

CIVIL RIGHTS DIVISION

Notice to Close File

File No. 144-72-2240

Date

To: Chief, Criminal Section

Re: Officer XXXXXXXXXXXX,
Memphis Police Department
Memphis, Tennessee - Subject;
Larry Payne (deceased) - Victim
CIVIL RIGHTS

It is recommended that the above matter be closed for the following reasons:

I. Synopsis

In the early afternoon of March 28, 1968, Larry Payne (victim), a 16-year-old African-American student, was fatally shot by Memphis Police Officer XXXXXXXX (subject), who is Caucasian. Payne had been observed with a group of young men removing televisions from a Sears store during the widespread unrest in connection with a sanitation workers' strike. XXXXXXXX and his partner, XXXXXXXX, pursued Payne as he ran to the housing complex where he lived.

Karla Dobinski, Attorney

To: Records Section
Office of Legal Administration

The above numbered file has been closed as of this date.

Date

Chief, Criminal Section

FORMERLY CVR-3 FORM CL

There, he entered a door to a basement boiler room. While XXXXXX stayed with the parked patrol car, XXXXXX followed Payne's path on foot. According to the subject's account, XXXXXX went up to the boiler room's closed door and yelled for Payne to come out. After a brief time, Payne partially opened the door and the subject reached with his left hand to control Payne while holding a shotgun in his right hand. At that moment, Payne began to put his left hand in the air but kept his right hand lower, near the doorknob. Upon spotting a knife in Payne's lowered right hand, XXXXXX fired his shotgun one time, striking Payne in the abdomen. The wound was fatal.

In comments to officers at the scene and later investigators, XXXXXX said he fired in self-defense because he believed Payne was about to attack him with the knife. Responding police officers reported that they observed the butcher knife at the scene. The knife was retrieved and photographed as evidence. The autopsy revealed significant gunshot residue around the entrance wound, indicating the subject and victim were close to each other at the time of the shot. The autopsy report also noted gunpowder flecking on the elbow of the victim's left arm. In addition, the subject's left hand incurred gunpowder burns, indicating his hand was near the end of the shotgun barrel when he fired the shotgun. This physical evidence is consistent with the subject's claim that Payne's left arm was reaching up and that the subject was reaching for Payne with his left hand in order to restrain Payne, when the subject unexpectedly perceived the need to fire the shotgun held in his right hand.

Because the shooting occurred around noon in a crowded housing complex, numerous residents soon converged in the vicinity of the shooting. Of those who provided statements in which they claimed to have seen the shooting, all alleged that the victim's hands were either high over his head or clasped behind his head at the time he was shot. Further, none of the residents said they observed a knife in the victim's hand. However, as more fully set forth below, for a variety of reasons these statements do not constitute sufficiently reliable evidence to prove beyond a reasonable doubt a federal criminal civil rights violation. First, there is physical evidence, including the autopsy report, which contradicts these statements. In several instances, the statements of some residents contradict the statements of other residents. Moreover, many residents provided more than one statement, and there are instances in which the two statements are inconsistent. A suggestion that the knife was planted by the officer is not supported by the circumstances leading up to the shooting and the immediate aftermath. In addition, for many of the reasons noted above, the available evidence is not sufficient to refute the subject's claim that he believed he had to fire the shotgun in order to defend himself from a possible knife attack.

Accordingly, because the evidence is insufficient to meet the high threshold of proof beyond a reasonable doubt required for a federal criminal civil rights violation, this matter must be closed. In addition, as explained below, the statute of limitations precludes pursuit of a prosecution.

II. Law Enforcement Investigations

The Memphis Police Department (MPD) conducted an extensive investigation into the shooting. The MPD's 23-page report was compiled by a team of nine investigators and included interviews of the subject, responding officers and numerous residents of the housing project.

The Federal Bureau of Investigation (FBI) opened a contemporaneous investigation two days after the shooting. FBI agents interviewed numerous witnesses and obtained documentary evidence including photographs and diagrams. The FBI submitted its report as well as the report of the Memphis Police Department to the U.S. Department of Justice (DOJ) which compiled a lengthy memorandum summarizing the evidence available at the time. The 27-page DOJ memorandum set forth the accounts of the subject, law enforcement officers at the scene, and civilian witnesses, combining the FBI and the MPD factual record. The memorandum included a diagram and photographs of the location of the shooting that reflected the vantage point of the main civilian witnesses, as well as a photograph of the knife allegedly brandished by the victim.

During the contemporaneous federal investigation, then United States Attorney Thomas Robinson and AUSA Henry Klein personally examined the relevant scenes, including the Sears Store, the route to the housing complex and the boiler room entrance.

In addition, records indicate that then- deputy assistant attorney general of the Civil Rights Division, Jim Turner, was in Memphis in the aftermath of the shooting to speak with community activists and witnesses to the incident. Members of the United States Civil Rights Commission (USCRC) also discussed the incident with DAAG Turner. There was significant attention in the media as part of its coverage of the widespread civil disturbances at the time.

In 1971, the DOJ closed its investigation and issued a statement explaining that the basis for its decision was the "problem with the credibility of the witnesses and because we cannot explain how a knife was found near the victim's body." In addition, the DOJ memorandum noted that the evidence "cannot disprove subject's claim of self-defense." Then-U.S. Attorney Thomas L. Robinson concurred with this review, adding that the shooting was "obviously executed in self-defense on the part of the police officer."

In May, 2007, pursuant to the Department of Justice's "Cold Case Initiative," the Federal Bureau of Investigation (FBI) initiated a review of the circumstances of the victim's death. As part of its review, the FBI interviewed three civilian witnesses and also obtained contemporaneous newspaper articles, the report of the Memphis Police Department (MPD) and documents from the court file of the federal civil lawsuit filed by the victim's parents.¹ DOJ

¹ Substantial portions of the MPD report have been rendered virtually illegible due to the quality of copying and the passage of time. Significant effort has been made to translate the report. Insofar as the contemporaneous DOJ memorandum cites portions of the MPD report, the memorandum has been relied upon to complement the review of the MPD reports.

personnel identified and retrieved the closed DOJ file from the National Archives and reviewed the numerous documents within that file.

The following summary and analysis is based on the above accounts and reports as well as documents from the U.S. Commission on Civil Rights and civil court pleadings. This review also incorporates the 1967 DOJ memorandum.

III. Investigative Results

A. Undisputed Events Leading Up to the Shooting

The events just before the shooting are largely undisputed. On the morning of the shooting, the victim and at least one friend joined hundreds of young people to skip school and travel to downtown Memphis. There was a great deal of tension and activity because of the ongoing strike by sanitation workers and an impending visit by the Rev. Dr. Martin Luther King, Jr. The gathering soon culminated in a civil disturbance with a violent police reaction, along with widespread looting. Coincidentally, the victim was photographed just hours before the shooting, as he stood near a building with windows apparently broken in vandalism. In the photograph, Payne is holding a stick and watching a police officer use a baton to strike Payne's friend who is on the ground.² After a few hours, the victim left the downtown area and returned to the Fowler Homes housing complex.

Upon arriving at the apartment complex, Payne opened the door and entered the boiler room in the basement of one of the buildings.³ Upon opening the boiler room door which is ground level, one enters the boiler room by descending three concrete interior steps downward into the basement. The victim was followed to the doorway by the subject who believed that he had stolen a television. Soon after, Payne was fatally wounded by one close-range shotgun blast fired by the subject. A large crowd gathered after the shooting and expressed significant hostility to the police officers.

B. Immediate Circumstances of Shooting

Set forth below are summaries of the pertinent portions of the accounts of the subject, law enforcement officers and civilian witnesses. The critical factual dispute concerns two related aspects of the victim's actions at the moment immediately before the officer shot: whether the victim was holding a knife and the location of his hands. The subject officer claimed the victim had a knife in his lowered right hand and was moving his right arm towards the officer. Most residents assert that they did not see a knife in the victim's hands and that both of the victim's

² This photograph appeared in the Memphis newspaper, Commercial Appeal, and is attachment #1.

