

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ARTHUR KRAUSE, et al.,)
)
Plaintiffs,)
) Civil Action
vs.) No. C 70-544
)
JAMES A. RHODES, et al.,)
)
Defendants.)

TRIAL PROCEEDINGS HAD BEFORE THE HON.
WILLIAM K. THOMAS, JUDGE OF SAID COURT,
AND A JURY, COMMENCING ON TUESDAY,
DECEMBER 19, 1978.

JP: 1 1

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TUESDAY, DECEMBER 19, 1978, 10:35 A.M.

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THE COURT: Now, then, just before

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Mr. Rosen presents his opening statement for the

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plaintiff, there are certain instructions that

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apply to all of the opening statements.

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I'm not sure, perhaps this would be a good

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time to ask, will anybody else be speaking for the

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plaintiffs?

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MR. ROSEN: No, your Honor.

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THE COURT: And for the defendants,

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who will be speaking?

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MR. BROWN: I will, your Honor,

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and then Mr. Fulton and Mr. Shanklin.

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THE COURT: The jurors should

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understand that the opening statements are an

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important part of the case but they do not consti-

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tute evidence. Whatever counsel says is in the

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nature of telling you what they believe the evidence

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will be. What they say is not and may not be

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considered as evidence in the case.

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At this time, Mr. Rosen, you may present

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the opening statement for the plaintiff.

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MR. ROSEN: Thank you, your Honor.

1 Ladies and gentlemen of the jury, the
2 cases you are about to hear are the civil damage
3 suits against Governor Rhodes and several officers
4 and enlisted men of the Ohio National Guard.
5 These persons are sued because of their roles as
6 State employees in the May 4, 1970 shootings of
7 unarmed students on the campus of Kent State
8 University.

9 This case is not a criminal case. No one
10 is seeking to jail the persons who were responsible
11 for the shootings. Rather, the nine injured
12 former students and the families of the four dead
13 students are seeking money damages for the losses
14 they have suffered as a result of what we will
15 show was the unconstitutional use of excessive
16 force on the Kent State campus that day more than
17 eight and a half years ago.

18 It may seem as though the shootings
19 happened a long time ago and should already be
20 put to rest, but the victims' claims have not yet
21 been resolved, and great tragedies often take a
22 long time to be resolved.

23 In this opening statement I am going to
24 summarize what we expect to prove to you at the
25 trial. This summary will be a kind of road map of

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1 the events of May 4th for our use in the trial. At
2 the trial itself we will prove these facts by
3 calling witnesses to testify as well as by intro-
4 ducing tangible exhibits as evidence.

JNK:2 5 Now, plaintiffs' witnesses will include
6 participants in the events of May 4, 1970, and
7 other eyewitnesses. Plaintiffs will also call one
8 or more expert witnesses to testify, for example,
9 about military practice, procedure, weaponry,
10 training and orders in civil disturbance control
11 situations.

12 Among our exhibits will be numerous photo-
13 graphs, including an album of 50 photographs
14 arranged essentially in their proper time sequence.
15 This will be Plaintiffs' Exhibit 1. Several
16 copies of this album will be available to you,
17 the jury, for examination as witnesses testify
18 about particular photographs.

19 Now, when you come to examine the album
20 you will see that each photograph is accompanied
21 by a map opposing it. The map is a map, like the
22 one behind me, of the relevant portions of the
23 Kent State campus as they existed on May 4, 1970.
24 You will notice that there are yellow markings
25 on the map. Each of these maps has been marked

properly to indicate where the photographer was standing at the time he or she took the picture, as well as the portions of the campus that appear in the photograph.

Our exhibits will also include several additional photographs, as well as 10 of the 50 photographs in the album, blown up to poster size.

Our exhibits will also include a 6 foot by 9 foot scaled model of the relevant portions of the campus. It is in the back of the room now. This model has a scale of 1/8 of an inch to 1 foot. For those of you who are model railroad enthusiasts, that is the equivalent of an HO model railroad scale. Thus, a person 6 feet tall would appear on the model as a 3/4 of an inch figure.

2-a Now, as the model presently exists, the trees and foliage are not yet to scale. They are merely representation. The model maker, however, is even now attempting to produce the trees to scale.

Our exhibits will also include a large blow-up version of the map of the relevant portions of the campus, in fact this map (indicating), which again is to scale with certain reservations about the placement and extent of the foliage indicated on

1 the map.

2 Our exhibits will also include some sound
3 recordings and perhaps some motion pictures.

4 Our exhibits will also include examples of
5 the weapons and bullets and other equipment used by
6 the Ohio National Guard on May 4, 1970.

7 Finally, our exhibits will include a number
8 of documents or writings. Most specifically, some
9 of these writings reveal the standards in effect
10 on May 4, 1970, for the Ohio National Guard as well
11 as those recommended by the United States Army for
12 use in civil disturbance control situations.

13 Before I go into what we will prove to you,
14 I would like to introduce to you the plaintiffs in
15 this lawsuit and the attorneys who represent them.

16 MR. FULTON: Objection, your Honor.

17 THE COURT: Mr. Rosen, I think
18 that has been done once already.

19 MR. ROSEN: Your Honor, --

20 THE COURT: Side bar, please, if
21 there is any discussion about it.

22 -- -- -- --

23 (Thereupon a side bar conference ensued
24 off the record, then continued on the record as
25 follows:)

1 THE COURT: After side bar
2 colloquy with counsel, the request to do what Mr.
3 Rosen indicated to the jury he was going to do is
4 denied. Mr. Rosen understands the limits to
5 which he may go by virtue of instructions I gave;
6 correct?

7 MR. ROSEN: I believe so, your
8 Honor.

9 THE COURT: Yes, very well.

10 (End of side bar conference.)

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12 MR. ROSEN: I am Sanford Rosen,
13 the chief counsel for those people who have
14 brought this lawsuit. They are called plaintiffs
15 by the law because they are the ones seeking money
16 damages for injuries wrongfully inflicted upon
17 them.

18 The people the plaintiffs have sued, Mr.
19 Rhodes, the Guardsmen and their officers, are
20 called the defendants by the law because they must
21 defend against the lawsuit brought by the plaintiffs.

22 Now, I shall not be introducing the plain-
23 tiffs to you, nor their counsel, but I shall give
24 a description of the plaintiffs, of who they were
25 on May 4th, 1970, and where they are today and what

1 wounds were inflicted upon them.

2 There are 13 plaintiffs in this lawsuit.

3 9 of the plaintiffs are former students at Kent
4 State University who were wounded and who survived
5 the May 4th shootings. 4 of the plaintiffs are
6 parents of the 4 students who were killed on May
7 4, 1970.

2-b

8 Sandy Scheuer was killed. She was 20 years
9 old at the time of her death and a junior at Kent
10 State University. She was struck down approximately
11 350 feet from the line of fire. She bled to death
12 as the Guardsmen turned on their heels and marched
13 away. Her mother, Sarah Scheuer, sues on behalf of
14 Sandy's estate.

