supreme court pointed to the language of the Comment to Rule 185 which then included the

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appellant's record should have been expunged after successful completion of ARD. *Id.*

125. *Id.* at 508, 434 A.2d at 1206.

126. *Id.*, 434 A.2d at 1205.

127. *Id.* at 508, 434 A.2d at 1206. The court began its discussion by reaffirming its previous holding in Commonwealth v. Wexler, 494 Pa. 325, 431 A.2d 877 (1981), "that in certain circumstances substantive due process guarantees an individual the right to have his or her arrest record expunged." *Id.* at 329, 431 A.2d at 879. The court also stated that the right to petition for expungement need not be statutorily created, but rather is a corollary to due process. 495 Pa. at 509, 434 A.2d at 1206 (citing Wolfe v. Beal, 477 Pa. 477, 384 A.2d 1187 (1978)).

128. 495 Pa. at 509, 434 A.2d at 1206.

129. *Id.* at 511, 434 A.2d at 1207.

130. *Id.* at 512, 434 A.2d at 1208. The court, citing Commonwealth v. Wexler, 494 Pa. 325, 431 A.2d 877 (1981), noted that several factors that should be considered in determining the various interests include the strength of the Commonwealth's case, its reasons for wishing to retain the records, defendant's age, criminal record, employment history, elapsed time between arrest and expungement petition, and specific adverse consequences to defendant. 495 Pa. at 510, 434 A.2d at 1207.

phrase, "earn a clean record,"[131] and noted that the fundamental appeal of ARD is the avoidance of a criminal record.[132] Justice Kauffman, writing for the court, stated that the denial of expungement for successful ARD participants would unduly deter participation, undermine the rehabilitative purposes, and impose added strain on the judicial system.[133] Thus, the supreme court reiterated the notion, stated both in *Briley*[134] and *Welford*,[135] that the Commonwealth has the burden of justifying the retention of the arrest record. In Armstrong's instance, the court stated that the Commonwealth's failure to identify any law enforcement need to retain her arrest record, in conjunction with the inherent policy of ARD of offering first offenders a new start, compelled expungement as requested.[136]

Despite the defeat in terms of expungement, however, the district attorney emerged with the clear recognition from the supreme court, itself the author and source of ARD, that the "rules give district attorneys broad discretion to select which crimes and which individuals qualify for diversion into ARD."[137]

Nevertheless, some indication that the courts should or would exercise some restraint on the prosecutor's discretion appeared in *Commonwealth v. Hunter*.[138] The defendant was charged with several criminal offenses, including burglary, receiving stolen property and criminal conspiracy. The district attorney of Mercer County motioned the trial court for ARD, but the trial court, after hearing the facts of the case, denied the motion.[139] On appeal, the superior court relying on Rule 184(c),[140] quashed the defendant's appeal as

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131. *Id.* at 512, 434 A.2d at 1208.

132. *Id.*, 434 A.2d at 1208.

133. *Id.* at 512-13, 434 A.2d at 1208.

134. Commonwealth v. Briley, 278 Pa. Super. 363, 420 A.2d 582 (1980).

135. Commonwealth v. Welford, 279 Pa. Super. 300, 420 A.2d 1344 (1980).

136. 495 Pa. at 513, 434 A.2d at 1208.

137. *Id.* at 512, 434 A.2d at 1208 (citing PA. R. CRIM. P. 175-77, quoting *Briley; see supra*, text accompanying note 115). *See also* Pyle v. Court of Common Pleas of Cumberland County, 494 Pa. 323, 431 A.2d 876 (1981), wherein the court rejected appellants' equal protection claim based on the Cumberland County prosecutor's refusal to accept any cases for ARD. In a summary dismissal, the court stated; "our review of the record and of the applicable authorities . . ., convinces us that the petitioner's claims are without merit." *Id.* at 325, 431 A.2d at 877.

138. 294 Pa. Super. 52, 439 A.2d 745 (1982).

139. *Id.* at 53-54, 439 A.2d at 746.

