APPENDIX A

**125SCT890, 160 LED2D 825, 543 US 1081 Florida v Franklin**

No. 04-568.

**Florida, Petitioner**
***vs.***
**Myron Franklin.**

**543 US 1081, 160 L Ed 2d 825, 125 S Ct 890, 2005 US LEXIS 289.**

**January 10, 2005.**

Motion of respondent for leave to proceed in forma pauperis granted. Petition for writ of certiorari to the District Court of Appeal of Florida, Fourth District, denied.

See same case below, 876 So 2d 607.

**125SCT895, 160 LED2D 825, 543 US 1081 RUI One Corp. v City of Berkeley**

No. 04-582.

**RUI One Corporation, Petitioner**
***vs.***
**City of Berkeley, California, et al.**

**543 US 1081, 160 L Ed 2d 825, 125 S Ct 895, 2005 US LEXIS 290.**

**January 10, 2005.**

Motion of Washington Legal Foundation for leave to file a brief as amicus curiae granted. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

See same case below, 371 F.3d 1137.

APPENDIX B

**STATE OF FLORIDA, Petitioner(s) vs. NNEKA WEST, Respondent(s); STATE OF FLORIDA, Petitioner(s) vs. TONNY PRESIDENT, Respondent(s); STATE OF FLORIDA, Petitioner(s) vs. GORMAN ROBERTS, JR., Respondent(s)**
**SUPREME COURT OF FLORIDA**
**892 So. 2d 1014; 2005 Fla. LEXIS 4**
**CASE NO.: SC04-1543, CASE NO.: SC04-1550, CASE NO.: SC04-1552**
**January 5, 2005, Decided**

**Notice:**

**DECISION WITHOUT PUBLISHED OPINION**

**Editorial Information: Prior History**

Lower Tribunal No.: 4D03-2027, Lower Tribunal No.: 4D02-3858, Lower Tribunal No.: 4D02-4490. President v. State, 884 So. 2d 126, 2004 Fla. App. LEXIS 9930 (Fla. Dist. Ct. App. 4th Dist., 2004)West v. State, 876 So. 2d 614, 2004 Fla. App. LEXIS 8362 (Fla. Dist. Ct. App. 4th Dist., 2004)

**Judges:** Case Nos. SC04-1543 and SC04-1550: WELLS, ANSTEAD, LEWIS, CANTERO and BELL, JJ., concur. Case No. SC04-1552: ANSTEAD, LEWIS, CANTERO and BELL, JJ., concur. WELLS, J., dissents as to Motion for Attorneys Fees, but otherwise concurs.

**Opinion**

These causes having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the petitions for review are denied.

No motions for rehearing will be entertained by the Court. *See* Fla. R. App. P. 9.330(d).

*As to Case Nos. SC04-1543 and SC04-1550:*

WELLS, ANSTEAD, LEWIS, CANTERO and BELL, JJ., concur.

*As to Case No. SC04-1552:*

ANSTEAD, LEWIS, CANTERO and BELL, JJ., concur. WELLS, J., dissents.

Respondent Gorman Roberts, Jr.'s Motion for Attorneys Fees filed in Case No. SC04-1552 is hereby denied.

WELLS, ANSTEAD, LEWIS, CANTERO and BELL, JJ., concur.

APPENDIX C

**TONNY PRESIDENT, Appellant, v. STATE OF FLORIDA, Appellee.**
**COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT**
**884 So. 2d 126; 2004 Fla. App. LEXIS 9930; 29 Fla. L. Weekly D 1598**
**CASE NO. 4D02-3858**
**July 7, 2004, Opinion Filed**

**Editorial Information: Subsequent History**

Released for Publication November 10, 2004. Review denied by, Sub nomine at State v. West, 892 So. 2d 1014, 2005 Fla. LEXIS 4 (Fla., 2005)

**Editorial Information: Prior History**

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; James I. Cohn, Judge; L.T. Case No. 02-4769 CF10B.

**Disposition:**
REVERSED.

**Counsel** Lewis A. Fishman of Lewis A. Fishman, P.A., Plantation, for appellant. Charles J. Crist, Jr., Attorney General, Tallahassee, and Linda Harrison, Assistant Attorney General, West Palm Beach, for appellee.

**Judges:** WARNER, KLEIN and HAZOURI, JJ., concur.

**CASE SUMMARY**

**PROCEDURAL POSTURE:** Defendant appealed the judgment of the Circuit Court for the Seventeenth Judicial Circuit, Broward County (Florida), which convicted him of three counts of robbery with a firearm.Where defendant was not specifically advised of his right to counsel during interrogation, a trial court should have suppressed a taped statement in which he confessed to a robbery because the Miranda warnings were legally insufficient.

**OVERVIEW:** Defendant was advised of his Miranda rights by a detective, who used a preprinted form from the sheriff's office. Defendant contended that the Miranda warnings administered to him did not properly advise him of his right to have counsel present during interrogation. Defendant also claimed that the trial court should have suppressed a taped statement in which he confessed to the robbery. On appeal, the court held that defendant's taped statement should have been suppressed. Although the warnings informed defendant that he had a right to talk to a lawyer before questioning, he was not specifically advised that he could ask to speak to a lawyer during questioning. Because the State could not prove beyond a reasonable doubt that the error did not contribute to the verdict, the error was not harmless. In addition, the State failed to produce evidence that defendant was aware of the right to counsel during interrogation and knowingly waived it. Therefore, the trial court should have suppressed defendant's taped statement because the Miranda warnings were legally insufficient.

**OUTCOME:** The court reversed the judgment of the trial court and remanded the cause for a new trial.

**LexisNexis Headnotes**

***Criminal Law & Procedure > Interrogation > Miranda Rights > Right to Counsel During Questioning***
***Criminal Law & Procedure > Interrogation > General Overview***
***Criminal Law & Procedure > Interrogation > Miranda Rights > General Overview***
***Criminal Law & Procedure > Interrogation > Miranda Rights > Notice & Warning***
***Criminal Law & Procedure > Counsel > Right to Counsel > General Overview***

A Miranda warning which fails to advise the suspect of the right to counsel during interrogation is inadequate.

***Criminal Law & Procedure > Appeals > Standards of Review > Harmless & Invited Errors > General Overview***
***Criminal Law & Procedure > Appeals > Standards of Review > Harmless & Invited Errors > Definitions***

Harmless error exists where the state can prove beyond a reasonable doubt that the error did not contribute to the verdict.

**Opinion**

**{884 So. 2d 126}** PER CURIAM.

Tonny President was convicted by jury of three counts of robbery with a firearm. He appeals the conviction on the basis that the trial court should have suppressed his taped statement in which he confessed to the robbery. President contends that the *Miranda* 1 warnings administered to him did not properly advise him of his right to have counsel present during interrogation. We hold that the *Miranda* warnings were legally insufficient and therefore reverse for a new trial.

President was advised of his rights under *Miranda* by Detective Sudman of the Broward County Sheriff's Office (BSO). Detective Sudman utilized the **{884 So. 2d 127}** preprinted form that the BSO provides to its officers. The form states as follows:

> You have the right to remain silent. Anything you say can be used against you in a court of law. You have the right to talk to a lawyer and have the lawyer present before any questioning. If you cannot afford a lawyer, one will be appointed to represent you, before any questioning, if you wish.

Although the warnings informed President that he had a right to talk to a lawyer before questioning, President was not specifically advised that he could ask to speak to a lawyer during questioning. We have recently addressed this same issue and held that a *Miranda* warning which fails to advise the suspect of the right to counsel during interrogation is inadequate. *See West v. State*, 876 So. 2d 614, 2004 Fla. App. LEXIS 8362, 2004 WL 1335766 (Fla. 4th DCA June 16, 2004); *Franklin v. State*, 876 So. 2d 607, 2004 Fla. App. LEXIS 8361, 2004 WL 1335753 (Fla. 4th DCA June 16, 2004); *Roberts v. State*, 874 So. 2d 1225, 2004 Fla. App. LEXIS 7497, 29 Fla. L. Weekly D1265 (Fla. 4th DCA May 26, 2004). In addition, the State has failed to produce evidence that President was aware of this right and knowingly waived it. Therefore, President's taped statement should have been suppressed.

We are unable to conclude that this error was harmless beyond a reasonable doubt. Harmless error exists where the state can prove beyond a reasonable doubt that the error did not contribute to the

verdict. *See State v. DiGuilio*, 491 So. 2d 1129, 1135 (Fla. 1986). Therefore, we reverse President's conviction and sentence and remand for a new trial.

REVERSED.

WARNER, KLEIN and HAZOURI, JJ., concur.

**Footnotes**

1

*Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966).

APPENDIX D

**NNEKA WEST, Appellant, v. STATE OF FLORIDA, Appellee.**
**COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT**
**876 So. 2d 614; 2004 Fla. App. LEXIS 8362; 29 Fla. L. Weekly D 1444**
**CASE NO. 4D03-2027**
**June 16, 2004, Opinion Filed**

**Editorial Information: Subsequent History**

Rehearing denied by West v. State, 2004 Fla. App. LEXIS 11878 (Fla. Dist. Ct. App. 4th Dist., July 30, 2004)Review denied by State v. West, 892 So. 2d 1014, 2005 Fla. LEXIS 4 (Fla., 2005)

**Editorial Information: Prior History**

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Paul L. Backman, Judge; L.T. Case No. 01-4118 CF10A.