15 Jeff Miller was killed. He was 20 years
16 old at the time of his death and a junior at Kent
17 State University. He was struck down approximately
18 200 to 220 feet from the line of fire. He died
19 instantaneously. His mother, Elaine Miller Holstein,
20 sues on behalf of his estate.

21 Bill Schroeder was killed. He was 19
22 years old at the time of his death and a sophomore
23 at Kent State University. He was struck down
24 approximately 330 feet from the line of fire. A
25 bullet entered his spine. His father, Louis Schroeder,

sues on behalf of his estate.

Allison Krause was killed. She was 19 years old at the time of her death and a sophomore at Kent State University. She was approximately 325 feet from the line of fire. She died when a bullet entered her body and fragmented, causing numerous internal wounds. Her father, Arthur Krantz, sues on behalf of Allison's estate.

Joe Louis was wounded. He was 18 years old when he was shot and a freshman at Kent State University. He was at least 60 feet from the line of fire. He was shot twice, in the abdomen and in the leg. Just before the shooting Joe Louis made an obscene gesture at the troops. He now lives and works in Oregon.

John Cleary was wounded. He was 19 years old when he was shot and a freshman at Kent State University. He was at least 60 to 75 feet from the line of fire, standing by the metal sculpture which is indicated right here on this map. He was shot in the chest. He now lives in Pittsburgh, where he works as a licensed architect.

Tom Grace was wounded. He was 20 years old when he was shot and a sophomore at Kent State University. He was at least 150 feet from the line

1 of fire. He was shot in the left foot. The bullet
2 entered his heel and exited through the front of
3 his foot. He now lives in Buffalo, New York, where
4 he works for the State of New York.

JP:3

5 Jim Russell was wounded. He was 23 years
6 old when he was shot and a postgraduate student at
7 Kent State University. He was at least 160 feet
8 from the line of fire. He was shot in the right
9 thigh and right forehead. He now lives and works
10 in Oregon as a city planner.

11 Alan Canfora was wounded. He was 21 years
12 old when he was shot and a junior at Kent State
13 University. He was approximately 175 feet from
14 the line of fire. He was shot in the right wrist.
15 He is now finishing graduate studies at Kent
16 State University.

17 Dean Kahler was wounded. He was 20 years
18 old when he was shot and in his first quarter as
19 a freshman at Kent State University. He was
20 approximately 205 feet from the line of fire. He
21 was paralyzed from the waist down and rendered a
22 paraplegic. He now lives in Ohio with his wife
23 and works for the State of Ohio.

24 Doug Wrentmore was wounded. He was 20
25 years old when he was shot and a sophomore at

1 Kent State University. He was at least 340 feet
2 from the line of fire. He was wounded in the
3 left knee and leg. He now lives in Iowa where he
4 plans to pursue graduate studies.

5 Robbie Stamps was wounded. He was 19 years
6 old when he was shot and a sophomore at Kent State
7 University. He was approximately 500 feet from
8 the line of fire. He was hit in the right buttock.
9 He now lives in San Diego, California.

10 Donald Mackenzie was wounded. He was 21
11 years old when he was shot and a junior at Kent
12 State University. He was approximately 500 feet
13 from the line of fire. He was hit in the back of
14 the neck. The bullet exited through his cheek,
15 shattering his jaw. He now teaches and pursues
16 his graduate studies in Colorado.

17 There are 28 defendants in this lawsuit.
18 I will not try to describe each of them to you
19 individually. However, I will separate them
20 into three groups.

21 First, there are the defendants who we
22 will prove intentionally and unlawfully fired
23 their weapons on May 4, 1970, causing the plain-
24 tiffs' injuries.

25 Second -- some of these people are also

1 in the first group -- there are the officers and
2 non-commissioned officers who we will prove were
3 in command of the troops at Kent State University
4 on May 4th. We will show that these officers
5 failed properly to control their troops on May
6 4th and allowed poorly trained and improperly
7 equipped soldiers to carry loaded military weapons
8 against unarmed civilians, thereby contributing
9 to the plaintiffs' injuries.

10 The third group of defendants includes the
11 persons who we will show contributed to the plain-
12 tiffs' injuries because these, as defendants, were
13 responsible for the Ohio National Guard's training,
14 weaponry and orders, and we will show that these
15 training, weaponry and orders were poor, inadequate
16 and inappropriate for use in civil disturbance
17 control situations.

18 The persons in this third group formulated
19 the Ohio National Guard's unreasonably dangerous
20 rules for engagement in civil disturbance situ-
21 ations which allowed the troops, as a matter almost
22 of course, to carry loaded weapons against unarmed
23 civilians.

24 This latter group, this third group,
25 includes the defendant Governor Rhodes, General

Del Corso and General Canterbury.

The defendant, General Canterbury, was the highest ranking officer present at Kent State University with the troops who fired their weapons on May 4, 1970.

The defendant, General Del Corso, was the Adjutant General of Ohio on May 4, 1970, and, therefore, was the overall military commander of the troops who fired their weapons on May 4th. He was the military man in Ohio most responsible for the Ohio National Guard's weaponry, training and orders.

The defendant, James A. Rhodes, was then, as now, Governor of Ohio on May 4, 1970. Under Ohio law he was also the civilian commander in chief of the Ohio National Guard. Therefore, he was ultimately responsible for the weaponry, training and orders of the Ohio National Guard.

We will also show that the defendant Rhodes, in effect, took active control over the troops at Kent State University. He also issued inflammatory and life-threatening orders to the Ohio National Guard officers and their troops.

At this stage of the trial before the evidence has been presented to you, as Judge Thomas

1 has indicated, the attorneys for each side will
2 get up and be given time to explain to you just
3 what this case is about.

4 Because the victims of the Kent State
5 shootings must bear the initial burden of proof
6 in this case, the rules provide that I must make
7 the first opening statement. Some people con-
8 sider this an advantage. Remember, however, the
9 defendants' lawyers have the added advantage of
10 being able to respond to any statement I make.

3-b 11 These opening statements, as Judge Thomas
12 has told you, are not evidence in this case. None
13 of the lawyers who speak to you at this time is a
14 witness. You must decide this case solely upon
15 the actual evidence presented at trial, not on the
16 basis of what any of the lawyers say to you.

17 Following my opening statement, the lawyers
18 for the defendant will have an opportunity to
19 explain to you their version of what happened at
20 Kent State University on May 4, 1970.

21 After the opening statements we will pre-
22 sent to you evidence on behalf of the victims of
23 the shootings. The defendants will then have time,
24 some weeks from now, to rebut that evidence and
25 present evidence of their affirmative defenses.

1 We may then present rebuttal evidence for the
2 plaintiffs.

3 Following the conclusion of all the
4 evidence, both sides will make closing arguments
5 to you and Judge Thomas will instruct you on the
6 law as it relates to the evidence you have heard.

