

# FROM PEN TO PATROL: HOW ARIZONA LAW ENFORCEMENT APPLIED *CARRILLO V. HOUSER*

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## INTRODUCTION

The Arizona Supreme Court's interpretation of a law affecting criminal procedure becomes, in theory, the "law of the land" in Arizona.<sup>1</sup> In practice, uniform application of the law can be complex. Because the Court lacks enforcement power, it must rely on law enforcement officers to effectuate its interpretation of a law.<sup>2</sup> This, of course, requires officers to understand the Court's interpretation and how that interpretation affects their daily duties. Presumably, this starts at an institutional level. That is, law enforcement agencies must inform their officers of evolving case law, provide guidance to their officers for how to comply with that law, and adjust their internal policies accordingly. In Arizona, there are approximately 162 law enforcement agencies, each of which has the authority to set its own training practices and internal policies.<sup>3</sup> Given this latitude

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1. See Corey Fleming Hirokawa, *Making the "Law of the Land" the Law on the Street: How Police Academies Teach Evolving Fourth Amendment Law*, 49 EMORY L.J. 295, 295 (2000) (citing *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (stating that the "judiciary is supreme in the exposition of the law")). Although the Court in *Cooper* discussed the supremacy of federal court constitutional interpretation, it logically follows that this principle can be applied to state supreme courts interpreting state law.

2. See generally *Cooper*, 358 U.S. 1.

3. Telephone Interview with Marie Dryer, Program Specialist, Ariz. Peace Officer Standards and Training Bd. (Feb. 7, 2011). Ms. Dryer explained that although the Arizona Peace Officer Standards and Training Board (AZPOST) offers complimentary, ongoing legal training—through DVDs or a computer eLearning program—to all of the approximately 162 Arizona law enforcement agencies annually, AZPOST does not mandate that agencies utilize these training materials. *Id.* Rather, the agencies are free to develop their own legal training procedures. *Id.* Harold Brady, chairman of AZPOST's Law and Legal Committee as well as Legal Advisor to the City of Surprise, commented that although AZPOST materials can be beneficial to agencies for consistency, the materials are only

among agencies and the inherent difficulty in understanding case law, is it a flawed assumption that the “law of the land” uniformly becomes the “law on the street”?<sup>4</sup>

This Note investigates that question using the recent Arizona Supreme Court decision *Carrillo v. Houser*,<sup>5</sup> which changed the common understanding of Arizona’s so-called “implied consent law.”<sup>6</sup> The Court in *Carrillo* clarified that an officer must obtain *express* agreement from an arrestee before the officer can procure a warrantless alcohol or drug test.<sup>7</sup> This Note examines how Arizona law enforcement agencies informed their officers of *Carrillo* and, more fundamentally, how the decision affected institutional policies and procedures. While the research shows that each law enforcement agency interviewed made an effort to comply with *Carrillo*, how the agencies responded was not uniform. This suggests that

*recommendations* for policy changes. Telephone Interview with Harold Brady, Chairman, Law and Legal Updates Comm., AZPOST (Feb. 7, 2011). Mr. Brady felt strongly that agencies should retain their autonomy for officer training. *Id.*

4. Although rare, there have been similar studies exploring how law enforcement agencies from other jurisdictions effectuate changes in criminal procedure. *See, e.g.*, Hirokawa, *supra* note 1; Charles D. Weisselberg, *In the Stationhouse After Dickerson*, 99 MICH. L. REV. 1121 (2001).

5. 232 P.3d 1245 (Ariz. 2010) (holding that law enforcement officers must obtain express agreement from arrestees before administering warrantless alcohol or drug testing).

6. ARIZ. REV. STAT. ANN. § 28-1321 (2003). The title of the statute is “Implied consent; tests; refusal to submit to test; order of suspension; hearing; review; temporary permit; notification of suspension; special ignition interlock restricted driver license.” *Id.* The relevant portions state:

A. A person who operates a motor vehicle in this state gives consent . . . to a test or tests of the person’s blood, breath, urine or other bodily substance for the purpose of determining alcohol concentration or drug content . . . while the person was driving or in actual physical control of a motor vehicle while under the influence of intoxicating liquor or drugs. . . .

B. After an arrest a violator shall be requested to submit to and successfully complete any test or tests prescribed by subsection A of this section, and if the violator refuses the violator shall be informed that the violator’s license or permit to drive will be suspended or denied for twelve months, or for two years for a second or subsequent refusal within a period of eighty-four months, unless the violator expressly agrees to submit to and successfully completes the test or tests. A failure to expressly agree to the test or successfully complete the test is deemed a refusal. . . .

C. A person who is dead, unconscious or otherwise in a condition rendering the person incapable of refusal is deemed not to have withdrawn the consent provided by subsection A of this section and the test or tests may be administered. . . .

D. If a person under arrest refuses to submit to the test designated by the law enforcement agency as provided in subsection A of this section:  
1. The test shall not be given, except as provided in § 28-1388, subsection E or pursuant to a search warrant. . . .

*Id.*

7. *Carrillo*, 232 P.3d at 1245.

how the “law of the land” becomes the “law on the street” depends on which street—or, more accurately, which law enforcement jurisdiction.