**Disposition:**
Reversed.

**Counsel** Carey Haughwout, Public Defender, and Joseph R. Chloupek, Assistant Public Defender, West Palm Beach, for appellant.
Charles J. Crist, Jr., Attorney General, Tallahassee, and Sue-Ellen Kenny, Assistant Attorney General, West Palm Beach, for appellee.

**Judges:** KLEIN, J. WARNER, J., concurs. GROSS, J., concurs specially with opinion.

**CASE SUMMARY**

**PROCEDURAL POSTURE:** After her motion to suppress her confession was denied, the Circuit Court for the Seventeenth Judicial Circuit, Broward County (Florida), convicted defendant of first degree murder. Defendant appealed.Defendant's confession should have been suppressed because defendant was not informed that she was entitled to have counsel present during interrogation or that she could stop the interrogation at any time.

**OVERVIEW:** Upon being arrested and after being read what was purported to be a Miranda warning, defendant admitted her involvement in a plan resulting in the victim's murder. At a hearing on her motion to suppress, a detective testified that he read defendant her rights from a standard Miranda form. He did not inform her that she was entitled to have counsel present during questioning or that she could stop the interrogation at any time during questioning. At the hearing on the motion to suppress, the evidence centered on whether defendant, who was mildly retarded, was of sufficient intelligence to waive her rights. Without addressing the facial inadequacy of the warning, the trial court denied the motion to suppress, finding that defendant understood her rights and knowingly and intelligently waived them. The appellate court held that defendant's confession should have been suppressed because defendant was not informed that she was entitled to have counsel present during interrogation or that she could stop the interrogation at any time. Nor did the State produce evidence that defendant knew that and knowingly waived those rights.

**OUTCOME:** The judgment of the trial court was reversed for a new trial.

**LexisNexis Headnotes**

***Criminal Law & Procedure > Interrogation > Miranda Rights > Right to Counsel During Questioning***
***Criminal Law & Procedure > Counsel > Right to Counsel > General Overview***

An individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation.

***Criminal Law & Procedure > Interrogation > Miranda Rights > Right to Counsel During Questioning***
***Criminal Law & Procedure > Interrogation > General Overview***
***Criminal Law & Procedure > Interrogation > Miranda Rights > General Overview***
***Criminal Law & Procedure > Interrogation > Miranda Rights > Self-Incrimination Privilege***
***Criminal Law & Procedure > Counsel > Right to Counsel > General Overview***

With specific reference to the failure to advise a defendant of the right to have a lawyer present during interrogation, as with the warnings of the right to remain silent and that anything stated can be used in evidence against him, this warning is an absolute prerequisite to interrogation. No amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead. Only through such a warning is there ascertainable assurance that the accused was aware of this right

***Criminal Law & Procedure > Interrogation > Miranda Rights > Right to Counsel During Questioning***
***Criminal Law & Procedure > Interrogation > General Overview***
***Criminal Law & Procedure > Interrogation > Miranda Rights > General Overview***
***Criminal Law & Procedure > Interrogation > Miranda Rights > Notice & Warning***
***Criminal Law & Procedure > Counsel > Right to Counsel > General Overview***

There is authority supporting the view that a Miranda warning which fails to advise of the right to counsel during interrogation makes a confession inadmissible as a matter of law.

***Criminal Law & Procedure > Interrogation > Miranda Rights > Notice & Warning***
***Evidence > Privileges > Self-Incrimination Privilege > General Overview***

With reference to a situation in which no Miranda warning was given, the Fifth Amendment privilege is so fundamental to the system of justice and the expedience of giving an adequate warning, so simple, that a court will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given.

**Opinion**

**Opinion by:** KLEIN

**Opinion**

{876 So. 2d 615} KLEIN, J.

Appellant was convicted of first degree murder and contends that the trial court should have suppressed her confession because her *Miranda* warnings were inadequate. We reverse.

In March, 2001, appellant was arrested, and after being read what purported to be a *Miranda* warning, admitted her involvement in a plan which resulted in the victim being murdered. At a hearing on her motion to suppress, a detective testified that he read appellant her rights from a standard Broward County Sheriff's Office *Miranda* form. He did not inform appellant that she was entitled to have counsel present during questioning or that she could stop the interrogation at any time during questioning. The detective explained:

> I told her, you have the right to remain silent, that anything that you say can be used against you in a court of law. You have the right to talk to a lawyer and have a lawyer present before any questioning and if you cannot afford a lawyer, one will be appointed to represent you or for any questions if you wish. And I asked her, do you understand the rights that we just read and that is where she initialed, yes.
>
> Q. That word yes, sir, is that your handwriting or Ms. West's handwriting?
>
> A. No, that's Nneka's, that's Ms. West's handwriting.
>
> Q. After that at the end of the rights waiver it says, I see where it says Nneka West. Who put Nneka West's name in?
>
> A. Ms. West.
>
> Q. Could you make out what it says after that?
>
> A. It says, I, the person you're meeting with, and Ms. West had printed her name, have read this statement of my rights or had it read to me and I understand what my rights are. With theses [sic] rights in mind, I am willing to answer questions without a lawyer present. This waiver of rights is signed of my own free will without any threats or promises having been made to me.As to the first ground of appellant's motion to suppress, that she was not advised of her right to have an attorney present during questioning, *Miranda v. Arizona*, 384 U.S. 436, 471-72, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966), held:

> [A]n individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation. . . . [emphasis supplied].With specific reference to the failure to advise a defendant of the right to have a lawyer present during interrogation, the *Miranda* court further stated:

> As with the warnings of the right to remain silent and that anything stated can be used in evidence against him, this warning is an absolute prerequisite to interrogation. No amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead. Only through such a warning is there ascertainable assurance that the accused was aware of this right. *Id.* at 471.

There is authority supporting the view that a *Miranda* warning which fails to advise of the right to counsel during interrogation makes a confession inadmissible as a matter of law. *United States v. Bland*, 908 F.2d 471 (9th Cir. 1990); *United States v. Oliver*, 505 F.2d 301 (7th Cir. 1974); *Chambers v. United States*, 391 F.2d 455 (5th Cir. 1968). *See also*, *Thompson* **{876 So. 2d 616}** *v. State*, 595 So. 2d 16, 17 (Fla. 1992) (appears to hold that the failure to advise defendant that if he could not afford an attorney the state would provide one at no cost rendered confession inadmissible as a

matter of law).

In *Miranda*, with reference to a situation in which no warning was given, the Court stated:

> The Fifth Amendment privilege is so fundamental to our system . . . and the expedient of giving an adequate warning . . . so simple, [that] we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given.*Id.* at 468.

At the hearing on the motion to suppress, in which the state had the burden of proving by a preponderance of the evidence that appellant waived her rights, *Ramirez v. State*, 739 So. 2d 568 (Fla. 1999), the evidence centered on whether appellant was of sufficient intelligence to waive her rights. Appellant, who had never before been arrested, scored sixty-one on an IQ test, indicating that she was mildly retarded. Whether she had the intellectual capacity to intelligently waive her rights was disputed by experts. Without addressing the facial inadequacy of the warning, the trial court denied the motion to suppress, finding that under the totality of the circumstances appellant understood her rights and knowingly and intelligently waived them.

The problem with the trial court's finding is that it overlooks that appellant was not informed that she was entitled to have counsel present during interrogation or that she could stop the interrogation at any time. Nor did the state produce evidence that appellant knew this and knowingly waived these rights. Her confession should accordingly have been suppressed.

We therefore reverse for a new trial.

WARNER, J., concurs.

GROSS, J., concurs specially with opinion.

**Concur**

**Concur by:** GROSS

GROSS, J., concurring specially.

My reading of the case law is that the law is flexible in the form that Miranda warnings are given, but rigid as to their required content.

It is unusual that a problem concerning the content of Miranda warnings has arisen in this day and age. Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966), was decided thirty-eight years ago. A recent Westlaw search revealed that Miranda has been cited 42,046 times. Declining the invitation to overrule Miranda, the United States Supreme Court wrote that "Miranda has become embedded in routine police practice to the point where the warnings have become part of our national culture." Dickerson v. United States, 530 U.S. 428, 444, 147 L. Ed. 2d 405, 120 S. Ct. 2326 (2000).

Most law enforcement agencies comply with Miranda without incident, since Miranda has not proved to be a roadblock to effective law enforcement. A recent article concludes that "[t]here is no good evidence that Miranda has substantially depressed confession rates or imposed significant costs on the American criminal justice system." George C. Thomas III & Richard A. Leo, *The Effects of* Miranda v. Arizona: *"Embedded" in Our National Culture?* 29 CRIME & JUST. 203 (2002).

The consensus of the first generation (1966-73) of empirical scholarship on the effect of Miranda, "was that the Miranda rules had only a marginal effect on the {876 So. 2d 617} ability of the police to elicit confessions and on the ability of prosecutors to win convictions, despite the fact that some detectives continued to perceive a substantial Miranda impact." Id. at 238.

