IN THE

SUPREME COURT OF PENNSYLVANIA

MIDDLE DISTRICT

NO. 1 MAP 2022

COMMONWEALTH OF PENNSYLVANIA,
Appellant
V.

STEVEN LEONARD VERBECK
Appellee

Appeal from the Order of the Superior Court entered April 9, 2021, at No. 1947 MDA 2019, vacating the judgment of sentence entered November 1, 2019 In the Court of Common Pleas, Centre County, at No. CP-14-CR-0002013-2018, and remanding for resentencing.

BRIEF FOR AMICUS CURIAE, THE PENNSYLVANIA DISTRICT ATTORNEYS ASSOCIATION, IN SUPPORT OF THE COMMONWEALTH OF PENNSYLVANIA

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Pennsylvania District Attorneys Association is the only organization representing the interests of its member District Attorneys and their assistants in the various counties in the Commonwealth of Pennsylvania. This Court's review of constitutional questions in criminal matters is of special interest to district attorneys throughout Pennsylvania. Moreover, as the chief law enforcement officers for their respective counties, each district attorney is responsible for both prosecution of all crimes arising therein, as well as the care of all victims of those criminal offenses.

No other person or entity has authored any portion of the within brief, in whole or in part, nor have any funds been expended by any person or entity in the preparation and filing of this brief outside of the Association.

STATEMENT OF THE QUESTION INVOLVED

I. Whether the Superior Court's decision in *Commonwealth v. Chichkin*, 232 A.3d 959 (Pa.Super. 2020), was wrongly decided because it erroneously and unnecessarily undermined the Legislature's statutory scheme to address recidivism and drunk driving, as well as to protect first time offenders from significant consequences resulting from their behavior, where that scheme does not violate a defendant's constitutional rights insofar as he voluntarily accepts ARD and all its attendant conditions?

SUMMARY OF THE ARGUMENT

Title 75, Section 3804, provides that a defendant is subject to mandatory minimum sentences for first, second, and subsequent DUI offenses committed within 10 years of one another, and § Section 3806(a) includes within its definition of prior offense, acceptance of Accelerated Rehabilitative Disposition (ARD). The Courts of this Commonwealth have previously held that pursuant to the plain language of Section 3806(a), mere acceptance of ARD triggers these sentencing enhancements, regardless of any subsequent conduct while on ARD, or whether a defendant's breach of an ARD agreement results in a conviction or acquittal.

Nonetheless, in *Chichkin, supra*, a panel of the Superior Court held that the Legislature could not equate acceptance of ARD with a prior conviction for sentencing purposes under the principles established by *Alleyne v. United States,* 570 U.S. 99, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013), and *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). The Pennsylvania District Attorneys Association submits that *Chichkin*'s reliance on *Alleyne* and *Apprendi* is a misplaced. The Legislature has created a statutory scheme to address recidivism and

drunk driving, as well as to protect first time offenders from significant consequences resulting from their behavior. Pursuant to that statutory scheme, a defendant waives his right to have the Commonwealth prove his guilt of DUI beyond a reasonable doubt in exchange for a significantly beneficial agreement, *i.e*. ARD. This case is about whether a defendant can constitutionally do so. *Chichkin* held he cannot. *Chichkin* was wrong.

ARGUMENT

I. THE SUPERIOR COURT PANEL DECISION IN *COMMONWEALTH V. CHICHKIN* WAS WRONGLY DECIDED BECAUSE THE LEGISLATURE HAS CREATED A STATUTORY SCHEME TO ADDRESS RECIDIVISM AND DRUNK DRIVING, AS WELL AS TO PROTECT FIRST TIME OFFENDERS FROM SIGNIFICANT CONSEQUENCES RESULTING FROM THEIR BEHAVIOR, AND THE PANEL FAILED TO RECOGNIZE THAT THE LEGISLATURE REQUIRES A DEFENDANT TO WAIVE HIS RIGHT TO REQUIRE THE COMMONWEALTH TO PROVE BEYOND A REASONABLE DOUBT THE UNDERLYING DUI RELATED ARD AS A CONDITION TO THIS VOLUNTARY AND BENEFICIAL PROGRAM.