Part I discusses Arizona’s implied consent law and how the Court’s interpretation of section 28-1321 of the Arizona Revised Statutes in *Carrillo v. Houser* provided a different procedural framework for applying the statute than was previously understood. Part I also describes the data collection method. Part II describes and analyzes the information gathered from the interviews, focusing on three primary findings: how Arizona law enforcement agencies disseminate legal updates to their officers, how the agencies train their officers to comply with evolving case law, and how the agencies adapted their institutional policies to reflect *Carrillo*’s express agreement requirement.

### I. THE BACKGROUND

In *Carrillo v. Houser* the Arizona Supreme Court, for the first time, interpreted title 28, section 1321 of the Arizona Revised Statutes, commonly known as Arizona’s “implied consent law.” The statute gives officers authority to procure evidence from individuals stopped on suspicion of driving under the influence of alcohol or drugs.<sup>8</sup> Prior to *Carrillo*, section 28-1321 was commonly understood not to *require* an arrestee to manifest consent by words or conduct; instead, officers were thought to have the authority to administer alcohol or drug testing based on the implied consent of all drivers who utilize Arizona roads.<sup>9</sup> The Supreme Court in *Carrillo* clarified that this understanding was incorrect, interpreting the statute to conclude section 28-1321 “does not authorize law enforcement officers to administer [a] test without a warrant, unless the arrestee *expressly* agrees to the test.”<sup>10</sup> The Court continued: “[T]o satisfy the statutory

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8. ARIZ. REV. STAT. ANN. § 28-1321. For the text of the statute, see *supra* note 6.

9. Telephone Interview with Detective Daven Byrd, Trainer, Ariz. Dep’t of Pub. Safety (Jan. 5, 2011). The officers’ understanding of the statute appears reasonable given the language in subsection (A): “A person who operates a motor vehicle in this state *gives consent* . . . to a test or tests of the person’s blood, breath, [or] urine . . . .” ARIZ. REV. STAT. ANN. § 28-1321(A) (emphasis added). Although obtaining express agreement was not believed to be a statutory requirement before *Carrillo*, many officers were already asking for consent, both as a means of colloquial communication and also as supplemental justification for a Fourth Amendment intrusion in case probable cause was later found deficient. Telephone Interview with Detective Daven Byrd, DPS, *supra*; Telephone Interview with Sergeant Dan Long, Safford Dist. Supervisor, Ariz. Dep’t of Pub. Safety (Feb. 7, 2011). The Motor Vehicle Division (MVD) offers to law enforcement an “Administrative Per Se” form, which informs arrestees both of their obligation to provide a sample for alcohol testing and of the consequences of refusal; this form affords officers the *opportunity* to ask for consent but does not make it mandatory. Telephone Interview with Detective Daven Byrd, DPS, *supra*.

10. *Carrillo*, 232 P.3d at 1245 (emphasis added). In *Carrillo*, officers used hand gestures and the Spanish word for “blood” to indicate to the Spanish-speaking arrestee that they were going to take a blood sample. *Id.* at 1246. In response, the arrestee held out his arm, and the officers administered a warrantless alcohol test. *Id.* Rather than merely analyzing the factual background, the Court’s conclusion that section 28-1321 requires “express agreement” was based on harmonizing several subsections of the statute—namely, reconciling subsections (B) and (D) with (A) and (C). *Id.* at 1247. After *Carrillo*, officers

requirement, the arrestee must unequivocally manifest assent to testing by words or conduct.”<sup>11</sup> Thus, if an arrestee does not expressly agree, an officer usually may not take a sample without a warrant;<sup>12</sup> however, pursuant to subsection (B) of the statute, the arrestee’s license will be administratively suspended for a “refusal.”<sup>13</sup>

When *Carrillo* came down in June 2010, it immediately garnered media attention<sup>14</sup> and created a stir among those within the DUI enforcement field.<sup>15</sup> At that time, however, it was unclear how Arizona law enforcement agencies would respond to the newly understood express agreement requirement. Six months later, presumably after agencies had sufficient time to change their internal policies to comply with the Supreme Court’s interpretation of the law, I interviewed trainers, sergeants, and supervisors from several law enforcement agencies across the state, including the Arizona Department of Public Safety (DPS), Glendale Police Department (GPD), Maricopa County Sheriff’s Office (MCSO), Northern Arizona University Police Department (NAUPD), Phoenix Police Department (PHX PD), Pima County Sheriff’s Department (PCSD), and University of Arizona Police Department (UAPD).<sup>16</sup>

Using *Carrillo* as the point of reference, the interviews focused on how the agencies inform officers of developments in case law and subsequently change internal policies to comply with those developments. I interviewed trainers, sergeants, and supervisors because they were most likely to know how and why their respective agencies implemented institutional policy changes. Interviewees answered questions related to the following five topics: (1) the agency’s process for informing officers of legal developments, particularly new case law, (2) the timeframe for disseminating legal updates to its officers, (3) the type(s) of longer-term legal training the agency provides for its officers, (4) the general understanding of *Carrillo* and its express agreement requirement within the

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are likely to obtain a telephonic search warrant anytime they have an arrestee who cannot “expressly agree” because of a language barrier. See *infra* notes 94–97 and accompanying text.

11. *Carrillo*, 232 P.3d at 1249.

12. *Id.* at 1248–49.

13. See ARIZ. REV. STAT. ANN. § 28-1321(B) (“[I]f the violator refuses the violator shall be informed that the violator’s license . . . will be suspended . . . unless the violator expressly agrees to submit to and successfully completes the test or tests.”). The failure to expressly agree is deemed a refusal and will result in a driver’s license suspension. See *Carrillo*, 232 P.3d at 1247 (“[T]he legislature instead deemed a failure to expressly agree to be a refusal . . .”).

