



U.S. Department of Justice

Civil Rights Division

MJK:PP:KD/sam
144-72-2240

Criminal Section - PHB
310 Pennsylvania Avenue, NW
Washington, DC 20530

[REDACTED]
Memphis, TN 38123

Dear [REDACTED]

We are writing to inform you and your family that the Department of Justice and the Federal Bureau of Investigation (FBI) recently conducted a review of the circumstances surrounding the death of your [REDACTED] 16-year-old Larry Payne, on March 28, 1968 at the Fowler Homes in Memphis. As we explain below, after careful review and consideration of these circumstances, we have reached the conclusion that the available evidence does not allow the federal government to pursue a prosecution for a violation of federal criminal civil rights statutes. The results of our review are summarized below.

Over the last 50 years, the Civil Rights Division of the Department of Justice has been instrumental in bringing justice to some of the nation's most disturbing civil rights era crimes. Today, the Division continues to use its resources and expertise to identify, locate, and, where possible, prosecute those responsible for committing racially-motivated crimes committed more than 40 years ago.

In 2006, the FBI began its "Cold Case Initiative" -- a comprehensive effort to identify and investigate racially-motivated murders committed decades ago. Toward that end, each of the 56 FBI field offices searched their "cold case files" to identify incidents which might be ripe for investigation. In February of 2007, the FBI announced the next phase of the initiative, which includes a partnership with the National Association for the Advancement of Colored People (NAACP), the Southern Poverty Law Center (SPLC), and the National Urban League to assist the FBI in identifying additional cases for investigation and to solicit their help. In October 2008, the "Emmett Till Unsolved Civil Rights Crime Act" ("Emmett Till Act") became law giving the Department of Justice additional tools to investigate "violations of criminal civil rights statutes . . . result[ing] in death" that "occurred not later than December 31, 1969."

The federal review concerning Mr. Payne's death was begun pursuant to the Cold Case Initiative and the Emmett Till Act. This review was conducted by FBI Special Agents and an experienced civil rights prosecutor.

As part of its review of the circumstances of Mr. Payne's death, the FBI interviewed civilian witnesses and also obtained contemporaneous newspaper articles, the report of the Memphis Police Department (MPD) and documents from the court file of the federal civil lawsuit filed by your parents. DOJ personnel identified and retrieved the closed file stored at the National Archives and reviewed the file which were generated during the 1968 investigation described below.

As you are already aware, the FBI had opened a contemporaneous investigation two days after Mr. Payne's death. FBI agents interviewed numerous witnesses and obtained documentary evidence including photographs and diagrams. The FBI submitted its report as well as the report of the Memphis Police Department to the U.S. Department of Justice (DOJ). During this federal investigation, [REDACTED] examined the relevant locations, including the Sears and Roebuck Store, the route to the housing complex and the boiler room entrance.

In addition, records indicate that then-Deputy Assistant Attorney General of the Civil Rights Division Jim Turner was in Memphis shortly after Mr. Payne died to speak with community activists and witnesses to the incident. Members of the Tennessee Advisory Committee to the United States Commission on Civil Rights (USCCR) also discussed the incident with Deputy Assistant Attorney General Turner. There was significant attention in the media as part of its coverage of the widespread civil disturbances at the time.

In 1971, the DOJ closed its investigation noting that the evidence "cannot disprove subject's claim of self-defense." At that time, then-U.S. Attorney Robinson, concurred with closing the investigation, adding that the shooting was "obviously executed in self-defense on the part of the police officer."

It is important to remember that we are obligated to analyze the evidence according to the legal standards of 18 U.S.C. § 242, the applicable federal criminal civil rights statute, which requires that the government be able to prove, beyond a reasonable doubt, that the officer willfully used more force than he reasonably could have believed was necessary under the circumstances. According to case law, the reasonableness of the amount of force used is determined from the perspective of a reasonable officer on the scene. The law also requires that the government must prove beyond a reasonable doubt that the officer willfully intended to use excessive force. "Willfully" means that the officer did not act out of mistake, misperception, or even bad judgment. Another way "willfulness" is often described is to say that the officer knew that what he was doing was wrong, but that he did it anyway. Thus, the conclusion reached has to be based on an analysis of the evidence using these standards.

The following summary of the events is based on our careful review of all of the above documents and the additional investigation. On the morning of March 28, 1968, Mr. Payne and at least one friend joined hundreds of young people to skip school and travel to downtown Memphis. There was a great deal of tension and activity because of the ongoing strike by sanitation workers and an impending visit by the Rev. Dr. Martin Luther King, Jr. The gathering soon culminated in a civil disturbance with a violent police reaction, along with widespread looting. Coincidentally, Mr. Payne was photographed just hours before the shooting, as he stood near a building with windows apparently broken due to vandalism. In the photograph, he is

holding a stick and watching a police officer use a baton to strike his friend who is on the ground. After a few hours, Mr. Payne left the downtown area and returned to the Fowler Homes housing complex, where he was a familiar member of the community.