7 As I said to you, the victims of the
8 shootings bear the initial burden of proof in this
9 case. That is, we must show by a preponderance of
10 the evidence that the victims are entitled to
11 damages for their injuries.

12 Preponderance is a legal term used to
13 indicate that the weight of the evidence, all of
14 the evidence, is more to one side than to another.

15 Defendants may claim certain defenses;
16 for example, that the circumstances that existed
17 on May 4, 1970, justified the shootings or that
18 they, the defendants, were otherwise exempt from
19 liability because of governmental immunity. The
20 defendants will bear the burden of proof as to
21 their defenses.

22 Our role and the role of the defense
23 lawyers is to act as advocates for our clients.
24 We will not be giving evidence ourselves but we
25 will try to bring to your attention evidence which

1 will enable you to know as much as possible about
2 the shootings themselves. Also, we will be trying
3 to draw reasonable inferences from the evidence we
4 present in order to show you that the defendant
5 Guardsmen who fired their weapons did so unjusti-
6 fiably and unreasonably and that the other defend-
7 ants so acted.

8 You, the jury, will hear and decide what
9 happened at Kent State University just prior to
10 the shootings on May 4th. Then you will apply the
11 law in the manner that Judge Thomas instructs you
12 to the facts as you will have found them to be.
13 Ultimately, you will decide if the defendants were
14 responsible or liable for the shootings.

15 As you remember, you took an oath to be
16 fair and impartial and to base your decision
17 solely on the evidence presented in court and not
18 to base your decision on anything you may have
19 otherwise seen, heard or read about the Kent
20 State shootings.

21 Judge Thomas will be the referee at the
22 trial. He will preside. He will rule on ques-
23 tions of evidence. He will rule on motions and
24 objections at the trial and he will charge you,
25 the jury, as to the law to be applied, and he is

1 impartial.

2 I will soon tell you more about what our
3 evidence will show but, first, I would like to say
4 this to you. I am going to tell you and have
5 told you what we will prove in the presentation of
6 our case. You should hold me to these predictions
7 of proof. If I prove to your satisfaction that
8 the facts which I am about to discuss with you,
9 I believe the people who were shot and the
10 families of the four students who were killed by
11 the Ohio National Guard are entitled to a verdict
12 at your hands.

13 MR. FULTON: Objection.

14 MR. BROWN: Objection.

15 THE COURT: The statement does
16 constitute argument at this point, Mr. Rosen. You
17 may certainly state that that is your claim.

18 Rephrase your statement, please.

19 MR. ROSEN: If I prove to your
20 satisfaction the facts which I am about to discuss
21 with you, I claim on behalf of the plaintiffs that
22 the people who were shot and the families of the
23 four students who were killed by the Ohio National
24 Guard on May 4, 1970, are entitled to a verdict in
25 their favor.

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MR. FULTON: Objection.

THE COURT: Overruled.

MR. ROSEN: Remember, however,
you should make no final decisions in this case
until all of the evidence is in and Judge Thomas
has instructed you on the law.

When you first came into this courtroom
two weeks ago with the entire jury panel, Judge
Thomas gave you a brief review of the incidents
which occurred in the days prior to May 4th. He
reminded you of an invasion of Cambodia by United
States troops, an incident that occurred during
the war in Vietnam which caused great turmoil on
many college campuses in all areas of these United
States. Judge Thomas told you of protests and
demonstrations and vandalism that took place in
and about Kent State University on May 1, 2 and 3,
1970, by persons, including perhaps many students,
who were angry by the invasion of Cambodia. He
further told you of Defendant Rhodes' call up of
the Ohio National Guard, the imposition of curfews
in the City of Kent and at Kent State University,
the burning of the Kent State ROTC Building, some-
time on the evening of May 2, 1970, and the
presence thereafter of National Guard troops at

and on Kent State University campus.

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During the course of this trial you will no doubt hear evidence of these and other events which occurred on the days before May 4th. There is no question about it. And we will not attempt to excuse or condone any violent or unlawful acts that occurred.

The wounded students and the families of those who were killed do believe that the events of just 15 minutes on May 4, 1970, those 15 minutes up to and including the shootings themselves, are the crucial events upon which you must make your decision in this case, and it will be up to you to judge, in the light of what happened in that time span, whether excessive force was used by the troops against the students.

May 4, 1970, was a sunny spring day at Kent. The university was opening and operating. Classes and other activities were being held. By about noon a large number of students had gathered peacefully by the victory bell which is located on the Commons at Kent State University. Right here on this chart (indicating). Right here on this chart, that's the victory bell (indicating).

Now, as you can see, the Commons was a large and open grassy area in the center of the campus. This entire campus was considered the Commons (indicating). In fact, at that time the Commons was both the physical center and busiest intersection of the campus and its activities. Large concentrations of students freely congregated there, especially at lunch time and between class breaks. 12:00 noon was both lunchtime and a break between classes.

The students who gathered by the victory bell did so even though public assemblies had been prohibited. But not all of these students were aware of the prohibition. As Judge Thomas stated in his recitation of facts to you --

MR. FULTON: I am going to object to the statement of Judge Thomas as stating a representation of facts.

THE COURT: Counsel, step over, please.

-- -- -- --

(Thereupon a side bar conference ensued on the record as follows:)

THE COURT: I think a reference to my statement may be unnecessary. I think you

1 certainly may take the sentence that I used at that
2 time and adopt it, accept that --

3 MR. ROSEN: Fine. I was going to
4 use that statement and I won't refer to your state-
5 ment of facts again.

6 THE COURT: O.K.

7 (End of side bar conference.)

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9 MR. ROSEN: Prior to the noon
10 hour at Kent State University on May 4th, prior to
11 the assembly of students in and about the victory
12 bell, representatives of the University, of the
13 City of Kent, of the Ohio State Highway Patrol and
14 of the Ohio National Guard, as well as other
15 officials, had met. When they learned at that
16 meeting that a gathering of students would occur
17 on the Commons at about noon, none of these
18 persons or officials stated a position against
19 disbursal of the anticipated noon gathering.

20 Defendant Canterbury was present at the
21 meeting. He was the ranking National Guard
22 officer on the campus at the time. He left the
23 meeting with the understanding that the Ohio
24 National Guard should disperse the gathering
25 scheduled for the noon hour.

1 So it was that the Ohio National Guard,
2 through General Canterbury, decided to disperse
3 the assembly, regardless of whether it was peace-
4 ful or not, and the dispersal order was read to
5 the gathered students.

6 Now, preparatory to dispersing the gather-
7 ing of students who were gathered at the eastern
8 end of the campus -- basically around here
9 (indicating) -- the Guardsmen of Companies A and
10 C and of Troop G, numbering approximately 100 men
11 in all, formed a long line on the Commons adjacent
12 to the student union and the burned out ROTC
13 building. They were here (indicating). The line
4-a 14 ran from north to south, near the west end of the
15 Commons.