Beginning in 1996, the second generation of Miranda studies "have generated considerable interpretive disagreement, debate, and commentary." Id. at 239. Thomas and Leo observed that

there appears to be relatively little dispute among second-generation researchers on several aspects of Miranda's real-world effects. First, police appear to issue and document Miranda warnings in virtually all cases. Second, police appear to have successfully "adapted" to the Miranda requirements. In practice, this means that police have developed strategies that are intended to induce Miranda waivers. Third, police appear to elicit waivers from suspects in 78-96 percent of their interrogations, though suspects with criminal records appear disproportionately likely to invoke their rights and terminate interrogation. Fourth, in some jurisdictions police are systematically trained to violate Miranda by questioning "outside Miranda" - - that is, by continuing to question suspects who have invoked the right to counsel or the right to remain silent. Finally, some researchers have argued that Miranda eradicated the last vestiges of third-degree interrogation present in the mid-1960s, increased the level of professionalism among interrogators, and raised public awareness of constitutional rights. Id. at 244-45 (internal citations omitted). The article concludes that "what the first-generation researchers suggested of their era may be true of ours: Miranda's impact in practice may be virtually negligible." Id. at 245.

The requirement of Miranda for the warning at issue in this case is not open to the wiggle room of creative interpretation.

As Judge Klein writes in the majority opinion, Miranda explicitly holds that as "an *absolute prerequisite* to interrogation," a suspect in custody "*must* be *clearly* informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation." 384 U.S. at 471 (emphasis added). Similar to the warning on the right to remain silent, the Supreme Court chose the requirement of a specific warning on the right to counsel as a "clearcut fact," to avoid "assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, [which] can never be more than speculation." Id. at 468-69, 471-72.

In California v. Prysock, 453 U.S. 355, 360, 69 L. Ed. 2d 696, 101 S. Ct. 2806 (1981), the Supreme Court held that the Miranda warnings need not be a "talismanic incantation" from the case, so long as the rights are adequately conveyed. The Court noted that it had "never indicated that the 'rigidity' of Miranda extends to the precise formulation of the warnings given a criminal defendant." Id. at 359. The Court emphasized that the police had "fully conveyed" to the defendant "his rights as required by Miranda." Id. at 361. The Court observed that Prysock did not involve the right at issue in this case. Id. ("This is not a case in which the defendant was not informed of his right to the presence of an attorney during questioning . . . .").

Most federal courts of appeals "have recognized the importance of informing suspects that they have the right to have a lawyer present prior to and during interrogation." Brown v. Crosby, 249 F. Supp. 2d 1285, 1306 (S.D. Fla. 2003) (cases cited); see {876 So. 2d 618} also United States v. Noti, 731 F.2d 610, 614-15 (9th Cir. 1984); Martin J. McMahon, Annotation, *Necessity that Miranda Warnings Include Express Reference to Right to Have Attorney Present During Interrogation,* 77 A.L.R. FED. 123, 131-35 (1986).

A few courts have held that when omitted from Miranda warnings, the right to a lawyer "during interrogation" may be inferred. See People v. Valdivia, 180 Cal. App. 3d 657, 226 Cal.Rptr. 144, 148 (Cal. Ct. App. 1986); State v. Butzin, 404 N.W.2d 819, 825 (Minn. Ct. App. 1987). These cases appear to contravene Miranda's language that the right be explicitly given and that "no amount of circumstantial evidence that a person may have been aware of this right will suffice to stand in its stead." Miranda, 384 U.S. at 471-72.

Nothing in any Supreme Court opinion suggests that it has relaxed the rigidity of Miranda regarding the *content* of the required warnings. At least three justices have expressed their concern about a Miranda warning identical to the one in this case, also arising from Broward County. In a statement accompanying a denial of a petition for writ of certiorari, Justice Breyer wrote:

Although this Court has declined to demand "rigidity in the *form* of the required warnings," *California v. Prysock*, 453 U.S. 355, 359, 101 S. Ct. 2806, 69 L. Ed. 2d 696 (1981) (*per curiam*), the warnings given here say nothing about the lawyer's presence during interrogation. For that reason, they apparently leave out an essential *Miranda* element. 384 U.S., at 470, 86 S. Ct. 1602.

Because this Court may deny certiorari for many reasons, our denial expresses no view about the merits of petitioner's claim. And because the police apparently read the warnings from a standard-issue card, I write to make this point explicit. That is to say, if the problem purportedly present here proves to be a recurring one, I believe that it may well warrant this Court's attention. Bridgers v. Texas, 532 U.S. 1034, 149 L. Ed. 2d 779, 121 S. Ct. 1995 (2001).

APPENDIX E

**STATE OF FLORIDA, Appellant, v. AIMEE LEE WEISS, Appellee.**
**COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT**
**935 So. 2d 110; 2006 Fla. App. LEXIS 13239; 31 Fla. L. Weekly D 2115**
**No. 4D04-3002**
**August 9, 2006, Decided**

**Editorial Information: Prior History**

Appeal of a non-final order from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Sheldon M. Schapiro, Judge; L.T. Case No. 01-6917 CF 10 A.

**Disposition:**

Affirmed.

**Counsel** Charles J. Crist, Jr., Attorney General, Tallahassee, and Jeanine M. Germanowicz, Assistant Attorney General, West Palm Beach, for appellant.

Ellis S. Rubin of the Law Offices of Ellis Rubin andRobert I. Barrar, Miami, for appellee.

**Judges:** TAYLOR, J. STEVENSON, C.J., and GUNTHER, J., concur.

**CASE SUMMARY**

**PROCEDURAL POSTURE:** Defendant was charged with murder in the first degree by indictment in the Circuit Court for the Seventeenth Judicial Circuit (Florida). While the trial court initially denied defendant's motion to suppress admissions and statements, the trial court granted defendant's renewed motion to suppress statements and vacated its previous order. The State of Florida appealed the suppression of the defendant's statements.Suppression of statements defendant made during questioning at a police station was affirmed as defendant was in custody at the time of the questioning and, thus, entitled to Miranda warnings. However, the Miranda warnings that were given her were inadequate as they did not advise her of the right to have an attorney present during the questioning.

**OVERVIEW:** Defendant, a teenager, was approached in the early morning hours by four plainclothes officers wearing badges and sidearms and was asked to accompany them to a police station for questioning about a baby case. Defendant was never told that she could refuse to accompany them to the station or that once she had arrived, she could leave; nor was there evidence that she had the means to leave if she so desired. Further, there was credible testimony that once defendant reached the station, a detective told her he believed she had delivered and disposed of a baby that was found. Defendant was then taken to an interview room, where she was read her Miranda rights and questioned for three hours. On appeal, the court found that defendant was in custody for Miranda purposes during the questioning. Further, she was given Miranda warnings from a form that advised of the right to have an attorney present before questioning, but did not include advisement of the right to have an attorney present during questioning. Thus, defendant was not properly advised of her Miranda rights. Accordingly, the trial court properly granted defendant's motion to suppress statements made during the questioning.

**OUTCOME:** The judgment was affirmed.

**LexisNexis Headnotes**

***Criminal Law & Procedure > Interrogation > Miranda Rights > Right to Counsel During Questioning***

Miranda warnings that do not include advisement of the right to have an attorney present during questioning are inadequate to fully inform a defendant of his constitutional rights.

***Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence***
***Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review > Motions to Suppress***
***Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence***

A trial court's ruling on a motion to suppress is presumed correct. In reviewing a ruling on such a motion, an appellate court will interpret the evidence and reasonable inferences and deductions drawn from the evidence in a manner most favorable to sustaining the trial court ruling. The standard of review applied to orders denying a motion to suppress is mixed: the court's factual findings are accorded deference and will be upheld if supported by competent, substantial evidence; legal conclusions, however, are reviewed de novo.

***Criminal Law & Procedure > Interrogation > Miranda Rights > Custodial Interrogation***

The safeguards provided by Miranda apply only if an individual is in custody and is subject to interrogation. Courts have defined custody in various ways. Simply put, the test is whether, from an objective point of view, an individual would believe he or she is free to end the encounter with law enforcement. A court must consider how a reasonable person would react given the totality of the circumstances of the situation.

***Criminal Law & Procedure > Interrogation > Miranda Rights > Custodial Interrogation***

Not every encounter between a citizen and police is custodial. By its very nature, any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. Nevertheless, it is only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may a court conclude that a seizure has occurred.

***Criminal Law & Procedure > Interrogation > Miranda Rights > Custodial Interrogation***

The Court of Appeal of Florida, Fourth District, has employed a four-factor test for determining whether a suspect is in custody: (1) the manner in which the police summon the suspect for questioning; (2) the purpose, place, and manner of the interrogation; (3) the extent to which the suspect is confronted with evidence of his guilt; and (4) whether the suspect is informed that he or she is free to leave.

***Criminal Law & Procedure > Interrogation > Miranda Rights > Custodial Interrogation***

The Florida Supreme Court has held that the question of whether a suspect is in custody is one of mixed fact and law.

