

CIVIL RIGHTS DIVISION

Notice to Close File

File No. 144-10-616

Date: May 7, 2019

To: Chief, Criminal Section

Re: Ed Vail (Deceased)
James Vail (Deceased) – Subjects;
Lee Edward Culbreath (Deceased) – Victim;
CIVIL RIGHTS

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

1. Date of the Incident: December 5, 1965
2. Synopsis of the Facts and Reasons for Closing:

On December 5, 1965, Lee Edward Culbreath, a 14-year-old African-American boy, was killed in Portland, Arkansas, by Ed Vail, who shot at Culbreath from a truck driven by his brother, James.

Angela M. Miller
Attorney

To: Records Section
Office of Legal Administration

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

May 7, 2019

Date

Barbara Bosserman
Deputy Chief, Cold Case Unit Chief, Criminal Section
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As explained more fully below, a federal prosecution of anyone responsible for Culbreath's death is not possible. All identifiable subjects involved in his death are deceased, and our review did not identify any additional participants or witnesses to his murder. Even if additional participants or witnesses were identified at this time, the statute of limitations has run on all potential federal hate crimes and there is no other potential basis for federal jurisdiction. The

Emmett Till Unsolved Civil Rights Crime Act¹ (Till Act) and its Reauthorization² authorize federal authorities to assist state and local jurisdictions in prosecuting cold cases. However, the fact that all identified subjects are now deceased, and no other subjects were identified as participating in Culbreath's murder, would bar any state prosecution. For these reasons, the case is being closed without prosecution or referral to the state.

3. The Death of Lee Edward Culbreath, the State Investigation, and the State Prosecution³

On December 5, 1965, Ed Vail, a white man from Hamburg, Arkansas, shot and killed Lee Edward Culbreath, a 14-year-old African-American boy. The shooting took place in Portland, Arkansas, just outside of a café. Culbreath and a friend had ridden their bicycles to the café, where Culbreath waited outside while his friend continued on to a nearby store to see a Christmas tree. Ed Vail and his brother, James, who had shortly before purchased items from the café, were in a pick-up truck when Ed, armed with a .22 revolver, fired three shots at Culbreath through the truck's open window. Culbreath's friend heard the shots and then saw the truck "speed off so fast it left the road to avoid an approaching car." Culbreath, who was shot once in the chest, was able to run inside the café before collapsing. Culbreath died from internal bleeding from a single gunshot-wound to his chest.

Ed and James Vail were arrested about 20 minutes after the shooting. They had been stopped at a roadblock by a State Trooper, who confiscated a revolver from Ed Vail after a brief struggle. Both Ed and James Vail were intoxicated when arrested. During the course of his arrest and booking, Ed Vail threatened to kill police officers and admitted shooting Culbreath. The police sent the revolver and two bullets, one recovered from Culbreath's body and one recovered from a wall near the café, to the FBI for analysis. The FBI determined that the bullet recovered from Culbreath's body was fired from the gun taken from Ed Vail.

Both men were charged with first-degree murder and held without bond. Ed Vail was tried in February 1966 after undergoing a mental examination and being pronounced "without psychosis." The state sought the death penalty against him. James Vail, who testified during his brother's trial, said that he and his brother had been drinking heavily before the incident and that he did not know about the shooting until they were stopped at the roadblock. He denied that he was a member of the KKK, although a State Trooper countered that, after James Vail was arrested, he told the Trooper that he was a member of the KKK. Ed Vail, who testified in his own defense, denied being a member of the KKK but admitted having attended a Klan rally. Another State Trooper, however, testified that Ed Vail had admitted to him after his arrest that he was a member of the KKK.

¹ Pub. L. No. 110-344, 122 Stat. 3934 (2008).

² Pub. L. No. 114-325, 130 Stat. 1965 (2016).

³ The summary is drawn from contemporaneous news reports of the incident and trial.

A jury of 11 white men and one black man convicted Ed Vail of second-degree murder after deliberating for two hours. The jury recommended a sentence of 21 years' imprisonment, which the court imposed.

4. Federal Investigation

An eligible entity referred this matter to the Department of Justice for review under the Emmett Till Unsolved Civil Rights Crime Act, which charges the Department of Justice to investigate "violations of criminal civil rights statutes . . . result[ing] in a death" that "occurred not later than December 31, 1969." The Department reviewed available newspaper reports of Culbreath's murder and Ed Vail's trial, and spoke with the Clerk's Office of the Ashley County Circuit Court, where Ed Vail was tried. The Clerk's Office confirmed that Ed Vail was convicted of second-degree murder and sentenced to 21 years' imprisonment in the state penitentiary. The Clerk's Office also explained that less than a month after Ed Vail was sentenced to prison, on March 21, 1966, James Vail's charge was reduced from first-degree murder to accessory-after-the-fact. In October of 1966, the state decided not to prosecute James Vail.

