

CIVIL RIGHTS DIVISION

Notice to Close File

File No. 144-52-1138

Date

To: Chief, Criminal Section

Re: XXXX XXXXXX,  
New York City Police Department,  
New York, NY - Subject;  
James Powell (Deceased) - Victim  
CIVIL RIGHTS

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

**A. Overview**

On July 16, 1964, off-duty New York City Police Department (NYPD) Lieutenant XXXXXX, the subject, shot and killed James Powell, the fifteen-year-old black victim, outside an apartment building located at 215 East Street in New York City. According to investigative reports, the subject claimed that he shot the victim in self-defense when Powell charged him while brandishing a pocket knife after XXXXXX identified himself as a police officer. The subject fired three shots from his revolver; two of the bullets struck Powell, fatally wounding him. More than twenty-five witnesses, including a dozen students attending summer school with Powell, witnessed some part of the shooting incident. Investigative reports indicate that the witness statements vary widely with respect to whether Powell attacked XXXXXX and whether XXXXXX identified himself as an officer before the shooting. Several students also alleged that XXXXXX shot Powell in the back after he had dropped to the ground. The medical evidence conflicts with this allegation and is consistent with the subject's account. In addition, there is testimonial evidence that corroborates the subject's version of events.

At the time of the shooting, the subject, who is white, was XXX years old. The fatal shooting sparked several riots between black residents and police in the Harlem and Bedford-Stuyvesant areas of New York City in the weeks that followed Powell's death. According to a *New York Times* article dated July 21, 1964, NYPD officers utilized gunfire to quell rioters in Harlem, wounding several people. One of the rioters, J.L. Jenkins, reportedly died at the scene.

In May 1965, the subject brought a libel suit against civil rights activists, including Dr. Martin Luther King, Jr., and James Farmer, alleging that they were responsible for printing and distributing a handbill with XXXXXX's picture and the caption "Wanted For Murder." At the same time, XXXXXX also brought a libel suit against the Congress of Racial Equality (CORE), the Progressive Labor Movement, and the Harlem Defense Council. The suit alleged that these groups had "conspired and maliciously and willfully participated in a plan to defame his good name and reputation."

## **B. 1964 Investigations**

### **a. DAO Investigation**

Immediately following the shooting, the NYPD and the Office of the District Attorney of New York County (DAO) commenced an investigation into Powell's death. The DAO subsequently presented the evidence to a state grand jury over 15 sessions. The grand jury, which included two black jurors, heard testimony from 45 witnesses and ultimately declined to indict the subject in connection with the shooting. The verdict was reportedly unanimous. Following the grand jury verdict, District Attorney Frank S. Hogan issued a report ("The Hogan Report") summarizing the investigative findings of the NYPD and the DAO. The text of the report was printed in its entirety in the September 2, 1964, edition of the *New York Times*.

According to the Hogan Report, at about 9:15 a.m. on the morning of July 16, 1964, the XXXXXX of three buildings on the 200 block of East 76th Street (identified by media articles as XXXXXX) had begun his morning task of watering the flowers and plants in front of Building 211 and the two trees in front of Building 215. Across the street on the south side of the block and is Robert Wagner Junior High School. As was common, a number of summer session students - estimates ranged up to 100 - were standing about on both sides of the street, leaning against cars or sitting on steps. The Hogan Report states that XXXXXX, whether intentionally or not, wet a few of the children with his hose who were in his immediate vicinity. In response, some of the students began throwing bottles and garbage can lids toward XXXXXX, who dropped the hose and ran into Building 215.<sup>1</sup>

The Hogan Report identifies Building 215 as an apartment building. Two 10.5 inch steps lead to the stoop landing, which is four feet and nine-inches wide and approximately four feet and three-inches deep. Another step leads to the outer door. On each side of the landing is a wall approximately two feet and four-inches high, topped by a railing two feet high. The distance from the building line to the curb is approximately 15 feet. On the west side of the stoop at building 215 was the Jadco TV Service Company, a television service store. On the morning of the shooting, the store's service truck was parked in front of the building and a passenger car was parked behind the truck.