***Criminal Law & Procedure > Interrogation > Miranda Rights > Custodial Interrogation***

Two discrete inquiries are essential to the determination of whether a defendant was in custody for Miranda purposes: first, what were the circumstances surrounding the interrogation; and second, given

those circumstances would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. The first inquiry is distinctly factual. State-court findings on these scene-and action-setting questions attract a presumption of correctness [under federal statutory law. The second inquiry, however, calls for application of the controlling legal standard to the historical facts. This ultimate determination presents a mixed question of law and fact qualifying for independent review.

***Criminal Law & Procedure > Interrogation > Miranda Rights > Custodial Interrogation***

Simply holding an interrogation at a police station does not, by itself, turn an otherwise noncustodial interrogation into a custodial one. The location of the interrogation is simply one factor.

**Opinion**

**Opinion by:** TAYLOR

**Opinion**

**{935 So. 2d 112}** TAYLOR, J.

The State of Florida appeals the trial court's order granting the defendant's motion to suppress admissions and statements. We affirm, concluding that the trial court correctly determined that the defendant was in custody and, thus, entitled to *Miranda* warnings. As the state concedes, the warnings were inadequate under *Roberts v. State*, 874 So. 2d 1225 (Fla. 4th DCA2004), *rev. denied sub nom. State v. West*, 892 So. 2d 1014 (Fla. 2005).

Following hearings held on the defendant's motion to suppress over a period of several months, the trial court issued a written order on February 24, 2003, summarizing the testimony at the hearings and making the following findings:

> A. FINDING THE INFANT'S BODY: On April 3, 2001 the body of a dead infant was found in a canal near the defendant's home. The body was wrapped in plastic bags, with a pair of panties wrapped around its neck. There were ligature marks on the baby's neck. The body was found inside a backpack along with a ten pound weight. According to a witness, the backpack had been placed in the canal by a white female who fit the description of the defendant. The witness described the girl with a wet backpack as being up to her knees in the canal water. The name Julie Gardner was contained on the backpack, and the name Matthew Walpole was found on a towel inside the backpack. A book was also found at the canal bank, which belonged to one of the defendant's friends.
>
> B. FINDINGS OF MEDICAL EXAMINER: On April 4th, 2001, an autopsy was conducted by the medical examiner's office, which revealed a full term baby boy with no evidence that the baby died of drowning. The ligature marks on the baby's neck was consistent with asphyxia. The medical examiner testified that prior to the defendant giving her taped statement, that no expert opinion could be rendered as to whether or not the child was born alive. In the defendant's subsequent statement, she stated that when she cut the umbilical cord that blood squirted out. She further stated that the color of the baby was pinkish. The medical examiner found that the death was consistent with homicide.
>
> C. The Broward Sheriff's Detectives canvassed the area where the baby was found for a white

female fitting the description described by the witness. This investigation led to an interview of the defendant's father, who stated that he had two daughters. The detectives interviewed the defendant, who stated that she had not been pregnant. On April 6, 2001, Detectives of the Broward Sheriff's Office obtained a statement of the defendant's friend, Julie Gardner, who identified the backpack as belonging to her, and who stated that she had loaned the backpack to the Defendant previous to April 3, 2001. A statement was also obtained from Matthew Walpole, who acknowledged that he was the defendant's boyfriend. He acknowledged that the defendant had been pregnant, and stated that the defendant had {935 So. 2d 113} been taking drugs and alcohol in an attempt to abort the baby. Mr. Walpole told the police that the defendant was spending the night at the Welch residence.

D. On April 7, 2001, detectives obtained a search warrant for the defendant's home. Detective Bukata testified that he told the defendant's father that defendant was at the Public Safety Building being questioned about the dead infant. The defendant's father signed a "consent to search" form to search the residence. Weights were found in the home, which were similar to the weight found in the backpack. Similar panties were found at the residence, which matched the panties wrapped around the baby's neck.

Earlier on the same date, at around 7:00 - 7:30 A.M., Four Detectives went to the home of Mr. and Mrs. Welsh [sic], where the defendant and her sister were sleeping with Jennifer Welsh. The detectives asked the Defendant and her sister to "accompany" them to the Broward Sheriff's Office for questioning about the "baby case". The defendant was not told that she had a right to refuse to go with the detectives. The detectives transported the defendant and her sister to the Broward Sheriff's Office for questioning. The defendant was told that her father would be notified of her whereabouts.

E. DEFENDANT AT THE BROWARD SHERIFF'S OFFICE: There is a conflict in the witnesses' testimony, as to whether the defendant requested the presence of her father at the Broward Sheriff's Office prior to her interrogation. In her taped statement the defendant recounts that her father was contacted before the tape went on, and that she elected to give the statement before consulting with him. The defendant's sister remained in a waiting room, and the defendant was taken to a conference room where Detective Reed [sic] and Murray interviewed her. The detectives testified that the defendant had been told that her father had been contacted, but she stated she did not want him present during the interview. The defendant was told by the detectives that they knew she had a baby and that they wanted to talk to her about it. Coffee and Donuts were brought in. The defendant at this point had not been given her Miranda Rights, she was not told that she was free to leave; or that she did not have to talk to the detectives. She was advised that she was not under arrest.

The interview of the defendant lasted approximately three hours. Prior to the interview the detectives contacted the medical examiner, who instructed the detectives to find out if there was blood coming from the baby's umbilical cord subsequent to his birth, and to find out the color of the baby's skin at birth. The taped statement of the defendant started at 12:30 P.M. Detective Reed testified that Detective Carmody advised the defendant of her Miranda rights at 9:30 A.M., from a Broward Sheriff's form, which the defendant signed. This form was received into evidence as Exhibit 7. The detectives stated that the defendant never requested an attorney, or to have her father present during the interview. The initial conversation that the defendant had was not recorded. The taped conversation took 39 minutes.

The defendant was shown a picture of the dead baby, and told the detectives that Julie Gardner had given her the backpack. She stated that the baby in the back pack was hers. The defendant

described the delivery of the baby, and stated that the clothes that she was wearing at the time of the statement, **{935 So. 2d 114}** were the same clothes that she had worn at the time of the delivery of the infant. The defendant was in 12th grade, and was a straight "A" student. She admitted that during her pregnancy that she attempted to force a miscarriage, by pushing heavy furniture and having her boyfriend, Matthew Walpole, jump on her stomach. When questioned about the baby, the defendant stated that the baby was not born alive, but stated that the baby was pink and that blood flowed from the umbilical cord. Follow [sic] the delivery, the defendant acknowledge [sic] that she put the baby in a canal on March 26, 2001. Initially, the bag did not sink, so she retrieved the bag from the water and inserted a 10 1b weight. When she came out of the water she was observed by a neighbor.

3. TESTIMONY OF THE DEFENDANT: The defendant testified that she had slept over at Jennifer Welch's house when the detectives arrived and Detective Reed told her to get dressed. One of the four detectives present told her that she was going to go to her house. The defendant was driven to the police headquarters by Sgt. O'Neil, and she was told that her father would meet her there. Sgt. O'Neil asked her if she wanted her father to sit in with her, and she testified that she said yes. She asked if her father was on the way, and she was told yes. The defendant stated that she was never told that she is free to leave.

4. TESTIMONY OF THE DETECTIVES: Detective Carmody testified that he never told the defendant that her father would be present before the questioning. Detective Reed testified that she transported the defendant from the Welsh home and that the defendant was not told that she was going home. Detective Reed testified that Detective Carmody told the defendant that she was going to the police station. The detective testified that she was informed that her father was on the way to the police station. The defendant did not say that she wanted her father present before she was questioned, and she said that she did not want her father present during the questioning.

Detective James Murray testified that four detectives went to the Welch house at the time that the defendant and her sister Kimberly were "picked up". The defendant was told that the detectives need to talk to her, and that she was going to the station. She did not ask about her father, and Deceptive [sic] Murray stated that he did not attempt to call him. The witness testified that there was no indication to the defendant that she was going to be taken to her home, rather than to the police station. Detective Murray did not inform the defendant that her father would be present during any questioning. When Detective Murray executed the search warrant at the Weiss home, he stated that he told Mr. Weiss that his daughter was being questioned at the Public Safety Building, and he said he did not want to be present during questioning.

Detective Brent Illiraza, testified that he was present at the Welsh home when the defendant was taken into custody. She understood that she was not going to her home, but to the police station. The defendant, according to the witness, was never told that her father would be present before any questioning. The detective testified that the defendant was never advised of her right to refuse to come in for questioning.

Detective Glen Bukata testified that he was involved in the search of the Weiss home. He testified that Mr. Weiss said that it was okay for the detectives to question his daughter, and that he chose {935 So. 2d 115} to stay home when he was told that his daughter was at the public safety building.

The defendant was charged by indictment with murder in the first degree for premeditated murder of an "unnamed infant child . . . by asphyxia." Her attorney filed motions to suppress her admissions and statements. After making the above factual findings, the trial court ruled that the defendant was in custody for *Miranda* 1 purposes and that she was subjected to custodial interrogation. In so ruling, the

court found, among other things, that the "pickup" of defendant at the Welsh home in the early morning hours of April 7, 2001 by four detectives of the Broward Sheriff's Office was a "de facto" arrest and a Fourth Amendment "seizure" of the defendant. The court ruled that based on "the totality of the facts and circumstances" known by the detectives at the time of their arrest of the defendant, the detectives had probable cause to arrest her.

