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STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Elizabeth L. Gleicher, P.J., and Mark J. Cavanagh and Peter D. O'Connell, JJ.

PEOPLE OF THE STATE OF MICHIGAN, Supreme Court No. 144762

Plaintiff-Appellant, Court of Appeals No. 299484

v Wayne Cir. Ct. No. 09-031564-FC

JOHNNY LEE WILLIAMS,

Defendant-Appellant.

**BRIEF OF ATTORNEY GENERAL BILL SCHUETTE AS *AMICUS CURIAE*
IN SUPPORT OF THE PEOPLE OF THE STATE OF MICHIGAN**

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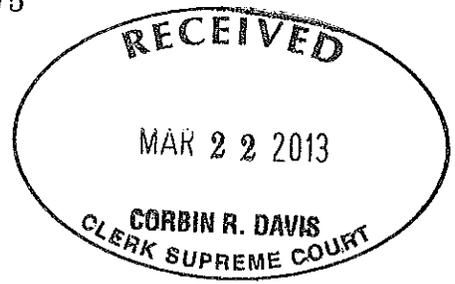


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INTEREST AND STATEMENT OF POSITION OF AMICUS CURIAE

The Attorney General is the chief law enforcement officer for the State of Michigan. In recognition of this role, the Court Rules provide that the Attorney General may file a brief as *amicus curiae* without seeking permission from this Court. MCR 7.306(D)(2). The Attorney General supports the position of the People of the State of Michigan, and joins the People in asking this Court to affirm the scoring of OV 19 and to affirm William's sentence.

STATEMENT OF QUESTION PRESENTED

In its order entered October 24, 2012, this Court granted Defendant-Appellant Williams' application for leave to appeal and limited the grant to the question of "whether OV 19 (interference with the administration of justice) was correctly scored."

CONSTITUTIONAL PROVISIONS, STATUTES, RULES INVOLVED

MCL 777.49:

Offense variable 19 is threat to the security of a penal institution or court or interference with the administration of justice or the rendering of emergency services. Score offense variable 19 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

* * *

(c) The offender otherwise interfered with or attempted to interfere with the administration of justice.....10 points

INTRODUCTION

Johnny Williams and Henry Morgan were both members of a Detroit motorcycle club. One night in November 2009, a fight broke out involving both Williams and Morgan. Although Morgan handed his gun away to a fellow club member, saying that he did not want to kill Williams, Williams showed no such restraint, shooting Morgan to death. Following the shooting, Williams did a number of things to avoid responsibility, including: not remaining at the scene, giving the gun to someone to remove from the scene, fleeing from the van in which he was already fleeing when police approached, remaining in hiding for 15 days, and influencing the testimony of his girlfriend and codefendant Tiffany Pritchett.

A Wayne County jury convicted Williams of second-degree murder and felony-firearm. The trial court, in sentencing Williams, scored 10 points under offense variable (OV) 19 for not turning himself in for 15 days. The Court of Appeals affirmed the score on the same ground. Because this was a valid basis to score 10 points under OV 19, and because the record supported other valid bases, this Court should affirm the score and affirm Williams' sentence.

In fashioning the sentencing guidelines, the Legislature has sought to ensure that trial courts sentence similarly situated defendants similarly and differently situated defendants differently, and to ensure that, "everything being equal, the more egregious the offense, . . . the greater the punishment." *People v Babcock*, 469 Mich 247, 263; 666 NW2d 231 (2003). In fashioning OV 19, the Legislature has specifically sought to ensure that trial courts consider crimes that involve an interference or an attempt to interfere with the administration of justice to be more

serious than those crimes that do not. But the Legislature has not granted courts the authority to stray from OV 19's plain language based on policy concerns. Even if a court feels that to apply OV 19 as written would mean applying it to nearly every defendant, that feeling does not give that court license to rewrite the statute, engineering it to avoid scoring offenders who come within its scope.

Williams does not argue that he did not interfere or attempt to interfere with the administration of justice. Instead, he says that his conduct should not be scored because of various policy considerations, all of which boil down to an argument that courts should not punish a criminal for acting like a criminal. This Court should reject these policy-based arguments, and affirm the lower courts, who properly applied OV 19's plain language.

Williams' policy-driven reimagining of OV 19 does not lend itself well to a test that sentencing courts can apply. And when Williams does offer a test to this Court, based on "common-sense and precedent," he falls within it. Under Williams' own test, because "something [wa]s done specifically designed or intended to frustrate or obstruct an investigation," the score is correct.