³ Photographs depict the exterior view of the door as well as the entryway to basement. (Attachment #2)

arms were held high with his hands either over his head or clasped behind his head.

1. Subject's Account

The subject, who was XX years old at the time, made several oral statements to his colleagues at the scene and afterwards, as well as a written statement to Memphis police investigators. He also testified at the trial of the federal civil suit brought by the victim's parents.⁴ In all of his statements, the subject consistently maintains that he fired the shotgun because he believed the victim was about to attack him with a knife. There is some variation in the details leading up to the shooting, but no details materially undermine the subject's basic claim of self-defense.⁵

XXXXXX's most detailed statement is the written account submitted two days after the shooting to Lieutenant XXXXXX, investigating officer for MPD. According to this statement, the subject arrived at the housing complex by following the victim, later identified as Larry Payne, from the scene of a looting. The subject was still in his patrol car when he saw the victim run to the basement of one of the buildings and close the door behind him. The subject got out of the patrol car and ran to within 10 feet of the door when Payne opened the door. XXXXXX ordered him to come out with his hands up but the victim jumped back inside and pulled the door shut. The subject came within five feet of the door and "hollered" several times for the victim to open the door. After several seconds, the door again opened and Payne started out of the door with his left side and left hand coming out first. The victim's right hand remained on the inside door handle as he came out. XXXXXX yelled three or four times for Payne to raise his hands. The subject, while he "pleaded" and "begged" for the victim to raise his hands, held his shotgun in his right hand, pointed towards the victim. XXXXXX then reached for Payne with his left hand in order to turn him around and take him into custody. At that same time, Payne's right hand suddenly came out and the subject spotted a blade about 6 or 8 inches long.⁶ As Payne began to make a motion towards the subject, XXXXXX shot him one time. The victim slumped down into the stairwell, near the door. The knife fell into the basement. When other officers arrived, XXXXXX picked up the knife. Crowds of people began to gather and yell hostilities at the officers.

When providing the written statement, XXXXXX showed Lieutenant XXXXXX powder burns on his own left hand, explaining that he had been reaching out towards the victim at the time he fired. XXXXXX told Lieutenant XXXXXX that if he had not shot the victim, "he would have killed me."

⁴ The testimony was not transcribed because the case was not appealed.

⁵ It is possible these minor variances occurred because these oral statements are secondhand accounts of the officers to whom the subject voluntarily spoke after the shooting as well as comments overheard by civilian witnesses.

⁶ A photograph of the knife found at the scene is attachment #3.

XXXXXX also made three statements in the immediate aftermath of the shooting, while still at the scene. He reportedly told his partner, Officer XXXXXX, that he had to shoot [the victim] because “he drew a knife on me.” He reportedly told Lieutenant XXXXXX that he shot because Payne had attacked him, and that he hated to have to shoot. XXXXXX told Officer XXXXXX that he had to shoot because XXXXXX was advancing on him with a butcher knife in his hand. XXXXXX also told Officer XXXXXX that at the time he fired the shotgun, his own left hand was in the area of Payne’s upper right chest as he was trying to restrain Payne.

In addition, as set forth more fully below, at least seven civilian witnesses at the scene overheard the subject say the victim had a knife. XXXXXX told the FBI that as the second officer approached, XXXXXX overheard the subject tell this officer that Payne had a knife. XXXXXX saw the officer come out of the boiler room holding a knife, while telling others “he had a knife.” XXXXXX reported that the officer told his partner, “I had to kill him; he pulled a knife on me.” XXXXXX heard the subject yell immediately after the shooting: “Get back! He had a butcher knife on me.” XXXXXX said the officer told Payne’s XXXXXX, while still at the scene, that he shot because Payne “pulled a knife” on him. XXXXXX said she overheard the officer tell his partner, “He drew a knife on me, I had no choice.” Finally, a nurse who arrived just after the shooting, XXXXXX, saw the officer go down the boiler room stairs, say something like “here it is” and come up with a knife.

2. Law Enforcement Witness Accounts

Officer XXXXXXXX, the subject’s XXXXXX, provided a statement at the scene as well as a written statement to the Memphis Police Department, followed by a verbal statement to the FBI. These statements are consistent, and summarized in pertinent part below.

After responding to a dispatch reporting looting at the Sears store, XXXXXX and XXXXXX drove into the parking area of the housing complex. They saw a young man wearing a yellow shirt and carrying a heavy object into the boiler room door of one of the buildings. XXXXXX, who was driving, told XXXXXX, “There goes one of them there.” XXXXXX stayed with the car while the subject jumped out and ran toward the boiler room door. As XXXXXX looked around for additional looters, he heard what sounded like a shotgun blast. XXXXXX ran towards the boiler room area and observed XXXXXX standing near a man lying on the ground. XXXXXX called out, “Did you shoot him?” The subject answered, “Yes, I had to shoot him, he drew (or pulled) a knife on me.” XXXXXX returned to the squad car and called for medical assistance.

XXXXXX did not see any persons around at the moment of the shooting but immediately afterwards a crowd began to gather from all directions, threatening to shoot and kill the police officers. Sensing that the crowd was in an angry and dangerous mood, XXXXXX left the patrol car and returned to the subject at the site of the shooting. Lieut. XXXXXX arrived. XXXXXX saw the subject holding a knife with a wooden handle and curved blade. The time between hearing the gunshot and seeing the subject holding the knife was anywhere from three to five

minutes.

XXXXXX also told the FBI that he had talked with XXXXXX several times since the shooting and XXXXXX consistently stated that he had to shoot because the victim came at him with a knife.

Lieut. XXXXX submitted a written report to the MPD and provided an oral statement to the FBI. His statements are consistent and are summarized in pertinent part below.

XXXXXX was a first responder to the scene. Upon his arrival within minutes after the shooting, XXXXXX described the incident to him. XXXXXX said he and his partner had been chasing the victim and his friends because they had a television. The subject chased the victim to the door of the basement, and the victim turned on him with a long bladed knife. The subject ordered him to put the knife down but instead the victim turned “to attack him” and the subject had to fire to protect his own life. XXXXXX told XXXXXX he “hated it” that he had to shoot the victim. XXXXXX asked about the location of the knife, and the subject pointed to a knife laying on the first step inside the basement door. XXXXXX instructed XXXXXX to pick up the knife. XXXXXX reported that upon his arrival, the victim’s body was laying partially in the open doorway to the boiler room of the basement.

Additional Officers. Officers who responded to the scene in the aftermath of the shooting and later provided statements to MPD investigators included XXXXXX, XXXXXX and XXXXXX. All three of these officers said they observed the knife on the stairs leading down into the basement in close proximity to the victim’s body. None reported hearing any statements from the subject.

3. Civilian Witness Accounts

The shooting occurred around noon in a tightly-knit housing complex with a dense population. Thus, there were numerous people who said they witnessed either the entire or partial aspects of the incident. Most of these residents were acquainted with the victim. None of the residents said they observed a knife in the victim’s hand, although many reported overhearing the shooting officer talk about the knife or seeing the knife at the scene.

The statements summarized in pertinent part below include those of the following citizens who said they were eye or ear witnesses to the shooting: XXXXXX, XXXXXX, XXXXX, XXXXXX, XXXXXX, XXXXXX, XXXXXX, XXXXXX, XXXXXX, XXXXX, XXXXX, XXXXXX, XXXXXX, XXXXXX, XXXXXX, XXXXX, XXXXX, XXXXXX, XXXXXX, XXXXXXX, XXXXX, XXXXXXX, XXXXX, XXXXX, XXXXX and XXXXXX.⁷

These accounts were provided during the initial investigations by the MPD and the FBI,

⁷ The ages given for each witness reflect the witness’ age in 1968.

and a May 16, 1968 meeting of the Tennessee Advisory Committee of the United States Civil Rights Commission (USCRC). In addition, the accounts of three witnesses include the results of interviews conducted as part of the FBI's "cold case review." Attached to this memorandum is a scene diagram included in the 1968 report that identifies the location in which some of the witnesses were believed to be at the time of the shooting. (Attachment #4).