14. See, e.g., Paul Davenport, *Arizona Court Rules on DUI Blood Test Consent Issue*, DAILY COURIER, June 7, 2010, <http://www.prescottaz.com/main.asp?SectionID=1&SubSectionID=1087&ArticleID=81920>; Howard Fischer, *Cops Must Get Warrant if DUI Suspect Balks at Blood Test*, ARIZ. DAILY STAR, June 8, 2010, at A1.

15. See Telephone Interview with Beth Barnes, Traffic Safety Res. Prosecutor, Phx. City Prosecutor’s Office (Oct. 10, 2010); Telephone Interview with Detective Daven Byrd, DPS, *supra* note 9; Telephone Interview with Deputy Robert Lynn, Pima Cnty. Sheriff’s Dep’t (Jan. 6, 2011); Telephone Interview with Sergeant William Niles, Supervisor, N. Ariz. Univ. Police Dep’t (Jan. 5, 2011).

16. For a list of all of the interviews, see *infra* Appendix A. Telephone Interview transcripts and summaries are on file with *Arizona Law Review* and the Author.

agency, and (5) the policy changes the agency enacted as a result of *Carrillo*.<sup>17</sup> This qualitative study shows the diverse ways in which Arizona law enforcement agencies disseminate case law to their officers and subsequently change their institutional policies to comply with the law.

## II. THE FINDINGS

Interview data suggests that Arizona law enforcement agencies do not uniformly respond to developments in case law, such as *Carrillo v. Houser*. There is no centralized state system for informing officers of legal developments, and each law enforcement agency has the authority to train its officers as it chooses. Furthermore, each agency has the authority to set its own internal policies for how its officers should comply with evolving law. As a result, although law enforcement agencies may be aware of the Arizona Supreme Court's interpretation of a law, different agencies train their officers to effectuate that law in different ways on the streets. Thus, the independence of agencies reveals the diverse avenues from pen to patrol.

### A. How Agencies Disseminate Legal Updates to Their Officers

Six of the seven law enforcement agencies in this study reported having systems in place through which officers receive urgent alerts of legal developments, including relevant Arizona Supreme Court decisions. UAPD, MCSO, PCSD, PHX PD, DPS, and GPD reported informing their officers of *Carrillo* and the express agreement requirement through standing bulletin systems.<sup>18</sup> These bulletins are delivered to officers either daily, weekly, or on an ad hoc basis.

At UAPD, officers receive daily briefings, or bulletins, before each patrol shift.<sup>19</sup> These bulletins contain changes in crime trends, new enforcement concentrations, and legal updates.<sup>20</sup> All officers are required to read the bulletins before beginning their shifts.<sup>21</sup> MCSO similarly sends out a bulletin to its officers every morning.<sup>22</sup> Its bulletin includes legal updates, which often come from legal advisors who work for the Sheriff's Office or the Maricopa County Attorney's Office.<sup>23</sup> At PCSD, supervising sergeants send bulletins with legal updates, when

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17. For a sample list of questions used, see *infra* Appendix B.

18. See Telephone Interview with Detective Kemp Layden, DRE/Phlebotomy/SFST Coordinator and DUI Trainer, Phx. Police Dep't (Dec. 28, 2010); Telephone Interview with Officer Johnny Lollar, Trainer and Patrol Officer, Univ. of Ariz. Police Dep't (Dec. 27, 2010) ; Telephone Interview with Sergeant Dan Long, DPS, *supra* note 9; Telephone Interview with Deputy Robert Lynn, PCSD, *supra* note 15; Telephone Interview with Sergeant Mark Malinski, Supervisor of DUI Enforcement Unit, Glendale Police Dep't (Dec. 28, 2010); Telephone Interview with Sergeant Paul White, Drug Recognition Coordinator, Maricopa Cnty. Sheriff's Office (Dec. 28, 2010).

19. Telephone Interview with Officer Johnny Lollar, UAPD, *supra* note 18.

20. *Id.*

21. *Id.*

22. Telephone Interview with Sergeant Paul White, MCSO, *supra* note 18.

23. *Id.*

they become available, to the officers under their command.<sup>24</sup> The sergeants may receive guidance as to the meaning of legal developments from the Department's legal advisors.<sup>25</sup>

PHX PD seems to have the most procedurally advanced system for informing officers of legal updates, although it disseminates updates on a weekly rather than a daily or as-needed basis. PHX PD officers receive legal notifications and ongoing legal training through Operations Digest, a weekly publication that is interdepartmentally distributed via email.<sup>26</sup> The Operations Digest contains both legal and non-legal updates, as well as new policy directives that concern the Department.<sup>27</sup> Distinct from the other law enforcement agencies, PHX PD uses a "time stamp" mechanism to ensure that officers read the legal updates distributed to them.<sup>28</sup> According to a detective with the Department, this process creates more accountability among the officers: "You can't say that you never saw it because you clicked that you read it."<sup>29</sup> PHX PD also codifies important notifications from the Operations Digest into its Operations Orders, which contain the standing operating procedure for the Department.<sup>30</sup> *Carrillo* appeared in the Operations Digest and also will be included in the Operations Orders.<sup>31</sup>

DPS and GPD receive emails from their legal advisors whenever there are relevant legal developments.<sup>32</sup> For example, when the Supreme Court released its decision in *Carrillo*, GPD's legal advisor alerted the Department via email and indicated how other agencies were responding to the newly understood express agreement requirement.<sup>33</sup>

The remaining law enforcement agency—NAUPD—did not report institutional procedures to quickly inform its officers of legal developments, such as *Carrillo*. Rather, the Department appears to rely on professional networking among officers for such updates.<sup>34</sup> Notably, each of the agencies interviewed reported also hearing of *Carrillo* through this type of networking.