140. PA. R. CRIM. P. 184(c), prohibits an appeal from an order terminating ARD when a defendant violates the conditions of the ARD program/probation. It provides:

> When the defendant is brought before the Court, the judge shall afford him an opportunity to be heard. If the judge finds that the defendant has committed a viola-

interlocutory and unappealable.[141] The *Hunter* court made it clear that a court's specified power pursuant to Rule 179[142] allowed the lower court to veto what it believed to be inappropriate cases for ARD.[143]

Rule 179(c) certainly provides for the supervisory role of the court in terms of rejecting cases submitted by the district attorney for ARD consideration. Further, the comment following Rule 185 establishes this supervisory role: "It is believed that the district attorney should have discretion with respect to which crimes he wishes to prosecute, and the presence of the judge in the program, along with the defendant and his attorney, precludes any danger that such discretion may be abused."[144]

The only time the appellate courts have indicated that the court itself may order diversion over the prosecution's objection occurred in an extraordinary and unique factual circumstance. In *Commonwealth v. McSorley*,[145] the defendant was arrested and charged

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tion of a condition of the program, he may order, when appropriate, that the program be terminated, and that the attorney for the Commonwealth shall proceed on the charges as provided by law. No appeal shall be allowed from such an order.

Id.

141. 294 Pa. Super. at 57, 439 A.2d at 747.

142. PA. R. CRIM. P. 179 (1985). Rule 179 states:

Hearing, Manner of Proceeding

(a) When the defendant, with the advice and agreement of his attorney, indicates his understanding of these proceedings, requests that he be accepted into the program, and agrees to the procedure set forth in Rule 178, the stenographer shall close the record.

(b) The judge thereupon shall hear the facts of the case as presented by the attorney for the Commonwealth, and such information as the defendant or his attorney may present, and shall hear from any victim present; but no statement presented by the defendant shall be used against him for any purpose in any criminal or civil proceeding.

(c) After hearing the facts of the case, if the judge believes that it warrants accelerated rehabilitative disposition, he shall order the stenographer to reopen the record and he shall state to the parties the condition of the program.

(d) The defendant shall thereupon state to the judge whether he accepts the conditions and agrees to comply. If his statement is in the affirmative, the judge may grant the motion for accelerated rehabilitative disposition and shall enter an appropriate order as set forth in Rules 180 or 181. If the defendant answers in the negative, the judge shall proceed as set forth in Rule 184(c).

Id.

143. 294 Pa. Super. at 55, 439 A.2d at 747. The court further stated that "when, in exercising his discretion pursuant to PA. R. CRIM. P. 179(c), if the judge does not believe that the case warrants accelerated rehabilitative disposition, the proper and mandated procedural step is for the attorney for the Commonwealth to proceed on the charges as provided by law." *Id.*

144. PA. R. CRIM. P. 185, comment.

145. 335 Pa. Super. 522, 485 A.2d 15 (1984).

with operating a motor vehicle while under the influence of alcohol.[146] After arraignment, McSorley received a letter, under the letterhead of the district attorney's ARD/DUI division, from the director of the program which operated a safe driving clinic for Montgomery County. The letter provided, *inter alia*, that McSorley was: to attend a safe driving clinic, to report to the Montgomery County Court House on four specific dates and times for classes and interviews, and to pay a fifty dollar fee for the interview and classes.[147] A week later, defendant McSorley received a letter from the chief of the ARD division of the district attorney's office which gave McSorley a general description of the ARD alternative, and instructed him to complete an enclosed questionnaire used to determine his eligibility for ARD. The letter was to be returned within ten days.[148] McSorley completed the questionnaire, returned it on the night of his first safe driving class, attended the four classes over the course of the ensuing month, and, after the last class, received a certificate signed by the director, who had sent him the original letter, stating that he had successfully completed the requirements of the clinic.[149]

Three days later, appellant was apprised by letter that he had been ineligible for ARD due to two minor arrests in Philadelphia County.[150] At trial, appellant asserted that the Commonwealth's acts were tantamount to double jeopardy, and that therefore the charges should be dismissed.[151]

The trial court determined that McSorley had neither been put in prior jeopardy nor suffered any punishment from ARD or any criminal penalty, and that there was no valid evidence that McSorley had been accepted into the ARD program.[152] The trial court then denied the motion.[153] On appeal, the superior court issued an "Opinion Announcing the Judgment of the Court," indicating that while a majority agreed with the judgment, which remanded the

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146. *Id.* at 524, 485 A.2d at 16-17.

147. 335 Pa. Super. at 524-25, 485 A.2d at 17.

148. *Id.* at 525, 485 A.2d at 17.

149. *Id.*, 485 A.2d at 17.

150. *Id.*, 485 A.2d at 17-18.