16 Defendant General Canterbury issued orders
17 to Defendant Colonel Fassinger to disperse the
18 persons gathered on the southeastern end of the
19 Commons, the students. These instructions were in
20 turn passed on to the several units. Tear gas was
21 fired at the students by the Guardsmen, dispersing
22 the students who had gathered near the victory bell
23 on the Commons. Some tear gas cannisters were
24 thrown back by students at the troops.

25 There is evidence, which will be in dispute,

1 as to the nature and extent of any rock or stone
2 throwing that occurred from the time the National
3 Guard began their march across the Commons until
4 the time in which the shootings occurred somewhat
5 later. Plaintiffs will show, for example, that in
6 the minute or so just before the troops opened
7 fire few or no rocks or other objects were being
8 thrown at the troops.

9 Some time prior to the commencement of the
10 Guard's march across the Commons, the Guardsmen
11 had been ordered to put their M-1 rifles in a
12 locked and load position. In this position a live
13 round of ammunition occupies the rifle's firing
14 chamber but the round cannot be fired while the
15 weapon is in the locked position.

16 The troops on the line also had their
17 unsheaved or naked bayonets affixed to their
18 rifles and were wearing gas masks, steel helmets
19 and heavy battle fatigues.

20 As the troops advanced across the campus
21 they approached Taylor Hall, this building right
22 here (indicating). Taylor Hall is constructed
23 on a hillside -- when you have an opportunity
24 during examination of certain witnesses to see
25 the contours, this will become much more clear --

1 constructed on a hillside with its eastern corner
2 at the bottom of the hill, this corner here
3 (indicating), and its southern corner at the top
4 of the hill, this corner here (indicating). The
5 top of the hill lies between Taylor and Johnson
6 halls, this building over here (indicating).

7 An umbrella structure, known as the pagoda,
8 is at the top of the hill. The structure marked
9 "Shelter" is the pagoda (indicating).

10 To the northeast of the hill are Prentice
11 Hall, this building here (indicating), and its
12 adjacent parking lot, this parking area in here
13 (indicating). They lie partly to the left and
14 rear of Taylor Hall as one approaches Taylor Hall
15 from the Commons, over here and here (indicating).

16 Now, approaching Taylor Hall, defendant
17 Colonel Fassinger split the line of soldiers.
18 Troop C, under the command of Defendant Captain
19 James Ronald Snyder, with the exception of two
20 of its members, proceeded to the north side of
21 Taylor Hall and was thereafter stationed at a
22 triangular grassy area between Taylor and Prentice
23 Halls. They were stationed in this triangular
24 area here (indicating). No guns were fired by
25 these Guardsmen, no weapons at all.

1 Company A of the 145th Infantry and
2 Troop G of the 107th Cavalry and the two members
3 of Company C who had been separated moved east
4 across the Commons and up the hill from this side
5 (indicating). Looking down the hill in an easterly
6 direction, these men could see into the parking
7 lot adjacent to Prentice Hall.

8 To the south of the parking lot and
9 directly ahead in the line of vision of these
10 troops as they reached the top of the hill, over
11 here (indicating), was an open grassy plain
12 called the practice football field. Down here is
13 the practice football field (indicating).

4-b 14 Instead of stopping once the students
15 had been dispersed from the Commons, Company A
16 and Troop G, commanded by General Canterbury and
17 other officers, marched past Taylor Hall and down
18 the hill to the practice football field, just like
19 that (indicating). At the practice football field
20 they were stopped by the L-shaped fence.

21 During their march and after they reached
22 the practice football field, these troops were
23 shooting tear gas cannisters. Some tear gas
24 cannisters, as well as some rocks and other
25 objects, were thrown by people beyond the fence,

1 or on the parking lot, at the troops. People
2 standing in and around here and here (indicating)
3 threw these objects at the troops. Slogans and
4 taunts were also shouted by some students, these
5 taunts including strong and vulgar words which
6 most of us would find objectionable.

7 Now, while the troops, composed of Company
8 A and Troop G, were on the practice football field,
9 Major Jones left Company C at its position on the
10 triangular grassy field between Taylor and
11 Prentice Halls and walked through or by the
12 students and joined the troops on the practice
13 football field. Some of the troops at the north
14 end of the line on the practice field, including
15 the two members of Company C who had been
16 separated from their company and also several
17 members of Troop G, knelt for several minutes,
18 pointing their weapons in the direction of the
19 Prentice Hall parking lot, in this direction
20 (indicating), and also at the L-shaped fence and
21 also at the plaintiff Canfora, over there
22 (indicating).

23 At the time the parking lot was nearly
24 empty of students, as the photographic evidence
25 will show.

1 Defendant Canterbury ordered an officer
2 to tell the men to get up, because he did not
3 believe that the threatening posture was necessary.
4 There is evidence, however, that this threatening
5 posture was taken under orders.

6 At least one of the Guardsmen on the prac-
7 tice field, Sergeant Pryor, had a pistol in his
8 hand. Moreover, there is evidence that while on
9 the practice field Sergeant Pryor said something
10 about "shooting students" to one or more of the
11 Guardsmen who were kneeling with their rifles
12 pointed.

13 After the troops had been on the practice
14 football field for several minutes they formed into
15 a wedged-shape formation and, on General Canterbury's
16 orders, began to march back up the hill towards the
17 shelter known as the pagoda, right up here
18 (indicating). As the Guardsmen marched back up the
19 hill, the students again threw some rocks and
20 objects at them. However, as the line of Guardsmen
21 neared the top of the hill, the evidence will show
22 that the quantity of rocks and objects thrown by
23 the students slackened, until there were few or
24 no rocks at all being thrown.

25 The evidence will also show that no

1 Guardsman suffered any serious injuries from rock
2 throwing or otherwise on May 4th.

3 When the Guardsmen marched up the hill from
4 the practice field, the students and other people
5 who had been watching from the slope adjacent to
6 Taylor Hall moved aside to let the troops pass
7 through. Some of these people came back onto the
8 slope after the troops had passed, and a few of the
9 more curious followed the Guard. But as you, your-
10 self, will see in the photographs that are in
11 evidence, which clearly document the entire period
12 of the troops' ascent back up the hill, there was
13 no charge or rush of threatening students toward
14 the troops.

15 Photographs taken from various vantage
16 points and the testimony of witnesses will show
17 that the troops were not under attack and cer-
18 tainly their lives and physical safety were not
19 in peril.

20 At the time of the shootings no student
21 on the hillside was closer than 60 feet from the
22 Guard, and only a handful were within 150 feet of
23 the troops. Most of these people were walking away
24 from the troops and were following the troops at a
25 distance to watch as they walked back over the hill

1 towards the Commons.

2 For some reason, which we do not know, just
3 as the Guardsmen reached the top of the hill between
4 the pagoda and the Commons of Taylor Hall, this
5 position right here (indicating), the right flank
6 of the line, composed mostly of Troop G, suddenly
7 stopped and turned about approximately 125 degrees,
8 facing back toward the parking lot below here
9 (indicating). Several of the soldiers raised
10 their rifles to their shoulders. Suddenly, at
11 about 12:17 in the afternoon, they began to fire
12 and continued to fire their deadly weapons for
13 nearly 13 seconds. More than 60 shots were fired.