#### *i. Subject's Version of Events*

XXXXXX, who was off-duty, told investigators that from inside the service store, he heard the sound of breaking glass and saw XXXXXX run inside Building 215. XXXXXX then stepped outside and saw Powell running around the front of the service truck parked outside and toward Building 215. XXXXXX stated that he heard Powell yelling, "Hit him, hit him, hit him!" According to XXXXXX, Powell was holding an open knife in his right hand, close to his chest, and ran toward the building's hallway.

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<sup>1</sup> One bottle struck XXXXXX's shoulder and a garbage lid broke one of the panes of the outer door building.

XXXXXX stated that he removed his badge and his revolver from his pants pockets and moved to a position in front of the stoop, facing the entrance to Building 215. By that time, Powell was just inside the hallway, at the outer door. XXXXXX stated that he held his shield out in front of him in his left hand and, holding his gun in his right hand, told Powell, “I’m a police XXX. Come out and drop it.” Powell looked over his shoulder and glanced at XXXXXX’s badge and gun. XXXXXX repeated his command to come outside and drop the knife. In response, Powell turned, raised the knife in front of his chest, and lunged at XXXXXX. XXXXXX stated that, in response, he fired a warning shot into the building and ordered Powell to stop. Powell, who was now close to the edge of the stoop landing, struck out at XXXXXX with the knife. XXXXXX stated that he blocked the attempted strike with his right hand, still holding the gun, and tried to push Powell back. In the process, Powell’s knife scraped along XXXXXX’s arm, causing it to bleed and later swell. According to XXXXXX, Powell was bent back but again struck out at XXXXXX with the knife. Gillian, who claimed to be an expert shot, stated that he pointed his gun slightly upward and fired at Powell’s raised hand, seeking to dislodge the knife. XXXXXX stated that Powell, who was still on the stoop above him, again lunged forward while pumping the hand holding the knife. At that point, XXXXXX stepped back and fired a shot into Powell’s torso. Powell staggered and collapsed face-down onto the sidewalk.

*ii. Witness Accounts of the Shooting*

**(a) Student Accounts**

Fifteen teenagers were interviewed by local investigators. Almost all the teenage witnesses were friends of Powell, or knew him by name or sight. All but one were summer session students at the school. Two teenage boys, both friends of Powell, stated that they rode the bus with Powell on the morning of the shooting. According to both boys, Powell showed them two knives during the bus ride. One knife had a red handle and the other was black-handled. Powell allowed each of the boys to keep one knife for him.

The two boys indicated that after XXXXXX fled inside Building 215, Powell crossed to street, away from the building, and demanded that his friend return his red-handled knife. According to the friend, Powell indicated that he was going to “cut” XXXXXX. The friend told investigators that he lied to Powell, pretending that he did not have Powell’s knife. After some argument, Powell approached the second friend, who told investigators that Powell asked him for the black-handled knife, adding that he would be right back.

The boy stated that he gave Powell the black-handled knife. Shortly thereafter, Powell was seen crossing the street, toward Building 215, as he opened and closed the knife’s blade. A girl told investigators that she was following behind Powell and that he told her that he was going to speak to the man (XXXXXX). The girl stated that, fearing trouble would ensue, she pleaded with Powell to stop and grabbed his arm in an unsuccessful attempt to restrain him. She then positioned herself by the stoop of Building 215.

The student accounts of what transpired after this point vary. Four students, including the girl who tried to stop Powell, stated that Powell walked up the steps of Building 215 and opened the door. XXXXXX, coming from the direction of the repair shop, stopped on the sidewalk in front of the building and shouted at Powell, causing Powell to turn around. In contrast, three students told investigators that Powell was already on the stoop and facing the street when Powell approached Building 215. Three other students stated that when the shooting began, both Powell and XXXXXX were on the sidewalk in front of the building. In addition, two more students claimed that XXXXXX followed Powell out of the building prior to the shooting.