151. *Id.* at 526, 485 A.2d at 17-18. Appellant McSorley raised a double jeopardy issue which centered around his payment of the fifty dollar fee for ARD. He asserted that the payment and subsequent attendance constituted a restriction upon his freedom, thus a deprivation of his liberty. Consequently, a trial on the merits would be an impermissible act. The Commonwealth maintained that appellant's participation had been voluntary, whereby he had never been subjected to punishment for his activities. *Id.*

152. *Id.* at 528, 485 A.2d at 18.

153. *Id.* at 524, 485 A.2d at 16.

case with directions to divert McSorley into ARD, the panel did not join in the opinion.[154] The court recognized that while the record established that the district attorney's office had never intended to recommend McSorley for ARD, an undiscovered administrative error originally led the district attorney to inform the clinic that McSorley had been accepted into the ARD program and led the clinic to send the initial letter.[155] Despite this apparent mistake on the part of the Commonwealth that McSorley would be eligible for the ARD program, the court rejected his request for dismissal based on double jeopardy.[156] The court noted that this was a case of first impression in the Commonwealth, whereby the case law was unclear as to how ARD would affect the status of a criminal defendant.[157]

The court did indicate, however, that while acceptance of ARD constituted a knowing waiver by the defendant to prove his innocence,[158] and was not the equivalent of finding of innocence,[159] it had also been determined that ARD acceptance was neither the equivalent of a conviction because charges were deferred[160] nor a conviction for impeachment purposes.[161]

With that in mind, the court intimated that its initial inclination was to dismiss the defendant's double jeopardy claim, as jeopardy had not yet attached.[162] Notwithstanding the above, however, the court sought guidance from without the jurisdiction, to reach its

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154. *Id.* at 524 n.1, 531, 485 A.2d at 16 n.1., 20. The panel consisted of Judges Cavanaugh, McEwen, and Cirillo. Judge Cirillo concurred in a separate opinion; Judge McEwen dissented and also filed an opinion. *Id.* at 531-33, 485 A.2d at 20-21. The superior court's opinion stated that the record indicated that McSorley: (1) interpreted the original letter as directing him to report to the Montgomery County ARD program; (2) attended the safe driving classes, believing that he was in ARD; (3) believed that the successful completion of the classes would result in dismissal of the charges against him; (4)before each of the four sessions at the court house, wrote down "ARD" on the visitor's log as the nature of his business; and (5) did not consult with a lawyer during any part of the proceedings until after the final letter which rejected him for ARD. *Id.* at 525-26, 485 A.2d at 17.

155. *Id.* at 525-26, 485 A.2d at 17.

156. *Id.* at 526-27, 485 A.2d at 20.

157. *Id.* at 527, 485 A.2d at 18.

158. *Id.*, 485 A.2d at 18.

159. *Id.* at 527-28, 485 A.2d at 18.

160. *Id.* at 527, 485 A.2d at 18.

161. *Id.*, 485 A.2d at 18.

162. *Id.* at 528, 485 A.2d at 18. *See also* Crist v. Bretz, 437 U.S. 28 (1978) (jeopardy attaches when the jury is impaneled and sworn); Abney v. United States, 431 U.S. 651 (1977) (double jeopardy protects a defendant from multiple punishments for successive prosecutions of the same offense); Commonwealth v. Klobuchir, 486 Pa. 241, 405 A.2d 881 (1979) (in non-jury trial, jeopardy attaches when the court has begun to hear the evidence).

conclusion. Relying upon an Ohio Court of Appeals decision,[163] the court likened the defendant's participation in ARD to a contract between the defendant and the state, whereby in consideration for the defendant's waiver of any statute of limitations, speedy trial rights, and any conditions, the state agrees to dismiss the charges against the defendant.[164] The court concluded that in order to maintain the efficacy of an ARD program, the state must honor its obligation to the defendant.[165]

Turning to McSorley's circumstances, the court stated that while the procedures outlined in the ARD Rules were not followed, McSorley, and any other reasonable person under similar circumstances, would not have acted differently.[166] The court emphasized that McSorley had detrimentally relied on the indication from the district attorney's office that the "successful completion of the program would result in a dismissal of the charges against him."[167]

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163. 335 Pa. Super. at 528, 485 A.2d at 18-19. The court relied upon State v. Urvan, 4 Ohio App. 3d 151, 446 N.E.2d 1161 (1982). In *Urvan*, the defendant was charged with receiving stolen property in Medina County, Ohio under an allied offense statute with receiving stolen property. The defendant was recommended for and successfully completed the diversion program in Medina County. As a result, the receiving charge was dismissed. One week later, the defendant was indicted in Cuyahoga County for grand theft relating to the same events as the Medina County charge. The defendant filed a motion to dismiss the Cuyahoga charge on grounds of double jeopardy. The *Urvan* court pointed out that:

> Any view of diversion processes not at war with their purposes must include a conception of them (when successfully completed) as the equivalent of served or probated time with the consequent expiation of the crime . . . . Moreover, if the program is to make logical sense and traffic at all in fair treatment, the states's election to pursue the crime of stolen property forecloses its right to undertake pursuit of the grand theft charge through a second agent (Cuyahoga County). Jeopardy must attach as a result of the activity of the first (Medina County).