Accelerated Rehabilitative Disposition, hereinafter "ARD", is a voluntary alternative criminal disposition intended to benefit the first-time offender by offering an opportunity for rehabilitation, avoidance of a criminal conviction, and, ultimately, expungement of the arrest records relating to that offense upon successful completion of the program.[1] As the Explanatory Comment to Chapter 3 of the Rules of Criminal Procedure explains:

> The primary purpose of this program is the rehabilitation of the offender; secondarily, the purpose is the prompt disposition of charges eliminating the need for costly and

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[1] See Pa.R.Crim.P. 300, *et seq.;* and 75 Pa.C.S.A. § 3807.

> time-consuming trials or other court proceedings. These rules contemplate that ordinarily the defendants eligible for the ARD program are first offenders who lend themselves to treatment and rehabilitation rather than punishment and that the crime charged is relatively minor and does not involve a serious breach of the public trust. The program is intended to encourage offenders to make a fresh start after participation in a rehabilitative program and offers them the possibility of a clean record if they successfully complete the program.

Given the opportunity the ARD program offers a defendant - to wipe the proverbial slate clean of any criminal record - there are few benefits greater than the ability to participate in the ARD program that the Commonwealth can offer a criminal defendant.

In agreeing to accept ARD, defendants also agree to waive certain rights that would normally attend a criminal prosecution. In particular, the Rules of Criminal Procedure require a defendant to waive the statute of limitations and speedy trial rights. Pa.R.Crim.P. 312. And the Legislature has mandated that the ARD program for DUI offenses in particular shall be developed "in accordance with ... Chapter 38 (relating to driving after imbibing alcohol or utilizing drugs) and rules adopted by the Supreme Court." 75 Pa.C.S.A. § 1552. Significantly, since 1983, the Vehicle Code has included the requirement that acceptance into ARD for a DUI offense will constitute a prior offense solely for purposes of sentencing on subsequent DUI convictions. 75 Pa.C.S.A. § 3806(a) ("[T]he term 'prior

offense' as used in this chapter shall mean any conviction for which judgment of sentence has been imposed, adjudication of delinquency, juvenile consent decree, acceptance of Accelerated Rehabilitative Disposition or other form of preliminary disposition ....").[2]

The interest in deterring recidivism in the context of intoxicated driving is plain -- drunk and drugged drivers pose a substantial public safety hazard. *See Birchfield v. North Dakota*, 579 U.S. 438, 136 S.Ct. 2160, 2178, 195 L.Ed.2d 560 (2016) ("The States and the Federal Government have a paramount interest . . . in preserving the safety of ... public highways" and a "compelling interest in creating effective deterrents to drunk driving")(internal citations omitted). Indeed, according to the National Highway Traffic Safety Administration, “on average over the 10-year period from 2010-2019, more than 10,000 people died every year in drunk-driving crashes.” *See* https://www.nhtsa.gov/risky-driving/drunk-driving. In Pennsylvania in 2020, there were 7,700 alcohol-related crashes, and

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[2] The Legislature first enacted this provision in 1983, and it was originally set forth in 75 Pa.C.S.A. § 3731(e)(2)("Acceptance of Accelerated Rehabilitative Disposition or any other form of preliminary disposition of any charge brought under this section shall be considered a first conviction for the purpose of computing whether a subsequent conviction of a violation of this section shall be considered a second, third, fourth or subsequent conviction.")(Repealed by 2003, Sept. 30, P.L. 120, No. 24, §

(continued …)

alcohol-related deaths were 26% of the total traffic fatalities. *See* https://www.padui.org/crash-facts.

By both creating an ARD program for DUI offenses and treating ARD as a prior offense for sentencing purposes on subsequent convictions, the Legislature struck a balance. Allowing first-time arrestees for drunk or drugged driving to take advantage of the opportunity afforded by ARD permits such defendants to participate in rehabilitative programs while avoiding a criminal conviction. Mandating that ARD will constitute a prior offense for those defendants who successfully fail to avail themselves of the rehabilitation opportunity provided, and who instead recidivate within 10 years,[3] promotes public safety.