The Federal Bureau of Investigation has determined through open source searches that both Ed and James Vail are deceased. Thus, all subjects known to law enforcement as present during and/or participating in Culbreath's murder are deceased.

5. Legal Analysis

This matter is being closed, as it cannot be federally prosecuted. No one known to be responsible for Culbreath's death is still alive. There are other barriers to prosecution. In 1965, at the time Culbreath was murdered, no federal hate crime laws existed. The only federal civil rights laws that existed in 1965 were Reconstruction-Era statutes that would have required proof that anyone charged for the offense was a law enforcement officer or otherwise acted under color of law.⁴ Since the time of Culbreath's death, Congress has enacted several laws prohibiting bias-motivated violence. But even if there were living subjects in this case, none could be prosecuted for violating these more modern statutes. This is because the Constitution's *Ex Post Facto* clause, art. I, § 9, cl.3, prohibits the government from prosecuting anyone for violating a law that was not in effect at the time of the alleged misdeed.

⁴ Two civil rights statutes were available to prosecutors in 1965. Section 52 of Title 18 prohibited persons acting under color of law from willfully depriving others of constitutional rights. The provision was initially enacted as § 2 of the Civil Rights Act of April 9, 1866. Act of Apr. 9, 1866, ch. 30, § 2, 14 Stat. 27 (1866). Section 52, often referred to in the 1940s as "Section 20" because it had previously been codified at Section 20 of the criminal code, was codified at 18 U.S.C. § 242 in 1948.

Section 51 of Title 18 prohibited conspiring to deprive others of rights or privileges secured to them by the Constitution or federal law. The provision was based upon Section 6 of the Enforcement Act of May 31, 1870. 16 Stat. 140 (1870). Section 51, often referred to in the 1940s as "Section 19" because it had previously been codified at Section 19 of the criminal code, was codified at 18 U.S.C. § 241 in 1948. Although this provision did not expressly contain a color-of-law requirement, it has been recognized, since the time of Reconstruction, that prosecutors may not charge private citizens with violating Constitutional provisions that served only to limit government power. It thus incorporates a color-of-law requirement for most racially motivated deaths.

No subject could be charged for violating the Reconstruction-Era civil rights statutes that *did* exist at the time of Culbreath's death. First, there is no indication that any individual acted under color of law, a fact that would have to be proven beyond a reasonable doubt at trial. Second, the statute of limitations, which is essentially a deadline for bringing a criminal case, has long since passed. At the time of the offense, the Reconstruction-Era statutes were subject to a five-year statute of limitations period. *See* 18 U.S.C. § 3282(a). In 1994, these statutes were amended to eliminate the statute of limitations for certain death-resulting offenses.⁵ However, the Constitution's *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, 610 (2003).

The Department of Justice has used non-civil rights statutes to overcome the statute of limitations challenge in a small number of cases, such as those involving kidnapping across state lines, *see United States v. Seale*, 600 F.3d 473 (5th Cir. 2010), or offenses occurring on federal land, *see United States v. Avants*, 367 F.3d 433, 440 (5th Cir. 2004). The available evidence in this case, however, does not support a finding that Culbreath was transported across state lines or that he was killed on federal land.

The Till Act and its Reauthorization provide that the federal government can assist state or local governments in prosecuting cold cases when the cases cannot be prosecuted federally. Referral to the state is not appropriate here. No individual identified as a suspect in Culbreath's death is known to be still alive. No one has come forward with information suggesting that there are additional subjects; nor has the government's own review identified any such subjects. In any event, the Constitution's prohibition against double jeopardy prevents the state from re-trying Ed Vail, who was already tried and convicted of Culbreath's murder. A state prosecution of James Vail, if he were alive, would not be suitable in this case. The state, which undertook a prosecution of Ed Vail, made a determination at that time, when there were more living witnesses and when the evidence was still fresh, not to prosecute James Vail.

In sum, the Civil Rights Division concludes that this matter should be closed without prosecution or referral to the state.⁶ The United States Attorney's Office for the Western District of Arkansas concurs with this recommendation.

⁵ This was accomplished by making certain offenses defined by 18 U.S.C. §§ 241 and 242 death eligible. *See* Pub. L. No. 103-322, 108 Stat. 1796 (1994); 18 U.S.C. § 3281 ("An indictment for any offense punishable by death may be found at any time without limitation.").

⁶ The Department of Justice attempted to identify and contact possible next of kin for Mr. Culbreath to inform his family of the results of our review but, unfortunately, was unsuccessful. If anyone is aware of Mr. Culbreath's next of kin, please contact attorney Angela M. Miller at 202-514-3204 so that the Department may appropriately notify his family of these findings.