In any event, several students recalled that a girl by the stoop shouted a warning to Powell that XXXXXX had a gun. According to that girl, Powell, having turned around, raised both his hands. In response, XXXXXX walked up the stoop, stopped about eighteen inches from Powell, and pushed Powell's right hand. A boy standing across the street stated that he also saw XXXXXX grab at Powell's right hand, but others stated that XXXXXX turned Powell around so that Powell was facing him.

Several students told investigators that they saw Powell raiding or lifting his arms, and one said he was flinging his arms as though to strike XXXXXX. None of these witnesses saw a knife in Powell's hand. One girl stated that Powell was holding a beer can in his right hand, and another student stated that Powell might have been holding a can. Two students later saw a knife lying in the street near the curb.

Regardless of the discrepancies about the nature of the encounter or the positions of Powell and XXXXXX, it was undisputed among the students that a shot was soon fired. According to the girl by the stoop, XXXXXX held the gun at waist-level and fired one shot, causing Powell to fall to the sidewalk. One student stated expressly that XXXXXX pointed his gun at Powell's right hand before he fired.

Almost all of the students agreed that Powell fell after the first shot, and ten students told investigators that XXXXXX fired two additional shots at Powell while Powell was on the ground.<sup>2</sup> The Hogan Report states that according to "the most frequent account," Powell fell to the sidewalk on his hands and knees, at which point XXXXXX fired two additional shots at Powell's back. Two of the students stated that Powell had dropped to his knees and was clutching his abdomen when XXXXXX fired the additional shots. One student stated that she was certain that Powell was lying on his back when XXXXXX forced the final two shots down at him.

Of those students who stated that they witnessed the shooting, some acknowledged that their view was obstructed by other students or by the repair truck parked in front of Building 215. Others admitted that they ran for cover when the shooting began. All of the students agreed that after the first shot, there was a pause followed by two additional shots fired in succession. Additionally, they all agreed that after the shooting, they saw Powell laying on his stomach parallel to the curb while XXXXXX stood over him, pointing the gun at Powell. The friend who had returned Powell's knife to him stated that when he reached XXXXXX and

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<sup>2</sup> One student later recanted and told investigators that he had not witnessed the shooting.

Powell, he asked XXXXXX why he had fired. According to the friend, XXXXXX removed his badge from his pocket and pinned it to his shirt, stating, "This is why." Powell's friend who had refused to return Powell's knife to him stated that he heard XXXXXX say that Powell had tried to kill him and that there was a knife beneath Powell. Many of the students stated that after the shooting, XXXXXX nudged, kicked, or pushed Powell over onto his back.

### **(b) Additional Witness Accounts**

In addition to the students, 18 adults witnessed some part of the incident. Seven witnesses stated that they saw Powell on the stoop of Building 215, heading toward the building's entrance, and some saw him enter the building. The Hogan Report states that these witnesses saw XXXXXX appear from the direction of the repair shop, and that "according to most versions," XXXXXX was standing on the sidewalk somewhere near the stoop when Powell started back down the stoop toward the street.

The XXXXXXXXXXXX told investigators that from his store's entrance, he saw the head and shoulders of someone coming out of a crouched position in the doorway of Building 215, with one hand clenched and raised to shoulder level. According to a witness in the repair shop, XXXXXX yelled, "Stop." This witness stated further that XXXXXX held his badge out with his left hand and pointed his gun at Powell using his right hand while shouting, "I'm a lieutenant, drop it!" A bus driver told investigators that from his location near Building 209, he saw Powell moving off of the stoop toward XXXXXX while holding a knife in his right hand. The bus driver stated further that XXXXXX, who was holding his badge in his open palm, had shouted, "Stop, I'm a cop!"

An XXXXXXXXXXXX stated that from his truck, stopped in traffic about three buildings west of Building 215, he heard someone shout "Stop and drop it!" From the elevated cab of his truck, he then saw Powell standing on the sidewalk with one foot on the bottom step of the stoop. According to the XXXX, Powell was standing about two feet away, facing XXXXXX and holding a knife in his right hand. The XXXX told investigators that Powell raised the knife to about head level, away from his body, and brought it down, striking at XXXXXX. The mechanic then heard a shot and saw Powell start to slump, but then watched as Powell stood upright, raised the knife, and swung it at Powell a second time. At that point, the XXXX heard another shot. Traffic began to move, and the XXXX drive away from the scene.