### ***B. How Agencies Train Their Officers to Comply with Evolving Law***

Beyond simply notifying their officers of legal developments, Arizona law enforcement agencies must train officers to comply with evolving law. Such training "[i]s not a one-time thing. [Officers] receive training from many different sources."<sup>35</sup> Every peace officer in Arizona is statutorily required to complete eight

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24. Telephone Interview with Deputy Robert Lynn, PCSD, *supra* note 15.

25. *Id.*

26. Telephone Interview with Detective Kemp Layden, PHX PD, *supra* note 18.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. See Telephone Interview with Detective Daven Byrd, DPS, *supra* note 9; Telephone Interview with Sergeant Mark Malinski, GPD, *supra* note 18.

33. Telephone Interview with Sergeant Mark Malinski, GPD, *supra* note 18.

34. Telephone Interview with Sergeant William Niles, NAUPD, *supra* note 15.

35. Telephone Interview with Deputy Robert Lynn, PCSD, *supra* note 15.

hours of in-service training annually.<sup>36</sup> All of the agencies interviewed reported providing their officers with some type of formal, active, and ongoing legal training. The following forms of training—electronic media, specialized units, and legal advisors—illustrate the diversity of long-term legal training procedures among law enforcement agencies in the state.

### *1. Electronic Media*

The Arizona Peace Officer Standards and Training Board (AZPOST) is the primary source of electronic media training for most Arizona law enforcement agencies.<sup>37</sup> AZPOST releases complimentary legal-update DVDs to all law enforcement agency training coordinators on an annual basis.<sup>38</sup> These DVDs are created by AZPOST-designated “subject matter experts” who explain the meaning of new statutes or case law and offer suggestions for law enforcement application.<sup>39</sup>

AZPOST also recently implemented a computer program, aptly named “eLearning,” to serve as a time-saving, inexpensive, and efficient way for officers in Arizona to achieve their annual ongoing training requirements.<sup>40</sup> MCSO initially developed and used the eLearning program.<sup>41</sup> The Sheriff’s Office later agreed to partner with AZPOST.<sup>42</sup> Because of the success of eLearning, AZPOST piloted the program with DPS to see how it functioned throughout the state, especially in outlying areas.<sup>43</sup>

The eLearning program provides interactive lessons organized by topic categories.<sup>44</sup> Each officer who attempts a lesson must complete it within a specified amount of time and must achieve a perfect score in order to “pass” the lesson.<sup>45</sup> If an officer does not understand a topic area, the eLearning program has a function for officers to post questions.<sup>46</sup>

The curriculum for the eLearning computer program is intended to build on basic training.<sup>47</sup> The lessons are designed as “refreshers” on particular topics

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36. Telephone Interview with Marie Dryer, AZPOST, *supra* note 3.

37. “Some of the larger agencies have training units and produce their own training materials, including electronic media.” Email from Harold Brady, Chairman, Law and Legal Updates Comm., AZPOST, to Lisa Lindemenn, Case Notes Editor, *Arizona Law Review* (Feb. 22, 2011, 13:33 MST) (on file with *Arizona Law Review*).

38. Telephone Interview with Marie Dryer, AZPOST, *supra* note 3; Telephone Interview with Harold Brady, AZPOST, *supra* note 3.

39. Telephone Interview with Marie Dryer, AZPOST, *supra* note 3; Telephone Interview with Harold Brady, AZPOST, *supra* note 3.

40. Telephone Interview with Marie Dryer, AZPOST, *supra* note 3. The eLearning service is free for certified peace officers. *Id.*

41. Telephone Interview with Sergeant Paul White, MCSO, *supra* note 18.

42. Telephone Interview with Marie Dryer, AZPOST, *supra* note 3.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

and include new legal updates relevant to those topics.<sup>48</sup> Although a range of topics exist within the eLearning program, agencies are free to select particular topic areas according to their needs, and all officers within a subscribing agency have access to legal updates through the program.<sup>49</sup>

Both DPS and MCSO use eLearning as a substantial form of ongoing legal training, and DPS used it to train officers on the *Carrillo* express agreement requirement.<sup>50</sup> According to a Program Specialist for AZPOST, other agencies have expressed hope to utilize such electronic media in the future but have not confirmed plans for its adoption.<sup>51</sup>

Although eLearning appears to be the most efficient and inexpensive method of ongoing legal training for law enforcement officers, it may not be a panacea to standardize enforcement across agencies. Currently, both the eLearning program and the DVDs are voluntarily distributed by AZPOST.<sup>52</sup> A program specialist for AZPOST commented, “You can lead a horse to water, but you can’t make it drink.”<sup>53</sup> She noted that AZPOST’s efforts are not steadfast requirements, but merely accessible tools for agencies that choose to use them.<sup>54</sup> And there may be good reason to forego mandating a streamlined, statewide eLearning program—police chiefs have different objectives. Agencies benefit from crafting their own training materials because budget, geography, and cultural background affect an agency’s priorities.

