

CIVIL RIGHTS DIVISION

Notice to Close File

File No. 144-3-1430

Date November 13, 2013

To: Chief, Criminal Section

Re: XXXXXXXX - Subject,
Choctaw County, Alabama;
Frank Andrews (Deceased) – Victim;
CIVIL RIGHTS

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

Case Synopsis

On November 28, 1964, Frank Andrews, a 27 year-old African American man, was shot in the back by XXXXXXX, a white Choctaw County, Alabama, Sheriff's Deputy, outside of Smith's Café in Lisman, Alabama. XXXXXXXXXXXX Deputy William Elmore "Bo" Clark were at the Café investigating the possession and consumption of illegal whisky. According to a statement given by XXXXXX in 1964, XXX shot Andrews in the back as Andrews was being questioned by W. Clark. XXXXXXX claimed that Andrews drew a knife out of his pocket and made aggressive moves toward W. Clark, causing XXXXX to fire XXX weapon.

Investigators initially identified three eyewitnesses to the shooting and interviewed each of them. All three accounts were factually inconsistent with respect to the recall of the events leading up to the shot being fired. XXXXXX's "defense of others" claim was corroborated by W. Clark, who is now deceased, during the 1964 investigation. A local grand jury voted not to indict XXXXX.

Sheldon Beer
Attorney

To: Records Section
Office of Legal Administration

The above file has been closed as of this date.

Date

Deputy Chief, Criminal Section
FORMERLY CVR-3 FORM CL-3

XXXXXX is still alive and was interviewed in 2008 about the shooting. During XX 2008 interview, XXXXX said that XXX shot Andrews by accident because XXX was using a firearm that XXX did not ordinarily use. Although XXXXX did not advise investigators that the shooting was accidental in 1964, the only still-living eyewitness has acknowledged the possibility that the shooting was an accident.

Predication and Investigative History:

A) The Local Investigation

Choctaw County Sheriff Leon Clark (deceased) initiated an investigation into Andrews' death on November 24, 1964. Clark began his investigation by interviewing three eyewitnesses to the shooting: XXXXXXXXXX and Charlie Jackson. Clark obtained written statements from each, but those statements were not preserved and no other records of the Sheriff's investigation are available.

L. Clark, in conjunction with the Choctaw County district attorney, presented the evidence they obtained to a grand jury in the winter of 1964. At least eight witnesses testified before the grand jury including XXXXXXXXXX and Jackson. At the conclusion of the two day presentation the grand jury voted not to indict XXXXXXX for shooting Andrews. There are no other records or transcripts from the proceedings.

B) The Federal Investigation

The FBI began its investigation into the shooting on November 30, 1964, after being notified by Andrew's XXXXXXXX about Andrews's death. The investigation lasted from late November until mid December of 1964, when the case was closed without prosecution.

In 2008, the FBI initiated a review of the circumstances surrounding Andrews' death, pursuant to the Department of Justice's "Cold Case" initiative and the "Emmett Till Unsolved Civil Rights Crime Act of 2007," which charges the Department of Justice to investigate "violations of criminal civil rights statutes . . . result[ing] in death" that "occurred not later than December 31, 1969."

The FBI interviewed family members and friends of Andrews to determine if there were additional eyewitnesses who could be identified. Many of the friends and relatives who spoke with the FBI recounted versions of the events as had been told to them by others. The FBI did not locate any additional eyewitness to the shooting based on these interviews.¹ The FBI did re-interview one eyewitness to the shooting, XXXXXXX, as well as the lead investigator from 1964, XXXXXXXX.

¹ The FBI also interviewed XXXXXXX, Frank Andrews' XXXX, who advised that XXX heard that Andrews was shot because he and the officer involved in the shooting were dating the same African American woman who worked at the Choctaw County jail. XXXXX did not know the name of this woman, and no other family member or friend corroborated this theory.

Evidence

A) Witness Statements

i) Subject Statements – XXXXXXXX

On November 30, 1964, XXXXXXXX was interviewed by XXXXXXXX regarding the circumstances surrounding Andrews' death. XXXXXX advised that he and Clark were on patrol in Lisman when they stopped at Smith's Café because it was known to have illegal whisky, and because "negro patrons" frequently fought at the Café.

