

CIVIL RIGHTS DIVISION

Notice to Close File

File No. 144-54-1171

Date: _____

To: Chief, Criminal Section

Re: Robert ("Bobby") H. Johnson, Jr. (Deceased)
Robert H. Johnson, Sr. (Deceased)
Russell Hatcher (Deceased)
Lester Phillips (Deceased)
R.H. Stephenson (Deceased)
Cleveland Township, North Carolina – Subjects;
Dan Carter Sanders (Deceased) – Victim;
CIVIL RIGHTS

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

1. Date of the Incident: November 18, 1946
2. Synopsis of the Facts and Reasons for Closing:

On November 18, 1946, Dan Carter Sanders, a 26-year-old African-American World War II veteran and married XXXXX, was shot and killed after a group of white men suspected him and another man of stealing animals from a local white man's farm.

Angela M. Miller
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-3

As explained more fully below, a federal prosecution of anyone responsible for Sanders's death is not possible. All identifiable subjects involved in Sanders's death are deceased, and the investigation did not identify any additional participants or witnesses to the attack. 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 would likely bar any state prosecution. Given the lack of any leads about other participants and the passage of more than 70 years from Sanders's death, it is unlikely that any additional living subjects could be identified or, if identified, could be successfully prosecuted on state charges. For these reasons, the case is being closed without prosecution or referral to the state.

3. The Death of Dan Carter Sanders and the State Investigation

On November 18, 1946, a white youth named Robert "Bobby" Johnson³ shot and killed Dan Carter Sanders, a 26-year-old African-American man. The shooting took place in Johnston Township, North Carolina. Bobby and three other white men had been pursuing Sanders and another black man. The white pursuers had accused the two black men of stealing foxhounds from the Johnson's property. Bobby's shot pierced Sanders's femoral artery. Neither Bobby nor his companions attempted to get Sanders any medical attention and, instead, left him to die in the field where he was shot. At the time of his death, Sanders was a World War II veteran and the married XXXXX.

Immediately after the incident, the local sheriff's office⁴ investigated the shooting, which was also the subject of a coroner's inquest.⁵ The inquest, held the day after the shooting, resulted in a verdict that Sanders "came to his death by the hands of Bobby Johnson." In fact, during the investigation, Bobby Johnson, who was then 16, admitted killing Sanders.

The Department could locate no transcripts of the original coroner's inquest; however, newspapers of the day reported on what transpired at that inquest. According to these reports, Lester Phillips and Russell Hatcher testified that Robert Johnson, Sr., asked them to come with Johnson to Johnson's home because "two Negroes had stolen" his dogs. While outside the Johnson home, Bobby returned from school and told the men that he had seen "a Negro" with the missing dogs. The four then drove together until they saw Sanders with the dogs in a cornfield; Bobby,

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

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

³ To avoid confusing Bobby Johnson with his father, Robert Johnson, Sr., who was also involved in the incident, this memorandum refers to the younger Robert Johnson as "Bobby" and the elder as "Johnson."

⁴ Johnston County Sheriff C. L. Denning and Deputy Sheriff Johnny Medlin conducted the initial investigation.

⁵ The coroner's inquest was led by Coroner Durward Creech.

the only one among the men who was armed, carried a .22 rifle. As Bobby and Johnson got out of the car and ran after Sanders, Hatcher enlisted R. H. Stephenson, who lived nearby, to drive to a different location to block Sanders's escape from the cornfield. According to Stephenson, Bobby jumped on the car's running board as Stephenson drove to intercept Sanders. The two, however, noticed that Sanders had already crossed the road and was running through an open field; Bobby therefore jumped down from the car. Stephenson testified that he was driving toward a different road when he heard a single shot. Hatcher also heard a single shot and testified that he saw Bobby shoot at Sanders, who was approximately 50 to 75 yards from the road when he was shot.

Bobby, Johnson, Hatcher, and Stephenson⁶ approached Sanders in the field; Sanders was still alive at the time. According to Hatcher, they asked Sanders the identity of his companion, who had run in a different direction, but they could not understand Sanders's "mumblings." Bobby had shot Sanders in the thigh and the bullet pierced his femoral artery; he bled to death in the field within ten to fifteen minutes. Hatcher said that he and Stephenson left the field while Sanders was still alive to notify the authorities and obtain medical care for XXXXX, "who was upset."

Bobby was released on bond following the inquest. A few weeks later, Solicitor W. Jack Hooks presented the case to the grand jury. The grand jury, however, found insufficient evidence to return a true bill. No other person was charged in Sanders's killing.

4. Federal Investigation

The Department of Justice identified this case 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 Sanders's killing and attempted to obtain the state investigative records. The Johnston County Sheriff's Office, however, indicated that relevant records were unavailable given the passage of time and changes in personnel.

The Federal Bureau of Investigation confirmed not only that Bobby, the person who actually fired the fatal shot, is deceased, but that all other persons identified as accompanying Bobby in pursuit of Sanders have also died. Thus, all subjects known to law enforcement as present during and/or participating in Sanders's killing (*i.e.*, Robert "Bobby" Johnson, Jr., Robert Johnson, Sr., Russell Hatcher, Lester Phillips, and R.H. Stephenson) are deceased and thus may not be prosecuted.

5. Legal Analysis

This matter is being closed, as it cannot be federally prosecuted. In 1946, at the time Dan Carter Sanders was killed, no federal hate crime laws existed. The only federal civil rights laws that existed in 1946 were Reconstruction-era statutes that would have required proof that anyone

⁶ Newspaper reports do not account for the whereabouts of Phillips.

charged for the offense was a law enforcement officer or otherwise acted under color of law.⁷ Since the time of Mr. Sanders'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.

No subject could be charged for violating the Reconstruction-era civil rights statutes that *did* exist at the time of Sanders'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.⁸ 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 Sanders 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 by the Johnston County Sheriff's Office as being a potential suspect in Sanders's death is known to be still alive. No one has come forward with information suggesting that there are additional subjects; nor has the

⁷ Two civil rights statutes were available to prosecutors in 1946. 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.

⁸ 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.").

government's own investigation identified any such subjects. Because it has been over 70 years since Sanders's death, it is extremely unlikely that anyone involved in the events who was not originally identified is still alive. Even in the unlikely event that, at this late date, an additional participant was identified, it is unlikely that any prosecution could succeed due to the lack of living witnesses.

In sum, the Civil Rights Division concludes that this matter should be closed without prosecution or referral to the state. The United States Attorney's Office for the Middle District of North Carolina concurs with this recommendation.⁹

⁹ The Department of Justice, through the FBI, attempted to locate Mr. Sanders's next of kin to inform his family of the results of our review but, unfortunately, was unsuccessful. If anyone is aware of Mr. Sanders'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.