The trial court further found that the defendant waived her right to talk to her father before interrogation and that the police did not coerce her into talking. Noting that the defendant was a straight "A" student with a 12th grade education, the trial court ruled that the defendant had knowingly and intelligently waived her rights despite the fact that the *Miranda* form advised her of her right to an attorney "before" questioning but not "during" questioning. The court further ruled that certain statements made by the defendant prior to being read her rights did not render the statements involuntary, given that she renewed them post-*Miranda*.

Thereafter, the defendant filed a renewed motion to suppress, citing our recent decision in *Roberts v. State*, 874 So. 2d 1225, 1226 (Fla. 4th DCA2004). We held there that *Miranda* warnings that did not include advisement of the right to have an attorney present during questioning were inadequate to fully inform the defendant of his constitutional rights. Based on *Roberts*, the trial court granted the defendant's renewed motion to suppress statements and vacated its previous order.

The state appealed the suppression of the defendant's statements. Although it acknowledges in its brief that, under *Roberts*, the *Miranda* warning given to the defendant was defective, it argues that the evidence adduced at the suppression hearings did not support the trial court's ruling that the defendant was in custody such that *Miranda* warnings were required.

A trial court's ruling on a motion to suppress is presumed correct. *State v. J.D.*, 796 So. 2d 1217, 1218 (Fla. 4th DCA2001). In reviewing a ruling on such a motion, we "interpret the evidence and reasonable inferences and deductions drawn from the evidence in a manner most favorable to sustaining the trial court ruling." *Id.*; *see also Connor v. State*, 803 So. 2d 598 (Fla. 2001). The standard of review applied to orders denying a motion to suppress is mixed: the court's factual findings are accorded deference and will be upheld if supported by competent, substantial evidence; legal conclusions, however, are reviewed de novo. *State v. C.F.*, 798 So. 2d 751, 754 (Fla. 4th DCA2001); *see also Harris v. State*, 761 So. 2d 1186, 1187-88 (Fla. 4th DCA2000) (stating that orders denying suppression of evidence are reviewed de novo; factual findings of the lower court are reviewed for competent, substantial evidence, although whether "as a matter of law those facts amount to a reasonable suspicion or probable cause" is determined de novo).

{935 So. 2d 116} It is well-settled that the safeguards provided by *Miranda* apply only if an individual is in custody and is subject to interrogation. *Sapp v. State*, 690 So. 2d 581, 585 (Fla. 1997); *Johnson v. State*, 800 So. 2d 275, 277 (Fla. 1st DCA2001); *Ramsey v. State*, 731 So. 2d 79, 81 (Fla. 3d DCA1999). Courts have defined "custody" in various ways. Simply put, the test is whether, from an objective point of view, the individual would believe he or she is free to end the encounter with law enforcement. *See Roman v. State*, 475 So. 2d 1228, 1231 (Fla. 1985) (explaining, "the ultimate inquiry is simply 'whether there is a "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest'") (citations omitted). The court must consider how a reasonable person would react given the "totality of the circumstances" of the situation. *See State v. Poole*, 730 So. 2d 340, 342 (Fla. 3d DCA1999); *Florida v. Bostick*, 501 U.S. 429, 437, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991).

Not every encounter between a citizen and police is custodial. By its very nature, "[a]ny interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to

be charged with a crime." *Roman*, 475 So. 2d at 1232. Nevertheless, it is "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Bostick*, 501 U.S. at 434 (quoting *Terry v. Ohio*, 392 U.S. 1, 19 n.16, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)).

We have employed a four-factor test for determining whether a suspect is in custody:

> (1) the manner in which the police summon the suspect for questioning; (2) the purpose, place, and manner of the interrogation; (3) the extent to which the suspect is confronted with evidence of his guilt; and (4) whether the suspect is informed that he or she is free to leave. *C.F.*, 798 So. 2d at 754 (quoting *Mansfield v. State*, 758 So. 2d 636, 644 (Fla. 2000)).

To begin our analysis, we note that the Florida Supreme Court has held that the question of whether a suspect is in custody is one of mixed fact and law. *Ramirez v. State*, 739 So. 2d 568, 574 (Fla. 1999). The court delineated the test that reviewing courts must conduct in determining whether a suspect was in custody:

> Two discrete inquiries are essential to the determination [of whether a defendant was "in custody" for *Miranda* purposes]: first, what were the circumstances surrounding the interrogation; and second, given those circumstances would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave . . . . The first inquiry, all agree, is distinctly factual. State-court findings on these scene- and action-setting questions attract a presumption of correctness [under federal statutory law]. The second inquiry, however, calls for application of the controlling legal standard to the historical facts. This ultimate determination, we hold, presents a "mixed question of law and fact" qualifying for independent review. *Connor v. State*, 803 So. 2d 598, 606 (Fla. 2001) (quoting *Thompson v. Keohane*, 516 U.S. 99, 112-15, 116 S. Ct. 457, 133 L. Ed. 2d 383 (1995)).

In conducting the first step - examining the circumstances surrounding the interrogation - we consider the factual findings made by the trial court in its order on the defendant's motion to suppress. In its **{935 So. 2d 117}** findings, the trial court noted that the defendant first spoke with detectives on the night of April 4, 2001, while they were canvassing the area. The defendant next encountered the officers early in the morning on April 7, 2001, when they came to the Welch home. The court found that the officers "asked the Defendant and her sister to 'accompany' them to the Broward Sheriff's Office for questioning about the 'baby case.'" The court also found that the defendant was not told that she could refuse to accompany the officers. The court further found that the defendant was told that her father would be informed of her location.

The court recognized conflict in the testimony of the witnesses regarding whether the defendant specifically requested that her father be present while she was being questioned. The court concluded that "having weighed the credibility of the witnesses and having considered the totality of the circumstances, [it] resolves the conflict in favor of the State's witnesses, and finds that the Defendant's father was notified that his daughter was being questioned by police." The court determined that the defendant did not request to see her father before she was questioned.

The court found that detectives told the defendant that they knew she had delivered a baby. The court further found that the defendant was not given her *Miranda* rights, told she could leave, or informed that she did not have to talk to the officers; however, the court also found that she was specifically advised that she was not under arrest. The court noted that the defendant was interviewed for three hours.

The court found that the detectives advised the defendant of her *Miranda* rights using the Broward Sheriff's Office form. It noted that the detectives stated that the defendant never requested the

presence of an attorney or her father during questioning. During the interview, the defendant admitted that the baby in the backpack was hers, that she had given birth to it, that she believed it to be dead at birth, and that she disposed of it in a nearby canal.

Applying the law to these factual findings - the second step in our two-step inquiry - we next determine whether the defendant was in custody. We are guided by the four-factor test outlined above. Here, after advising the defendant the night before that they would return the next day, four detectives came to the Welches' home around 8 a.m. The girls, thus, should have expected the return of the officers because they were so informed the previous evening.

Sergeant O'Neil testified that he requested the participation of a female officer, Juanita Reid, because of the "sensitive" subject matter of the investigation. After the girls were woken by Mr. Welch, Detective Reid greeted them and gave them time to dress. The defendant and Kim were then asked to return with the detectives to the police station to talk about the "baby case." They were specifically told that their father would be notified of their whereabouts. There is no evidence that the girls were threatened, coerced, or cajoled to accompany the officers. They were not handcuffed nor told that they were under arrest. There is no evidence that the defendant did not voluntarily accompany the officers. *Poole* noted that simply because a person responds to an officer's request without first being told that he or she may decline does not mean that the encounter is not consensual. 730 So. 2d at 342. However, the presence of multiple officers and the fact that they wore side arms may indicate that the girls did not feel free to ignore the officers' request. *See id.* at 342 (circumstances that indicate the seizure of a person **{935 So. 2d 118}** "would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled") (quoting *Mendenhall*, 446 U.S. 544 at 554,100 S. Ct. 1870, 64 L. Ed. 2d 497).

Regarding the second factor in the four-factor test - the location of the questioning - the defendant and her sister were questioned at the Public Safety Building. Our supreme court has noted that simply holding an interrogation at a police station does not, by itself, turn an otherwise noncustodial interrogation into a custodial one. *Roman*, 475 So. 2d at 1231; *Ramsey*, 731 So. 2d at 80. The location of the interrogation is simply one factor. *See Bostick*, 501 U.S. at 437.

The third factor is "the extent to which the suspect is confronted with evidence of his guilt." *C.F.*, 798 So. 2d at 754. In *Ramirez*, the court found that the defendant, a juvenile with only limited contact with the criminal justice system, was in "custody," in part, because he was never told he was free to leave, and the questions directed at him indicated that the officers considered him a suspect. 739 So. 2d at 574. Here, the detectives did not inform the defendant that she was a suspect when they arrived at the Welches' home on the morning of April 7 or during the drive to the Public Safety Building. However, while in the waiting room prior to her interview, Detective Murray told the defendant that he knew that she had given birth and that this was the reason she was there. Arguably, the defendant was "confronted with evidence of her guilt" when Murray told her that he believed she was responsible for the dead baby. Moreover, she likely did not feel free to leave after Murray made this statement.