XXXXXX stated that XXX found two-thirds of a gallon of whisky in a jar on the side of the café and was trying to determine who it belonged to when XXX observed Jackson and Andrews leaving the café heading towards Jackson's pickup truck. XXXXXXXX told W. Clark to check on Andrews and Jackson because he felt that they had been drinking and should not be driving while intoxicated. XXXXXXXX said that W. Clark walked toward the truck to question Jackson and Andrews, and stated to both of them "you're under arrest," to which Andrews responded, "What the hell are you going to do about it?"

According to XXXXXXXX, at this point W. Clark was standing by the truck with his back to the pick-up and Andrews was standing directly in front of him. After XXXXXX approached Andrews and W. Clark, XXX told Andrews that XX was going "to put him in jail." Andrews responded by making a fist with his right hand, and pulling a knife out of his trousers with his left. XXXXXXXX advised that Andrews took a step towards W. Clark as if to assault him, causing W. Clark to move to one side. XXXXXX then drew his service weapon and fired a shot into Andrews back.

XXXXXXX claimed that when XXX shot Andrews XX was standing behind him on the left side of his body. XXXXXXXX further advised that XX shot Andrews because XXX felt certain that Andrews was going to cut W. Clark, and that the events occurred rapidly. XXXXXX's belief that Andrews would cut W. Clark was based in part on the fact that that about a year prior to the shooting, XXXXXXXX investigated Andrews for cutting another individual named XXXXXXXX.² XXXXXXXX stated that since XX knew that Andrews had been involved in a cutting scrape before, XXX was especially fearful that Andrews would cut W. Clark.³

After the shooting, XXXXXXXX and W. Clark immediately took Andrews to the Choctaw County Hospital in Butler, Alabama, where Andrews died hours later.

² Sheriff L. Clark confirmed that XXXXXX had been involved in the XXXXXX investigation. W. Clark was also aware of Andrews' previous involvement with XXXX and the "cutting scrape." However, XXXXXX, Frank Andrews' XXXXXX, claimed that F. Andrews had nothing to do with XXXXXXXX. According to XXXXXX, it was XXXXXX, Frank's other XXXXXX, who was involved with the cutting of XXXXXXXX.

³ The FBI was notified that XXXXXX had previously arrested Andrews on March 20, 1964, for not having a driver's license. Andrews was fined \$10.00 and costs.

XXXXXXX was not re-interviewed until October of 2008, when he agreed to be interviewed by the FBI in the presence of his attorney.⁴ After being advised of his rights, and signing a waiver of rights form, XXXXXXXX provided the following information.

XXXXXXX had trouble remembering the date of the shooting, at which establishment/club it took place, or why XXX and W. Clark were dispatched to the club. XXXXXXXX did recall that when XX arrived at the club, XX observed Andrews standing approximately 200-300 feet from the club holding what appeared to be a bottle of illegal whisky. XXXXXXXX advised that when Andrews and the other black male (Jackson) saw the patrol vehicle, Jackson grabbed the whisky bottle and ran while W. Clark gave chase. XXXXXXXX went to Andrews and noticed that Andrews had one of his hands in his pocket. XXXXXXXX ordered Andrews to take his hand out of his pocket and drew his .38 caliber service revolver “for protection.”

According to XXXXXXXX, when XXX pulled his weapon, it fired accidentally and the bullet struck Andrews in his side. After the shooting, W. Clark arrived at the scene and they immediately took Andrews to the hospital where he later died. XXXXXXXX recalled that after Andrews was pronounced dead, Dr. Clark told him that he found a “blocked” knife in Andrews’ right pocket. XXXXXXXX explained that this “blocked” knife was like a switchblade, which could be opened quickly.

When XXXXXXXX was questioned further about the alleged accidental discharge of XXX service weapon, XX advised that the revolver XX was using that evening was not XX duty weapon. XXX weapon was being serviced and XX was using a loaner. XXXXXXXX claimed that after the shooting XX was told by Sheriff L. Clark that the weapon XX was using on the night of the shooting had an extremely sensitive trigger because it had been previously seized by the Sheriff’s Department.⁵

XXXXXXX concluded the interview by telling the FBI that XXX did not believe that W. Clark witnessed the shooting because XX was chasing Jackson when the shooting occurred. XXXXXXXX claimed that XX was not charged with the shooting because it was accidental. XXXXXXXX said that XXX regretted killing Andrews because it was an accident.⁶

XXXXXXX has declined further interview requests from the FBI.

ii) XXXXXXX Statement – William Clark

Clark was also interviewed by the FBI on November 30, 1964. Clark advised that as he and XXXXXXXX were investigating who was responsible for the illegal whisky, XX noticed

⁴ XXXXXXXX was XX years old at the time of the 2008 interview.