A neighborhood workman told investigators that from a scaffold four buildings east of Building 215, he heard a shot. When he looked in the direction of the shot, he saw Powell moving down the stoop rapidly toward XXXXXX, who was standing on the sidewalk. According to the workman, XXXXXX was holding an object in his right hand and his left hand was partially outstretched. The workman also stated that Powell was holding an object, and that his hands were raised and his fists were clenched. As the workman climbed up the scaffold rope to safety, he heard two additional shots.

Other witnesses differed concerning the positions of XXXXXX and Powell just prior to and during the shooting. A truck driver who was standing in front of the cleaning store told investigators that XXXXXX had followed Powell into Building 215, and that they were both still

in the hallway when the three shots were fired. Two witnesses maintained that one or all three shots were fired from the street into the hallway. Another witness stated that XXXXXX was in front of the repair store window when he fired toward the door of Building 215.

A teacher standing by a fourth-floor window inside the school when the first shot was fired told investigators that she believed that XXXXXX was facing the street and Powell was facing the building when the second and third shots were fired.

All but one of the witnesses who heard three shots agreed that the first shot was followed by a pause and then two shots fired in rapid succession. All of the witnesses who saw Powell fall to the sidewalk agreed that Powell did not fall until all three shots had been fired. These witnesses also agreed that Powell remained face-down on the sidewalk while XXXXXX stood over him with his gun pointed at Powell. Two men told investigators that they heard XXXXXX indicate that there was a knife beneath Powell. They also noticed a badge hanging from XXXXXX's pants pocket.

Two teachers who watched from the third and fourth floor of the schools, respectively, claimed that XXXXXX then pushed Powell over onto his back. Conversely, a man standing by the cleaning store maintained that an ambulance attendant turned Powell over onto his back. Another witness stated that a police officer and a clergyman turned Powell over. The priest who arrived after the shooting indicated that when he arrived, Powell was already on his back.

With respect to the knife, two witnesses, both teachers, saw a knife in the street after the shooting. One of the teachers stated that she saw a knife blade next to Powell's thigh, between his body and the stoop, before someone kicked the knife toward the curb. The other teacher, who ran out of the school after the shooting, stated that he saw the knife laying in the gutter about ten feet from Powell. According to this teacher, he closed the knife's open blade and gave it to a police officer.<sup>3</sup>

### *iii. Medical Evidence*

An autopsy performed by the Deputy Chief Medical Examiner determined that Powell died as the result of gunshot wounds. The Hogan Report states that one bullet entered the lower part of Powell's right forearm, just above the back of the wrist, and exited the opposite side of the wrist. The bullet then entered the right side of Powell's chest and came to rest in the left lung. A second bullet entered Powell's torso, just above and to left of the navel, and exited through the back. There was no evidence of smoke, flame, or powder marks to the body, indicating that both bullets were fired from a distance of at least eighteen inches.

Shortly after the shooting, Officer XXXXXX received medical treatment at Roosevelt Hospital, where a splint was applied to his right hand and forearm. The following day, a doctor examined XXXXXX and diagnosed his injury as abrasion of the right upper forearm, contusion

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<sup>3</sup> Powell's friend later identified the knife as the black-handled knife he had received from and returned to Powell that morning.

and sprain of the right hand and wrist, and recurrence of a previous injury resulting in a severe twisting of the back. The tissues of the right arm revealed evidence of a sharp blow to the lateral area of the right hand and forearm.

*iv. Ballistics Evidence*

A ballistics expert examined Powell's clothing and determined that there were no powder burns or scorch marks on the clothing. Consequently, the examiner concluded that the gun must have been more than two feet from Powell when the shots were fired.

Two of the three bullets recovered were too deformed for comparison, however, ballistics tests performed on the bullet recovered from Powell's chest confirmed that it had been fired by XXXXXX's gun. Examination of XXXXXX's gun revealed that three of six cartridges had been discharged, which is consistent with reports that XXXXXX fired three shots.