## 2. Specialized Units

Within agencies, certain units also receive specialized training appropriate for their concentrations. For example, DUI enforcement officers receive specialized in-service training, such as phlebotomy training or Drug Recognition Expert (DRE) training.<sup>55</sup> During these specialized sessions, officers receive legal updates that are necessary for their particular roles. A sergeant for GPD reported learning the express agreement requirement from *Carrillo* at a phlebotomy in-service training.<sup>56</sup> PHX PD also reported specialty training for DUI enforcement officers. According to a detective with the Department, “if one is HGN<sup>57</sup> certified, [the legal] training associated with HGN is also included.”<sup>58</sup> The

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48. *Id.*

49. *Id.*

50. Telephone Interview with Detective Daven Byrd, DPS, *supra* note 9; Telephone Interview with Sergeant Paul White, MCSO, *supra* note 18.

51. Telephone Interview with Marie Dryer, AZPOST, *supra* note 3.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. Telephone Interview with Sergeant Mark Malinski, GPD, *supra* note 18.

57. The HGN test is one of three field sobriety tests commonly given by law enforcement officers. See generally NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., *Horizontal Gaze Nystagmus: The Science & the Law* (Dec. 20, 2001), available at <http://www.nhtsa.gov/people/injury/enforce/nystagmus/>. “[HGN] refers to a lateral or horizontal jerking when the eye gazes to the side. In the impaired driving context, alcohol consumption . . . hinders the ability of the brain to correctly control eye muscles . . .” *Id.*

Department teaches “refreshers” every other year for each specialized unit.<sup>59</sup> Legal training, such as how to comply with the express agreement requirement from *Carrillo*, would be included in these “refreshers.”<sup>60</sup>

Training for specialty concentrations is not limited to skills training like phlebotomy or HGN; training also comes directly from the sergeants assigned to specialty units. For instance, at PCSD the sergeants assigned to the Traffic Unit or DUI Unit create focused lesson plans to teach legal issues as they become relevant.<sup>61</sup>

Arizona’s sixteen DUI Taskforces also serve as an additional legal training forum. According to one sergeant, “If there is a trend or new law and we have our [West Valley] Taskforce meeting, everyone discusses those kinds of things.”<sup>62</sup> The express agreement requirement from *Carrillo* is a likely topic to be discussed during a Taskforce meeting because it relates to the officers’ daily practices in DUI enforcement.

### 3. Legal Advisors

Public and private resources fund legal advisors who provide training to law enforcement agencies. The research in this study reveals that public legal advisors have the ability to provide immediate assistance, whereas private advisors may only supply intermittent, though comprehensive, legal training.

Using funding provided by the Arizona Governor’s Office of Highway Safety, the Traffic Safety Resource Prosecutor (TSRP) assists law enforcement agencies with questions relating to DUI case law.<sup>63</sup> The TSRP maintains an email list of Arizona prosecutors, officers, and traffic safety professionals who desire to be notified of DUI and traffic issues.<sup>64</sup> When new case law, new legislation, or developments in other areas of interest arise, the TSRP sends a notice to everyone on the list.<sup>65</sup> The TSRP also serves as a resource for officers who have specific questions, such as regarding the express agreement requirement from *Carrillo*.<sup>66</sup> Similar to the assistance the TSRP provides, some agencies, like GPD, have attorneys “on call” to answer questions that arise during DUI stops.<sup>67</sup>

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58. Telephone Interview with Detective Kemp Layden, PHX PD, *supra* note 18.

59. *Id.*

60. *Id.*

61. Telephone Interview with Deputy Robert Lynn, PCSD, *supra* note 15.

62. Telephone Interview with Sergeant Mark Malinski, GPD, *supra* note 18.

63. GOVERNOR’S OFFICE OF HIGHWAY SAFETY, STATE OF ARIZONA ANNUAL PERFORMANCE REPORT FEDERAL FISCAL YEAR 2009, at 24 (2010) [hereinafter 2009 AZ ANNUAL PERFORMANCE REPORT], available at <http://www.azgohs.gov/about-gohs/FY2009AnnualReport.pdf>.

64. *Id.* at 25.

65. *Id.* at 24–25.

66. *Id.* at 24.

67. Telephone Interview with Sergeant Mark Malinski, GPD, *supra* note 18.

Other law enforcement agencies, such as NAUPD and UAPD, rely on private companies for their legal training updates.<sup>68</sup> Officers of both agencies receive annual training from Edwards & Ginn, a private law firm.<sup>69</sup> An officer from UAPD reported that an Edwards & Ginn representative taught *Carrillo*'s express agreement requirement at the last annual training.<sup>70</sup> Unlike larger law enforcement agencies that have their own legal advisors or access to a local prosecutor's office, neither NAUPD nor UAPD receives immediate in-house legal training; instead, the agencies rely on the private firm to provide such instruction.<sup>71</sup> Training contracts with private firms are common among smaller agencies that do not have sufficient funding for their own legal advisors.<sup>72</sup>

Not having access to immediate legal updates may be remedied by a streamlined, state-wide, free eLearning program. Although the program is still in its infancy, many are optimistic that it will be available to all Arizona law enforcement agencies in 2011.<sup>73</sup>

### *C. How Agencies Adapted Their Institutional Policies to Reflect Carrillo's Express Agreement Requirement*

After law enforcement agencies inform their officers of legal developments, the more lasting responses are the agencies' internal policies for how their officers comply with those developments. This study identifies two primary policy responses post-*Carrillo*: some agencies require their officers to obtain express written agreement and the remaining agencies require their officers to obtain express verbal agreement.