Finally, we consider whether the defendant was told that she could leave. Here, the officers, the defendant, and her sister all testified that the girls were never expressly told that they were free to refuse the detectives' request to accompany them to the station or that they were free to leave once they arrived. There is no indication on the record that the defendant believed she could refuse the officers' requests, particularly after she was told that they knew she had delivered the baby that was found. *Cf. Ramsey*, 731 So. 2d at 80 (where a suspect voluntarily spoke with detectives on several occasions and voluntarily came to the station, simply because he was not told that he was not free to leave did not mean he was in custody).

Given the totality of the circumstances, we agree with the trial court that the defendant was in custody for *Miranda* purposes. We need not consider the defendant's particular mindset. *See State v. Gilles*, 701 So. 2d 375, 377 (Fla. 3d DCA1997). However, we may consider her youth and lack of exposure to the criminal justice system. *See Ramirez*, 739 So. 2d 568. In sum, the evidence revealed at the suppression hearings shows that the defendant was approached in the early morning hours by four plain-clothes officers wearing badges and sidearms and was asked to accompany them to a police station for questioning about the "baby case. " She was never told that she could refuse to accompany them to the station or that once she had arrived, she could leave; nor is there evidence that she had the means to leave if she so desired. Further, there was credible testimony that once the defendant reached the station, a detective told her he believed she had delivered and disposed of the baby that was found. The defendant was then taken to an interview room, where she was read her *Miranda* rights and questioned for three hours. **{935 So. 2d 119}** *See Raysor v. State*, 795 So. 2d 1071, 1072 (Fla. 4th DCA2001) (holding, once a suspect is read her *Miranda* rights, she may reasonably assume that she is not free to leave).

As the trial court found, the defendant was not properly warned of her right to counsel during police questioning. Rather, she was given warnings identical to those we found inadequate in *Roberts*. 2 Accordingly, we affirm the order granting her motion to suppress statements.

*Affirmed.*

STEVENSON, C.J., and GUNTHER, J., concur.

**Footnotes**

1

*Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

2

We also note that the defendant was not provided the warnings we determined to be sufficient in *Canete v. State*, 921 So. 2d 687 (Fla. 4th DCA2006).

APPENDIX F

**GORMAN ROBERTS, JR., Appellant, v. STATE OF FLORIDA, Appellee.**
**COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT**
**874 So. 2d 1225; 2004 Fla. App. LEXIS 7497; 29 Fla. L. Weekly D 1265**
**CASE NO. 4D02-4490**
**May 26, 2004, Opinion Filed**

**Editorial Information: Subsequent History**

Released for Publication July 2, 2004.Rehearing denied by Roberts v. State, 2004 Fla. App. LEXIS 10699 (Fla. Dist. Ct. App. 4th Dist., July 2, 2004)

**Editorial Information: Prior History**

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Victor Tobin, Judge; L.T. Case No. 02-004214 CF 10 A.

**Disposition:**

REVERSED in part, AFFIRMED in part and REMANDED.

**Counsel** Ellis S. Rubin of the Law Offices of Ellis Rubin and Robert I. Barrar, Miami, for appellant.

Charles J. Crist, Jr., Attorney General, Tallahassee, and Jeanine M. Germanowicz, Assistant Attorney General, West Palm Beach, for appellee.

**Judges:** TAYLOR, J. STONE and KLEIN, JJ., concur.

**CASE SUMMARY**

**PROCEDURAL POSTURE:** Defendant appealed a judgment from the Circuit Court for the Seventeenth Judicial Circuit of Broward County (Florida), which convicted him for manslaughter in the drowning death of a five-year-old boy in a local canal.Where the preprinted Miranda rights form that was read to a mentally challenged 17-year-old did not clearly inform him of his right to counsel during questioning, a videotaped statement should have been suppressed and his conviction was vacated.

**OVERVIEW:** Defendant, a low-IQ 17-year-old, was convicted of manslaughter after a five-year-old boy drowned. Defendant appealed, arguing his post-arrest videotaped statement where he said he might have touched the boy on the forehead when separating children from fighting should have been suppressed because his Miranda warning failed to inform him that he had a right to have an attorney present during questioning. Therefore, he argued, he did not knowingly and intelligently waive his constitutional rights under Miranda. The court agreed and reversed defendant's conviction. The court held that the preprinted form used by the sheriffs' office to inform defendant of his rights did not advise him of his right to have a lawyer during questioning. Moreover, a signed waiver form did not clearly advise defendant of the right to counsel during questioning. Also, the evidence from one of defendant's interviewers while he was in custody indicated he did not understand he had the right to counsel during questioning. Finally. the error was not harmless since the bulk of the other evidence against defendant was provided by two young witnesses whose credibility was sharply contested.

**OUTCOME:** The court reversed defendant's conviction and remanded for a new trial on the issue of whether his videotaped confession should have been suppressed, but the court affirmed the trial court's

rulings on all other issues.

**LexisNexis Headnotes**

***Criminal Law & Procedure > Arrests > Miranda Warnings***
***Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review > General Overview***
***Criminal Law & Procedure > Interrogation > General Overview***
***Criminal Law & Procedure > Interrogation > Miranda Rights > General Overview***

Courts review de novo the adequacy of Miranda warnings, as a question of law.

***Criminal Law & Procedure > Arrests > Miranda Warnings***
***Criminal Law & Procedure > Interrogation > Miranda Rights > Right to Counsel During Questioning***
***Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Self-Incrimination Privilege***
***Criminal Law & Procedure > Interrogation > General Overview***
***Criminal Law & Procedure > Interrogation > Miranda Rights > General Overview***
***Criminal Law & Procedure > Interrogation > Miranda Rights > Self-Incrimination Privilege***
***Criminal Law & Procedure > Counsel > Right to Counsel > General Overview***
***Evidence > Privileges > Self-Incrimination Privilege > General Overview***

In Miranda, the United States Supreme Court said that the right to have counsel present during an interrogation is indispensable to the protection of the Fifth Amendment privilege against self-incrimination. The Court described the right-to-counsel warning which must be given as that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation. As with the other warnings, this warning is an absolute prerequisite to interrogation.

***Criminal Law & Procedure > Arrests > Miranda Warnings***
***Criminal Law & Procedure > Interrogation > Miranda Rights > Notice & Warning***
***Estate, Gift & Trust Law > Wills > Interpretation > General Overview***
***Estate, Gift & Trust Law > Wills > Interpretation > Rules of Construction > General Overview***

Miranda warnings need not be given in the exact form described in Miranda. Reviewing courts need not examine Miranda warnings as if construing a will or defining the terms of an easement. Rather, the inquiry is whether the warning uses equivalent and adequate language that fulfills the substantive requirements of Miranda.

***Criminal Law & Procedure > Arrests > Miranda Warnings***
***Criminal Law & Procedure > Interrogation > Miranda Rights > Right to Counsel During Questioning***
***Criminal Law & Procedure > Interrogation > Miranda Rights > Notice & Warning***
***Criminal Law & Procedure > Interrogation > General Overview***
***Criminal Law & Procedure > Interrogation > Miranda Rights > General Overview***
***Criminal Law & Procedure > Counsel > Right to Counsel > General Overview***

Florida courts have consistently interpreted Miranda as requiring notification that a person in custody has a right to have counsel present not only before interrogation but during interrogation as well.

***Criminal Law & Procedure > Interrogation > Miranda Rights > Voluntary Waiver***
***Criminal Law & Procedure > Interrogation > Miranda Rights > Notice & Warning***

***Criminal Law & Procedure > Counsel > Right to Counsel > General Overview***

No amount of circumstantial evidence that the person may have been aware of the right to counsel during questioning will suffice to stand in its stead. Only through a warning is there ascertainable assurance that the accused was aware of this right.

***Criminal Law & Procedure > Interrogation > Miranda Rights > Notice & Warning***
***Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel***
***Criminal Law & Procedure > Interrogation > Miranda Rights > Voluntary Waiver***
***Criminal Law & Procedure > Counsel > Right to Counsel > General Overview***

Miranda requires a clear, understandable warning from law enforcement officers that conveys all of a defendant's rights. Only through such a warning is there ascertainable assurance that the accused was aware of this right.

**Opinion**

**Opinion by:** TAYLOR

**Opinion**

**{874 So. 2d 1225}** TAYLOR, J.

Gorman Roberts appeals his conviction for manslaughter in the tragic drowning **{874 So. 2d 1226}** death of five-year old Jordan Payne in a local canal. He contends that his post-arrest videotaped statement should have been suppressed, because the *Miranda* 1 warning he received failed to inform him that he had a right to have an attorney present during questioning. As a result, he argues, he did not knowingly and intelligently waive his constitutional rights under *Miranda*. We agree and reverse.