A deformed .38 caliber bullet was recovered from the jamb of the inner door of Building 215, 40 inches above the floor. Prior to lodging in the doorjamb, the bullet pierced the glass panel of the outer door at a location 55 inches above the floor. Thus, the trajectory of the bullet was an upward angle. The location of the recovered bullet and the depth of its penetration into the doorjamb, as well as the size and shape of the hole in the outer pane, nullified the possibility that it had first passed through Powell's body before reaching the hallway. The absence of any impact marks on the newly cemented sidewalk outside the building also negated any possibility that Powell had been shot in the abdomen while lying on the ground.

**B. CORE Investigation**

Within hours of the shooting incident, the Congress of Racial Equality (CORE) commenced its own investigation into the circumstances of Powell's death. According to the resulting CORE Report, which summarized the investigative results, the investigation was carried out by three attorneys and four law students who interviewed approximately 20 witnesses, five of whom had not been interviewed by the DAO.<sup>4</sup> The CORE Report concluded that XXXXXX, a highly trained officer who had been commended previously for disarming adult offenders, shot Powell needlessly. A summary of the CORE report is set forth below.

*i. Events Prior to the Shooting*

Like the Hogan report, the CORE report states that the shooting occurred across from the junior high school where Powell had been attending voluntary summer classes. It indicates that few African-Americans lived in the neighborhood, and the summer students had caused some disruptions that summer while gathering on the streets, creating an "open-air social hall." According to the CORE Report, the summer students had caused a "certain amount of trouble" and were "noisy and undisciplined in the streets." The neighborhood "regulars," including XXXXXX, allegedly did not like the students.

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<sup>4</sup> The CORE Report states that CORE also provided the DAO with names and addresses of other witnesses who refused to be interviewed by CORE.

On the morning of the shooting, Powell took the bus to school with two friends. Those same friends also borrowed the two pocket knives Powell had acquired a few days earlier. Upon arriving at East 76<sup>th</sup> Street with time before school began, Powell and his friends joined a larger group of kids already gathered and separated from one another.

From across the street, XXXXXX saw some boys on the stoop of 211 East 76<sup>th</sup> Street, one of two buildings for which he was the superintendent. XXXXXX asked the students to move, and most complied after a few minutes. When a student refused to move, XXXXXX turned a hose on the student's face. When several students shouted at XXXXXX in protest, XXXXXX turned the hose on them. In response, some of the boys began throwing objects at XXXXXX taken from a nearby garbage can. XXXXXX retaliated by spraying his hose. Powell joined the fray near the end, as XXXXXX retreated into 215 East 76<sup>th</sup> Street. A pane of glass on the outer door of that building was broken by one of the objects thrown after XXXXXX. During the confrontation between XXXXXX and the students, loud and profane remarks were exchanged. XXXXXX reportedly made some racial remarks including, "I'm going to wash the black off you." Officer XXXXXX was in the repair shop during the incident between XXXXXX and the students, where there was reportedly some discussion of what was happening outside.

After XXXXXX entered Building 215, the students who had been on the north side of the street scattered. Powell returned to the south side of the street and joined his acquaintances. Powell spoke to a few girls and then asked both of his friends to return his knives. Like the Hogan Report, the CORE Report states that one of Powell's friends claimed he could not find Powell's knife, but the second friend returned Powell's knife to him. The CORE Report states that, apparently, no one paid further attention to Powell aside from one of the girls to whom Powell had been speaking. The CORE Report states further that there is "no question" that Powell wanted to discuss matters further with XXXXXX, but none of the other students took him seriously or joined Powell when Powell went up the street and entered the outer doors of Building 215. Powell then tried to open the inner doors, but upon finding them locked, turned and took a step out. The CORE Report states that XXXXXX exited the repair shop at virtually the same time that Powell was turning to leave Building 215.