XXXXXXXX. XXXXXXXX, XX, gave a statement to the MPD. XXXXXXXX was mopping the floor of his second floor apartment at 878 South 4th Street when heard some small children shouting outside. He walked out to the ramp which is about three or four feet above the boiler room at the east end of 878 South 4th street. He saw an officer running directly towards him and another officer sitting in a car in the parking lot. The officer stopped about 10 feet from the ramp and shouted, "raise your hands!" At first XXXXXX thought the officer was talking to him. However, he then looked down and saw Payne standing beneath him with his hands clasped behind his head. The policeman then moved across the yard, threw his gun into Payne's stomach and pulled the trigger. The policeman then started back towards the patrol car. XXXXXXXX did not see Payne come through the boiler room door. He simply saw him standing in front of the building. However, he remembers that the door of the boiler room was open approximately 16 to 18 inches wide.

In a statement to the FBI, XXXXXXXX added that after the shooting the second police officer approached XXXXXXXX and asked him why he had shot Payne. XXXXXXXX did not answer but simply walked away towards the police car. XXXXXXXX saw Payne's XXXXX faint while at the scene, but says no police officer threatened her. XXXXXXXX described the balcony upon which he was standing as being recessed about 15 inches from the top of the boiler room. He stated that he observed the shooting while leaning over the balcony. He could see Payne's hands as well as Payne's body from the shoulders up. Payne did not have a knife.

However, at the USCRC hearing, XXXXXXXX testified under oath that Payne was coming out of the boiler room at the time he was shot. XXXXXXXX added that Payne said, "All right, man, don't shoot!" but the officer ran over and shot him anyway. Upon being questioned, XXXXXXXX explained that Payne's hands were not clasped behind his head, but rather were up and parallel to his ears.

XXXXXXXX testified that he had been called as a witness at the state grand jury and related the same account, adding that he knew Payne before the shooting. XXXXXXXX reiterated that he did not see a knife until after Payne had been taken away on a stretcher and the officer had gone in and come out of the boiler room.

XXXXXXXX. XXXXXXXX, XX, gave a statement to the MPD and the FBI. XXXXXXXX was standing about 100 feet west of the boiler room door. XXXXXXXX saw Payne carrying a large object and running between the buildings in the complex, but then XXXXXXXX lost sight of him. Soon after, police cars arrived. As an officer approached the door to the boiler room, he had a shotgun pointed towards the ground. The officer said, "Come out with your hands up." Payne

came out of the boiler room after the police officer opened the door with his left hand. Payne had his hands folded above his head. As Payne came out of the basement door, Payne said to the officer, "Please don't shoot me." The police officer then placed the shotgun in Payne's stomach and the gun went off. Payne fell to the ground beside the door of the boiler room which was opened about two or three inches. The officer who did the shooting called to the other officer to get an ambulance. The second officer then joined XXXXXX and asked "Did you have to shoot him?" XXXXXX did not hear XXXXXX's reply. XXXXXX then returned to the police car and used the police radio.

In both statements, XXXXXX said that Payne did not have knife in his hand but also noted that about five minutes after the shooting, he saw the officer who shot come out of the boiler room with a knife in his hand, saying, "He had a knife."

XXXXXX was believed to be in the position labeled "1" on the attached scene diagram. He was with the group whose vantage point is depicted in the photo marked as attachment 6.

XXXXXX. As part of its Cold Case Review, the FBI interviewed XXXXXX who was XX years old at the time of the shooting. XXXXXX said she was playing in the yard with her brother when she saw some boys running with televisions. They came from the direction of the Sears and came through the parking lot of the complex. Shortly after, she saw a white police officer approach a maintenance worker who was pointing in the direction of the basement door. XXXXXX and her brother ran up a ramp in order to see where the police officer was going. They were on the ramp directly over the basement door. She heard the officer direct the person to come out with their hands up. When the door to the basement opened, XXXXXX saw the boy she knew as Larry Payne. She saw Payne look up towards her brother with a smile on his face. She believes Payne's hands were up in the air.

XXXXXX. XXXXXX, XX, was interviewed by the MPD and by the FBI. The statements were substantially consistent.

XXXXXX was standing at the end of the ramp at the southeast corner of the building at 885 Mason Street. A man named XXXXXX was standing with her. A policeman stepped out of a car in the driveway and began to run towards Payne, telling him to halt. Eventually Payne just stood against the closed boiler room door, and raised his hands behind his head. Payne told the policeman that he had not done anything. The policeman then approached Payne and pressed the gun against his stomach. XXXXXX believes the policeman spoke to Payne for about two seconds and then the gun went off. The policeman then ran back to the police car from which he had come for about five seconds.

In testimony before the USCRS, she said that after the shot, XXXXXX ran to alert Payne's XXXXXX and they returned to the scene. As Payne's XXXXXX approached, the officer said "Get back, lady or I will kill you, too." The second officer came and said, "What did you kill him for? You didn't have to kill him." The officer replied, "I had to kill him, he pulled a knife on

me.” The ambulance then arrived and carried Payne away. XXXXXX said that she observed the officer come out from the basement with a knife.

As part of its Cold Case Review, the FBI telephonically contacted XXXXXX in 2007. She reiterated the substance of her earlier accounts, though she could not recall some details. She added that in March, 1968, she had been dating Payne’s XXXXX, XXXX.

XXXXXX was believed to be in the position labeled “13” on the scene diagram.

XXXXXX. In a statement to the MPD, XXXXX, XX, said that he saw a police officer running toward the basement door with a shotgun in his hands. Payne, wearing a long sleeve blue shirt, then came out of the boiler room with his hands on the back of his head. Payne backed up against the door and closed it when he came out. The officer at this point was about five feet in front of Payne. The officer then took a step forward, jabbed the gun in Payne’s stomach and with one hand on the barrel and one hand on the trigger, shot him. Payne fell with his head pointing east. At this moment, XXXXX ran down to the other end of building and climbed up to a balcony that overlooks the scene of the shooting. The officer was screaming, “Get back; he had a butcher knife on me.” The officer then signaled for his partner to join him. However, the other officer simply shook his head and said that he was not coming down and simply returned the police car. In a few moments the area was swarming with other police cars. XXXXX’s partner remained standing about ten feet from the car and did not walk down to the scene of the shooting.

XXXXXX also provided a statement to the FBI in which he reiterated the account above, adding that immediately after the shooting; the officer said Payne had pulled a knife. XXXXX also observed officers later remove a television from the boiler room.

XXXXXX was believed to be in the position labeled “2” on the scene diagram.

XXXXXX. In a brief statement to the MPD, XXXXX, XX, is a brother of XXXXXX, above. XXXXX said that he saw Payne come out of the basement with his hands behind his head and then the officer shot him. In a more complete statement to the FBI, XXXXX stated that Payne opened the door to the boiler room with his hands raised over his head. After he stepped out, Payne closed the boiler room door with his right hand and then once again put his right hand over his head. The police officer then walked up to Payne, stuck the gun in his stomach and pulled the trigger. Payne fell backwards against the boiler room door and slumped to the ground. Immediately after the shooting Wesley returned to his apartment and stayed there. He did not approach the scene of the shooting.

XXXXXX was believed to be in the position labeled “3” on the scene diagram.

XXXXXX. In a statement to the MPD, XXXXXX, XX, related that he saw the shooting from the west end of the building at 878 South 4th. He saw Payne open the boiler room door halfway, and then saw the policeman open it the rest of the way. XXXXXX observed what

appeared to be a conversation of about half a minute between Payne and the officer, but he could not hear what was said. The officer then stuck the gun into Payne's stomach and shot him. At this point the policeman had one hand on the barrel of the gun and the other on the trigger. Immediately after the shooting, XXXXXX ran toward the scene. However, the policeman was aiming his gun at people and telling them to move back. The officer then began to check the body and later walked about halfway towards the police car from which he had come. The officer's partner never joined him at the scene of the shooting.