When the police picked up Roberts and told him that he was being charged with Jordan's murder, he was taken to the police station for questioning. At the time Roberts was seventeen years old with an IQ of 67. After an unsuccessful attempt to reach Roberts's guardian by phone, the detective read Roberts his rights from the Broward Sheriff's Office (BSO) rights form. That form reads in pertinent part:

> **MIRANDA WARNING**
>
> BEFORE I ASK YOU ANY QUESTIONS, I WANT TO ADVISE YOU OF YOUR CONSTITUTIONAL RIGHTS.
>
> 1. You have the right to remain silent.
>
> 2. Anything you say can be used against you in a court of law.
>
> 3. You have the right to talk with a lawyer and have a lawyer present before any questioning.
>
> 4. If you cannot afford a lawyer, one will be appointed to represent you before any questioning if you wish.Nowhere does the form advise Roberts of his right to have a lawyer present *during* questioning.

In the videotaped statement that followed, Roberts said that he, Jordan, and two other young boys were playing wrestling near the canal. Roberts acknowledged touching Jordan on the forehead when he tried to separate him and another boy while they were wrestling, but he denied pushing Jordan into the water. He said that as he was walking back up the canal edge, he heard something hit the water, then saw the little boy moving up and down in the water. Afraid to jump in the lake, he started crying and then fled the scene in a panic.

The defense moved unsuccessfully both before and during the trial to suppress this videotape, arguing, *inter alia*, that the *Miranda* warning given prior to the statement was constitutionally defective. Through the testimony of lay and expert witnesses, the state attempted to prove that the defendant, despite his youth and mild retardation, understood his *Miranda* right to have a lawyer with him during interrogation. However, none of the court-appointed psychologists could render a definitive opinion that the defendant understood this particular right. The only expert who actually interviewed the defendant concerning his understanding of this right testified that the defendant did *not* understand that he could have an attorney present during questioning. Dr. Shari Bourg-Carter testified that when she met with the defendant, she questioned him about his understanding of the right to counsel. She asked him "when the police have to give you an attorney and whether you have to get one when you are being questioned." His response was:

> [N]o. Only in the courtroom. You can't have one when you're questioned because the cops wouldn't want one. Why not? Because you might not say what they want you to say.

Another psychologist, Dr. Ceros-Livingston, described the defendant's low IQ test results over the years, and, though unable to reach any conclusions concerning the defendant's understanding of his rights, **{874 So. 2d 1227}** found it plausible that he did not fully understand his right to have an attorney present during questioning by the police.

At the suppression hearing, the trial court took judicial notice of eighty-nine different *Miranda* rights forms used by other Florida law enforcement agencies. They all contained the warning that the accused is entitled to an attorney during questioning, or words to that effect. Although the court acknowledged that this element was missing in the BSO form, it denied the motion to suppress, finding that the defendant was competent and gave his statement freely and voluntarily without any police coercion.

After the jury returned a guilty verdict on the manslaughter charge, the defendant moved for judgment of acquittal notwithstanding the verdict. The court denied the motion, but noted troubling inconsistencies in the testimony of the two ten-year old state witnesses and commented that its decision was "a very close call."

The defendant contends that the *Miranda* warning recited by the police from the BSO rights form was defective in that it failed to advise him that he was entitled to have an attorney present *during* questioning as well as *before* questioning. For this reason, he argues, the motion to suppress his post-arrest videotaped statement was improperly denied.

We review *de novo* the adequacy of *Miranda* warnings, as a question of law. *See C.A.M. v. State*, 819 So. 2d 802, 804 (Fla. 4th DCA2001).

In *Miranda*, the Supreme Court said that the right to have counsel present during an interrogation is indispensable to the protection of the Fifth Amendment privilege against self-incrimination. The Court described the right-to-counsel warning which must be given:

> We hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation . . . . As with the [other]

warnings . . . this warning is an absolute prerequisite to interrogation.384 U.S. at 471-72.

The Court, however, pointed out that *Miranda* warnings need not be given in the exact form described in *Miranda*. *Id*. at 490; *see also California v. Prysock*, 453 U.S. 355, 359, 69 L. Ed. 2d 696, 101 S. Ct. 2806 (1981)("Quite to the contrary, *Miranda* itself indicated that no talismanic incantation was required to satisfy its strictures."). In *Duckworth v. Eagan*, 492 U.S. 195, 203, 106 L. Ed. 2d 166, 109 S. Ct. 2875 (1989), the Court reiterated that reviewing courts "need not examine *Miranda* warnings as if construing a will or defining the terms of an easement." Rather, the inquiry is whether the warning uses equivalent and adequate language that fulfills the substantive requirements of *Miranda*. *Id*.

Florida courts have consistently interpreted *Miranda* as requiring notification that a person in custody has a right to have counsel present not only before interrogation but *during* interrogation as well. *See Ramirez v. State*, 739 So. 2d 568 (Fla. 1999); *Sapp v. State*, 690 So. 2d 581, 583-84 (Fla. 1997); *Holland v. State*, 813 So. 2d 1007, 1009 (Fla. 4th DCA2002); *T.S.D. v. State*, 741 So. 2d 1142 (Fla. 3d DCA1999); *Statewright v. State*, 278 So. 2d 652 (Fla. 4th DCA1973); *James v. State*, 223 So. 2d 52 (Fla. 4th DCA1969).

Similarly, federal courts have recognized that advisement of the right to counsel during questioning is a vital part of the *Miranda* procedural safeguards. *See United Stated v. Noti*, 731 F.2d 610, 614 (9th Cir. 1984); *United States v. Anthon*, 648 F.2d 669 (10th Cir.1981); *Atwell v.* **{874 So. 2d 1228}** *United States,* 398 F.2d 507 (5th Cir. 1968); *Groshart v. United States,* 392 F.2d 172, 175 (9th Cir. 1968) *; Windsor v. United States*, 389 F.2d 530 (5th Cir. 1968).

Federal courts, however, have reached different conclusions as to the adequacy of the *Miranda* warnings where, as here, a suspect was advised of the right to consult with counsel before questioning, but not advised of the right to have an attorney present during interrogation. Some courts have held that further express warnings of the right to an attorney during interrogation must be given. *See United States v. Bland*, 908 F.2d 471 (9th Cir. 1990) *; United States v. Oliver*, 505 F.2d 301 (7th Cir. 1974) *; Chambers v. United States*, 391 F.2d 455 (5th Cir. 1969) *; United States v. Fox*, 403 F.2d 97 (2d Cir. 1968); *United States v. Averell*, 296 F. Supp. 1004 (E.D.N.Y. 1969) *; Pemberton v. Peyton*, 288 F. Supp. 920 (E.D. Va. 1968); *see also Brown v. Crosby*, 249 F. Supp. 2d 1285, 1302 (S.D. Fla. 2003)(noting that advising the suspect of the right to have an attorney present before being asked any questions is not the same as advising him of the undeniable right to have an attorney present during questioning).

Other federal courts have found that additional warnings, expressly referring to the right to an attorney during interrogation, were unnecessary. *See Evans v. Swenson*, 455 F.2d 291 (8th Cir. 1972) *; United States v. Vanterpool*, 394 F.2d 697 (2d Cir. 1968); *Coyote v. United States*, 380 F.2d 305 (10th Cir. 1967). These courts have deemed the omission of the warning insignificant, reasoning that the right to counsel during interrogation can be inferred from warnings given as to the right to counsel before interrogation.

In cases where the suspect was informed generally of the right to an attorney, without being told *when* the attorney could assist, there is a split of authority among the federal courts as to whether this "timeless" warning is constitutionally sufficient. Our court is among those which have ruled that such an ambiguous statement is *not* constitutionally sufficient. *See James v. State,* 223 So. 2d 52 (Fla. 4th DCA1969); *see also Atwell*, 398 F.2d at 510 *; Groshart,* 392 F.2d at 175 *; Chambers v. United States,* 391 F.2d 455, 456 (5th Cir. 1968) *; James,* 223 So. 2d at 55*; but see United States v. Frankson,* 83 F.3d 79, 82 (4th Cir. 1996); *United States v. Caldwell*, 954 F.2d 496, 502 (8th Cir. 1991) *; United States v. Dizdar*, 581 F.2d 1031 (2d Cir. 1978) *; United States v. Adams*, 484 F.2d 357, 361-62 (7th Cir. 1973) *; Evans v. Swenson*,455 F.2d at 295-96 (8th Cir. 1972); *United States v. Lamia*, 429 F.2d 373, 376-77 (2d Cir. 1970).

Here, the BSO warning does not fail to state altogether when an attorney can be present. Rather, it explicitly states that an attorney can be present *before* questioning. This use of the "before questioning" warning alone, however, has suggested to at least one court that the suspect was affirmatively misled into believing that the attorney could *not* be present *during* questioning itself. *See Caldwell*, 954 F.2d at 504 (distinguishing *United States v. Fox*, 403 F.2d 97 (2d Cir. 1968)). Perhaps for this reason, courts confronting warnings with just the "before questioning" advice have deemed them constitutionally infirm. *See United States v. Bland*, 908 F.2d 471 (9th Cir. 1990) *; Noti*, 731 F.2d at 615 *; Fox*, 403 F.2d at 100 (2d Cir. 1968) *; Windsor*, 389 F.2d at 533 (5th Cir. 1968); s*ee also Brown v. Crosby,* 249 F. Supp. 2d at 1302.