For decades, District Attorneys have offered ARD for DUI offenses in compliance with the requirements of Chapter 38 and its predecessor, as well as any additional specific parameters they deemed appropriate in such cases. District Attorneys developed their ARD policies mindful that if a defendant fails to rehabilitate and commits another DUI

14, eff. Feb. 1, 2004).

[3] Prior to the effective date of the current provisions of Chapter 38 on February 1, 2004, the look back period was seven years. See 75 75 Pa.C.S.A. § 3731(e)(1).

offense, public safety would be served insofar as such a defendant would still be subject to the consequences for a second or subsequent DUI offense.

Commonwealth v. Chichkin, 232 A.3d 959 (Pa.Super. 2020), has materially altered the balance between offering rehabilitation and punishing recidivism that was achieved by the Legislature decades ago and has been effectuated by District Attorneys throughout the Commonwealth ever since. District Attorneys have indeed relied on this balance when offering ARD to DUI defendants up until the day *Chichkin* was decided. Now, as a result of *Chichkin*, the Commonwealth is unable to invoke recidivist DUI sentencing provisions for repeat offenders despite its well-founded belief at the time it offered ARD that it would be able to do so, frustrating the very intent and balance the Legislature sought to achieve. Moreover, District Attorneys are now forced to choose between offering the rehabilitative benefits of ARD to DUI defendants or protecting public safety by ensuring their ability to invoke enhanced penalties intended for those who recidivate. This choice, necessitated by *Chichkin*, creates bad public policy, deprives the Commonwealth of the benefit of its bargain, negates the intent of the Legislature, and is unnecessary insofar as the *Chichkin* panel wrongly concluded that equating ARD with a prior offense for the

limited purpose of sentencing enhancements for a second or subsequent conviction is unconstitutional.

Judge Megan King recently warned of a potential "chilling effect on the Commonwealth offering ARD to first-time offenders" in the event the Commonwealth is not permitted to prove the underlying ARD for DUI offenses to enhance subsequent DUI sentences. *Commonwealth v. Richards*, 1673 EDA 2020 (Pa. Super. October 8, 2021) (King, J. concurring, slip op. at 2).[4] While Judge King was addressing the panel's specific conclusion in that case to disallow the Commonwealth from proving the underlying ARD DUI offense at sentencing on a subsequent DUI conviction, the much greater potential chilling effect is *Chichkin*'s holding itself.

Indeed, in light of *Chichkin*, several counties have decided not to offer ARD for DUI offenses for some period of time after *Chichkin*, and at least one (Union County) still does not. Several District Attorneys have restricted the types of DUI cases that are eligible for ARD. Still others now

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[4] That panel decision was subsequently withdrawn after the Commonwealth's request for reargument *en banc* was granted. Richards is currently pending before the Superior Court awaiting an *en banc* panel's consideration. See Docket 1673 EDA 2020.

require defendants who accept ARD for DUI offenses to explicitly stipulate in writing that the ARD can be used as a prior conviction for sentencing purposes on a second or subsequent conviction, hoping that the trial and appellate courts will uphold the validity of such stipulations when they are undoubtedly attacked by defendants subject to them, giving rise to even further litigation.

While District Attorney's offices face decisions about how to address ARD for post-*Chichkin* defendants, they also continue to grapple with what to do about pre-*Chichkin* defendants who already received the benefit of ARD. There is uncertainty over how to interpret *Chichkin*'s directive that the prosecution must prove the underlying ARD DUI offense beyond a reasonable doubt in order to rely on it as a prior conviction. *Chichkin*, 232 A.3d at 968. Even when the Commonwealth still has access to unexpunged documents for the underlying ARD DUI case, there has been no clear guidance on whether it can rely on them or, at what point in the proceedings, if any, it is supposed to prove the underlying offense. *See, e.g., Commonwealth v. Richards, supra* (panel decision holding that *Chichkin*'s instruction on proving the underlying DUI offense was *dictum*,

but also suggesting that the Commonwealth may be able to offer such proof at some point other than sentencing).[5]