Alternatively, this Court should affirm because there are other facts on the record that support a score of 10 points: Williams gave the murder weapon to Pritchett, and influenced Pritchett's testimony. Although the People have raised these arguments in both lower courts, Williams professes to be unaware of them, and provides no argument as to why these actions do not justify a 10-point score.

COUNTER-STATEMENT OF FACTS

Attorney General Schuette adopts the People's recitation of facts and account of proceedings below as accurate and complete.

ARGUMENT

I. Defendant Williams fled the scene of the murder and hid from police for more than two weeks to make it more difficult to apprehend him.

The question presented to the trial court at sentencing was a straightforward one: Did Williams interfere or attempt to interfere with the administration of justice? "The investigation of crime is critical to the administration of justice." *People v Barbee*, 470 Mich 283, 288; 681 NW2d 348 (2004). By remaining in hiding for 15 days when he knew he was wanted for Henry Morgan's murder, Williams sought to hinder, and may in fact have hindered, the investigation of that crime and thus the administration of justice.

Williams does not argue to the contrary. Instead, he asserts that he should not be scored based on various policy considerations he urges this Court to adopt to override the Legislature's command.

For example, Williams attaches some significance to the fact that Michigan law does not, in general, require a person to report a felony. Williams' reasoning appears to be that the Legislature cannot have intended to punish defendants for breaching a duty when the Legislature has not established such a duty. But this argument is ill-founded: the offense variables and prior record variables do not establish duties and punishments for the breach of those duties. Williams is not

being punished for interfering with the administration of justice, any more than he is being punished for having a prior low-severity conviction (PRV 2, MCL 777.52), or for causing serious psychological injury to a victim's family member (OV 5, MCL 777.35). Williams is being punished for murder.

And, in fashioning the punishment for second-degree murder, the Legislature requires the courts to consider the circumstances of the offense, and specifically, the circumstances enumerated in the offense variables. Because Williams' conduct fell within that described in OV 19(c), the score of 10 points was correct.

II. In considering whether to apply OV 19's plain language, a court need not guess how many offenders will be scored under that language or determine whether those numbers are too high.

Williams argues that an overbroad interpretation of OV 19 will result in too many offenders being scored. Williams employs hyperbole, wondering whether an offender would be scored for failing to call police ahead of time to alert them that he is going to commit a crime, or for exercising his right to remain silent, or for pleading not guilty, or for attempting to negotiate a plea deal. Of course, no one has argued that courts score OV 19 for any of these things, and Williams has not identified any cases in which a court has.

But Michigan's courts have had similar concerns to Williams'. For example, in *People v Gajos*, the Court of Appeals reversed a score of OV 19 because, in its view, to score OV 19 for that offender would require the scoring of the offender in "virtually every criminal conviction." *People v Gajos*, unpublished opinion per curiam of the Court of Appeals, issued February 3, 2009 (Docket No. 281344), App.

14a–15a. The *Gajos* court suggested that the offender’s flight from police *did* in fact interfere with the administration of justice, when it noted that “there is no allegation that defendant provided any false information, or otherwise interfered with the police response to his crime, *but for his attempt to flee* in the first instance.” *Id.*, App. 15a (emphasis added). In spite of this, the court declined to score OV 19 because it felt that any offender would run from the police, and that to do otherwise would be “uncharacteristic.” *Id.*; contra *People v Magee*, unpublished opinion per curiam of the Court of Appeals, issued January 13, 2009 (Docket No. 280534), attached to Pl’s Br on Appeal as Attachment A (affirming score under OV 19 for, among other things, “le[aving] the scene of the accident prior to the arrival of the authorities despite apparently painful injuries, . . .”).

Similarly, in *People v Deline*, 254 Mich App 595; 658 NW2d 164 (2002) (*Deline I*), vacated in part 470 Mich 895 (2003), the Court of Appeals held that it was error to score 10 points where a drunk driver “switch[ed] seats with his passenger and refus[ed] an immediate blood-alcohol content test. 254 Mich App at 597. The *Deline I* court declined to apply OV 19 in part because, “[i]f [it] were to conclude that this evasive and noncooperative behavior justified the imposition of points under OV 19, that variable would apply in almost every criminal case. Defendants almost always seek to hide their criminal behavior and rarely step forward to offer evidence proving their guilt.” *Id.* at 597-598.