#### *1. Agencies that Require Written Agreement*

In *Carrillo*, the Court did not explicitly state that section 28-1321 requires officers to obtain written agreement. Agency policies that require written agreement may go beyond what the statute, as interpreted by the Supreme Court, requires. Both GPD and MCSO require their officers to obtain signed consent forms before administering alcohol or drug tests.<sup>74</sup> Notably, after *Carrillo*, MCSO added a sentence to its alcohol testing consent form, which reads: "I am verbally (and 'expressly') giving permission for breath, blood, or other bodily substance to be taken."<sup>75</sup> The Sheriff's Office has different consent forms, in both English and

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68. Telephone Interview with Officer Johnny Lollar, UAPD, *supra* note 18; Telephone Interview with Sergeant William Niles, NAUPD, *supra* note 15.

69. Telephone Interview with Officer Johnny Lollar, UAPD, *supra* note 18; Telephone Interview with Sergeant William Niles, NAUPD, *supra* note 15.

70. Telephone Interview with Officer Johnny Lollar, UAPD, *supra* note 18.

71. *Id.*; Telephone Interview with Sergeant William Niles, NAUPD, *supra* note 15.

72. *See* Telephone Interview with Marie Dryer, AZPOST, *supra* note 3.

73. *Id.* Ms. Dryer reported that because eLearning is still "in its infancy," she was unsure exactly when in 2011 the rollout will occur. *Id.*

74. Telephone Interview with Sergeant Mark Malinski, GPD, *supra* note 18; Telephone Interview with Sergeant Paul White, MCSO, *supra* note 18.

75. Telephone Interview with Sergeant Paul White, MCSO, *supra* note 18. Apparently in an effort to precisely comply with the Court's verbiage in *Carrillo*, the form

Spanish, for different types of specimens.<sup>76</sup> The consent forms also include space for the date and time, to indicate when the officers administer tests.<sup>77</sup> Approximately four months after *Carrillo*, the Arizona Court of Appeals held, in an unpublished opinion, that reading a consent form to an arrestee who subsequently signs the form satisfies the express agreement requirement.<sup>78</sup> Thus, if GPD and MCSO read the forms to arrestees, their procedure will almost certainly clear the *Carrillo* hurdle.<sup>79</sup>

As with the written consent form read back to the suspect, the time, date, and signature requirements may help eliminate plausible consent arguments for defendants and thus reduce litigation costs for the agencies that require the forms. However, internal policies mandating written agreement come at a cost. According to a detective, some arrestees or suspects of a DUI will readily give verbal agreement but will refuse to sign *anything*.<sup>80</sup> If arrestees give verbal agreement, is their failure to sign a written consent form indicative of their refusal to agree? Perhaps a written agreement policy is too restrictive for the varied situations officers face during DUI stops.

## 2. Agencies that Require Verbal Agreement

Other law enforcement agencies reported policy changes that appear to be well-tailored to meet the *Carrillo* Court's interpretation of section 28-1321. For example, PHX PD, arguably the largest agency in Arizona with the highest number of DUI arrests,<sup>81</sup> requires its officers to ask arrestees for their consent to alcohol testing and then record the exact words of the verbal response in the police report.<sup>82</sup> DPS and PCSD also follow this procedure of recording verbal consent.<sup>83</sup>

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includes quotations around "expressly." *Id.* Sergeant White expressed continuing uncertainty among agencies: "What is 'express' consent? Isn't sticking out your arm consenting to it?" *Id.* Law enforcement agencies may include "expressly" on their consent form as a way to decrease potential litigation over whether an arrestee actually gave express agreement.

76. *Id.* The arresting officer determines what type of specimen is needed from the arrestee. *Id.*; ARIZ. REV. STAT. ANN. § 28-1321(A) (2003) ("The test or tests chosen by the law enforcement agency shall be administered at the direction of a law enforcement officer . . .").

77. Telephone Interview with Sergeant Paul White, MCSO, *supra* note 18.

78. *State v. Rhinehart*, No. 2 CA-CR 2009-0379, 2010 WL 4278504 (Ariz. App. Oct. 12, 2010). The Court of Appeals concluded that "[e]ven assuming Rhinehart did not personally read the consent form, [DPS Officer] Shupe read it to her, and she subsequently signed it. She thus 'unequivocally manifest[ed] assent to the test by her . . . conduct' in signing the consent form after having been verbally informed of its contents." *Id.* at \*3.

79. DPS also uses consent forms for blood alcohol testing because of its invasive nature. *See* Telephone Interview with Sergeant Dan Long, DPS, *supra* note 9. This policy predates *Carrillo*. *Id.* The Department requires officers to obtain express verbal consent for other types of alcohol content testing. *Id.*; *see also infra* note 83 and accompanying text.

80. Telephone Interview with Detective Kemp Layden, PHX PD, *supra* note 18.

81. *See* 2009 AZ ANNUAL PERFORMANCE REPORT, *supra* note 63, at 19.

82. Telephone Interview with Detective Kemp Layden, PHX PD, *supra* note 18; Telephone Interview with Beth Barnes, Phx. City Prosecutor's Office, *supra* note 15.