District Attorneys are not simply interested in maximizing punishment in such instances for punishment's sake. Rather, allowing a defendant who previously accepted ARD to contest the Commonwealth's and court's authority to treat that ARD acceptance as a prior offense for purposes of the recidivist sentencing statute runs contrary to the purpose of the ARD program as a vehicle for rehabilitation. As this Honorable Court has previously observed:

> 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. Rather, society, for its own protection, has an interest in carrying out the penalties prescribed by the legislature for drunk driving, except in the cases where even society's representative in the case, the district attorney, acting in conjunction with the court, and subject always to the restrictions set out in Section 3731(d) (concerning persons who may not be admitted to ARD) determines that ARD is preferable to conviction *because of the strong likelihood that a given criminal defendant will in fact be rehabilitated by an ARD program*.

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5 Panel decision withdrawn and awaiting *en banc* consideration.

Commonwealth v. Lutz, 508 Pa. 297, 307, 495 A.2d 928, 933 (1985) (emphasis supplied). In the wake of *Chichkin*, defendants no longer need be rehabilitated by their participation in ARD in order to avoid the consequences of the recidivist sentencing statute. Instead, a powerful incentive for first-time offenders not to re-commit a DUI offense has been removed – the risk of increased penalties for reoffending.

A defendant who accepts ARD does so with the explicit statutory notice that his ARD acceptance includes a condition that the ARD DUI will be used to enhance the penalties on any future DUI offenses should the rehabilitation intended by the ARD program fail. To permit a defendant who participated in the ARD program to instead assert the right to dispute whether he or she did in fact commit the DUI offense for which the defendant received ARD calls into question the very purpose of the ARD program. *Cf*. *Whalen v. Com., Dept. of Transp., Bureau of Driver Licensing*, 613 Pa. 75-76, 32 A.3d 677, 684 (2011) (making the "common sense observation that a defendant who actively denies that he committed a violation of law is simply not a likely or promising candidate for ARD").

Moreover, ironically, while the holding of *Chichkin* benefits recidivist defendants in the short term, it potentially harms ARD-eligible defendants in the long term. First, as observed, *ante*, *Chichkin* has caused

District Attorneys throughout the Commonwealth to either eliminate or restrict ARD for first-time DUI offenders. Additionally, the Legislature could respond to *Chichkin* by requiring that prior to accepting ARD a defendant must first make an admission of guilt or agree that the Commonwealth could prove the charged DUI beyond a reasonable doubt. This is certainly a potential "fix" that the PDAA and its members believe would once again allow the Commonwealth to rely on an ARD DUI as a prior offense in the event a defendant recidivates. If the Legislature were to so require, then ARD would satisfy *Chichkin's* due process concerns and there would be no objection to use of that ARD as a prior offense under Section 3806.

Yet, were the Legislature to do so in order to once again reap the public safety benefits of its recidivist sentencing scheme, defendants, who for a variety of reasons would prefer not to make such an admission, would lose the benefit of the existing ARD program. For example, because acceptance into ARD does not require an admission of guilt, and does not constitute a conviction, a person who successfully completes ARD may truthfully attest on any employment, housing, licensing application, or the like, that he has never been convicted of a crime (arising out of that arrest) or pled guilty to any such offense. Also, non-citizen defendants currently face little to no risk of deportation from accepting ARD because no

admission is required. Should, however, the Legislature require an admission of guilt in order to restore the pre-*Chichkin* balance between rehabilitation and public safety, that would not be possible, and one of the primary benefits of ARD would be lost to defendants. In short, *Chichkin* does not merely create bad public policy from the perspective of the Commonwealth, but could well lead to very detrimental consequences for ARD-eligible defendants.