14 No officer admits to having given an order
15 to fire.

16 As you will notice when you review the
17 photographs, one of the most prominent Guardsmen
18 during the shooting is the man with the pistol,
19 Sergeant Pryor. He is the same man who while on
20 the practice field may have said something to his
21 troops about "shooting students."

4-c 22 And the Guardsmen who most clearly parti-
23 cipated in the shooting, the men of the right flank,
24 primarily members of Troop G, appear to have been
25 the same men who had knelt on the practice field

1 and aimed their weapons in the direction of a few
2 students several minutes before.

3 Now, you and only you must decide, based
4 solely on the evidence you will see and hear,
5 whether the troops were justified in firing their
6 deadly weapons at the students. What we can say
7 and what we will prove is that the evidence does
8 not support any claim that the shootings were
9 justified because the troops' lives were in
10 danger. They were not under attack. The nearest
11 students, and there weren't many of them, were no
12 closer than 60 feet.

13 In any event, the troops had other means
14 available to protect themselves if they were in
15 fact being threatened. For example, they had
16 naked bayonets on their rifles. In other words,
17 they had no legitimate reason to fire whatsoever.

18 Several officers and non-commissioned
19 officers were present on the firing line with
20 .45 caliber military semi-automatic pistols.
21 Defendant Major Jones was present and carrying
22 an unauthorized .22 caliber Baretta automatic
23 pistol loaned to him by Captain Snyder. Some
24 Guardsmen carried pump-action shotguns loaded with
25 large sized and lethal shot. Other Guardsmen had

1 shotguns loaded with bird shot. The remaining
2 troops had M-1 rifles loaded with .30 caliber
3 ammunition, with a shell in the firing chamber.

4 The killing range of an M-1 rifle is at
5 least one mile. A marksman can bring down a
6 person within 500 to 550 yards, more than 1,500
7 feet.

8 Now, although a number of students were
9 standing behind the railing on the porch at
10 Taylor Hall, which would be indicated here on
11 the map, on the chart (indicating), virtually all
12 of the National Guard gunfire was directed in a
13 narrow triangle northeast, down the hill towards
14 the Prentice Hall parking lot, basically just
15 like that (indicating).

16 There was also a victim who was hit in
17 this area down here (indicating).

18 The nearest victim in this direction
19 (indicating) was the plaintiff Lewis.

20 Would you stand, Jim?

21 Thank you.

22 He was at least 60 feet from the line of
23 fire. He was at least as far from the firing
24 line as the distance from Judge Thomas's bench
25 to the back wall of the courtroom. He was

1 standing still when the troops turned around,
2 and he was standing still when he was shot twice
3 by the defendant Shafer.

4 The next closest student who was shot
5 was the plaintiff Cleary, and he was beside the
6 metal sculpture, almost halfway down the hill,
7 right here (indicating). And Lewis was up here,
8 just beyond the road. (Indicating).

9 All of the students who were killed were
10 all of the way down at the bottom of the hill,
11 in the road or in the parking lot (indicating),
12 approximately 100 yards or an entire football
13 field away from the firing.

14 Many of the victims were shot when their
15 backs were turned to the Guardsmen. None of the
16 victims was armed or constituted a threat to the
17 physical safety of any Guardsman.

18 Some of the defendants no doubt will say
19 that they were in fear of being overrun and
20 killed or seriously injured by these unarmed
21 students, that they were in fear for their lives
22 and therefore justified in shooting. However,
23 the evidence, including particularly the photo-
24 graphic evidence, will demonstrate that the
25 students were not rushing towards the troops at

1 the time of the shooting; and even if they had been,
2 the Guardsmen had ample means to defend themselves;
3 and the quality and quantity of force used was far
4 in excess of that which was needed under those
5 circumstances. The students had no firearms. The
6 Guardsmen had rifle butts and fixed bayonets, as
7 well as some tear gas, which they could have used
8 to protect themselves.

9 After the shooting, the defendant Captain
10 Snyder stated that he found a pistol --

11 MR. FULTON: Objection.

12 THE COURT: Just a minute.

13 MR. FULTON: Objection.

14 THE COURT: Side bar.

4-d

15 - - - - -

16 (Thereupon the following side bar confer-
17 ence ensued on the record:)

18 THE COURT: Your objection?

19 MR. FULTON: Well, he is going to
20 state that Sergeant Snyder --

21 MR. ROSEN: Captain.

22 THE COURT: Captain.

23 MR. FULTON: Captain Snyder.

24 Excuse me.

25 That Captain Snyder found a weapon which in

1 effect was a drop out, a term used by the police
2 for a weapon put there by himself.

3 Now, the evidence in this case has always
4 been, and he testified in the last case, that he
5 never did, he never found that weapon. So we are
6 getting back in that area. What his evidence will
7 be in chief as he testifies here is not what he
8 told some Grand Jury down in Portage County.

9 And I think this is highly prejudicial to
10 Snyder, highly prejudicial to the case.

11 MR. ROSEN: May I be heard? Two
12 things:

13 Snyder admitted under oath at trial pre-
14 viously that he lied, that he concocted the story.
15 That goes to his culpability, and I am entitled
16 to make reference to it. It is substantive evi-
17 dence as to Snyder.

18 Secondly --

19 THE COURT: Of course, Snyder
20 himself -- this is that question of the claim
21 against him that remains.

22 MR. ROSEN: That's right.

23 THE COURT: And I think in view --
24 let's just postulate. Assuming at the end of the
25 evidence I grant a motion for summary judgment as

1 to your claim against Snyder, I am not sure that
2 his statements would be reputable against any of
3 the others.

4 MR. KROSIN: Then you could give
5 a cautionary instruction.

6 THE COURT: I know, but I think
7 it is a lot easier, I would much prefer to wait
8 until we have all of the evidence in the record
9 and then permit you to argue this in your final
10 argument than to put it in now. It seems to me
11 that it is not essential to your statement of
12 claims and we can avoid any possible prejudice.

13 MR. ROSEN: All right.

14 MR. FULTON: I don't want to
15 belabor a point but I want to make it clear and
16 make sure the Court understands that Snyder told
17 a story which is truthful at the Federal Grand
18 Jury and the last trial. So I argued at the last
19 trial, and was permitted to do so, that trying to
20 show he lied back in another Grand Jury has nothing
21 to do with the truth of the matter.

22 THE COURT: All right. We will
23 deal with it on a voir dire before you actually
24 get into it.

25 MR. ROSEN: I would like to suggest

1 Snyder also testified that there was a common
2 story among the Guardsmen which was concocted ---

3 THE COURT: Very well.

4 (End of side bar conference.)