Id.

164. 335 Pa. Super. at 529, 485 A.2d at 19. The court then stated that diversion programs are similar to plea bargaining, in that in both instances the terms of the agreement are, and must be binding upon the state. *Id.*, 485 A.2d at 19. Further, while the court reaffirmed the broad discretion of the prosecution in determining whether a case should be given ARD treatment, "the decision to divert . . . 'comes after the prosecutor has fully discharged all discretionary functions and after the prosecutorial die has been cast.' " *Id.*, 485 A.2d at 19 (quoting Dearborne v. State, 575 S.W.2d 259, 262 (Tenn. 1980)).

The court seemingly adopted the *Urvan* court's elucidation regarding the double jeopardy issue. "For the state to be allowed to . . . bring a second prosecution . . . after all of the terms of the diversion contract have been met, violates the spirit and the letter of constitutional double jeopardy policy and the policy and the spirit of the legislative policy in the state." 335 Pa. Super. at 529, 485 A.2d at 19 (quoting *Urvan*, 4 Ohio App. 3d at 155, 446 N.E.2d at 1168).

165. 335 Pa. Super. at 529, 485 A.2d at 19.

166. *Id.* at 530-31, 485 A.2d at 19-20.

167. *Id.* at 530, 485 A.2d at 20. The court indicated: "what the district attorney's office knew and did with its right hand (sending the notification that appellant could reasonably

However, although the court determined that the district attorney was restrained from prosecuting McSorley, the court concluded that dismissal would be inappropriate.[168] The court therefore stayed the proceedings and remanded with directions to divert McSorley into ARD and to impose upon McSorley any remaining conditions that would be placed upon a similarly situated defendant.[169]

Judge Cirillo concurred in the result, but disagreed with the interjection of double jeopardy principles, which he felt were inapplicable to resolve the issue. Rather, Judge Cirillo found the concept of contract between the state and the defendant as compelling and that the state had plainly breached its agreement.[170]

Judge McEwen dissented, stating his belief that jeopardy had never attached and that the principles of contract law and fairness did not preclude prosecution, since the correspondence from the district attorney stated that his application would have to be evaluated and the accused would be notified of his acceptance or rejection.[171] Judge McEwen indicated that McSorley was notified twenty-five days after his application was submitted and that the only hardship he suffered was the attendance at the four classes and fifty dollar fee paid. Judge McEwen stated that while under certain circumstances fairness might preclude prosecution, this was not one of those occasions.[172]

IV. Conclusion

The concerns originally voiced by Judge Spaeth in *Kindness* have essentially gone unaddressed and thus leave intact the broad discretion of the prosecutor in ARD matters.[173] However, the cases following *Kindness* not only call attention to the problems of such wide prosecutorial discretion but also raise other constitutional

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have interpreted as evidencing his acceptance into ARD), it cannot take away with its left hand (by claiming that appellant was ineligible)." *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 531-33, 485 A.2d at 20-21 (Cirillo, J., concurring). Judge Cirillo stated: "A criminal defendant has a 'constitutional interest in finality, a cognizable interest in seeing that criminal proceedings against him are resolved once and for all.' . . . Here however, appellant has no right to expect that his problems with the Commonwealth have been resolved. His constitutional interest in finality has not yet vested." *Id.*, (Cirillo, J., concurring) (*quoting* Western & Drubel, *Toward a General Theory of Double Jeopardy*, 1978 Sup. Ct. Rev. 81).

171. 335 Pa. Super. at 533-36, 485 A.2d at 21-23 (McEwen, J., dissenting).

172. *Id.* (McEwen, J., dissenting).

173. *See supra* notes 60-74 and accompanying text.

questions that will have to be addressed by our appellate courts. Until such direction or guidance is forthcoming, the apparently unbridled discretion of the prosecutor will be operative.

