

***Miranda*: Nontestimonial statements and physical evidence are not excluded by *Miranda* rule.....Revised 12/2009**

“Preclusion of evidence obtained in violation of *Miranda* is based on the Fifth Amendment privilege against self-incrimination.” *In re Jorge D.*, 202 Ariz. 277, 281, ¶ 19, 43 P.3d 605, 609 (App. 2002). “[I]n order to be testimonial, an accused’s communication must itself, explicitly or implicitly, relate a factual assertion or disclose information. Only then is a person compelled to be a ‘witness’ against himself.” *Doe v. United States*, 487 U.S. 201, 210 (1988).

In *United States v. Patane*, 542 U.S. 630 (2004), the Supreme Court held that failure to give a suspect *Miranda* warnings did not require suppression of a gun found as fruit of the suspect’s voluntary statement. Police suspected Patane, a convicted felon, of violating a temporary restraining order and, while investigating that violation, learned that Patane, a prohibited possessor, had a pistol. Two officers arrested Patane at his residence. They attempted to advise Patane of his *Miranda* rights but he interrupted them, saying that he knew his rights. Neither officer attempted to complete the warning. They then questioned Patane about the pistol. Patane admitted he had a pistol, told the officer where it was, and gave him permission to get the gun. The officer found and seized the gun, and Patane was charged with being a convicted felon in possession of a firearm.

Despite the lack of *Miranda* warning, the United States Supreme Court held that the gun did not have to be suppressed because Patane’s statements to police were voluntary. Both the Self-Incrimination Clause of the Fifth Amendment and the *Miranda* rule focus on the criminal trial. The Court stated that the Self-Incrimination Clause “is not implicated by the admission into evidence of the physical fruit of a voluntary

statement. ... The *Miranda* rule is not a code of police conduct, and police do not violate the Constitution (or even the *Miranda* rule, for that matter) by mere failures to warn. For this reason, the exclusionary rule articulated in cases such as *Wong Sun [v. United States]*, 317 U.S. 471 (1963) does not apply.” *Patane*, 542 U.S. at 637. The Court noted that its decisions have consistently insisted that the “closest possible fit be maintained between the Self-Incrimination Clause and any rule designed to protect it.” *Id.* at 641. “Our cases also make clear the related point that a mere failure to give *Miranda* warnings does not, by itself, violate a suspect’s constitutional rights or even the *Miranda* rule.” *Id.* The Court concluded:

It follows that police do not violate a suspect’s constitutional rights (or the *Miranda* rule) by negligent or even deliberate failures to provide the suspect with the full panoply of warnings prescribed by *Miranda*. Potential violations occur, if at all, only upon the admission of unwarned statements into evidence at trial. And, at that point, the exclusion of unwarned statements is a complete and sufficient remedy for any perceived *Miranda* violation.

Id. [internal citations, quotation marks, brackets, and ellipsis omitted]. Of course, any physical evidence obtained as a fruit of *involuntary*, coerced statements is still inadmissible.

Thus, *Miranda* does not protect a defendant from providing the police with nontestimonial evidence, such as blood samples, fingerprints, handwriting exemplars, and the like. In *State v. Lee*, 184 Ariz. 230, 233, 908 P.2d 44, 47 (App. 1995), the Court of Appeals held that because field sobriety tests are nontestimonial in nature, police need not give a suspect any *Miranda* warnings before asking him to perform such tests. Physical evidence is also nontestimonial. *Schmerber v. California*, 384 U.S. 757 (1966); *State v. Moorman*, 154 Ariz. 578, 585, 744 P.2d 679, 686 (1987). In *Pennsylvania v. Muniz*, 496 U.S. 582, 592 (1990), the Court held that the fact that the defendant was

slurring his speech and showing signs of lack of coordination was not “testimonial.” In *State v. Spreitz*, 190 Ariz. 129, 144, 945 P.2d 1260, 1275 (1997), officers who made a *Terry* stop observed that the defendant was smeared with blood. The Arizona Supreme Court held that, even if the defendant had been in custody, “This is nontestimonial evidence the officers observed in plain view. Such evidence would have been admissible even if defendant had been in custody and had not been given his *Miranda* warning.”

See also *Hiibel v. Sixth Judicial Dist. Court of Nevada*, 542 U.S. 177 (2004), in which the Court held that principles of *Terry v. Ohio* permit a State to enact a law requiring a person to give an officer his name during a *Terry* stop and making it a crime for a person to refuse to do so. Although the Court did not find it necessary to reach the issue of whether a person’s name is “nontestimonial” under the Fifth Amendment, *id.* at 189, the Court noted that the Fifth Amendment “prohibits only compelled testimony that is incriminating.” *Id.* “Answering a request to disclose a name is likely to be so insignificant in the scheme of things as to be incriminating only in unusual circumstances.” *Id.* at 191.