Implicit in this reasoning is a troubling premise: that the Legislature can *only* have intended the offense variables to be interpreted in such a way that a significant number of offenders will not be scored, and that it falls to the courts to determine what is a significant number, and what exactly it is that many, or most, or nearly all offenders do.

But if the Legislature only wished OV 19 to be scored for unusual or “uncharacteristic” interference with the administration of justice, it would have said so. For example, OV 7 requires courts to score 50 points where “[a] victim was treated with sadism, torture, or *excessive* brutality or conduct designed to *substantially* increase the fear and anxiety a victim suffered during the offense.” MCL 777.37(1)(a) (emphasis added). In doing this, the Legislature invited the courts to determine whether an offender’s brutality was “excessive,” and whether the intended increase in fear and anxiety was “substantial[.]” No such adjectives are present in OV 19(c); the Legislature has not invited the courts to make the judgment call Williams advocates.

If this Court accepts Williams’ argument, it will impose on Michigan’s courts two tasks, both fundamentally legislative in nature. First, courts will need to determine, as a matter of legislative fact, how common a particular act of interference with the administration of justice is. Second, courts will need to determine, as a matter of policy, whether that act is too common to be scored under OV 19. It is not clear how courts would go about either task, as these are legislative policy considerations, not legal determinations.

A. The Legislature has not empowered the courts to consider how uncommon various acts of interference are.

The *Gajos* court did not cite any support for its proposition that “virtually every” suspect runs from police, nor did the *Deline I* court support its statement that “almost every” suspect engages in “evasive and noncooperative behavior.” For his part, Williams does not explain how he knows that his flight from the police and his two weeks as a fugitive are so normal that to score him would be to score everyone. Nor does Williams explain how a court should make this determination. If a court simply relies on its own subjective experience and intuition, as the *Gajos* and *Deline I* courts appear to have done, the door is open for exactly the type of unpredictability and inconsistency in sentencing that the guidelines are intended to prevent. Will a new judge and an experienced judge score OV 19 the same way? Will a Wayne County judge score OV 19 like an Iron County judge? Will a judge who is a former prosecutor score OV 19 the same way as a judge whose background lies in tort litigation?

Because the Legislature was attempting to create uniformity and predictability, it is understandable that it did not pass an OV 19 that reads, “Score 10 points if the offender interfered or attempted to interfere with the administration of justice *in such a way that strikes the sentencing judge as unusual.*” But it is essentially this version of OV 19 that Williams is asking this Court to create and apply.

Courts have scored 10 points under OV 19 where an offender has told his minor sexual-assault victim not to report the crime to the police. *People v Steele*, 283 Mich App 472, 492-493; 769 NW2d 256 (2009). But the *Steele* decision was

silent as to whether such conduct is typical or not. Similarly, this Court has unanimously affirmed a score for giving a false name to police, simply holding that to do so “is certainly interference with the administration of justice,” and without discussing how common such interference is. *People v Barbee*, 470 Mich 283, 288; 681 NW2d 348 (2004). In both instances, OV 19 scoring did not involve a policy inquiry but simply application of the variable’s plain language.

B. Courts should not undertake the policy decision of determining what conduct is too common to score.

Under Williams’ argument, once a court has determined how common a particular interference with the administration of justice is, it would then have to determine whether that is too common to score. If a court finds that, say, 90% of offenders attempt to convince witnesses to lie, is it permissible to score one who falls within that 90%, or is 10% too “uncharacteristic”? Would a 95/5 split be more equitable, or perhaps an 80/20 split? And how exactly are courts expected to answer this policy question? Williams himself does not propose a number. The *Gajos* and *Deline I* courts, both of which reversed scores because the interference was too typical, have not named numbers. See also *People v Spangler*, 480 Mich 947, 948; 741 NW2d 25 (2007) (MARKMAN, J., dissenting) (expressing concern over scoring decision where “it would seem that OV 19 would almost always be scored under the trial court’s interpretation.”). Again, such inquiries are ideally suited for legislative committee hearings. They are a poor fit for judicial inquiry and resolution.

C. Courts should not take on the legislative function Williams proposes, but should apply the language of OV 19 as written.