Upon arriving at the apartment complex, Mr. Payne ran to one of the buildings where he opened the door and entered the boiler room in the basement. The boiler room door was on ground level, followed by three concrete interior steps descending downward into the basement. He was followed to the doorway by [REDACTED] of the Memphis Police Department who had seen him on the street and believed that he had stolen a television.

According to [REDACTED] he was still in his patrol car when he saw Mr. Payne run to the basement of one of the buildings and close the door behind him. The officer got out of his patrol car and ran to within 10 feet of the door, when Mr. Payne suddenly opened the door. The officer ordered Mr. Payne to come out with his hands up but instead Mr. Payne jumped back inside and pulled the door shut. The officer came within five feet of the door and "hollered" several times for the victim to open the door. After several seconds, the door again opened and Mr. Payne started out of the door with his left side and left hand coming out first. His right hand remained on the inside door handle as he came out. [REDACTED] yelled three or four times for Mr. Payne to raise his hands. The officer held his shotgun in his right hand, pointing it towards Mr. Payne. He then reached with his left hand in order to turn Mr. Payne around and take him into custody. At that same time, Mr. Payne's right hand suddenly became visible and the officer spotted a blade about 6 or 8 inches long. Mr. Payne began to make a motion towards the officer who fired his weapon one time. Mr. Payne fell down into the stairwell, near the door, and the knife fell into the basement.

When other officers arrived, [REDACTED] picked up the knife and told his partner that he felt he had to shoot because "he drew a knife on me." Within minutes, [REDACTED] showed a responding [REDACTED] the powder burns on his own left hand, explaining that he had been reaching out towards Mr. Payne at the time he fired. [REDACTED] told the [REDACTED] that if he had not fired, "he would have killed me." Seven civilians at the scene overheard the officer mention the knife held by Mr. Payne. While still at the scene, the officer said he "hated" to have to shoot.

Because, as you know, the shooting occurred around noon in a tightly-knit housing complex with a dense population, there were about 25 residents and friends who reported that they witnessed either the entire or partial aspects of the incident. These witnesses have been interviewed at least once and sometimes twice, by either the Memphis Police Department or by the Federal Bureau of Investigation.

Most of these residents were acquainted with, or knew of, your [REDACTED] and your family members, including your mother who arrived at the scene. Though at the time of the incident, none of the residents observed a knife in Mr. Payne's hand, many of them reported that while still at the scene, they either overheard the officer talk about the knife or that they saw the knife on the ground. The witnesses were generally gathered in a few different locations, none of which allowed a direct unobstructed view into the interior basement stairwell where the shooting occurred. Eight of the witnesses were nearly a block away, at the opposite end of the courtyard, and their view was obstructed by the open door of the basement. Others were on the second or third floor balconies above the doorway, which would have prevented a clear line of sight into the basement stairwell. Still other witnesses were scattered at various locations in the complex, and had their attention drawn to the scene only after hearing the gunshot. Understandably, all of

the witnesses were terribly distraught at the fact that a young man known to them had been fatally shot by a police officer, and many engaged in intense conversation about their accounts as well as expressed anger at the officers. Also many witnesses' accounts were in conflict either in significant ways or in small ways with those of other witnesses, which is not unusual after a fast moving event that is viewed from many different vantage points. Thus, it is to be expected that in any prosecution, for the above reasons, the witnesses' accounts would be substantially vulnerable to cross-examination and could not solely be relied upon as the basis of a prosecution.

Moreover, the physical evidence does not refute the account provided by the officer. The autopsy diagram shows that the location of the gunshot wound matched the location of gunpowder flecking on the arm if the arm was in a raised position.

The investigation further noted that a Memphis grand jury declined to indict the officer and that the civil lawsuit brought by your parents was dismissed after a jury found in favor of the officer.

Our careful analysis of the record described above has led to the conclusion that the evidence simply does not provide an adequate basis for a federal criminal civil rights prosecution, where the government would have to meet the legal standard described above, of proof beyond any reasonable doubt that the officer acted willfully when he fired his weapon. It should be noted that even if the evidence were sufficient to establish willfulness on the part of [REDACTED] we would nonetheless be barred from pursuing this matter as a federal criminal civil rights matter, because the applicable federal statute of limitations has expired. In 1968, criminal civil rights violations were not capital offenses and accordingly, were subject to a five-year statute of limitations. Years later, 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 five-year statute of limitations. However, this change was not retroactive, and therefore, any prosecution for your brother's death would have had to have been pursued within five years. The first investigation by the Department of Justice undertaken in 1968 did conclude within the five years, with the decision that there was not enough evidence upon which to bring a prosecution. Our review has not identified any additional source of federal jurisdiction that would allow the Civil Rights Division to pursue a prosecution.

Again, please accept our sincere condolences to you and to your family for the loss of your [REDACTED]. We recognize that your terrible loss will never be resolved by any actions taken within the legal system but we hope that you are assured that we have examined this case as thoroughly as possible. We regret that we cannot be of further assistance to you.

Sincerely,

Paige M. Fitzgerald
Deputy Chief in Charge
of the Cold Case Initiative

[REDACTED]