

CIVIL RIGHTS DIVISION

Notice to Close File

File No. 144-41-3572

Date APR 12, 2010

To: Chief, Criminal Section

Re: Unknown Subjects,
Pickens, Mississippi;
Herbert Orsby (Deceased) - Victim
CIVIL RIGHTS

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

Case Synopsis

On September 9, 1964, the body of Herbert Orsby, the 14-year-old African-American victim, was found floating in the Big Black River in Canton, Mississippi. The victim was clad only in his shorts and the remainder of his clothing was found on a nearby riverbank. The victim, who resided in New Orleans, Louisiana, had been visiting relatives in Pickens, Mississippi. Relatives reported that they had last seen him walking toward the Big Black River on Labor Day, September 7, 1964. Holmes County Coroner Dr. Justin Kazar examined the victim's body and found no bruises or other evidence of foul play. A Coroner's inquest was held immediately and the verdict was that the victim had died as a result of accidental drowning.

Cristina Gamondi
Attorney

To: Records Section
Office of Legal Administration

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

4-12-2010

Date

Chief, Criminal Section

Rumors, set forth below, that the victim was found wearing a CORE (Congress of Racial Equality) t-shirt and was last seen alive in a pick-up truck with white men remain unsubstantiated.

Federal Investigation and Review

1) 1964 Investigation

The Federal Bureau of Investigation (FBI) initiated an investigation on September 9, 1964, after receiving a complaint from XXXXXXXXXXXXXXXXXXXX the FBI that he had received information from XXXXXXXX at the Canton, Mississippi, COFO that the body of an African-American teenager and been found in the Big Black River, and that the victim was wearing a t-shirt with the letters CORE (Congress of Racial Equality) imprinted on it. XXXXXXXXXXXXXXXX that a XXXXXXXX had reportedly seen the removal of the victim's body from the river.

As part of the 1964 investigation, the FBI interviewed XXXXXXXX XXXXXXXXXXXX that XXXXXXXX and a group of others went to the river and saw several Mississippi Highway Safety Patrol (MHSP) cars, but XXXXXXXX denied having ever seen the victim's body.

The FBI also interviewed Holmes County Coroner Dr. Justin Kazar. Dr. Kazar stated that he conducted a thorough examination of the victim's body at the scene and found no bruises, marks, or any other evidence of foul play. Having concluded that the victim died as a result of an accidental drowning, Dr. Kazar declined to conduct what he deemed would have been an unnecessary autopsy.

A CORE press release, dated September 10, 1964 stated that the victim, who had been wearing a CORE t-shirt, was declared missing on September 6, 1964. According to the release, the previous day, "another [African-American] youth had been observed being forced at gunpoint into a white-driven pickup truck." The press release did not indicate the source of those allegations.

According to a September 17, 1964 *Lexington Advisor* article, Holmes County Sheriff's Office (HCSO) Sheriff Andrew Smith stated that the victim's clothing did not have the CORE lettering on it.

2) 2008 Review

In the fall of 2008, the FBI initiated a review of the circumstances surrounding the victim's 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 XXXXXXXX one of the victim XXXXXXXX. The FBI also retrieved from the National Archives and Records Administration (NARA) the 1964 FBI file relating to the incident; contacted various Mississippi law enforcement and government officials; conducted searches of the FBI records, Mississippi Department of Archives and History (MDAH), the University of Southern Mississippi library, and the internet for relevant references and media articles; sent letters to both the Southern Poverty Law Center (SPLC) and the NAACP requesting information; and solicited information about the case via a press release that was published in local newspapers and broadcast on local television and radio stations.

XXXXXXXXXX one of the victim XXXXXXXX, told the FBI that he was XXXX years-old when the victim died. XXXXXXXX stated further that the victim could not swim.¹

The MDAH search produced a May 7, 1965, memorandum from an investigator for the Mississippi State Sovereignty Commission (Commission) to its director. The investigator reported having spoken with XXXXXXXX XXXXXXXX told the investigator that the victim had left XXXXXXXX early on Labor Day, September 7, 1964. The XXXXXXXX did not know where the victim had gone, but they assumed that he was visiting other relatives in the area. When the victim had not returned the next day, his XXXXXXXX called the HCSO that then initiated a search. XXXXXXXX said that they had found the victim the next day. XXXXXXXX opined that the victim had intended to wade in the river, but had accidentally stepped in a deep hole and drowned. XXXXXXXX the victim XXXXXXXX and "others" shared XXXXXXXX theory. XXXXXXXX had been contacted by the press concerning the allegation that there was CORE written on the victim's shirt. XXXXXXXX stated that he found no such writing and that "so far as is known," neither the victim nor any of his relatives had been involved in any civil rights organization.

¹XXXXXXXX told the FBI that XXXXX and the victim had another XXXXX, Lester Orsby, but Lester was now deceased.

The FBI also contacted officials at the Mississippi Department of Public Safety, the Mississippi Attorney General's Office, and the Canton Police Department (CPD) and determined that none of those agencies had any records pertaining to the matter.

An FBI search of SPLC records found a number of contemporaneous newspaper articles and a number of MDAH records. None of these documents provided any information not previously collected by the FBI.

The press release requesting information received no response. As of the date of this memorandum, the letter to the NAACP has also yielded no information.

Legal Analysis

This matter does not constitute a prosecutable violation of the federal criminal civil rights statutes. First, there is insufficient available evidence to contradict the statement of the coroner that the victim died as a result of accidental drowning. Moreover, the allegation that the victim was wearing a CORE t-shirt was contradicted by the HCSO Sheriff, and the allegation that the victim was last seen alive in a pickup truck with white men remained unsubstantiated. The victim XXXXXXXX did not mention either of those allegations or any additional information concerning those allegations in his interview with the FBI. Ultimately, no subjects were identified.

Second, even if it were possible to locate evidence indicating that the victim was murdered and subjects were identified, 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 kidnaping resulting in death, the facts of the present case do not lend themselves to prosecution under other statutes.

Based on the foregoing, this matter lacks prosecutive merit and should be closed. Additionally, because no subjects have been, or are likely to be identified, this matter will not be forwarded to the state for prosecutive review. AUSA Glenda Haynes, Southern District of Mississippi, concurs in this recommendation.