5 - - - - -

JP:5 6 MR. ROSEN: There will be
7 evidence in this case that after the shootings
8 many of the Guardsmen invented a self-defense
9 theory. There will also be evidence showing that,
10 in addition to the Guardsmen who shot, actions of
11 the officers and the defendant Rhodes were substan-
12 tial factors in causing the unlawful shooting of
13 the students on May 4, 1970.

14 Governor Rhodes and General Del Corso
15 together formulated and approved the Ohio Rules
16 for Engagement which provided at the time of the
17 shootings that Guardsmen on civil disturbance
18 duty should routinely carry loaded rifles with
19 a bullet in the chamber.

20 We will show that this unreasonably
21 dangerous rule was contrary to the guidelines of
22 the United States Army. In addition, the Ohio
23 National Guard rules were also unreasonably dan-
24 gerous and contrary to U.S. Army guidelines in
25 that they permitted Guardsmen to shoot their

1 weapons in situations which created substantial
2 risk to innocent victims.

3 Ohio's rules for engagement in civil dis-
4 turbance and trouble were formulated and distri-
5 buted to officers and enlisted men under Governor
6 Rhodes' and General Del Corso's authority and
7 control. Governor Rhodes and General Del Corso
8 had the power, the authority and the duty to
9 conform the rules of engagement of Ohio to
10 United States Army guidelines and thus make them
11 not unreasonably dangerous, but they failed or
12 refused to do so, even though they knew or should
13 have known the risk that they ran.

14 Having helped to create such an unreason-
15 ably dangerous situation, Governor Rhodes gave
16 inflammatory orders to the National Guard at Kent
17 State University in private meetings with Guard
18 officers and other officers and in a May 3, 1970,
19 press conference which was taped. We will present
20 evidence of these inflammatory orders and of the
21 circumstances from which you will be able to find
22 that these orders were or may have been conveyed
23 to some of the troops who fired their weapons on
24 May 4th.

25 The officers who were present with the

1 troops on May 4th, together with General Del Corso
2 and Governor Rhodes, are also responsible for
3 failing to supervise properly the Guardsmen and
4 for failing properly to train and equip the
5 Guardsmen. These officers allowed some troops on
6 the firing line who were untrained in civilian
7 disorder control and others who were equipped
8 with weapons which they did not know how to use
9 properly. These officers thereby created un-
10 reasonably dangerous circumstances which contributed
11 to the plaintiffs' injuries.

12 Many of the Guardsmen who are defendants
13 had severe vision problems requiring them to wear
14 corrective glasses, yet they were permitted to
15 remove their glasses to put on gas masks on May
16 4th. Although gas masks with corrective lenses
17 should have been provided to them, they were not
18 provided to these troops, and they were not
19 instructed to keep their glasses on under their
20 gas masks. There will be evidence that that can
21 be done. Hence, many of the troops having removed
22 their glasses when they were present on May 4th
23 simply could not see. These included four of the
24 troops who fired their weapons.

25 Thus, the leadership of the National Guard

1 officers present on the scene was unreasonably
2 dangerous and was a substantial contributing factor
3 in causing the injuries and deaths.

4 The victims of the unnecessary and unjusti-
5 fiable shootings which occurred on May 4, 1970, at
6 Kent State University, deserve fair compensation
7 for their injuries.

8 MR. FULTON: Objection, your Honor.

9 THE COURT: The issue before us
10 now, of course, is --

11 You want to step over to side bar, Mr.
12 Rosen?

13 - - - - -

14 (The following proceedings were had at
15 side bar.)

16 THE COURT: If Mr. Rosen immedi-
17 ately couples with it the statement that the issue
18 the jury is to determine in this hearing or trial
19 is the issue of liability, I will overrule the
20 objection, but you, of course, may note your excep-
21 tion.

22 MR. FULTON: I wanted the Court to
23 instruct the jury that the issue of damages is not
24 part of this action.

25 MR. ROSEN: Ultimately, it is.

1 THE COURT: I can make a state-
2 ment following Mr. Rosen's, if you --

3 MR. FULTON: That isn't necessarily
4 true, what he said.

5 (The foregoing proceedings were had at the
6 side bar.)

7
8 THE COURT: The jury will under-
9 stand that, as you were told in the impaneling of
10 the jury, the issue which we will be hearing and
11 determining in this trial is the issue of liability
12 and any question about damages would have to be in
13 a subsequent hearing only reached if, indeed,
14 liability is found against the defendants.

15 You may proceed, Mr. Rosen.

16 MR. ROSEN: Taking up where I
17 was, the victims of the unnecessary and unjusti-
18 fiable shootings which occurred at Kent State
19 University on May 4, 1970, deserve fair compensa-
20 tion for their injuries.

21 As Judge Thomas just said, that is not the
22 issue in this case now. The issue in this case
23 now is whether the defendants or any of them is
24 liable for the injuries to the plaintiffs.

25 Four of the plaintiffs are dead. One is

1 permanently paralyzed. All of the living victims
2 are permanently scarred, physically and emotionally,
3 by having been the victims of this major disaster
4 in American life.

5 Plaintiffs will prove that the defendant
6 shooters violated even the Ohio National Guard's
7 rules for engagement in civil disorder control
8 situations and that they used excessive force
9 under the circumstances that pertained at Kent
10 State University at approximately 12:00 o'clock
11 noon on May 4, 1970.

12 Plaintiffs will also prove that the other
13 defendants, Officers and higher-ups, created
14 unreasonably dangerous circumstances through their
15 failure properly to train, equip and control their
16 troops and through their orders and through the
17 unreasonably dangerous Ohio rules of engagement in
18 civil disorder situations.

19 Collectively, the defendants deprived the
20 plaintiffs of their constitutional rights.

21 Thank you very much, ladies and gentlemen
22 of the jury.

23 - - - - -

24 (The following proceedings were had at the
25 side bar:)

1 MR. FULTON: If I understand what
2 plaintiffs' counsel said, he said they violated
3 the Ohio National Guard rules, and if that's the
4 case and that's the proximate cause, at this time
5 I move for a directed verdict on behalf of General
6 Del Corso.

7 THE COURT: Wait a minute. Explain
8 your point.

9 MR. FULTON: He said they violated
10 the Ohio National Guard rules in shooting these
11 people, and if there's a violation there that is
12 such an intervening cause, then General Del Corso,
13 as the person who established those rules, is not
14 responsible.

15 MR. ROSEN: I can hardly respond
16 to that absurd statement.

17 I also said they violated the United States
18 Army rules and the Ohio Rules of Engagement.

19 THE COURT: How does it become
20 relevant in this case that they violated the Ohio
21 Rules, as a claim? It may have some corroborative
22 aspect but it certainly doesn't bear on your claim.
23 Is that right?

24 MR. ROSEN: It's a matter of
25 emphasis. It doesn't bear at this point on the

1 claim.

2 THE COURT: Very well. Just so
3 it's understood then, any reference to that at
4 any later point in this case, I would want to deal
5 with it before you examine General Del Corso about
6 it or Governor Rhodes because at the moment it seems
7 it's beyond the scope of the issues.