In addition to creating bad public policy, as a result of the practical inability of the Commonwealth to prove cases that were expunged, and of the legal uncertainty over whether the Commonwealth is permitted to offer such proof, few if any defendants who accepted ARD prior to *Chichkin* are bound by the condition relied upon by the Commonwealth when it offered ARD: that the ARD would constitute a prior offense should the defendant commit another DUI offense within 10 years. As such, since the *Chichkin* decision, the Commonwealth has repeatedly been denied the benefit of the bargain it struck with such defendants when it offered and defendants accepted ARD. Numerous defendants who were offered the benefit of ARD for a DUI offense, who received the opportunity for the "fresh start" and a "clean record," and who then engaged in the same behavior ARD was meant to prevent, have nonetheless been treated

as first-time offenders and sentenced as such, despite the Legislature's clear intent and the Commonwealth's clear expectation to the contrary.[6]

To be sure, if *Chichkin* were correct that it violates a defendant's due process rights for the Legislature to equate ARD to a prior offense for purposes of the DUI recidivist sentencing scheme, then surely those constitutional rights would trump policy considerations and the Commonwealth's right to enforce the benefit of its bargain. Yet, respectfully, that is not the case. The *Chichkin* panel incorrectly concluded that Section 3806 of the Vehicle Code, equating ARD to a prior offense for sentencing purposes, violates a defendant's constitutional rights.

The PDAA does not intend to reiterate all the various arguments made by the Commonwealth-Appellee or other amicus, in this case regarding why the *Chichkin* decision was wrongly decided. The PDAA joins in those arguments, and they will all undoubtedly be carefully considered by this Honorable Court. However, the PDAA does wish to highlight one argument in particular that it deems decisive on the issue of

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[6] Of course, the effect of the decision goes beyond just those arrested for a second offense and treated as a first-time offender. Defendants who have been arrested on a third or subsequent DUI after having first received ARD will also all be subject to lower mandatory minimums than they would have otherwise been subject as a result of *Chichkin*.

whether that portion of Section 3806 equating ARD with a prior offense is unconstitutional, namely that because ARD is a wholly voluntary program which a defendant is free to reject should he wish to avail himself of his full constitutional rights, due process is not violated when he voluntary agrees to give up his right to have the Commonwealth prove his guilt of the DUI offense beyond a reasonable doubt in exchange for the bargained-for benefit of ARD.

Chichkin held that equating ARD to a prior conviction for sentencing purposes on a second or subsequent conviction violates due process. It relies on *Apprendi* and *Alleyne* and for his proposition. Those cases, however, are inapposite. They address a defendant's jury trial right, and the burden of the Commonwealth to prove beyond a reasonable doubt to a jury all elements of an offense, including any fact that can be used to invoke a mandatory sentence. They do not speak to the circumstances at play here: where, pursuant to an agreement with the Commonwealth, defendant agrees that the Commonwealth need not prove his or her guilt beyond a reasonable doubt in exchange for a benefit the defendant receives.

To be sure, when a defendant enters a guilty plea, he agrees to give up his right to have the Commonwealth prove beyond a reasonable

doubt that he is guilty in exchange for some benefit. No one doubts that such an agreement, where knowing and voluntary, is enforceable. Agreements generally between the Commonwealth and defendants are considered binding on both parties. Accordingly, a defendant who has pled guilty or *nolo contendere*, cannot later say, when the Commonwealth relies on that conviction to enhance a sentence for a subsequent conviction, that the Commonwealth cannot do so because the Commonwealth never proved the defendant's guilt beyond a reasonable doubt to a jury.

Similarly, when a defendant agrees that the Commonwealth need not prove his guilt beyond a reasonable doubt in exchange for ARD – an even greater benefit than a plea insofar as the defendant is not punished for the offense nor does he incur a criminal record should he abide by the ARD conditions – he should be bound by that agreement. He should not be permitted to later say – after receiving the benefits of the bargain, undergoing rehabilitation, and then doing the very thing ARD was intended to prevent, *i.e*. re-offend – that the Commonwealth need now be required to prove his guilt beyond a reasonable doubt of that offense for which he accepted ARD. To suggest that *Apprendi* and *Alleyne* require such a result is tantamount to saying that those cases sanction a

defendant's disavowal of the terms of an agreement he made with the Commonwealth. Those cases require no such thing.

While it is certainly true that there are strict requirements governing a defendant's waiver of rights for a guilty or *nolo* plea that do not apply in the ARD context, due process does not require the same procedural safeguards for the terms of ARD to be deemed voluntary and enforceable. Again, unlike a plea, ARD does not result in criminal punishment or a criminal record should the defendant abide by the requirements of ARD, and a defendant will have available to him his full constitutional rights should he fail to so abide and his ARD is revoked. The procedures that surround a defendant's acceptance of ARD are what a defendant is appropriately due given the nature of the agreement.