⁵ According to XXXXXXXX, it was common for deputies to use seized weapons when their duty weapons were being serviced.

⁶ In 2012, the FBI reached out to XXXXXXXX’s attorney to attempt a second interview. XXXXXXXX, through XX attorney, declined.

Andrews and Jackson walking towards the pickup truck outside the Café. XXXXXXXX asked W. Clark to check on Andrews and Jackson, so W. Clark approached the pickup. By the time W. Clark arrived at the pickup, Andrews was sitting in the passenger's seat, so W. Clark talked with Jackson who was standing near the driver's side door.

W. Clark asked for Jackson driver's license, and Jackson complied. Clark then began a search of the truck. Jackson denied consuming alcohol that night, but W. Clark said to him "I know you've been drinking, I can smell it."⁷ W. Clark then entered the pickup truck on the driver's side, sat down, and asked Andrews to open the glove compartment. Andrews replied "I'm not going to open the damn thing unless the owner tells me to do so." Jackson, who was standing outside the truck, gave Andrews permission to open the compartment. W. Clark recalled that instead of opening the compartment, Andrews exited the truck, and stood next to the vehicle with his foot on the running board. W. Clark, who by this time was in the middle front seat, told Andrews to step back so he could exit out of the passenger's side of the truck. W. Clark then informed Andrews that he was under arrest. Andrews responded, "What the hell are you going to do about it?"

It was at this point that Clark recalled XXXXXXXX approaching from the rear. Andrews then drew up his right fist as if he were going to strike W. Clark and then stepped towards him. W. Clark heard XXXXXXXX say "Don't bring your hands out of your pocket," but W. Clark was focused only on Andrews' right hand. W. Clark could not state if Andrews had his left hand in his pocket.

The next thing W. Clark remembered was hearing the gunshot. He didn't recall seeing XXXXXXXX pulling out his revolver. Andrews then grabbed the left side of his back and collapsed. Following the shooting, W. Clark and XXXXXXXX took Andrews to the hospital in Butler, Alabama. W. Clark never saw Andrews with a knife the night he was shot.

W. Clark's statement is consistent with XXXXXXXX's 1964 statement that the shooting was necessary to defend W. Clark. Although W. Clark didn't see a knife, he did corroborate the fact that Andrews balled up his fist and that Andrews was the aggressor, both of which support XXXXXXXX's 1964 version of events.

On the other hand, W. Clark does contradict XXXXXXXX's 2008 claim that the shooting was accidental. W. Clark's statement omits any reference to an accidental discharge and makes no mention of which service revolver XXXXXXXX used that evening. Ultimately, we cannot explore this issue any further with W. Clark, and he could not be a witness in any case against XXXXXXXX because W. Clark is deceased.

iii) Civilian Eyewitness Statements – XXXXXXXX

XXXXXXX, who was XX years old at the time of the shooting, was first interviewed by the FBI in 1964. XXX said that XX and Robert had been at the Café when XXXXXXXX and W.

⁷ According to W. Clark, XXXXXXXX was still talking with a negro woman at the home next to the Café while he was initially dealing with Andrews and Jackson.

Clark entered the establishment looking for the owner of a jar of whisky. When the officers left the Café to further investigate who the whisky belonged to, Jackson and Andrews left the Café and went to Jackson's truck. XXXXXXXX watched as Andrews got into the passenger's side of the vehicle before being confronted by W. Clark. XXXXXXXX recalled hearing W. Clark ask Andrews to open the glove compartment, but could not hear Andrews' response.

XXXXXXX next observed Andrews get out of the truck on the passenger's side with W. Clark standing right next to him. XXXXXXXX said that Andrews made a fist with his right hand, but held it down by his side. XXXXXXXX then approached Andrews, said "you're under arrest," and pointed his gun at Andrews' chest. From where XXX was standing, XXXXXXXX could not see Andrews' left hand.

XXXXXXX next observed XXXXXXXX moving to the side of Andrews while Andrews took a couple of steps forward toward the deputies' vehicle. XXXXXXXX "fell in behind" Andrews to his left with W. Clark on Andrews' right side.⁸ XXXXXXXX reported "at this point XXX heard one shot. XXXXXXXX has XXX gun in Andrews' back and XXX saw Andrews grab his side." After the shooting, XXXXXXXX watched as XXXXXXXX and W. Clark put Andrews in their vehicle and drove away. XXXXXXXX advised that XXX did not see nor hear anything about a knife on the night Andrews was killed.