Williams does not explain exactly how a court would apply this two-part analysis to his own conduct (though he knows what the conclusion would be). He does not cite any evidence showing how many offenders go into hiding after their crimes, much less how many remain in hiding for 15 days. Nor does he propose a threshold percentage of offenders that courts should use to determine how common is too common.

But these are fundamentally legislative questions, and the Legislature has not asked the courts to take them on. With respect to OV 19, the Legislature has only directed the courts to ask whether an offender interfered, or attempted to interfere, with the administration of justice. Williams did, and his sentence should be affirmed.

III. This Court should not interfere with the Legislature's rational policy decision that those who interfere with law enforcement should be sentenced more harshly than those who cooperate, or refrain from interfering.

The Legislature has determined that, when courts craft sentences, they must take into consideration whether or not an offender interfered with the administration of justice. It is irrelevant to claim, as Williams does, that he did not breach some established duty, or that Michigan law does not recognize the crime of misprision of a felony, or that he was not "required to report [his] own crime," or that he was not "mandate[d]" to turn himself in. Again, Williams is not being punished for any of these things. He is being punished for murder.

Perhaps Williams was not “required” to refrain from hiding from the police, in the sense that doing so constituted a separate felony, but this does not mean that the courts may ignore the requirement that they consider the fact at sentencing. Indeed, this is true throughout the offense variables. For example, when an offender is scored 10 points under OV 14, MCL 777.44, it is not because there is a “duty” not to be a leader in a multiple-offender situation that the offender has “breached,” or that the Legislature is “requiring” offenders not to be leaders in multiple-offender situations. It is the Legislature’s policy decision that criminal ringleaders should receive harsher sentences than other criminals.

It is unconvincing for Williams to point out that he is being scored for not doing something he was not required to do. His punishment is increased because the Legislature determined that offenders like him deserve a higher score than offenders who do not interfere with the administration of justice. It is not for the courts to second-guess this policy determination. If Williams feels that OVs should only be scored when the offender has breached a duty, or only when his scored conduct consists of a separate felony, then his remedy is the Legislature.

IV. The test Williams proposes encompasses his own conduct.

Williams offers a simple test of whether an offender’s conduct falls within the scope of OV 19(c): “common-sense and precedent recognize that there are consequences in the criminal justice system for an offender when something is done specifically designed or intended to frustrate or obstruct an investigation.” Def’s Br on Appeal, p 13. But Williams’ conduct plainly falls within that test.

Williams disputes whether he left the scene because he was afraid of capture by the police, and claims he was only waiting to turn himself in because he was taking time to earn money to retain an attorney. But his actions show he *was* trying to evade police. For example, after Williams and Pritchett fled the scene, when Williams saw a police car, he jumped out of Pritchett's vehicle and ran. App. 58b-60b, 66b, 68b. He did not return to the home he shared with Pritchett for the time he remained a fugitive. App. 42b, 61b, 63b. At that time, he was well aware that he was wanted by police. 4/6/10 Trial Tr at 56 (Attachment A).

On these facts, if this Court applies the test Williams offers, it will affirm the scoring decision. Was there evidence on the record to support a finding that Williams did something "specifically designed or intended to frustrate or obstruct" the police investigation of the murder of Henry Morgan? Yes. The trial court was not required to accept Williams' excuse that he was trying to earn money to retain counsel. It was reasonable for the trial court to find that Williams was in fact trying to interfere with the investigation, by seeking to avoid capture, and for remaining at large, in hiding, for more than two weeks.

V. OV 19 was properly scored for additional reasons.

A scoring decision must be affirmed if there is "any evidence in support." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). Here, the sentencing court and the Court of Appeals relied on the fact that Williams left the scene of the murder and went into hiding for two weeks, even though he knew he

was wanted by the police. But this is not the only evidence on the record that supports a score of 10 points under OV 19.

When Williams' codefendant, Tammy Pritchett, talked to police shortly after the murder, she told police that she did not see the victim carrying or holding a gun before he was murdered. App. 39b. But when Pritchett testified, she said that Morgan had a gun. App. 45b. Pritchett also testified that she spoke with Williams "several times" between speaking to the police and testifying at trial. App. 61b-62b. Because the question of whether Morgan was carrying a gun was relevant to Williams' theory of self-defense, this change in Pritchett's story was favorable to Williams.