At the point when a defendant accepts ARD, there has been a criminal complaint filed, a preliminary hearing held[7] (or waived at the election of the defendant[8]), a criminal information lodged in the Court of Common Pleas advising the defendant of the charges against him[9], an

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7 Pa.R.Crim.P. 540

8 Pa.R.Crim.P. 541

9 Pa.R.Crim.P. 560

opportunity to retain counsel or have counsel appointed to advise the defendant[10], and an opportunity to obtain and review pretrial discovery.[11] At that point in the process, defendants have the right to have the case proven by the Commonwealth against them at trial beyond a reasonable doubt should they decide that is in their best interest to do so. They also have the right to waive their constitutional right to have the Commonwealth prove the case against them and instead enter a plea, with all its consequences. Alternatively, defendants who are eligible for ARD, have the option to elect to forego a trial or plea and accept ARD and its attendant conditions upon the recommendation of the District Attorney.[12]

In exchange for the benefit of ARD participation, just as the this Honorable Court can mandate that a defendant who accepts ARD waive his speedy trial rights and the statute of limitations, the Legislature can, and has, effectively required a defendant to waive his right to compel the prosecution to prove the ARD DUI offense beyond a reasonable doubt before it can be considered a prior offense for purposes of triggering the

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10 U.S. Constitution, 6th Amendment; Pa. Constitution Art. I, Section 9

11 Pa.R.Crim.P. 573

12 Pa.R.Crim.P. 311

mandatory minimum DUI sentences for second or subsequent DUI convictions. By virtue of Section 3806, this waiver effectively becomes a condition of ARD acceptance.[13] Because acceptance of ARD is entirely voluntary, a defendant is not prevented from asserting important procedural and constitutional safeguards should he or she so choose, including the right to insist the Commonwealth prove beyond a reasonable doubt the charged offense before that offense can be considered a conviction for any purpose. In short, a defendant can never be forced to accept ARD and may opt instead to go to trial and have his or her guilt decided by a judge or jury.

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[13] It is immaterial that the defendant is not explicitly colloquied on this waiver/condition of ARD. The fact that an ARD will constitute a prior offense for purposes of sentencing on a second or subsequent DUI conviction is written directly into the statute and defendants are therefore presumed to know it. *See Commonwealth v. Robertson*, 186 A.3d 440, 446-47 (Pa.Super. 2018) (holding defendant presumed to know both statutory and case law); *Commonwealth v. Bowers*, 25 A.3d 349, 356 (Pa.Super. 2011)("[§ 3806] adequately notifies defendants that earlier ARD acceptance will be considered a prior DUI offense for future sentencing purposes"). Furthermore, as this Honorable Court has observed, "[a] waiver colloquy is a procedural device; it is not a constitutional end or a constitutional 'right.' Citizens can waive their fundamental rights in the absence of a colloquy; indeed, waivers can occur by conduct or by implication…." *Commonwealth v. Mallory*, 941 A.2d 686 (Pa. 2008). *See also Commonwealth v. Reeb*, 593 A.2d 853 (Pa.Super. 1991)(holding that court is not required to specifically advise a defendant that his ARD for DUI will constitute a prior offense for purposes of sentencing enhancement on a subsequent DUI conviction). Insofar as an explicit waiver has never been necessary for this condition of the ARD agreement to be upheld, *Alleyne* in no way constitutes an intervening change in the law that now mandates such a procedure.

Thus, when a defendant waives that right by voluntarily accepting ARD, he does so after being afforded the level of due process required in order for that acceptance of ARD to count as a prior offense under Section 3804. Indeed, defendants who accept ARD for DUI offenses willingly agree to give up their "cloak of innocence" for the singular and limited purpose of having that offense count as a prior conviction for sentencing purposes of a subsequent DUI conviction. Due process requires no more than the voluntary acceptance of ARD and its attendant conditions, and in holding otherwise and relying instead on *Alleyne* and *Apprendi*, the *Chichkin* panel lost focus of the fact that this is a condition of an agreement that a defendant voluntary accepts in exchange for the substantial benefits of ARD.