In September 2013, the FBI located and re-interviewed XXXXXXXX regarding XXX memory of Andrews' death. XXXXXXXX's recollection of the events leading up to the shooting differed in a number of ways from XXX 1964 statement. For example, XXXXXXXX advised that XXX did not recall Andrews getting into Jackson's pick-up truck and did not recall any search for illegal whisky. XXXXXXXX advised that the shooting occurred as the deputies were walking Andrews and Jackson out of the café, not at the pick-up truck as XXX had advised in 1964. It appears that XXXXXXXX's memory of the events has deteriorated with the passage of time.

When asked about the shooting, XXXXXXXX advised that XXXXXXXX shot Andrews in the left side of his body after they exchanged words outside the café. XXXXXXXX could not recall what was said and advised that the shooting could have been "a mistake" or XXXXXXXX could have been "having a bad day." XXXXXXXX further opined that XXX believed XXXXXXXX to be a good man who never mistreated anyone because of their race.

Here, XXXXXXXX would not be an effective trial witness in any case against XXXXXXXX. XXXXXXXX's memory of the events has faded, XXX could not testify as to what was said between XXXXXXXX and Andrews just prior to the shot being fired, and XXX cannot provide a motive for an unjustified shooting. Moreover, XX recent statements regarding the fact that this could have been a "mistake," corroborate XXXXXXXX's 2008 statements that this was an accidental shooting.

iv) Civilian Eyewitness Statement – Tommie Lee Roberts

⁸ XXXXXXXX's statement does not indicate which side W. Clark was on.

Roberts, who was an 18 year-old student at the time of the shooting, said that he and XXXXXXXX had been at the Café when XXXXXXXX and W. Clark entered the establishment looking for the owner of a jar of whisky. After the officers left the Café, Andrews and Jackson, who had come back inside after the deputies pulled up, left to go to Jackson's truck. Roberts advised that he watched as W. Clark searched Jackson's truck. According to Roberts, when W. Clark was searching the truck, XXXXXXXX walked up to the passenger's side. Roberts saw Andrews with his right hand in his pocket, and either XXXXXXXX or W. Clark told him to take his hand out, which Andrews did. XXXXXXXX then pulled out his revolver and pointed it at Andrews' chest, saying "You're under arrest." Andrews held both hands at his side but his right hand was folded up to make a fist. XXXXXXXX then took Andrews by the left arm before coming around behind Andrews, putting XX gun in XX back side. XXXXXXXX then heard one shot.

After the shooting, Roberts recalled that XXXXXXXX and W. Clark put Andrews in the back seat of their patrol vehicle and drove away. XXXXXXXX didn't recall seeing anyone with a knife the night Andrews was killed.

Roberts' statement is insufficient to refute either XXXXXXXX's 1964 claim of defense of others or XXXXXXXX's 2008 claim of an accidental discharge. In any event, XXXXXXXX is deceased and could not be a witness in any case against XXXXXXXX.

v) Civilian Eyewitness Statement – Charlie Jackson

On December 7, 1964, the FBI interviewed Charlie Lee Jackson. Jackson stated that on November 28, 1964, as he and Andrews were heading to his pickup truck to leave Smith's Café, they noticed the patrol vehicle of deputies XXXXXXXX and W. Clark pull in behind them. As a result, they got out of the truck and went back to the Café. After waiting approximately five or six minutes, Jackson and Andrews went back to the pickup truck so they could leave the Café. When they arrived at the vehicle, Andrews got in the passenger's side just as Jackson was confronted by W. Clark. W. Clark asked for Jackson's driver's license and proceeded to search his truck.

Jackson advised that when W. Clark asked Andrews to open the glove compartment, Andrews turned to Jackson to ask his permission. Jackson told Andrews it was okay to open the compartment. W. Clark interjected saying, "I don't care what he says, you do what I tell you to." Andrews then got out of the truck, and W. Clark came around the back, telling Andrews "You are under arrest."