Presently, although the exercise of that discretion has given rise to problems, the appellate courts have generally honored or at least given effect to the relatively unfettered discretion exercised by the district attorney in ARD matters. Not only have the courts recognized that discretion in and of itself, but they have defended it against constitutional attack on both equal protection and due process grounds.

Perhaps the courts have implicitly recognized the immense value of the ARD program in providing disposition of an enormous number of criminal charges through a non-traditional but highly efficient process that benefits the court system and defendants. Since that process is highly successful in both instances, the court is perhaps reluctant to disrupt the current status of the program by accepting finely tuned constitutional arguments.

That the problems in regard to ARD have become widespread is evidenced by the case of *Commonwealth v. Lutz*,[174] where the Pennsylvania Supreme Court may have finally laid to rest any realistic hopes that the prosecutor's discretion in this area may be successfully challenged. In *Lutz*, nine individual cases were consolidated for determination since each raised the question of whether a defendant may be admitted to ARD over objection of the prosecutor.[175] In seven of the cases, the trial court ordered that each defendant be considered for ARD, and in two others the trial court actually ordered that the defendants be admitted to ARD over the objection of the prosecutor.[176] All of the cases were drunk driving cases being prosecuted under the Pennsylvania Motor Vehicle Code.[177] Nevertheless, the supreme court chose to speak very broadly in terms of the prosecutor's discretion regarding ARD, and there can be no doubt that prosecutors received an early Christmas gift from the supreme court.

Justice Flaherty, writing for a near unanimous court,[178] briefly outlined the history of and theory behind ARD, making explicit reference to the fact that the utilization of ARD was at the option

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174. ___ Pa. ___, 495 A.2d 928 (1985).

175. *Id.* at ___, 495 A.2d at 930.

176. *Id.*

177. 75 PA. CONS. STAT. ANN. § 3731. *See supra* note 29 and accompanying text.

178. ___ Pa. ___, 495 A.2d at 930. Chief Justice Nix, joined by Justice Zappala, authored a concurring and dissenting opinion. *See infra* notes 191-94 and accompanying text.

of the district attorney.[179] The court then addressed the more narrow issue of whether it was properly within the prosecutor's discretion to refuse, if so inclined, any one case under the ARD rules despite the Motor Vehicle Code provision that ARD be available statewide for drunk drivers.[180] However, within that context, the court, perhaps sensing the need for clarity or a more definitive standard in the area, undertook a broader discussion of the prosecutor's discretion in ARD matters.[181] First, Justice Flaherty, citing Rules 175-85,[182] dispelled the proposition given effect by the trial courts in these cases that anyone other than the district attorney may move for the admission of a defendant into ARD.[183] The majority emphasized that the ARD rules preserved the traditional discretion afforded the prosecutor in choosing which crimes he wished to prosecute,[184] and the court clearly stated that a defendant was precluded from submitting his own case for ARD consideration.[185] Justice Flaherty noted further that the court, by its own design, intentionally preferred a restrictive approach to the admission to ARD programs. The court also emphasized that the district attorney, as representative of the Commonwealth, is responsible to ensure that no criminal defendant enter the ARD program whose case is inappropriate for such a disposition.[186] As the court stated: "Society has no interest in blindly maximizing the number of ARD's passing through the criminal justice system, and the criminal defendant has no right to demand that he be placed on ARD merely because any particular offense is his first."[187] Later in the opinion, Justice Flaherty again unequivocally laid to rest any notion that anyone other than the prosecutor may move for a defendant to be placed on ARD: "Our earlier discussion of the *Pyle* and *Boerner* cases and a plain reading of our ARD rules, Pa. R. Crim. P. 175-185, themselves make it clear that only Commonwealth attorneys may move for admission to ARD under those rules."[188]

The court, in perhaps the most important part of the *Lutz* opin-

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179. ___ Pa. at ___, 495 A.2d at 931.

180. *Id.* at ___, 495 A.2d at 931-32. *See infra* note 188 and accompanying text.

181. ___ Pa. at ___, 495 A.2d at 932.

182. PA. R. CRIM. P. 175-85. *See supra* note 24.

183. ___ Pa. at ___, 495 A.2d at 932.

184. *Id.*, (quoting PA. R. CRIM. P. 185, comment).

185. *Id.*, 495 A.2d at 933 (citing Commonwealth v. Armstrong, 495 Pa. 506, 512, 434 A.2d 1205, 1208 (1981)) (admission to ARD is not a matter of right, but a privilege).

186. ___ Pa. at ___, 495 A.2d at 933.