In a subsequent statement to the FBI, XXXXXX offers a similar account, differing only on whether Payne opened the door the entire way by himself. After watching Payne run into the boiler room and close the door behind him, XXXXXX saw XXXXX walk to the closed boiler room door and say something to Payne through the closed door. Payne then opened the door and stepped out with his hands above his head, with nothing in his hands. The officer then appeared to reach out to take hold of Payne, though he did not actually touch him. After the shooting, Payne fell backwards, partly into the boiler room. The officer then yelled some instructions to XXXXX who was still standing at the police car.

XXXXXX was believed to be in the position labeled "4" on the scene diagram.

XXXXXX. In a statement to the MPD, XXXXX, XX, admitted that he participated with Payne in the looting of Sears Roebuck during the morning before the shooting. Afterwards, XXXXXX was sitting on a porch at 878 South 4th St. when he saw a police car turn into the project parking area. He left the porch and walked into the yard facing east towards the boiler room. At the beginning of his statement to the MPD, XXXXXX recounted that Payne came out of the boiler room with his hands over his head and was shot by the policeman who just put the gun into Payne's stomach and shot him. Payne fell back against the boiler room door, forcing it shut. However, under further questioning, XXXXXX retracted that statement. XXXXXX admitted that he could see only Payne's left hand above his head, adding that he does not know who shot Payne or how he was shot. Then, under further questioning, XXXXX again retracted his second statement and admitted that from where he was standing, he could not see anybody come out of the door. When the MPD questioner asked XXXXXX why he initially told a lie, XXXXXX responded that everybody around the project was "Ayapping" about how they told the MPD that Larry had been shot and XXXXXX decided to "stay with" them and lie too. XXXXXX added that nobody standing with him on the west end of 878 South 4th Street could have seen more than he did. He added, finally, that he was sure only that a boy named XXXXX was with him at the west end of the building.

In a statement to the FBI, XXXXXX again admitted his participation in the looting. He stated that after putting the items into the basement boiler room, he went around to the west end of the building with his friend XXXXX, who had also participated in the looting. They saw Payne running across 4th street with a heavy object in his arms. At this point the police car appeared, driving eastward to the parking lot. XXXXXX looked eastward toward the boiler room. He saw the policeman walking towards the boiler room door. The officer appeared to be

saying something while holding the shotgun in his right hand. The officer moved to the door and opened it with his left hand. XXXXXX could then see Payne's left elbow in the air as Payne came out of the boiler room. The policeman then pushed the shotgun against Payne's stomach and pulled the trigger. Because of the angle from which he viewed the incident and because the door of the basement was open, perpendicular to the building, XXXXXX could not see all of Payne's body before the shooting.

XXXXXX added that a number of people who claim that they saw Payne being shot were not even at the scene. He mentioned, in particular, a girl named XXXXXX who told police that she saw the shooting but who, XXXXXX knows, was not even there.

XXXXXX was believed to be in the position labeled "5" on the scene diagram.

XXXXXX. XXXXXX, XX, lived at XXXXXXXX in Apartment XX. In an interview with the FBI, XXXXXX said she was sitting in the front porch area of XXXXXX when she saw Larry Payne carrying a television set between the buildings at 890 and 878 South 4th Street. She then walked to the back part of her building and went outside. She saw a police car turn into the parking lot in her building. She, along with several others in the area, urged Larry to hurry up so the police would not catch him. Payne went into the boiler room at the end of the building. A short time later (she did not indicate the length of time) she saw Larry come out of this room with his hands held over his head. She had not yet seen any police officer walking towards Larry, but she saw Larry stop just as soon as he came outside the door. She then saw an officer walk up to Payne and speak to him, but she was too far away to hear what was said. The officer then stuck his gun in Larry's stomach and the gun went off. She saw nothing in Payne's hands.

In a statement to the MPD, XXXXXX added two other details. She said that the officer who did the shooting met his partner about halfway between the scene of the shooting and the police car. The partner officer said to XXXXXX "You didn't have to shoot him." XXXXXX also said that at the time he was shot, Payne was standing up against the closed boiler room door. After Payne was shot, he fell back against the door, causing it to open. In addition, in this statement, XXXXXX seems to indicate that she observed the shooting while sitting in the back porch of her apartment.

XXXXXX' statements before the USCRC were generally consistent with the above account. In addition, she said that even though she appeared for the state grand jury, she was not called as a witness.

XXXXXX was believed to be in the position labeled "6" on the scene diagram, if she was outside at the time of the shooting.

XXXXXX. XXXXXX, XX, gave a statement to the MPD. XXXXXX was picking up her XXXX and arrived home just after the shooting. Her XXXXXX, told her that she had just

witnessed the shooting from the back window of their apartment. According to XXXXXX, XXXXX reported that the officer shot Payne in the back.

XXXXXX. XXXXXX, age XX at the time, gave a statement only to the MPD. She was standing in the back room of her apartment at XXXXXXXX (apartment XXX), looking out of her back window. Payne opened the boiler room door and came out of the boiler room with his hands up. As he came out, Payne said, "I give up". However, just as Payne reached the top edge of the steps, the police officer shot him. The door was wide open when the policeman told Payne to come out.

XXXXXX was believed to be in the position labeled "17" on the scene diagram.

XXXXXXX. XXXX, XX, provided a statement to the FBI. XXXXXX was standing with XXXXXX on the ramp at the apartment building. XXXXXX said that he saw a white man in a white shirt running with a shotgun and yelling. The man stopped about 30 to 40 feet from XXXXXX, where Payne was simply standing. The man said something to Payne who began to put his hands behind his neck or head. The man punched the front end of the shotgun into Payne's stomach. The gun fired and Larry slumped against the building. The man then ran back to the parking lot and did not reappear until uniformed police officers arrived.

XXXXXX. XXXXXX, XX, provided a statement to the FBI. XXXXXX said Payne was one of two boys carrying television sets into the boiler room. In a short while after they entered the boiler room, a police officer came and hollered that they should come out with their hands up. Payne kicked the door open and came out with his hands over his head. Payne told the officer he was coming out and asked the officer to not shoot. When Payne came out, the officer walked up to him, shoved the barrel of the shotgun into Payne's stomach and the shotgun went off. Payne fell down. Payne's mother arrived and asked the officer why he shot, and the officer said Payne had pulled a knife on him.

XXXXXX also spoke to the MPD, adding that she saw Payne enter the boiler room with another boy. She saw the police officer shoot at the door before firing a second shot that struck Payne.

In testimony before the USCRC, XXXXXX said that she was standing "across the stairway from the door where Larry got shot." The officer said, "Come out or I'll shoot" so Payne came out and told the officer not to shoot. While Larry's hands were up in the air, the officer stuck the gun in his stomach and shot him. Under specific questioning, XXXXXX said she was actually on a sidewalk only 25 feet from the shooting. XXXXXX said she did not testify before the grand jury because she was not called as a witness.

XXXXXX. XXXXXX, XX, gave a statement to the MPD. XXXXX said she was standing in the driveway when the patrol car pulled in and that she remained standing in front of the driveway throughout the shooting. A policeman jumped out of the car and ran across the

grass in a northerly direction towards the boiler room. At the time the patrol car pulled in the driveway, Payne was standing in front of an open door. At no time did she see Payne emerge from the boiler room. The officer ran across the grass calling "Halt!" Payne, apparently hearing the shouts, turned around and put his hands behind his head and his back against the door. The policeman continued to run across the grass. As he approached Payne, he placed his gun into Payne's stomach and fired. The policeman then ran back to his car and told his partner to call an ambulance. XXXXXX says the partner said to XXXXXX "Why did you shoot him? You didn't have to shoot him."

XXXXXX was a witness at the USCRC hearing. She said that she had been talking with Payne on the ramp before starting to walk away in order to go to a store. Suddenly a police car pulled up beside her. The passenger officer jumped out and ran across the yard toward Payne and started shouting "Halt, nigger, halt!" XXXXXX walked closer to Payne who was standing with his hands up in the air. The police officer walked up and shot him. XXXXXX started screaming and began to run towards her XXXXX house. On the way she turned and saw that Payne was lying on the ground with his shoulder resting on a hill. When Payne's XXXXXX approached, the officer hit her in the chest with the butt of his gun and the XXXXXX fell and fainted. By this time, the partner officer came up and said to the shooting officer, "You didn't have to shoot him, you didn't have to kill him." But the shooting officer replied, "He drew a knife on me, I had no choice." A crowd began to form, with people shouting "We are going to kill him!" meaning the officer.