8 MR. SHANKLIN: I don't believe it is
9 at all. The issue is always proximate cause.

10 THE COURT: O.K.

11 MR. SHANKLIN: The point Mr. Fulton
12 made is that if they violated those rules, that
13 was the proximate cause and, therefore, violation
14 of any other rules would not be proximate cause.

15 THE COURT: Suppose at the same
16 time they violated the United States Army rules.
17 I mean assuming that also, are you saying this
18 would be intervening?

19 MR. FULTON: Sure. It's an inter-
20 vening cause that had they not violated the
21 National Guard rules, then there wouldn't have
22 been that shooting.

23 MR. BURTCHE: Your Honor, in the
24 first part of the opening statement one of the
25 claims against Defendant Rhodes is that he was

1 ultimately responsible for the rules of engagement.
2 If the Guardsmen violated those rules, it's another
3 proximate cause linking the claim to Governor
4 Rhodes.

5 MR. SHANKLIN: For that reason we
6 move for a directed verdict on his opening state-
7 ment for Governor Rhodes.

8 THE COURT: I'm overruling your
9 motion, but I am also striking that claim. This is
10 the first time it's surfaced in this case.

11 MR. FULTON: I object to it being
12 stricken. He's made it.

13 THE COURT: It may be in the open-
14 ing statement but certainly not in the issues as
15 framed in the pleadings.

16 MR. BURTCHE: It's an issue he's
17 framed in his opening statement.

18 THE COURT: I will be glad to
19 hear you later, but I don't believe it's an issue
20 for this jury to determine and I don't think it's
21 appropriate for questions on the subject. The
22 issue is whether the constitutional rights of
23 these people are deprived and the claim against
24 Governor Rhodes goes to that.

25 Exceptions noted to each of the defendants.

1 (The foregoing proceedings were had at the
2 side bar.)

3 - - - - -

4 THE COURT: At this time, ladies
5 and gentlemen of the jury, we are going to adjourn
6 until 1:30 when we will hear the opening statements
7 of those defense lawyers who will be speaking for
8 the defendant.

9 Please, now, again let me caution you.
10 Do not discuss the case among yourselves or allow
11 anyone to talk to you about it. Do not read any
12 newspaper concerning the Kent State matter or
13 these cases. Do not watch any T.V. telecasts.
14 Do not listen to any radio newscasts.

15 We will see you perhaps about 20 or 25
16 after so we can start at 1:30.

17 The jury is excused.

18 I will ask all the people who are spectators
19 to wait until the jury has passed out of the court-
20 room.

21 Get your coats and we will keep everybody
22 until you have had an opportunity to exit the
23 courtroom. Please don't linger in the restrooms
24 so we can move along.

25 (The jury left the courtroom.)

1 (The following proceedings were had in the
2 absence of the jury:)

3 THE COURT: I have just indicated
4 I am prepared to instruct the jury to disregard
5 that last statement of Mr. Rosen's because that is
6 not an issue that at any previous time has been
7 injected into this case. It is certainly not an
8 issue under 1983 that I would be concerned with,
9 and the pendent State claims having been stricken,
10 there would be no possible basis on which it is an
11 issue in this case, as I see it.

12 MR. FULTON: Well, I think it is
13 an issue in this case. At least it's a factual
14 issue under 1983 as to whether or not they violated
15 their own rules. That's a factual issue. He said
16 it, and that's it.

17 THE COURT: He made the state-
18 ment. I understand you don't want any cautionary
19 instructions, is that right?

20 (No audible answer.)

21 (The foregoing proceedings were had in the
22 absence of the jury.)

23
24 (Court was in recess for the lunch period.)
25

JP:

1

TUESDAY, DECEMBER 19, 1978; 1:45 P.M.

47

2

3

THE COURT: Mr. Brown, on behalf

4

of, I understand, several or some of the Guardsmen

5

and officers, is that correct?

6

MR. BROWN: I do, your Honor.

7

THE COURT: You may present your

8

opening statement.

9

MR. BROWN: Thank you.

10

May it please the Court. Ladies and gentle-

11

men of the jury, as you well know by now, myself

12

and Mr. Fulton, Mr. Shanklin and the other gentle-

13

man and lady seated at this table represent the

14

defendants in this matter.

15

As the Court has told you and as Mr. Rosen

16

has said, an opening statement is not evidence and

17

is not to be considered by you as such. It is a

18

vehicle which the law affords us lawyers to ex-

19

plain to you what we believe the evidence will be.

20

Let me assure you at the outset -- and I

21

will remind you again at the conclusion of all of

22

the evidence and the closing arguments -- that

23

what I tell you now, and please hold me to it,

24

will be proved by one or more witnesses. So the

25

words that I am to speak now are not guess or

1 speculation. They are what the evidence will show.

2 These lawsuits are suits by the plaintiffs
3 not against the State of Ohio but against the
4 Governor, the officers and individual Guardsmen,
5 as individuals.

6 The evidence will show that students and
7 everyone are bound by the same laws as the
8 National Guard and all of the other people in-
9 volved in this case and, yes, in fact even you
10 ladies and gentlemen of the jury.

11 At the outset let me set the record very
12 straight as to May 4th and what happened on the
13 hill. This was not, as alluded to by Mr. Rosen,
14 a peaceful rally. The evidence will clearly
15 show that. The avowed purpose of the rally was
16 to drive the Guard off the campus. That is what
17 the evidence will show. It was not a peaceful
18 protest against Cambodia by any stretch of any-
19 one's imagination, however fertile that imagina-
20 tion may be.

21 In May, 1970, it was a time of unrest in
22 this country. There were riots in many places
23 and, in particular, in early May, 1970 in Ohio
24 there were riots at Ohio State --

25 THE COURT: Counsel, step over

1 to the side bar.

2 - - - - -

3 (The following proceedings were had at the
4 side bar.)

5 THE COURT: Nothing could be
6 clearer in my mind than this is totally irrelevant,
7 what happened at Ohio State or someplace else. I
8 direct you not to go into anything dealing with
9 any other campus. We are dealing with Kent State.

10 MR. BROWN: There were 3,300
11 Guard troops committed in other places in the state.
12 That was the purpose of it.

13 THE COURT: It's wholly irrelevant
14 and I want you to refrain from it.

15 MR. FULTON: You mean we aren't
16 able to show that other Guardsmen were deployed at
17 other campuses?

18 THE COURT: You mean somehow
19 explaining what happened on the basis of a minimum
20 number of Guard?

21 MR. FULTON: Part of the plaintiffs'
22 case with respect to testimony of General Walter
23 Johnson was the necessity to saturate with a
24 number of people. We didn't have them. They were
25 at Ohio State, Ohio University, in the Northern

Ohio Trucker's strike.

50

THE COURT: I didn't hear that
in the opening statement.

In any event, I am telling you on the
basis of what I know about this case, what you have
just said is not relevant and you are to refrain
from it.