187. *Id.*

188. *Id.*, 495 A.2d at 935.

ion, set out the standard of review under which a prosecutor's decision to withhold a case from diversion is scrutinized. As stated, that standard allows the prosecution to exercise the widest available discretion under the law:

> [T]he decision to submit the case for ARD rests in the sound discretion of the district attorney, and absent an abuse of that discretion involving some criteria for admission to ARD wholly, patently and without doubt *unrelated* to the protection of society and/or the likelihood of a person's success in rehabilitation, such as race, religion or other such obviously prohibited considerations, the attorney for the Commonwealth must be free to submit a case or not submit it for ARD consideration based on his view of what is beneficial for society and the offender.[189]

There can be no doubt that this ultimately is the most important part of the *Lutz* opinion, for it now encumbers a defendant with the difficult if not insurmountable burden of pleading and demonstrating that the prosecutor's decision not to submit his case for ARD consideration is one dispossessed of rationality.[190] The *Lutz* court vacated the orders in all the cases and remanded the cases for trial, realistically ending whatever speculation remained that the prosecutor is restrained in administering the ARD program absent the most flagrant abuse of discretion.[191]

Chief Justice Nix, joined by Mr. Justice Zappala, wrote a concurring and dissenting opinion, wherein he agreed that the prosecutor should have sole discretion in determining which cases should be submitted for ARD.[192] However, the Chief Justice concisely noted two concerns, echoing those first recognized by the dissenting Judge Spaeth in *Kindness*.[193] First Chief Justice Nix was troubled by the fact that there was no requirement in the ARD rules or applicable case law that the prosecutor specifically articulate the reasons for withholding any one case from ARD disposition.[194] Justice Nix believed that a mandated articulation was a necessary measure to guard against an abuse of prosecutorial discretion. Sec-

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189. *Id.* at ___ (emphasis in original) (citing Shade v. Commonwealth, Dept. of Transp., 394 F. Supp. 1237, 1242 (M.D. Pa. 1975)).

190. *See generally,* Hodel v. Indiana, 452 U.S. 314 (1981) wherein the Court noted that under the rational basis test, state action is valid unless the heavy burden is met that the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes, that a court can only conclude that the government's actions were irrational.

191. ___ Pa. at ___, 495 A.2d at 936.

192. *Id.*

193. *Id. See also supra* notes 52-67 and accompanying text.

194. ___ Pa. at ___, 495 A.2d at 936-37.

ond, the dissenting Chief Justice disagreed with the standard of review established by the majority. Rather than granting the prosecutor the widest possible discretion afforded under the law as the *Lutz* majority had done, Chief Justice Nix stated that an abuse of discretion should be found upon a showing of fraud or arbitrariness.[195]

Although unfettered, unrestrained or absolute are not wholly accurate terms to describe the discretion of the prosecutor in regard to ARD, it is now clear that both by design, and perhaps necessity, the prosecutor is granted the widest possible discretion under the law in order to effectively administer a program that is of immense benefit to the court, the prosecutor and the thousands of persons who avoid traditional prosecution for lesser offenses by entering the ARD program.

While there are still areas of ARD that lend themselves to criticism (e.g., the lack of uniform statewide standards as to what offenses should be included for diversion), the wide discretion given to the prosecutor enjoys the continued and perhaps enhanced support of the court and the Pennsylvania Supreme Court Rules Committee. Opportunities to curtail the prosecutor's broad prerogative have continuously presented themselves to the courts and the Rules Committee. Nonetheless, owing in part to the program's success and in part to the flexibility so necessary to effectively implement and assure the success of ARD, the support of the prosecution's wide discretion in selecting ARD participants, in contrast to its more limited ability to deny expungement, has remained the strongest from the very sources of change. The Pennyslvania Supreme Court's decision in *Lutz*, in particular, represents a desirable clarification of the parameters of this exercise of prosecutorial discretion. While this decision leaves little doubt that ARD is firmly established as part of, or at least an extension of the prosecutor's charging function, it remains to be seen which challenges will prevail in those areas where Pennsylvania's ARD program remains vulnerable.

Edward J. Borkowski

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195. *Id. See also* Commonwealth v. Burdge, No. J-35035, slip op. at 2-4 (Pa. Super. Sept. 6, 1985) (superior court relying on *Lutz* rejected court established admission criteria for ARD, stating, "Because ARD is a pre-trial disposition, its governance lies at the discretion of the district attorney, not that of the court." *Id.* at 3).