## *ii. The Shooting Incident*

The CORE Report states that while the Hogan Report "accurately reflects the "contradictory state of the evidence," it also "fails to emphasize the most significant contradictions, the disparity of the opponents, the restrictions of time and space." Specifically, the CORE Report emphasizes that there is witness testimony which is not consistent with or contradicts several components of XXXXXX's version of events. The CORE report contends that the available evidence tends to indicate that: 1) XXXXXX did not stop and identify himself as an officer; 2) Powell did not attack XXXXXX with a knife; and 3) in any event, the first bullet that struck Powell would have rendered him incapable of sustaining an attack on XXXXXX.

First, the CORE Report takes issue with XXXXXX's description of the events prior to the shooting, including identifying himself as an officer. XXXXXX claimed that he left the repair store as Powell was coming around the repair truck toward the entrance to Building 215,



immediately after XXXXXX heard the sound of breaking glass and saw XXXXXX run into the building. XXXXXX went on to say that he drew his gun, pulled out his badge, and identified himself as an officer while Powell was between the inner and outer doors of building 215, before Powell turned to exit the building. The CORE Report argues that, contrary to XXXXXX's account, multiple witnesses indicated that there was an interval between XXXXXX entering the building and Powell following him. During this interval, witnesses indicated that Powell crossed to the south side of the street and spoke to two of his friends in an effort to retrieve one of his knives.

The CORE Report concludes, based upon the testimony of several witnesses, that the entire shooting incident occurred with "extreme rapidity." Consequently, there was no time, as XXXXXX claimed, for XXXXXX to stop and identify himself. Rather, a number of witnesses stated that XXXXXX first showed a badge after the shooting. Further, the pace of action and the restricted space support the testimony which contradicts XXXXXX's version of events. The CORE Report opines that the "fair conclusion" is that, just prior to the shooting, XXXXXX and Powell were moving toward one another, though XXXXXX was moving faster. The CORE report opines that if Powell was aware of XXXXXX at all, it is entirely plausible that Powell "thought himself under unprovoked attack by an armed stranger."

Several witnesses indicated that XXXXXX exited the repair store with his gun drawn at the same time Powell was turning to leave Building 215. XXXXXX ran the few steps to the entrance of Building 215 shouting, "Hey, you!" At almost the same instant, a girl yelled out, "Look out, he's got a gun." According to the CORE Report, numerous witnesses stated that XXXXXX fired the first shot from the hip as he came to a position in front of Building 215, as soon as Powell took a step out of the building. The Hogan Report suggests that the first shot lodged in the door frame and was a warning shot. The CORE Report argues that the shot was actually fired waist-high, directly across Powell's path, and could well have passed through Powell (although the police ballistics expert did not reach that conclusion).

Next, the CORE Report disputes XXXXXX's statement that he shot Powell in self-defense because Powell attacked him with knife. The CORE Report argues that the evidence tends to indicate that Powell either had no knife in his hand, threw the knife in the gutter where it was later found, or was gesturing surrender. According to the report, all of these alternatives are supported by different witnesses. Although some witnesses indicated that they saw a knife, the CORE Report emphasizes that "many" of the witnesses stated that they did not see a knife in Powell's hand or that they were not in a position to see whether Powell had a knife. One witness also claimed to have seen a closed knife. In addition, the CORE Report states, "many witnesses state positively that there was no attack." In support of this proposition, the CORE Report also references witness statements indicating that Powell's hands were either down or at about shoulder height when he was shot.

Further, the CORE Report disputes XXXXXX's claim that, in any event, he shot Powell a second time, again in self-defense, because Powell continued to attack him after being shot. According to the CORE Report, XXXXXX's claim "is contradicted by witnesses and objective considerations." The CORE report argues that XXXXXX's weapon, a .38 caliber revolver, is a weapon with great stopping power. The CORE Report states that because the first bullet that

struck Powell was fired from a distance of three to five feet, the shock of the impact would have been “tremendous” and “exceeded a blow from a sledgehammer.” The CORE report opines that it is “objectively unbelievable that a 122 pound boy, struck in the forearm and chest by a .38 caliber bullet could continue an attack.” In addition, many witnesses stated that the first bullet to strike Powell caused him to fall against a low railing, and then fall further forward onto his face. The CORE Report concludes that because the first bullet that struck Powell caused such a grievous injury, a continued attack was “most improbable.”