According to Jackson, while this was occurring, XXXXXXXX drew his gun, approached Andrews, and searched him by patting down his sides. Jackson then reported "after completing his search, XXXXXXXX walked around behind Andrews and, without saying a word, shot Andrews in the back." Jackson did not see Andrews make any moves towards the deputies and did not see Andrews pull a knife from his pocket. Although Jackson was on the opposite side of the truck when the shooting happened, he claimed to have had a full view of all the parties.

After the shooting, Jackson watched as the deputies put Andrews in their vehicle and drove away. He did not have any further information about what happened to Andrews on the ride to the hospital.

Jackson's version of events is inconsistent with XXXXXXXX and Roberts' 1964 version of events in two significant respects: 1) Jackson doesn't say that XXXXXXXX's gun was ever pointed at Andrews' chest; and 2) he omits any reference to Andrews's fist being balled up. Thus, even if Jackson were alive today, and had a sharp memory of the events, he would be subject to impeachment on bias and these two inconsistencies with other eyewitnesses. In any event, because he is deceased, we cannot use the information he provided in any criminal case against XXXXXXXX.

vi) Other Witnesses

On December 1, 1964, FBI Special Agents interviewed Nettie Lee Smith (Smith's Café), Henry Mitchell, and Rose Mae Spear, regarding Andrew's death.

Smith advised that Andrews and Jackson had been at the Café on the night of the Andrews' death and that both had been drinking. Smith confirmed that XXXXXXXX and W. Clark had been in her establishment on the night of the shooting looking for the owner of a bottle of illegal whisky. After they left her shop, she did not see them again that night. She did not witness the shooting and could provide no further information. Smith is deceased.

Rose Mae Spear operated a beauty shop situated next to Smith's Café. On the night of Andrews' death she was looking out the window of her shop when she noticed that two Sheriff's Deputies were conducting a search around the Café. After about 15-20 minutes, she noticed that the deputies were talking to a Negro man who was standing there with his hands above his head. She noted, "One of the Deputies, XXXXXXXX had his gun in his hand pointing it at the Negro man."⁹ Spear then claimed to have returned to her shop and "within a minute [she] heard a shot." She had no other information about the interaction between the victim and the officers. Spear is deceased.

Henry Mitchell informed the FBI that he had just left Smith's Café when he noticed Andrews sitting in Jackson's pickup truck in the parking lot. As Mitchell started to back out of the parking lot he noticed that he was blocked in by the deputies' patrol vehicle. Mitchell attempted to get out of the parking lot by pulling around Jackson's truck, but before he was able to pull onto the highway, he observed Andrews and W. Clark talking to one another. He specifically recalled hearing W. Clark say to Andrews, "consider yourself under arrest." Mitchell said he "heard a gun go off and ... immediately turned his around and saw Andrews holding his side." Mitchell advised that he did not see the actual shooting and could not say who had drawn a weapon. Because Mitchell was already going to Butler, Alabama, he followed the

⁹ It is unknown whether Spear knew XXXXXXXX's name before the interview, or if that was provided by the investigators.

deputies to Choctaw County Hospital, where he saw them escort Andrews inside. He learned later that Andrews died.¹⁰ Mitchell is deceased.

As part of the 2008 investigation, the FBI interviewed XXXXXXXXXXXXXXXX who investigated Andrews' death in 1964.¹¹ XXXXXXXX noted that after the shooting of Andrews, L. Clark asked him to "talk to XXXXXXXX," because XXXXXXXX was not doing well emotionally. XXXXXXXX recalled that xxx was not "investigating" the shooting, as there had not been a complaint, but was primarily providing counsel to XXXXXXXX on how to deal with the emotions XX felt. XXXXXXXX said that XXX did not believe that XXX documented this conversation.¹²

When asked about what XXX remembered about the case, XXXXXXXX replied that XXXXXXXX told XXX that XX fired his gun by accident striking Andrews in his stomach. XXXXXXXX commented that XX didn't believe that XXXXXXXX intended to shoot Andrews and that XXXXXXXX didn't appear to "hold any malice," towards Andrews.

XXXXXXX didn't recall any mention of XXXXXXXX's service weapon being repaired or XX use of a loaner. XXX didn't recall any mention of a knife or switchblade. XXX finished the interview by reiterating that XX only spoke to XXXXXXXX to help XX emotionally deal with the shooting.