XXXXXX said the basement door was open only a little crack that would require someone to enter by turning sideways. She did not see a knife. Under further questioning at the USCRC hearing, XXXXX said she had no idea why the officer was yelling "halt" because she saw Payne standing still with his hands up in the air. She insisted Payne was not in the boiler room.

XXXXXX apparently did not provide a statement to the FBI. She was believed to be standing in the position labeled "9" on the scene diagram.

XXXXXX. In a statement to the MPD, XXXXXX, XX, estimated that from his distance about 200 feet west of the site of the shooting, he was able to see Payne step out of the boiler room with his hands high over his head but was not able to see whether Payne held anything in his hand. The policeman stepped towards Payne, placed a rifle in his stomach and pulled the trigger. XXXXXX immediately ran home and stayed in his house until the policemen left the area. Under further questioning by the MPD, XXXXXX demonstrated what he meant by saying that Payne had his hands high over his head. To illustrate Payne's hand position, XXXXXX clasped his hands behind his head. XXXXXX added that the officer was about three or four feet away from Payne before he shot him, and he then moved closer to him when he fired the fatal shot.

In a statement to the FBI, XXXXXX repeated his statement that Payne came out of the boiler room with his hands clasped behind his head. He added, however, that the door to the

boiler room was only about one-third open and that Payne=s whole body was in front of this door facing the policeman. The policeman then walked up to Payne, poked the gun in his stomach and shot him. XXXXXX stated specifically in this interview that he did not see any weapon in Payne=s hand. He noted however, that he had seen a picture in the newspaper of the knife allegedly found at the scene, and said the knife resembled the knife he had seen used by a handyman who works in the project to make repairs.

XXXXXX was believed to be in the position labeled “7” on the scene diagram.

XXXXXX. XXXXX lived in the complex and was employed as a XXXXX. When she departed the taxicab which brought her home from work, she saw all of the commotion in the yard. She went to the scene and saw a boy lying down. She went to him and felt his pulse but there was none. As she held the head of the boy, she saw the police officer go down the steps into the basement and say something like “here it is” and bring up a knife. A second officer arrived and told her to stand up, so they could put the boy on a stretcher.

XXXXXX. In a signed affidavit dated April 26, 1968, the victim’s XXXXX said that just prior to the shooting, XXXXX had been at her XXX, and had left for only about fifteen minutes when a girl came running to her apartment to tell her that XXXXX had been shot. XXXXX went to the scene where she saw XXXXX lying on the ground. The police officer kept her away from him. She alleged at the USCRC hearing that when she tried to get close to XXXXX, the officer said to her, “Get back nigger. I will kill you.” XXXXX said she fainted at the scene. XXXXX was also quoted in newspaper articles describing her experience and her pain over the tragedy.

XXXXXX. XXXXXX, a XX-year-old woman, provided statements to the MPD and to the FBI. XXXXXX was in her apartment which is just XXXXXXXXXXXXX. XXXXXX heard someone yell “Halt!” several times, followed by one shot. She ran outside and then heard another shot. She saw a young man, later identified as Payne, lying downward with his head into the threshold of the open doorway of the boiler room. A white police officer was standing about 15 feet from the victim. XXXXXXXX asked why the officer had shot the boy and he said “Lady, I had no other choice. Stand back.” The officer called to his partner to come down here but the partner took a few steps and told the officer to come back to the car, as a crowd was beginning to gather. Later she saw an officer holding a knife.

XXXXXX. XXXXXX, XX, stated to the MPD that he did not see the actual shooting. While standing at the west end of a building at 878 South 4th Street, he saw Payne come out of the basement with his hands in back of his head. A policeman ran up to him to catch him. At this point XXXXXX turned his head away from the scene. He then heard a single shot. When he looked back, he saw Payne falling to the ground. The officer then stood over Payne with a gun in his hands. Because XXXXXX turned away from the scene just prior to the shooting, he does not know if Payne made any kind of motion toward the officer. He never saw a knife in Payne’s hand.

XXXXXX did not provide a statement to the FBI. He is believed to be in the position labeled "8" on the scene diagram.

XXXXXX. XXXXXX, XX, gave consistent statements to the MPD and the FBI. XXXXXX was sitting in his apartment (Apartment XXX at XXXXXX) at the kitchen table when he saw a patrol car pull into the driveway behind his apartment. The car stopped and the driver jumped out of the car carrying a rifle. XXXXX states that he went outside at this point, apparently behind the building at 885 Mason Street, and saw the officer running north towards the boiler room. The door of the boiler room was closed. As the officer approached the door, he had a rifle held in both hands. As he neared the door, the officer held the rifle in his right hand and opened the door with his left hand. As the door opened, Payne began to come out with both hands behind his head. At this point, the officer said something to Payne and Payne shook his head. XXXXXX, however, was too far away to hear what was said. At that moment, XXXXXX reached down to pick up his little boy who was standing with him, and as he did so, he heard a shot. He looked up to see Payne falling to the ground with the officer standing close to him, holding his rifle in the air. The officer then called for his partner to come to the scene of the shooting, and that officer called back, asking if he had shot the boy.

XXXXXX states that he saw nothing in Payne's hands. He also says that Payne fell on his back, with his head resting on the top step leading down to the boiler room.

He is believed to be in the position labeled "10" on the scene diagram.

XXXXXX. XXXXX, XX, gave a statement to the MPD. He was shooting marbles and standing in the driveway as Payne entered the boiler room with a television set. Soon a police car drove up and officer ran towards the basement door that Payne had entered. Payne later pushed the boiler room door open halfway and then the policeman pulled the door open the rest of the way. The policeman asked Payne something, and Payne, in response, shook his head. XXXXXX believes Payne was "fixin' to put his hands up" when the officer shot him. The officer who fired the shot ran back up to the patrol car for help.

He is believed to be in the position labeled "11" on the scene diagram.

XXXXXX. XXXXXX, XX, provided a statement to the FBI. She was in her apartment at XXXXXXXX when she observed a police officer carrying a shotgun run through the area. She was afraid that her children who were outside might be in danger, so she ran outside to find them. The police officer was walking up to the boiler room when Payne began to emerge from the room with both hands raised over his head. She says that the officer said something to Payne, but she was too far away to hear what was said. The officer then approached Payne with both hands on his gun, shoved the barrel into Payne's stomach, and fired. XXXXXX says that she then became very emotional and starting screaming for her children and returned immediately to the inside of her apartment. She states that she did not see a knife in Payne's hand.

It is unclear whether XXXXXX was outside or in her apartment at the time of the shooting. If she was outside, it is believed her position is the one labeled "12" on the scene diagram.

XXXXXX. XXXXXX, XX, provided statements to both the MPD and the FBI. XXXXXX was standing by himself on the first floor ramp of 878 South 4th street, immediately above the boiler room door. XXXXXX leaned over the balcony wall in order to see the events below. An officer approached the boiler room from the south. Looking down, XXXXXX saw Payne standing with his back against the wall of the building. Payne had his arms out in front of his shoulders with his forearms upwards. His hands were empty. The officer came up to Payne, hesitated for a second and then poked him in the stomach with his gun, which went off. XXXXXX does not remember if the boiler room door was open or closed. He does not remember any words being spoken by Payne or XXXXXX. After the shooting, XXXXXX told the officer who had remained by the patrol car to call an ambulance. XXXXXX remained on the ramp for about one minute and then walked down to the scene of the shooting. The door to the boiler room was open, perpendicular to the wall of the building. Payne rested with his head on the threshold of the boiler room door. However, after Payne was taken away in the ambulance, XXXXXX noticed the officer had a knife in his hand. The knife looked like an old rusty butcher knife. XXXXXX had no idea where the officer obtained the knife.

XXXXXX's location is marked with the number "16" on the scene diagram and is depicted in the photographs that show the ramp. (Attachment 5.)