The CORE Report also states that the second bullet that struck Powell followed immediately after the first and struck Powell either as he was falling or after he had fallen. Because the evidence suggests that the second bullet entered the abdomen and exited the back, the shot was likely fired as Powell was falling. Some witnesses insisted that at least one bullet was fired after Powell was down. It may be that when witnesses saw XXXXXX standing over Powell with his gun pointed down at Powell, they believed that XXXXXX fired then. The CORE Report states that possibility remains, however, that XXXXXX did shoot Powell after he was already down, and, moreover, the firing of the second bullet that struck Powell “casts doubt on the justification of the first.”

Finally, the CORE Report argues that although XXXXXX’s version of events “depends greatly on his claim to have been injured by Powell,” no witnesses corroborated XXXXXX’s injury claim and several witnesses contradicted him on this point. The Hogan Report does not make the facts of XXXXXX’s alleged injury clear at all. The diagnosis on July 16 mentioned no abrasions, though abrasions were included in the diagnosis the following day, as was another injury not mentioned in the initial assessment.

### **C. Federal Review**

Although it is possible that the New York Division of the FBI conducted an investigation onto the shooting of Powell, no case file was located specifically regarding Powell’s death. An indices check revealed that a case opened in July 1964 had references to XXXXXX, but the case file was destroyed in October 1978 for reasons unknown.

The Federal Bureau of Investigation (FBI) initiated a review of the circumstances surrounding Powell’s death in February 2009, pursuant to the Department of Justice’s “Cold Case” initiative and the “Emmett Till Unsolved Civil Rights Crime Act of 2007,” which focus on civil rights era homicides that occurred not later than December 31, 1969. As part of its review, the FBI obtained several media articles concerning the results of the grand jury investigation into Powell’s shooting, including the text of the Hogan Report, and those which contained references to a demand by civil rights proponents for the formation of a civilian review board, independent of the police, to examine similar police shootings.

After obtaining the CORE Report, the FBI also attempted to locate George Schiffer, who was primarily responsible for CORE’s investigation into the shooting of Powell, but investigation revealed that Schiffer died on December 12, 2002. Efforts to locate other attorneys mentioned in CORE documents were not successful.

On January 11, 2010, the FBI interviewed Roy Innis, National Director of CORE, and George Holmes, Executive Director of CORE. Innis, who was working with CORE's Harlem Chapter, recalled that CORE conducted an independent investigation into the shooting because there were serious concerns about XXXXXX's version of events. According to Innis, members of CORE opined that based upon XXXXXX's history and skill, the shooting was not necessary. On February 10, 2010, the FBI traveled to the King Center in Atlanta, Georgia, to view the relevant CORE documents archived at that location. The King Center archives are maintained by XXXXX and XXXXX. The CORE documents are stored in approximately 100 boxes. XXXXX was unable to locate the box containing document from the Harlem Chapter or CORE, but FBI investigators identified nine documents in other boxes relevant to Powell's death, including the 15-page CORE Report on the shooting; excerpts from the CORE-later (a bimonthly publication of CORE) discussing events that occurred in the aftermath of the Powell shooting; a letter from CORE General Counsel, Carl Rachlin, dated July 17, 1964, to the NYPD Police Commissioner Michael Murphy suggesting an independent investigation of the Powell shooting; a letter from George Schiffer dated November 13, 1964, to Edward F. Cavanaugh, Deputy Mayor of New York, requesting a reinvestigation of the Powell shooting; a memorandum dated July 16, 1964, relating the results of an interview with a witness to the Powell shooting who claimed that before Gillian fired, he told Powell, "I'm going to shoot the black off of you"; and an undated CORE interoffice memorandum pointing out the omission in the Hogan Report of the testimony by an Italian Government Official and another woman who saw no knife in Powell's hand and did not see Powell touch XXXXXX.