We agree with the defendant that the *Miranda* warnings given to him were inadequate in failing to inform him that he had a right to have counsel present during interrogation. This inadequacy militated against a finding that the defendant knowingly and intelligently waived his *Miranda* **{874 So. 2d 1229}** rights. *See Brown,* 249 F. Supp. 2d at 1291 (discussing that a waiver of *Miranda* rights is "knowingly and intelligently" made only if the defendant has a full awareness of the nature of the right being abandoned and the consequences of his decision to abandon it).

We reject the state's argument that there was sufficient evidence upon which the trial court could rely in finding that the defendant understood his *Miranda* right to have an attorney present during questioning. The state contends that testimony of the state's psychologists that the defendant was "barely" mentally retarded and familiar with the juvenile justice system, as well as testimony of the defendant's high school coach and assistant principal that the defendant was "street smart" and appeared to be normal, supported the trial court's finding that the defendant understood his right to a lawyer. However, as the Supreme Court said in stressing the importance of *Miranda* warnings*:*

> No amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead. Only through such a warning is there ascertainable assurance that the accused was aware of this right.*Miranda,* 384 U.S. at 471-72.

The state suggests that another indicator of the defendant's understanding of his right to have a lawyer present during questioning is the separate "waiver of rights" section of the *Miranda* form he signed. This form states:

> I, Gorman Roberts, have read this statement of my rights or have had it read to me and I understand what my rights are. With these rights in mind I am willing to answer questions without a lawyer present. This waiver of rights is signed of my own free will without any threats or promises having been made to me.

In the state's view, this acknowledgment was sufficient to clarify any possible confusion as to whether or not an attorney could be present during questioning. We disagree, however, that the signed form, in conjunction with the warnings given, sufficiently conveyed the substance of the *Miranda* requirements or served to corroborate the defendant's knowing and intelligent waiver of his rights. The right to appointed counsel during questioning cannot readily be inferred from the waiver form. This form is not the "effective and express explanation" of the right to counsel required by *Miranda*. *Miranda* requires a clear, understandable warning from law enforcement officers that conveys all of a defendant's rights. "Only through such a warning is there ascertainable assurance that the accused was aware of this right." *Miranda*, 384 U.S. at 471-72.

Because the *Miranda* warnings the defendant received while in custody were inadequate to fully inform him of his constitutional rights, we conclude that the trial court erred in admitting the

defendant's videotaped statement into evidence. Further, we are unable to conclude that this error was harmless beyond a reasonable doubt, given that the bulk of the evidence against defendant was provided by two young witnesses whose credibility was sharply contested at trial. 2 Accordingly, we reverse defendant's conviction and sentence **{874 So. 2d 1230}** and remand this cause for a new trial. We affirm as to all other issues raised by the defendant.

REVERSED in part, AFFIRMED in part and REMANDED.

STONE and KLEIN, JJ., concur.

**Footnotes**

1

*Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966).

2

One of the issues raised by the defendant in this appeal is the trial court's denial of his motion to strike the testimony of one the state's main witnesses after the court acknowledged that the witness was "unworthy of belief" and did not appear "to know the difference between truth or fiction."

APPENDIX G

**MYRON FRANKLIN, Appellant, v. STATE OF FLORIDA, Appellee.**
**COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT**
**876 So. 2d 607; 2004 Fla. App. LEXIS 8361; 29 Fla. L. Weekly D 1445**
**CASE NO. 4D03-741**
**June 16, 2004, Opinion Filed**

**Editorial Information: Subsequent History**

Released for Publication July 22, 2004. Rehearing denied by Franklin v. State, 2004 Fla. App. LEXIS 11360 (Fla. Dist. Ct. App. 4th Dist., July 22, 2004)US Supreme Court certiorari denied by, Motion granted by Fla. v. Franklin, 543 U.S. 1081, 125 S. Ct. 890, 160 L. Ed. 2d 825, 2005 U.S. LEXIS 289 (U.S., Jan. 10, 2005)

**Editorial Information: Prior History**

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; James I. Cohn, Judge; L.T. Case No. 01-20804CF10A.

**Disposition:**

Reversed and remanded.

**Counsel** Carey Haughwout, Public Defender, and Ian Seldin, Assistant Public Defender, West Palm Beach, for appellant.

Charles J. Crist, Jr., Attorney General, Tallahassee, and James J. Carney, Sr. Assistant Attorney General, West Palm Beach, for appellee.

**Judges:** GUNTHER, POLEN and GROSS, JJ., concur.

**CASE SUMMARY**

**PROCEDURAL POSTURE:** The Circuit Court for the Seventeenth Judicial Circuit, Broward County (Florida), convicted defendant of robbery with a firearm, aggravated fleeing and eluding, and grand theft of a motor vehicle. Defendant appealed.Where defendant was not advised of his right to consult with a lawyer during questioning, his convictions were reversed. As his two statements filled in gaps in the State's case, the error was not harmless.

**OVERVIEW:** Defendant appealed his convictions. Central to the conviction, and at issue on appeal, were two statements he gave while in the hospital. In examining these statements, the appeals court held that the Miranda warnings given were deficient. At the suppression hearing, the defense offered 90 rights forms obtained from federal and state law enforcement agencies. Eighty-nine of these forms properly indicated that the suspect could consult with a lawyer during questioning. Only the form utilized in the instant case omitted that portion of the Miranda warning, and this was reversible error. Furthermore, as defendant's two statements filled in gaps in the State's case, the error was not harmless.

**OUTCOME:** The judgment was reversed, and the case was remanded for a new trial.

**LexisNexis Headnotes**

***Criminal Law & Procedure > Interrogation > Miranda Rights > Right to Counsel During Questioning***
***Criminal Law & Procedure > Interrogation > Miranda Rights > Notice & Warning***
***Criminal Law & Procedure > Counsel > Right to Counsel > General Overview***
***Estate, Gift & Trust Law > Wills > Interpretation > General Overview***
***Estate, Gift & Trust Law > Wills > Interpretation > Rules of Construction > General Overview***

Reviewing courts need not examine Miranda warnings as if construing a will or defining the terms of an easement. However, Miranda does not require that attorneys be producible on call, but only that the suspect be informed that he has a right to an attorney before and during questioning, and that an attorney would be appointed for him if he could not afford one.

***Criminal Law & Procedure > Appeals > Standards of Review > Harmless & Invited Errors > General Overview***
***Criminal Law & Procedure > Appeals > Standards of Review > Harmless & Invited Errors > Definitions***
***Evidence > Procedural Considerations > Rulings on Evidence***

Harmless error exists where the State can prove beyond a reasonable doubt that the error did not contribute to the verdict. Application of the test requires an examination of the entire record by the appellate court including a close examination of the permissible evidence on which the jury could have legitimately relied, and in addition an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict.

## Opinion

**{876 So. 2d 608}** PER CURIAM.

After a jury trial, Myron Franklin was convicted of robbery with a firearm, aggravated fleeing and eluding, and grand theft of a motor vehicle.

Central to the convictions were two statements Franklin gave in the hospital. The Miranda 1 warnings given in this case were deficient in the same way that the warnings were deficient in Roberts v. State, 874 So. 2d 1225, 2004 Fla. App. LEXIS 7497, No. 4D02-4490, 2004 WL 1161666 (Fla. 4th DCA May 26, 2004) and West v. State, 876 So. 2d 614, 2004 Fla. App. LEXIS 8362, No. 4D03-2027 (Fla. 4th DCA June 16, 2004), also decided today.

At the suppression hearing, the defense offered ninety rights forms obtained from federal and state law enforcement agencies. Eighty-nine of the ninety forms properly indicated that the suspect could consult with a lawyer during questioning. Only the form utilized in this case omitted that portion of the Miranda warning.

As this court held in West and Roberts, United States Supreme Court cases have established that the omitted portion of the Miranda warning is crucial. For example, in Duckworth v. Eagan, 492 U.S. 195, 106 L. Ed. 2d 166, 109 S. Ct. 2875 (1989), the Supreme Court specified that "[r]eviewing courts . . . need not examine *Miranda* warnings as if construing a will or defining the terms of an easement." Id. at 203. However, the Court noted: "*Miranda* does not require that attorneys be producible on call, but only that the suspect be informed . . . that he has a right to an attorney before and during questioning, and that an attorney would be appointed for him if he could not afford one." Id. at 204 (emphasis added).

Furthermore, the error in this case was not harmless. Harmless error **{876 So. 2d 609}** exists where the state can prove beyond a reasonable doubt that the error did not contribute to the verdict. See State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986); Sims v. State, 839 So. 2d 807, 811 (Fla. 4th DCA2003). "Application of the test requires an examination of the entire record by the appellate court including a close examination of the permissible evidence on which the jury could have legitimately relied, and in addition an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict." DiGuilio, 491 So. 2d at 1135.

Here, Franklin's two statements filled in gaps in the state's case. We cannot say beyond a reasonable doubt that they did not contribute to the verdict.

Reversed and remanded for a new trial.

GUNTHER, POLEN and GROSS, JJ., concur.

**Footnotes**

1

Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966).