XXXXXX. XXXXXX, XX, provided statements to both the MPD and the FBI. XXXXXX was standing on the third floor ramp of 878 South 4th Street with her XXXXXX. She saw a police car drive into the parking lot to the south of the building, approximately 75 yards away. Two officers got out of the car and one of them ran towards the apartment with a shotgun in both hands, yelling "Come out or I will shoot the door down." She looked down and saw a boy directly below her with his hands raised behind his head but not clasped. There was nothing in his hands. She could see that the boy was saying something to the officer but she could not understand it. At this point she reached down for her son and heard a shot. She looked down again and saw that Payne was on his back.

XXXXXX did not see Payne come out of the boiler room. However, shortly after the shooting when she went down to the scene, she did see that the boiler room door was open. She theorized that she could not see the door open from her vantage point simply because it had not been opened far enough. She also noted that she had seen people standing on the landings beneath her at the time of the shooting. Though she was not able to see clearly all the way to the ground, she was able to see Payne's hands raised behind his head. She did not see any knife.

XXXXXX. As part of its Cold Case review, the FBI telephonically contacted XXXXXX who reported that she was XX years old at the time of the shooting. XXXXXX stated that she was walking through the parking lot when she saw Payne. They began to tease and joke. Payne

walked with her to the bottom of the stairs leading to her apartment, when she went up the stairs. She then heard a loud noise, immediately looked and saw Payne lying on the ground.

XXXXX. XXXXX, XX, provided a statement to the FBI. XXXX was with Larry XXXXXXXX and Payne at Sears that morning, where they took televisions and record players. He last saw Payne in the Sears parking lot. XXXXX returned to the apartments and gave the record player to XXXXX who was at the boiler room door. XXXXX then went to his apartment and changed his pants. He heard something that sounded like a shot and ran around to the boiler room. There he saw Payne lying on his back with his head within six inches in the doorway of the boiler room. An officer was there holding a shotgun at the crowd that had begun to gather. Another officer came up and asked, "Did you have to shoot him?" The first officer replied, "He had a knife." XXXXX never saw a knife at the scene. XXXXX was angry because he saw the two officers "do their little fingers together – we call it the Chinaman," referring to an action he interpreted as a kind of congratulations.

FNU XXXXX. A witness whose last name was XXXXX but whose first name was not provided in the transcript testified at the USCRC hearing. She said that she observed the entire shooting, from near the home of XXXXXX. She saw the officer from the side and walked right up to him before the shooting. She heard the officer call Payne a "black nigger" before he "hauled off and shot him" by shoving the gun into his stomach. XXXXX reported that Payne's hands were up over his head at the time of the gunshot. She also testified that the officer went into the basement, to the bottom step, and then came out with a knife. XXXXX further alleged that when the second officer arrived at the scene, he and the shooting officer touched their little fingers together, in a movement that residents called "Chinaman" and means "good luck."

4. Physical Evidence

Photographs of the scene, attached, reveal that the boiler room door opens outward, and several stairs are indoors, leading down into the boiler room. (Attachments 2) In addition, the photographs show various perspectives and vantage points in the housing complex.

Autopsy and Toxicology. According to the autopsy report by J.T. Francisco, the Shelby County Medical Examiner, the cause of death was a near gunshot wound to the chest, with hemorrhage, and the manner of death was homicide (caused by another person). The bullet's entrance wound was in the upper abdomen/chest area and the trajectory was slightly upward from left to right and from front to back. The autopsy report also notes that there was powder and flecking on the victim's upper chest and on the elbow of his left arm. The diagram indicates the gunshot wound is approximately at the same level as the elbow, when the arm is in a downward position. In addition, the examiner noted a small 1/8" recent laceration at the base of the right forefinger. A photograph of the gunshot wound is included in the file.

The toxicology test results were negative for alcohol or amphetamines.

Knife. MPD investigators said they found a brown handled butcher knife on the bottom of three steps at the entrance to the basement boiler room. MPD Lieut. XXXXX said he observed the knife about two feet from the victim's body. The knife had a recently-sharpened blade about 5 inches long. A photograph of the knife is attached to this memorandum.

Shotgun. The subject used his personal weapon during the incident, a single shot, sawed-off, 12 gauge shotgun with a single 18 ½ -inch barrel, and black tape on handhold. One spent shotgun hull was located at the scene.

Television and stereos. MPD Inspector XXXXXX found a stolen television set and two record players in the basement. Sears officials examined the serial numbers of these items and identified them as having come from the local store where the looting had occurred.

IV. Legal Proceedings

A. Local grand jury

According to media reports and civil court documents, a Shelby County grand jury declined to bring criminal charges against the subject. MPD Inspector XXXXX reported that on May 15, 1968, the county grand jury summoned 40 witnesses and heard from 13 witnesses.

B. U.S. Commission on Civil Rights

On May 18, 1968, the Tennessee Advisory Committee of the U.S. Commission on Civil Rights was convened to receive complaints of police misconduct and forward them to the Department of Justice. The Commission had no enforcement authority nor did it have the power to take sworn testimony.

The Commission met with a group of residents, who answered questions in a discussion format, with all of the witnesses present and hearing the accounts of others. These persons included XXXXX, XXXXX, XXXXX, XXXXX, XXXXX, XXXXX (the victim's XXXXX, who did not observe the shooting) and FNU XXXXX. While there was no new material information about the actual shooting incident, the witnesses described a generally chaotic and intense scene in the aftermath of the shooting. During their report, the residents described their concern that after the shooting, the officer used his foot to turn Payne's body over. Two of the witnesses, XXXXX and XXXXX, said they heard the subject tell his partner, "I had to shoot him." XXXXX also told the Commission that she saw the subject officer holding the knife after the shooting and that the officer then "pulled a knife on me." One of the witnesses noted that when he testified before the local grand jury, he noticed that the grand jury had about seven or eight members who were African-American.

C. Federal civil lawsuit

In 1969, the victim's parents filed a federal civil suit in the United States District Court for the Western District of Tennessee. Their complaint alleged deprivation of civil rights, personal injury and wrongful death, and negligence. The defendant's answer claimed he acted in self-defense. The case went to trial and on March 3, 1971, a jury rendered its verdict for the defendant officer. The district court denied the plaintiffs' post-trial motion to set aside the verdict and the plaintiffs subsequently did not pursue an appeal.

The Plaintiff's Memorandum of Points and Authorities alleges that the subject "wrongfully, recklessly, tortiously and/or negligently" shoved the open end of the barrel of his shotgun into the abdomen of the victim and discharged it. The lawsuit alleges that the victim was unarmed and made no threatening movements as he attempted to surrender to the subject. In their pleadings, the plaintiffs specifically assert that for the civil litigation, they did not need to prove that the officer's conduct was willful.

In their post-trial pleadings, the plaintiffs alleged that "nine eyewitnesses testified that they saw [the] defendant shoot Larry Payne ... while the youth was standing with his hands up..." and that no eye witness corroborated the subject's claim that the victim had a knife in his hand.

V. Additional Information

A. Background investigation regarding the knife

XXXXXX. XXXXX is the only witness who linked the victim to ownership of a knife. XXXXX was a friend of the victim who was with him during the civil disturbance on the morning of the shooting. He gave statements to Memphis Police Department and to the FBI as well as a deposition, excerpts of which were read at the federal civil trial. The statements are consistent and summarized in pertinent as follows:

XXXXXX described the looting that took place the morning of the shooting. He identified the persons in the photograph taken that morning as himself, the victim and their friend who was being struck by a police officer. Before the photo was taken, he saw the victim use the stick to break a store window and grab some cloth. XXXXXX said that on the morning of the shooting, he and the victim were with a group of friends including a girl who he thought was XXXXXX who told the victim to "get that knife off me." XXXXXX further said that he believed the victim carried a knife in the past, specifically stating that he previously had seen the victim carry a knife while at the high school.

XXXXXX provided a statement to the FBI. She said she had seen the victim the morning of the shooting, but she did not see him with XXXXX and did not hear any mention of a knife.

XXXXXX, a friend of the victim, reported to the FBI that he did see XXXXX with the group of friends on the morning of the shooting.