The fact that Pritchett's testimony changed and became more favorable to Williams after she spoke with Williams was sufficient evidence on the record to support a finding that Williams influenced Pritchett's testimony, which constitutes an interference with the administration of justice. Cf. *Steele*, 283 Mich App at 492-493; *People v Ericksen*, 288 Mich App 192, 203-204; 793 NW2d 120 (2010). Making matters worse for Williams, he testified that he did *not* speak to Pritchett about the case. 4/6/10 Trial Tr at 75 (Attachment B). A fact-finder could reasonably find Pritchett's testimony more credible, find that Williams had spoken to Pritchett, and then reasonably infer from Williams' denial that there was something improper about his conversation with Pritchett, all of which adds weight to the conclusion that Williams influenced Pritchett's testimony.

Second, there was evidence in the record to support a finding that Williams gave the murder weapon to Pritchett. A fact-finder could infer that this was an attempt to avoid being caught with the weapon, or otherwise eliminate the connection between Williams and the weapon. Cf. *Ericksen*, 288 Mich App at 203-204.

And even though neither the trial court nor the Court of Appeals relied on that evidence in support of the OV score, they could have. In fact, the People invited both courts to do so, but, although neither court rejected the arguments, both courts relied only on Williams' 15 days in hiding.

Williams offers no argument that these other bases for scoring OV 19 are insufficient. Instead, he appears not to be aware of these bases, stating in his brief,

~~“Such extra factors as found in *Ericksen* are not present in the instant case.”~~ Def's Br at 14. But Williams is mistaken: the “extra factors” are present. This is not a new argument; the People made the argument at sentencing, and again before the Court of Appeals. Williams cannot claim that he had no way of knowing that the People would seek to support the OV score based on his improper influence of Pritchett's testimony, or his disposal of the murder weapon. Further, this Court's order granting leave to appeal was not limited to whether the reasons the lower courts relied on were correct. The grant asked “whether OV 19 (interference with the administration of justice) was correctly scored.” *Williams*, 493 Mich at 876.

Regardless of whether Williams' 15 days as a fugitive support scoring 10 points under OV 19, his giving the gun to Pritchett and his influence on her

testimony both do. For these reasons, this Court may affirm the OV score, and Williams' sentence on this alternative ground. *Hornsby*, 251 Mich App at 468.

CONCLUSION AND RELIEF REQUESTED

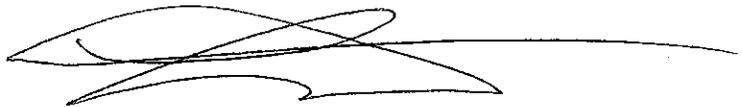
This Court should apply OV 19's plain language, affirm Williams' sentence, and affirm Williams' conviction. That affirmance can be based on the same underlying facts on which the lower courts relied (Williams' flight and attempts to hide to avoid arrest), or the alternative grounds that Williams sought to hide the murder weapon and influence a key witness's testimony.