83. Telephone Interview with Detective Daven Byrd, DPS, *supra* note 9 (noting that DPS officers were already asking for verbal consent, though with less emphasis on

UAPD appears to follow this practice as well, but does not have an express institutional policy reflecting this decision.<sup>84</sup> Recording arrestees' verbal responses rather than obtaining written consent appears to adequately obey the Court's express agreement command. This procedure is likely to satisfy section 28-1321's directive because it both asks for an arrestee's agreement and documents the arrestee's "unequivocal[] manifest[ation of] assent to the testing by words or conduct."<sup>85</sup>

The remaining agencies reported that *Carrillo* did not change their procedures. In fact, some described the effects of the case as "business as usual."<sup>86</sup> For agencies like DPS, officers were already asking arrestees for express verbal consent.<sup>87</sup> Indeed, the Department reported that after giving the Motor Vehicle Division (MVD) Administrative Per Se notification,<sup>88</sup> most officers received verbal consent from arrestees.<sup>89</sup> Similarly, NAUPD reported that its officers read the MVD Administrative Per Se form to arrestees, which prompts the arresting officer to ask, "Will you submit to the specified test?"<sup>90</sup> Although this question would appear to comply with *Carrillo*'s "express agreement" exhortation, changing the word "submit" to "expressly agree" on the Administrative Per Se form might provide a stronger defense should the procedure be challenged.

Accordingly, agencies which had a practice of requesting express consent prior to *Carrillo* did not make a cognizable change in response to the decision. As the Legal Advisor for the City of Surprise remarked, "Although *Carrillo* caused an uproar after it was decided, most of the dust settled after prosecutors realized that most officers were already complying."<sup>91</sup> In fact, he stated, "Most DUI officers who have been doing this for awhile know to ask for consent. That way it isn't a problem later."<sup>92</sup>

## CONCLUSION

Within six months after *Carrillo*, the Arizona law enforcement agencies interviewed seem to have made modifications where necessary. These adaptations

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recording responses, prior to *Carrillo v. Houser*); Telephone Interview with Deputy Robert Lynn, PCSD, *supra* note 15. DPS only records verbal consent for breath or urine alcohol testing; the Department uses a written consent form for blood alcohol testing. Telephone Interview with Sergeant Dan Long, DPS, *supra* note 9; *see also supra* note 79.

84. *See* Telephone Interview with Officer Johnny Lollar, UAPD, *supra* note 18.

85. *Carrillo v. Houser*, 232 P.3d 1245, 1249 (Ariz. 2010).

86. Telephone Interview with Detective Daven Byrd, DPS, *supra* note 9.

87. *Id.*

88. The MVD Administrative Per Se statement informs arrestees of their obligation to provide a sample for alcohol testing and the consequences of an express refusal. *See* Telephone Interview with Officer Johnny Lollar, UAPD, *supra* note 18; *see also supra* note 9.

89. Telephone Interview with Detective Daven Byrd, DPS, *supra* note 9.

90. Email from Sergeant William Niles, N. Ariz. Univ. Police Dep't (Feb. 24, 2011 00:11 MST). Officers are not required by law to read or ask the questions listed in the Administrative Per Se form. Telephone Interview with Sergeant William Niles, NAUPD, *supra* note 15. Rather, it is an agency practice to utilize the form for DUI investigations. *Id.*

91. Telephone Interview with Harold Brady, AZPOST, *supra* note 3.

92. *Id.*

did not create as big an upset as agencies feared when the decision first came out. When asked if the new requirement was a burden on the agency, a supervisor with MCSO responded, “It’s not really a big deal. It’s just defense attorneys trying to get one more place to wiggle out of.”<sup>93</sup> It appears that nearly all agencies are equipped and prepared to deal with *Carrillo*’s express agreement requirement. The law of the land generally does become the law on the street—it just may not be in a uniform manner.

It should also be noted that if arrestees refuse or equivocate, all interviewed agencies reported policies requiring an arresting officer to prepare a telephonic search warrant application.<sup>94</sup> An arrestee’s failure to affirmatively agree—whether the agency’s protocol requires officers to obtain written or verbal consent—constitutes equivocation; according to one supervisor, “that way there is no question whether [the arrestee] consented or not.”<sup>95</sup> The agencies agreed that the telephonic search warrant is not an extra burden on officers, as it can take as little as twenty minutes to receive the warrant from a judicial officer.<sup>96</sup> An officer at UAPD noted that he does not recall a time when a judge denied a telephonic search warrant application for an alcohol or drug test.<sup>97</sup>

While Arizona law enforcement agencies do implement the Arizona Supreme Court’s interpretation of a law, the assumption that each agency applies the Court’s commands in a uniform fashion is flawed. Rather, agencies respond to evolving criminal procedure case law in different ways. Such varied responses may be advantageous; agencies adjust procedures to best serve the needs of their particular communities. Perhaps, however, an enhanced system of state-wide application—like the eLearning program—could supplement agencies’ autonomous responses, further ensuring that the law that springs from the Court’s pen is, at the baseline, the law on patrol.

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93. Telephone Interview with Sergeant Paul White, MCSO, *supra* note 18.

94. *E.g.*, Telephone Interview with Sergeant Paul White, MCSO, *supra* note 18. According to Sergeant White, Sheriff’s deputies are trained to apply for a search warrant at the first sign of denial for alcohol testing. *Id.* This is a consistent theme among all agencies interviewed.