Additionally, on November 21, 2011, FBI investigators went to XXXXXX's residence and attempted to question him about the shooting incident. XXXXXX.

#### **D. Legal Analysis**

The applicable statute of limitations precludes prosecution of Lieutenant XXXXXX 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 kidnaping resulting in death, the facts of the present case do not lend themselves to federal prosecution under other statutes.

Further, even if the statute of limitations challenge could be overcome, this matter does not constitute a prosecutable violation of 18 U.S.C. § 242, the applicable federal criminal civil rights statute. To establish a violation of Section 242, the government must prove beyond a reasonable doubt, that an officer, acting under color of law, willfully deprived the victim of a right protected by the Constitution or laws of the United States, here, the right to be free from

excessive force when detained or taken into custody. See United States v. Lanier, 325 U.S. 259, 265 (1997), citing United States v. Screws, 325 U.S. 91 (1945). To establish a felony violation of Section 242, the government must demonstrate beyond a reasonable doubt that the subject officers willfully used more force than they reasonably could have believed was necessary under the circumstances, resulting in serious bodily injury or death.

*i. Reasonableness of the Use of Force*

Whether a particular use of force was reasonable is “not capable of precise definition or mechanical application.” Graham v. Connor, 490 U.S. 386, 396 (1989), quoting Bell v. Wolfish, 441 U.S. 520, 559 (1979). The question is whether the officers’ actions were “objectively reasonable” in light of the facts and circumstances confronting them at the time. Id. at 397. “The ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” Id. at 396. “Careful attention” must be paid “to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.” Id. Allowance must be made for the fact that law enforcement officials are often forced to make split-second judgments in circumstances that are tense, uncertain, and rapidly evolving. Id. at 396-97. The use of deadly force is justified where the officer had “probable cause to believe that the suspect pose[d] a threat of serious physical harm, either to the officer or to others.” Tennessee v. Garner, 471 U.S. 1,11 (1985).

There is insufficient evidence in this matter to prove a federal criminal civil rights violation beyond a reasonable doubt. Officer XXXXXX maintained that he shot Powell in self-defense, after Powell refused to comply with commands to drop his knife and instead attempted to stab him. While there are witnesses, mostly classmates of Powell, who contradicted XXXXXX’s claim that Powell was armed with knife and behaved in a threatening manner toward XXXXXX, there is also testimonial evidence corroborating XXXXXX’s version of events. In addition, there is ample testimonial evidence, including the statements made by Powell’s friends, that Powell was, in fact, armed with a knife when XXXXXX shot him. Similarly, multiple witnesses indicated that immediately after the shooting, XXXXXX indicated that there was a knife beneath Powell.

With respect to statements made by witnesses that XXXXXX shot Powell in the back after Powell had fallen to the ground, the medical evidence reportedly is not consistent with this allegation. Consequently, the totality the evidence fails to establish that the subject officers’ conduct under the circumstances was objectively unreasonable.

Furthermore, even if it could be proven, beyond a reasonable doubt, that XXXXXX’s conduct was unreasonable, there is a lack of evidence to prove that he acted willfully, that is, with a bad purpose to violate the law. Screws, 325 U.S. at 101-107 (discussing willfulness element of 18 U.S.C. § 242). XXXXXX claimed that he fired in self-defense because he believed that Powell was attacking him with a knife. As previously discussed in this memorandum, there is ample evidence that supports XXXXXX’s claim that Powell was armed with a knife, did not comply with commands to drop it, and moved toward XXXXXX in a

threatening manner. Certainly, it may be argued that XXXXXX used poor judgment in firing at Powell, given Powell's age and the size discrepancy between them. Nonetheless, mistake, fear, misperception, or even poor judgment, does not constitute willful conduct prosecutable under the statute. As there is a lack of evidence establishing that XXXXXX acted with the requisite criminal intent, it cannot be proven, beyond reasonable doubt, that he acted willfully when he shot Powell. Accordingly, this matter lacks prosecutive merit and should be closed. AUSA David Kennedy of the Southern District of New York concurs in this recommendation.