XXXXXXX would not be an effective trial witness against XXXXXXXX because XXX didn't see the shooting and was unable to uncover any motive for XXXXXXXX to unjustifiably shoot Andrews. Moreover, XXXXXXXX's memory has been severely affected by the passage of time as demonstrated by XX belief that XX didn't "investigate" the shooting, despite documentation for 1964 that shows otherwise. It appears as if XXXXXXXX believed that the shooting was accidental, or at the very least, that XXXXXXXX seemed greatly affected by it.

B) Other evidence

After the shooting, Andrews was transported to the hospital by XXXXXXXX and W. Clark. According to Dr. James Clark, Choctaw County Hospital, Andrews died on November 28, 1964, at approximately 7:30 p.m. as a result of the gunshot wound to his back, which caused massive internal bleeding. J. Clark advised that the bullet entered Andrews' body on his lower left back and lodged on the right side of his stomach, about two fingers below the last rib. J. Clark further noted that while collecting Andrews' personal effects, he found "a knife, a large blade of which was partially opened on about a 45 degree angle." No autopsy was performed.

¹⁰ Mitchell advised that because he only had a fifth grade education, he did not believe that he could furnish a signed statement.

¹¹ XXXXXXXX was XX years old at the time of the interview.

¹² XXXXXXXX's recount of events is contradicted by the FBI's 1964 case file. The file indicates that the complaint was received by the FBI on the day Andrews was killed, November 29, 1964, and that XXXXXXXX had recorded an interview with XXXXXXXX on November 30, 1964.

There is no other available physical evidence. The bullet that killed Andrews, the gun that fired it, and the knife found by Dr. Clark have been disposed of. There are no other crime scene reports, and no other eyewitnesses have been identified. Dr. Clark is deceased and could not serve as a witness.

Legal Analysis

This matter does not constitute a prosecutable violation of the federal criminal civil rights statutes. To prove a violation of 18 U.S.C. § 242, the applicable criminal civil rights statute, the government must prove, beyond a reasonable doubt, (1) that XXXXXXXX acted under color of law; (2) that XXXXXXXX deprived Andrews of a right secured or protected by the Constitution or laws of the United States; and (3) that XXXXXXXX acted willfully. See United States v. Lanier, 520 U.S. 259, 264 (1997) (citing Screws v. United States, 325 U.S. 91 (1945)).

There is only one surviving eyewitness to the shooting, XXXXXXXX, and XXX account will not be able to establish that a constitutional violation has occurred or that the shooting was a willful act as required by the statute. XXXXXXXX admitted that XXX didn't know why XXXXXXXX shot Andrews and conceded that XXX didn't hear what was said between the two men just prior to Andrews being shot. We cannot show beyond a reasonable doubt that XXXXXXXX willfully shot Andrews.

Even if we believed we could have established the elements beyond a reasonable doubt, the applicable statute of limitations precludes prosecution of XXXXXXXX under the federal criminal civil rights statutes. 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 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 when the victim is transported in interstate or foreign commerce, the facts do not indicate that federal prosecution is available under other statutes. There is no evidence that XXXXXXXX crossed state lines or entered federal land when he shot Andrews.

We also considered the possibility of proceeding against XXXXXXXX under 18 U.S.C. § 1001, for the statement he gave to the FBI in October of 2008. In order to prove a violation of Section 1001, the government must prove that: (1) XXXXXXXX made a false statement to a governmental agency regarding a matter within its jurisdiction, (2) XXXXXXXX made the statement intentionally, knowing that it was false, (3) the statement was material, and (4) that XXXXXXXX made the false statement for the purpose of misleading the FBI. United States v. Jara-Favela, 686 F.3d 289, 301 (5th Cir. 2012), United States v. Richardson, 676 F.3d 491 (5th Cir. 2012).

Here, despite the fact that XXXXXXXX has given two conflicting statements, there are no living eyewitnesses that could establish beyond a reasonable doubt that XXXXXXXX lied about the shooting being an accident. In fact, XXXXXXXX expressly acknowledged the possibility of an accidental discharge when he said the shooting could have been a “mistake.” Moreover, it would be difficult to prove that XXXXXXXX’s 2008 statement, when he was XX years old, was an intentional, knowing false statement as opposed to an inconsistent statement attributable to the passage of time. There are no other known living eyewitnesses to the shooting who could provide information about the nature of Andrews’ death. As such, there is insufficient evidence to support a prosecution of XXXXXXXX for violating 18 U.S.C. § 1001.

Accordingly, this matter lacks prosecutive merit and should be closed. AUSA Greg Bordenkircher of the Southern District of Alabama concurs.