Several additional persons interviewed said they had never observed the victim with a knife. These including the following friends and classmates of the victim: XXXXXX, XXXX, XXXXX, XXXX, XXXXXX, XXXXX, XXXXXX, XXXXXX, XXXXXX and XXXXXX.

XXXXXX, a friend of the victim, told investigators that the knife was very similar to the one used by the handyman at the apartment complex. However, maintenance staff at the Fowler Homes also provided statements to the FBI, all saying that they had never seen the knife previously. These staff members included XXXXX, XXXXX, XXXXX and XXXXX.

In addition, the victim's XXXXX, XXXXX, said he had never known Payne to carry a knife.

B. Conclusion of MPD investigation and disposal of evidence.

The MPD investigation concluded with a finding that the shooting was a justified use of deadly force in self-defense. According to documents in the file, the Memphis Police Department eventually deemed the knife to be unneeded evidence in the absence of criminal charges following the investigation. They obtained a court order to dispose of the knife, along with other unneeded evidence unrelated to this case, in the Mississippi River; accordingly, the knife was not available for the civil trial.

C. Family Members.

In addition to XXXXXX, the victim's XXXXX, whose account is described above, the following members of the victim's family were interviewed by the MPD and the FBI: XXXXXX, XXXXXX, and XXXXX. The information shared by the additional family members was about events before and after the incident and, accordingly, did not shed light on the immediate events leading up to and during the shooting itself. During their interviews, the family members explained that Larry Payne usually lived with his XXXX, but sometimes stayed with his XXXXX at the housing complex.

D. Event as described in history book.

This review has included reading relevant portions of "The Last Crusade," written by Gerald McKnight, published in 1998. In the chapter entitled, Memphis: Days of Rage, Days of Sorrow, the author criticizes the Memphis police for having disposed of the evidence before the civil trial occurred. The author notes that the residents of the housing complex who claim to have seen the shooting "have to be treated as partisan," in favor of the victim, because in the author's words, "Payne was very popular with the residents" and since this was a matter of "white on black violence involving the police, there was little likelihood" of witnesses supporting the police.

E. Victim's Record.

The victim has only one previous known encounter with law enforcement. He had been arrested for assaulting a girl on the street. He successfully served the probation imposed as punishment.

VI. **Factual and Legal Analysis**

A. Legal Standard

To show a violation of 18 U.S.C. § 242, the applicable federal criminal civil rights statute, the evidence must establish, beyond a reasonable doubt, that the subject willfully used more force than he reasonably could have believed was necessary under the circumstances. This burden of proof has both an objective and a subjective component. The reasonableness of the amount of force used is determined from the perspective of a reasonable officer on the scene. See Graham v. Connor, 490 U.S. 386 (1989) (discussing objective reasonableness standard). The government must also show that the officer subjectively intended to use excessive force. See Screws v. United States, 325 U.S. 91 (1945) (discussing willfulness element of 18 U.S.C. § 242). Mistake, misperception, or even bad judgment, are not sufficient to establish criminal intent under this statute.

B. Factual Analysis

Analyzed under the above standard, this matter does not disclose a prosecutable violation of 18 U.S.C. §242. For the reasons explained below, the evidence is insufficient to establish that the subject willfully used excessive force when he fired his shotgun at the victim.

1. Corroboration of subject's account

The subject's account is corroborated by the physical evidence and in critical part by at least seven witness accounts. In addition, there is insufficient evidence to refute the subject's statements that he fired at the victim in self-defense, a claim that is corroborated by the key physical evidence of the knife's location as well as the autopsy report. The knife was observed by other officers at the scene in close proximity to the injured victim. Significantly, XXXXX's contemporaneous reporting of the knife is corroborated by at least five civilian witnesses – XXXXX, XXXXX, XXXXX, XXXXX and XXXXX -- who told the FBI that as the second officer approached, they overheard the subject tell this officer that he had to shoot because Payne had a knife, or heard other statements about a knife. The autopsy noted gunpowder flecking on the victim's elbow, level with the upper abdominal wound, which would be consistent with the subject's claim that the victim's right arm was lowered at the time he fired. XXXXXX, an adult who did not know the victim, had a clear vantage point to the scene. She looked over immediately after hearing the gunshot and saw the victim lying in the open doorway of the boiler

room, a position that matches the account of the subject. XXXXXX, another adult who did not know the victim, recounts that the door was open at the time of the gunshot, and that the victim fell within the open door. XXXXX also corroborates that Payne fell back into the boiler room.

2. General analysis of civilian witness accounts

The multitude of witness accounts, when examined one against the other, or held against the physical evidence, reveal internal and external inconsistencies that render them insufficient to form the basis of a federal criminal civil rights prosecution. As noted earlier, the material factual disputes are related and concern two matters: the location of the victim's arms at the time of the gunshot and the contents of the victim's right hand. Numerous witnesses allege the victim's arms were raised over his shoulders and that Payne did not have a knife.

As shown by the photos, the vantage point of many of these witnesses compromises the accuracy of their account. For instance, the location from which XXXXX, XXXXX, XXXXX, XXXXX, XXXXX, XXXXX, XXXXX and XXXXXX state they observed the shooting is due west of the basement door. When the basement door was open, it opened to the outside, facing south. Accordingly, from that vantage point, a direct view to the actions of the victim would necessarily have been blocked by the open door. Therefore, because this vantage point would have been blocked by the basement door which the majority of witnesses describe as open, the accounts of the witnesses from the Fourth Street location do not constitute reliable evidence. The visual limitations of this vantage point are reflected in Photos 3 and 4, attached.

Further, the accounts of the civilian witnesses often contradict the physical evidence and sometimes contradict each other. With regard to each of several relevant aspects, the witnesses' accounts provided a range of variations. For instance, accounts regarding whether the victim had been looting ranged from the victim never having left the complex to his running back into the boiler room holding a television. Regarding the victim's location at the time of the gunshot, some witnesses place the victim within the entryway of the door, while others claim he was fully outside of the door. Accounts regarding the victim's hand placement at the time of the gunshot included his hands having been straight up in air or clasped behind his head. Accounts differ regarding the placement of the officer's hands: some witnesses say he had both hands on his shotgun and others say the officer had one hand reaching forward. Some witnesses estimate the distance between officer and victim to have been 15 feet while others say there was direct contact with shotgun. Finally, though all civilian witnesses allege that Payne did not have a knife in his hand, several provide corroboration for the knife being found at the scene in the immediate aftermath of the shooting (e.g., XXXXX) or for the heat-of-the-moment admissions by the officer (e.g., XXXXX, XXXXX, XXXXX, XXXXX, and XXXX).

Moreover, a number of witnesses allege that they are aware of others who claimed to have witnessed the shooting but actually had not witnessed it. For instance, XXXXX told the FBI that he had talked with XXXXX and concluded that XXXXXX had not witnessed the shooting, even though XXXXX claims to have seen it. Moreover, XXXXX told investigators that XXXXX did

not see the shooting, even though she claims to have seen it.

In addition to the above eye or ear witnesses, many residents in the complex reportedly responded to the sound of the gunshot and crowded around the officers. Because these residents responded only after the gunshots were fired, any accounts they would offer would be unable to shed light on the facts concerning the critical moment when the shotgun was fired. In his investigative report, Lieut. XXXXX cited the antagonism and tensions in the crowd as a reason the officers had to leave the scene immediately. The police returned two days later in order to locate and interview witnesses.

3. Witnesses' collective influence

It is unfortunately impossible to eliminate the possibility that some witnesses' recollections might have been influenced by repeated conversations within the close neighborhood. As friends and acquaintances of the victim and his family, it is possible that a number of witnesses may have been affected by and sympathetic to the tragedy of a young man losing his life, particularly a young man as well-known and liked within the neighborhood as the victim was. This possibility is given some credence by at least one witness, XXXXXX, the friend who accompanied the victim that morning in the civil disturbances. XXXXX told MPD investigators that "everybody around the project was 'yapping' how they had told the Memphis Police Department that Larry had been shot." XXXXX explained the difference in his several accounts by revealing that initially he had decided to "stay with them and lie, too." XXXXX asserted that some of the people who claim to be eyewitnesses were not even at the scene and that witnesses were talking among themselves about an account of how Payne was shot.