In sum, *Chichkin* undermines the balance between rehabilitation and public safety struck by the Legislature and disincentivizes District Attorneys from offering ARD for DUI offenses, to the detriment of the Commonwealth, public safety, and many ARD-eligible defendants. The decision makes for bad policy, and has deprived the Commonwealth of the benefit of the bargain it made with defendants. Moreover, it does so unnecessarily insofar as there is nothing unconstitutional about a defendant agreeing, as part of a voluntary and beneficial diversionary program, that

the ARD will constitute a prior offense solely for sentencing purposes for a second or subsequent DUI conviction. Accordingly, for the reasons set forth in this amicus brief as well as the Commonwealth-Appellee's brief, the PDAA joins in the Commonwealth-Appellee's request that this Honorable Court overturn the panel decision in *Commonwealth v. Chichkin*.

Finally, assuming, *arguendo*, that this Court agrees with the *Chichkin* panel that *Alleyne* and *Apprendi* are applicable in this context, and that the Legislature cannot equate ARD with a prior conviction as a condition of this voluntary program, it does not follow that the Commonwealth is thus required to prove the underlying facts of the ARD DUI in order to treat that ARD DUI as a prior offense for sentencing purposes. Rather, the only fact that needs to be found by the factfinder prior to invoking the enhanced mandatory minimums for a second or subsequent DUI conviction is that a defendant has been accepted into ARD for a DUI offense within 10 years. The *Chichkin* panel rejected this argument, holding that because ARDs do not constitute prior convictions, due process required the Commonwealth to prove the underlying DUI offense, and not the mere acceptance of ARD as Section 3806 requires. Respectfully, this argument misses the mark.

The Legislature has the power to establish mandatory minimums for aggravating factors other than prior convictions - *e.g*., the age of the victim, the sale of drugs near school grounds, whether a crime of violence was committed in or near public transportation. *Alleyne* did not abolish this legislative authority, but only requires the Commonwealth to prove beyond a reasonable doubt those facts that result in enhancing the mandatory minimum sentence. As such, nothing prohibits the Legislature from identifying factors that would result in enhanced mandatory minimum sentences on a second or subsequent DUI conviction, so long as the Commonwealth proves such factors beyond a reasonable doubt to the factfinder.

Due to the interplay between the sentencing scheme set forth in Section 3804 and the definition of "prior offense" in Section 3806, a factor that increases the mandatory minimum for a second or subsequent DUI conviction is the prior acceptance of ARD for a DUI offense within the past 10 years. Treating the previous acceptance of a DUI-related ARD as an aggravating factor for sentencing purposes on a subsequent DUI conviction is certainly relevant to considerations of recidivism and failure to adjust one's criminal conduct despite past leniency. Moreover, as set forth above, because a defendant's acceptance of ARD is entirely voluntary and a

defendant who accepts ARD is on notice of this condition of accepting ARD, there is no due process violation in making ARD acceptance a factor that triggers the enhanced mandatory minimums under Section 3804.

As such, if a defendant who accepted ARD for a DUI offense and then is subsequently convicted of a subsequent DUI offense, the only requirement should be that the Commonwealth prove beyond a reasonable doubt that the defendant previously accepted ARD for a DUI offense within 10 years of his instant DUI offense. This is the sentencing enhancement contemplated by the General Assembly in Section 3806, and it is the sentencing enhancement of which ARD defendants are given notice. Requiring more than mere acceptance of ARD, and instead requiring proof of the underlying offense as the panel in *Chichkin* found, goes well beyond what *Alleyne* demands. Accordingly, the Commonwealth submits that if it is required to prove facts beyond a reasonable doubt to comply with *Alleyne*, that burden is satisfied by proving beyond a reasonable doubt that the defendant previously accepted ARD for a DUI offense within 10 years of his instant DUI offense, and nothing more.

CONCLUSION

WHEREFORE, the Commonwealth respectfully requests that the Order of the Superior Court be vacated.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to Pa.R.A.P. 531 and 2135 that this amicus brief does not exceed the 7,000 word count.

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CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

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