Respectfully submitted,

Bill Schuette
Attorney General

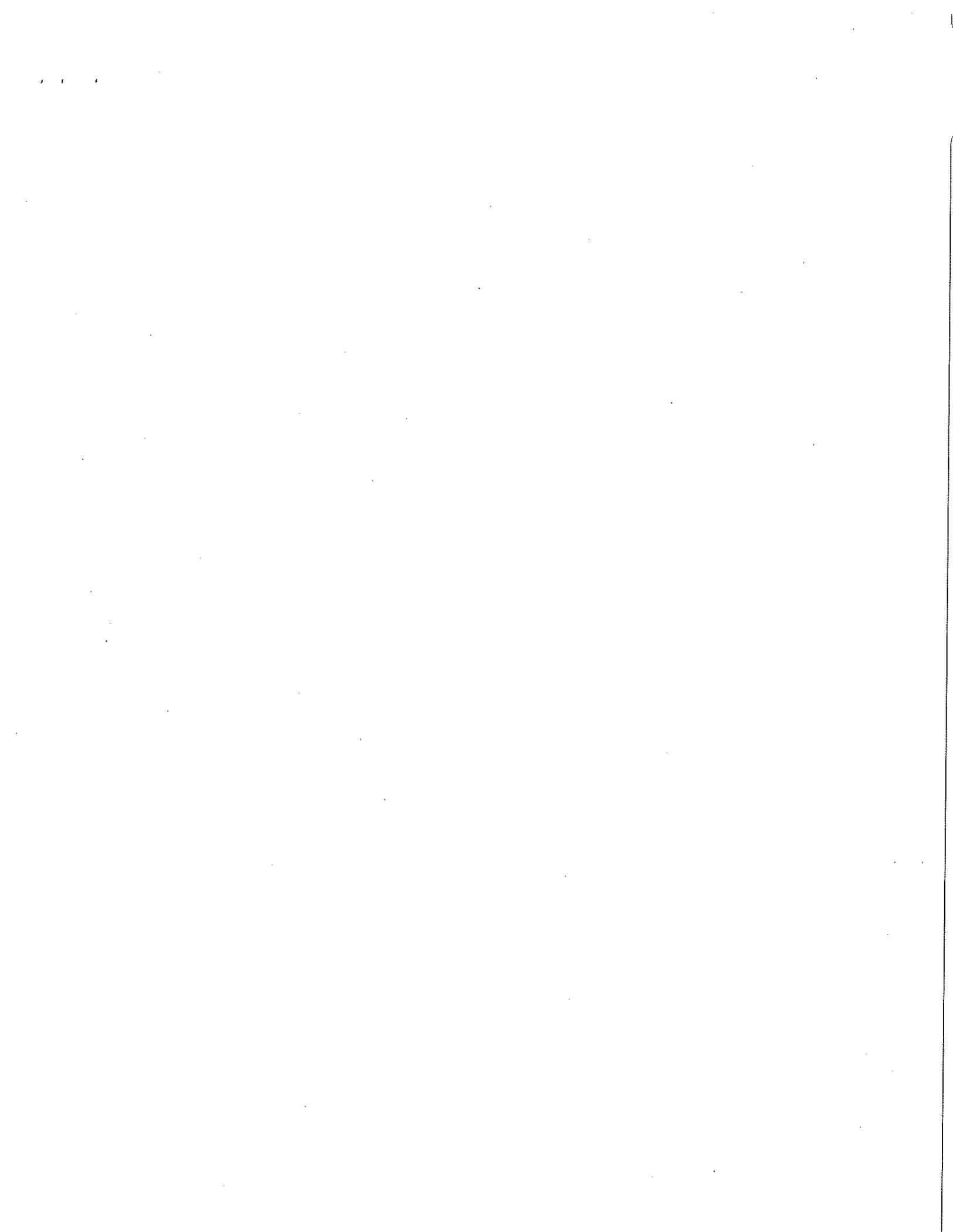
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1 Q You took control of that situation in terms leaving
2 those premises?

3 A Yes.

4 Q It was your decision to jump in that van?

5 A It was my decision to jump in that van.

6 Q Tiffany had nothing to do with that?

7 A She had nothing to do with it.

8 Q Now, once you get out of the van and you tell Tiffany
9 that you love her, and you get out of the van, is that
10 the last time you see Tiffany?

11 A Yes. That's the last time I seen Tiffany.

12 Q What happens next, sir?

13 A I got out of the van and I started walking up the
14 street. I then called my cousin.

15 Q And for what purpose do you call your cousin?

16 A To come pick me up.

17 Q Does he come and pick you up?

18 A Yes. He comes and pick me up. We go to his house.

19 Q Tell the jury why you don't have your cousin take you to
20 the police department?

21 A Because I'm talking to him as we are riding to his
22 house, and I'm like I've got to go turn myself in.
23 He said naw, you can't do that right now -- you need
24 to get you an attorney.

25 MS. STANFORD: Objection, hearsay, Judge.

1 A Of course, I talked about it. I had to tell my attorney
2 what happened.

3 Q And you talked about it with other people, too, didn't
4 you, sir?

5 A I let my cousin know when he came and picked me up, and
6 that's when he told me I need to get an attorney. As
7 far as that, nobody else knew about what happened.

8 Q The only people you talked to were your lawyer and your
9 cousin, is that what you want this jury to believe?

10 A Yes, Ma'am.

11 Q Okay. And you never talked to Tiffany about it?

12 A No, Ma'am.

13 Q You never talked to Joy about it?

14 A (No response.)

15 THE COURT: You didn't have an answer on --

16 A (Interposing) I'm thinking.

17 THE COURT: Okay.

18 A I didn't go into detail with Joy. I just told Joy
19 what happened as far as I shot somebody, and that was
20 it.

21 Q You never talked to Myeshia about it?

22 A Yes.

23 Q You never talked to Patrice about it?

24 A When you say talk to them, there's a difference between
25 talking and going into details with them. You tell them