4. Additional inconsistent details

The following review of testimonial inconsistencies per witness demonstrates the difficulty of gathering sufficient evidence to meet the high evidentiary burden -- beyond a reasonable doubt -- that is required to prove a criminal civil rights violation.

XXXXXX changed his account of the location of Payne's hands at the time of the shot. During his first statements to the MPD and the FBI, XXXXXX said Payne's hands were clasped behind his head, but at the hearing, XXXXXX said the hands were up and parallel to his ears.

XXXXXX's account described Payne as looking up to her brother who was on the balcony. She said that Payne was smiling. No other witness reported this observation.

XXXXXX never saw Payne come out of the boiler room though she said she viewed the entire incident from the moment the policeman got out of his car to the shooting. In contrast to her account, the majority of other witnesses stated that Payne was emerging from the boiler room door at the time he was shot.

XXXXX' account has three inconsistencies with the majority of other witnesses: 1) Payne was wearing a blue shirt (most other witnesses say the shirt was yellow); 2) Payne fell with his head to the east (most other witnesses say his head was to the north), and 3) the basement door was closed (most other witnesses say the door was open).

XXXXX, like his XXXX, XXXX, asserts that the door of the boiler room was closed at the time Payne was shot, a statement at odds with most other witnesses. XXXXX also reported that he saw Payne use his right hand to close the door and then returned his right hand above his head. However, XXXXX is the only civilian witness to provide corroboration of the subject's claim that Payne's right hand was near the door knob at the time Payne opened the door.

XXXXXX, two accounts contain internal inconsistencies and contradictions with the physical evidence. She told the MPD she watched the shooting from her apartment porch, yet told the FBI she went outside after she saw the police car arrive. XXXXX also maintains that the door of the boiler room was closed at the time Payne was shot and opened only after Payne fell against it, an account that conflicts with the physical evidence that the door opens outward. (See Photo 7 attached).

XXXXXX's account is undermined by the physical limitations of her view. She said her vantage point was from Apartment XXXX; however, an examination of the scene diagram as well as photograph 5, attached, raises the question of her ability to see the events on the other side of the open boiler room door, especially given the jutting-out of the brick wall. The physical evidence appears to make it clear that her view would have been obstructed. In addition, her XXXXX, XXXXX, told MPD that XXXXX originally said Payne had been shot in the back.

XXXXX. All other eyewitnesses saw Payne enter the basement by himself whereas XXXXX said Payne entered with another boy. XXXXX is the only witness to claim there were two shots fired. In addition, one of the other eyewitnesses, XXXXX, states specifically that XXXX claimed to be an eyewitness though he knows that she was not.

XXXXX's statements are at odds with the majority of other witnesses in a significant aspect. According to her account, Payne never entered the basement. Also, contrary to most other witnesses, XXXXX also says that the police officer ran back to the patrol car after he had shot Payne. Further, no one else reports the dialogue that XXXXX says she overheard between the two officers, although XXXXX credits XXXXX with saying that he had no choice but to shoot, because Payne had a knife.

XXXXXX was identified by XXXXXX as the one person that he, XXXXXX, was sure was standing with him at the west end of 878 South 4th Street. Several others claimed to be standing there but there is uncertain corroboration for their presence.

XXXXX described hearing two shots, though the vast majority of the witnesses recall only one shot. In addition, XXXXXX told the MPD that she never saw XXXXXX at the scene.

XXXXX made one questionable assertion. He stated that after the police car stopped in the driveway, it was the driver who jumped out of the car and pursued Payne. All other witnesses on the topic say it was the passenger officer (XXXX) who jumped from the car to pursue Payne.

XXXXXX's account contains an element that is contradicted by most other witnesses as well as by the physical evidence. XXXXXX said that as Payne stood with his back against the wall, he had his arms straight out from his shoulders and his forearms straight up. Most other witnesses describe Payne as having his hands clasped behind his head or raised over his head.

XXXXXX's account is at odds with all other accounts. No other witness describes seeing Payne teasing and smiling with her in the minutes before the gunshot.

FNU XXXXXX's account to the USCRC stands apart from all other witnesses' accounts in several ways. No other witnesses alleges that the subject called the victim a "black nigger" before shooting him, nor does any other witness describe the two officers engaging in a "good luck" hand signal called the "Chinaman" as related by XXXXX.

Photographs . An examination of the photographs indicate that it would be difficult, if not impossible, for someone further than the immediate opening of the door to see a knife in the hands of a person who was standing within the inside frame of the door. Further, the photographs show that when the door is open to the outside, the view from the vantage point of those from the west would be blocked by the open door. In addition, the photos show that the balcony views would be obstructed due to an overhang.

5. Analysis of evidence concerning the knife

There is physical evidence that conflicts with witnesses' statements that the victim placed his hands behind or above his head at the time of the gunshot and did not hold a knife. This evidence includes the knife found in close proximity to the victim's body as well as the gunshot flecking on the victim's arm at the same level as the chest wound. Some of the witnesses said they were 100 feet away which would make it difficult for them to see details, and the views of other witnesses were obstructed by the open boiler room door which blocked the view into the basement landing. In addition, the location where some of the witnesses claimed to be at the time of the shooting did not in fact allow a vantage point from which to observe the shooting.

Of significance to the analysis is the statement an acquaintance of the victim who reported that he saw what appeared to be a knife handle in the victim's belt area and heard a friend exclaim about a knife held by the victim on the morning of the shooting

The knife was identified by at least one other witness as looking similar to one carried by the victim and also similar to one used by the complex handyman used. The knife was recovered from the bottom of the three-step interior stair well. Any suggestion that the knife was planted is

refuted by the circumstantial evidence as well as the physical evidence. According to numerous witnesses, the officer declared the victim had a knife BEFORE the officer went into the basement and came out with a knife. It is illogical to suggest that the officer would have concealed an open blade knife somewhere on his person in anticipation of a possible opportunity to fabricate evidence.

There is, however, a possible understanding of the evidence that reconciles the existence of the knife with the residents' accounts that they did not witness Payne holding a knife. The subject reported that Payne's right hand with the knife was held low near the door handle. This location would have prevented the witnesses from seeing the knife, particularly those witnesses who were some distance away. It is possible that Payne dropped the knife and began to raise his hands almost simultaneously; indeed, the physical evidence reveals gunshot residue on Payne's elbow at chest level. The dropped knife was located within the basement, at the bottom of three steps, so it is logical that it would be visible only to someone standing at the door's threshold.

VII. Conclusion

This review is focused solely on whether there is sufficient evidence to prove beyond a reasonable doubt that the subject willfully used excessive force when he fired his weapon at the victim. As is shown by the above recitation of the facts, a criminal civil rights violation cannot be proven by the evidence. The subject's account is consistent with the physical evidence and is not substantially refuted by the testimonial evidence.

In addition, prior to 1994, federal criminal civil rights violations were not capital offenses, thereby subjecting them to a five-year statute of limitations. See 18 U.S.C. § 3282(a). In 1994, some of these civil rights statutes, including 18 U.S.C. § 242, were amended to provide the death penalty for violations resulting in death, thereby eliminating the statute of limitations. See 18 U.S.C. § 3281 ("An indictment for any offense punishable by death may be found at any time without limitation."). However, the Ex Post Facto Clause prohibits the retroactive application of the 1994 increase in penalties and the resultant change in the statute of limitations to the detriment of criminal defendants. *Stogner v. California*, 539 U.S. 607, 611 (2003). While the Civil Rights Division has used non-civil rights statutes to overcome the statute of limitations challenge in certain cases, such as those occurring on federal land and kidnapping resulting in death, there are no facts in this matter that provide jurisdiction under other federal statutes.

Accordingly, because this review has determined there is insufficient evidence to constitute a prosecutable federal civil rights violation, this matter should be closed. AUSA Steve Parker of the Western District of Tennessee concurs in this recommendation.