95. *Id.*

96. *Id.*; Telephone Interview with Detective Daven Byrd, DPS, *supra* note 9; Telephone Interview with Detective Kemp Layden, PHX PD, *supra* note 18; Telephone Interview with Officer Johnny Lollar, UAPD, *supra* note 18; Telephone Interview with Deputy Robert Lynn, PCSO, *supra* note 15; Telephone Interview with Sergeant Mark Malinski, GPD, *supra* note 18; Telephone Interview with Sergeant William Niles, NAUPD, *supra* note 15.

97. Telephone Interview with Officer Johnny Lollar, UAPD, *supra* note 18.

**APPENDIX A  
INTERVIEW LIST**

1. Beth Barnes, Traffic Safety Resource Prosecutor, City of Phoenix Prosecutor's Office, October 10, 2010.
2. Harold Brady, Chairman, Law & Legal Updates Committee, Arizona Peace Officer Standards and Training Board, February 7, 2011.
3. Detective Daven Byrd, Trainer, Arizona Department of Public Safety, January 5, 2011.
4. Marie Dryer, Program Specialist, Arizona Peace Officer Standards and Training Board, February 7, 2011.
5. Detective Kemp Layden, DRE/Phlebotomy/SFST Coordinator and DUI Trainer, Phoenix Police Department, December 28, 2010.
6. Officer Johnny Lollar, Trainer and Patrol Officer, University of Arizona Police Department, December 27, 2010.
7. Deputy Robert Lynn, Pima County Sheriff's Department, January 6, 2011.
8. Sergeant Mark Malinski, Supervisor, Glendale Police Department, December 28, 2010.
9. Sergeant William Niles, Supervisor, Northern Arizona University Police Department, January 5, 2011.
10. Sergeant Paul White, Drug Recognition Coordinator, Maricopa County Sheriff's Office, December 28, 2010.
11. Sergeant Dan Long, Safford District Supervisor, Arizona Department of Public Safety, February 7, 2011.

**APPENDIX B**  
**INTERVIEW QUESTIONS**

I interviewed eleven law enforcement officials from agencies across the state of Arizona. For each interview, I used the following script as a baseline for my questioning. Necessarily, each interview was different; I did not ask all of these questions of every official, and, in some cases, I asked follow-up questions not listed here.

***A. Introduction and Background Information***

- I am a law student at the University of Arizona and am working on a case note involving how police agencies respond to evolving case law.
- Date:
- Name and Official title:
- Agency Name:

***B. Training Protocol for Legal Updates***

- How do law enforcement officers find out about Arizona cases impacting police procedures?
  - Prosecuting agencies? (*see below*)
  - Is there someone designated within the police agency to do research?
  - Word of mouth? Internet?
  - Specialized bulletins? Checklists?
  - Mailing list of decisions?
- Do you, as a police trainer, read the Arizona cases impacting police procedures?
  - If so, how do you reinterpret the holding (rule) from the case to an educational training opportunity for law enforcement officers?
- Are officers required to receive continuous legal training?
- How often are law enforcement officers required to receive updated training?
  - Yearly? Monthly?
- How are training materials distributed to officers?
  - Classroom format?
  - Email?

- Do you distribute written materials that the law enforcement officers can refer back to?
  - How extensive are these written materials? Comprehensive? Checklists?
    - If known, do officers carry these materials with them while “on the force”?

### ***C. Prosecuting Offices***

- Are you in regular contact with prosecuting agencies in Arizona?
  - If so, which ones?
  - Do you have a designated contact at each agency?
    - If so, whom?
  - Do these agencies give interpretations of cases? Do prosecuting agencies offer this information unsolicited? Does your police agency ask prosecuting agencies for interpretation of [complex] case law?
    - If so, does the prosecutor’s interpretation of the case influence your training procedure and materials?

### ***D. Changing Policies Resulting from Carrillo v. Houser***

- Prior to this interview, was your agency aware of the Arizona Supreme Court’s decision in *Carrillo v. Houser*?
  - If so, how do you explain the holding/new requirement to officers?
- Have your agency’s orders and/or administrative policies changed as a result of the *Carrillo* decision?
  - If not, do you anticipate forthcoming changes?
    - If so, what changes?
  - If changes have been or will be made in training or administration, what were the policies and/or orders before the change and what are the policies and/or orders after the change?
  - What procedure did your agency undergo to determine what changes would/would not be made? (e.g., consultation with legal counsel, committee meetings, etc.).
- Has your agency’s training or training materials changed as a result of *Carrillo*?

- If so, how?
  - Does this only impact enforcement officers that deal with DUI offenses? Or does the entire police department learn about these changes in DUI law?
- If not, do you anticipate forthcoming changes?
  - If so, what changes?
- Will *Carrillo* be incorporated into future training materials for new recruits?
- How is your agency implementing and enforcing these changes with your personnel?
  - Specialized training sessions?
  - Email?
  - Order?
- What are some examples of how the new policy will be executed?
  - Standardized statement given to arrestees? (i.e., *Miranda* warning?)
  - Written form authorizing consent?
- How do you know that your training materials are adequately understood and implemented by law enforcement officers?
  - Is there a test/exam given after training sessions? What about when the information is only disseminated via bulletin/email?
- Do you anticipate that the Court's holding will be an obstacle for law enforcement officers?
  - If not, why not?
  - If so, why?