MR. ROSEN: We have been very
indulgent for these first few minutes. Mr. Brown
has mischaracterized what I said with regard to
the assembly. I never said it was a peaceful
assembly.

THE COURT: That's a matter of
evidence.

MR. ROSEN: Of course it is.

THE COURT: And try to keep your
voice not quite so much in the final argument range
as the opening statements.

MR. FULTON: What about talking
about the truckers' strike?

THE COURT: That has nothing to
do with the case.

MR. FULTON: Some of these Guards-
men came here ---

THE COURT: You are talking about
their frame of mind?

1 MR. SHANKLIN: They were in the
2 truckers' strike and went to Kent from there.

3 THE COURT: You are saying they
4 had a physical condition?

5 MR. SHANKLIN: I'm talking about the
6 facts that are going to come out in the evidence.

7 THE COURT: How is that relevant?

8 MR. BROWN: It's going to come
9 out in the evidence that they were called here
10 specifically for Kent.

11 THE COURT: You see, this is a
12 different lawsuit than last time. I will instruct
13 the jury that the call out of the National Guard
14 is perfectly lawful. That's a different issue.

6-a 15 MR. SHANKLIN: Governor Rhodes has
16 been charged with rules of engagement, problems of
17 the rules of engagement, weaponry and training,
18 and I think it's pertinent to find out where all
19 the troops were.

20 What they are saying is we had inexperienced
21 troops in the firing line. Well, why did we have
22 them there?

23 THE COURT: Is this a defense?

24 MR. SHANKLIN: Not a defense, but
25 he's claiming it as part of the case.

1 THE COURT: Is it a defense that
2 you are saying you did not have experienced troops
3 available?

4 MR. SHANKLIN: No, sir.

5 MR. FULTON: It's a defense with
6 regard to the number of troops we had available
7 and their availability. No question of that.

8 THE COURT: This is the very
9 first time I have heard that the number of troops
10 is relied upon as a defense.

11 MR. FULTON: Not a -- Their
12 assertion is, your Honor, that the Mississippi
13 National Guard --

14 MR. DAVIS: No.

15 MR. FULTON: Just let me finish.

16 THE COURT: Go ahead.

17 MR. FULTON: Questions were gone
18 into of how many people we had at the campus. I
19 think we are allowed to --

20 THE COURT: Merely because it's
21 on deposition doesn't make it allowable here.

22 Are you attempting to show saturation?

23 MR. ROSEN: We are not.

24 THE COURT: I would want to read
25 that deposition carefully because I don't see the

1 relevance.

2 MR. DAVIS: The lack of saturation
3 came in on cross-examination.

4 THE COURT: I will examine
5 Johnson's deposition carefully unless it can be
6 shown --

7 This is the first time it's surfaced that
8 this is a claim that what happened was due to the
9 inability of the State of Ohio to make available a
10 large number of troops. If that's a defense, we
11 will have to deal with it, but this is the first
12 time I have heard it.

13 MR. ROSEN: It came out in
14 Johnson's deposition when we were asking him the
15 procedures he followed, the stages of activity.

16 THE COURT: We will deal with
17 that.

18 MR. SHANKLIN: As we understand it,
19 Mr. Rosen intends to put the tape of the Governor's
20 press conference in.

21 MR. DAVIS: Yes, that will be
22 here tomorrow afternoon.

23 MR. SHANKLIN: Then it seems to me
24 that all the background Governor Rhodes knows
25 about on Sunday, May 3rd, in his official capacity

1 as Governor is relevant to this lawsuit, and in
2 his official capacity he was required to call out
3 the Guard for all these other instances.

4 MR. ROSEN: That's stipulated.

5 THE COURT: Wait, please.

6 MR. SHANKLIN: And it seems to me
7 it is appropriate for us to make reference to
8 that in our opening statements.

9 THE COURT: But you see, that
10 assumes that somehow the lawfulness of the call
11 out is at issue, and it is no longer at issue.

12 MR. ROSEN: That's right.

13 THE COURT: I will clearly tell
14 the jury -- and if you want, I will do it now --
15 that that was not the case.

16 MR. SHANKLIN: You mean I can't
17 refer to anything the Governor knew in calling
18 out the Guard to come to Kent?

19 THE COURT: There's no question
20 in terms of call up to Kent. It was on the cir-
21 cumstances there, I assume, as I read his testimony.

22 MR. SHANKLIN: Certainly was.

23 THE COURT: All I am saying is
24 I don't think the relevance to this case is on the
25 basis of what may have happened at Ohio State or

1 some other place.

2 If you want me to, I will instruct the jury.
3 now that the call up was lawful.

4 MR. FULTON: I won't stipulate to
5 that.

6 THE COURT: That it was lawful?

7 MR. FULTON: I won't stipulate
8 that in the sense that you say it to the jury.

9 THE COURT: Well, at an appro-
10 priate time I will tell them.

11 MR. BROWN: (Inaudible).

12 THE COURT: In terms of the fact
13 that these particular Guard were called in for the
14 Teamster's strike, you may mention that.

JC: 2 15 (The foregoing proceedings were had at the
16 side bar.)

17

18 MR. BROWN: May I proceed, your
19 Honor?

20 THE COURT: Yes, you may.

21 MR. BROWN: In and around the
22 City of Kent from May 1 through May 4, riot,
23 rebellion and destruction were rampant.

24 The evidence will show that the National
25 Guard troops in question, some of them had been on

1 duty at the Teamsters' strike in the Akron area
2 and were called into Kent from there. Most of
3 these defendants lived with their families in
4 and around Portage County.

5 Commencing on May 1 and ending on May 4
6 violence, the evidence will show, disorder,
7 burning, destruction and terror were the order
8 of the day in and about the City of Kent.

9 The evidence will show that the Ohio
10 National Guard was called up at the request of
11 the Mayor to protect the lives, the property of
12 the citizens of Kent and Kent State University.

13 Let us look briefly at what the evidence
14 will show as to what did occur in and around the
15 City of Kent before May 4 of 1970.

16 Judge Thomas has told you, in his opening
17 remarks --

18 MR. DAVIS: Object to the remarks.

19 THE COURT: Passing reference is
20 permissible. We agreed at side bar we would limit
21 any reference to what I may have told the jury.

22 You may proceed, Mr. Brown.

23 MR. BROWN: All I am going to say,
24 and will say, that Judge Thomas has told you some
25 of these things in his opening remarks.

1 The evidence will show that on Friday,
2 May the 1st, some of the students had buried the
3 United States Constitution. That evening, in the
4 downtown city of Kent, a riotous situation existed.
5 Mobs of people, including students, broke windows,
6 looted stores, set fires, stoned police officers
7 and sheriffs and just created havoc in the down-
8 town area of Kent.

9 The evidence will show all of the police
10 force at Kent, approximately 22 officers in
11 number, were on duty as well as 80 to 90 deputy
12 sheriffs from Portage County.

13 The situation became so bad that at mid-
14 night, approximately, Mayor Satrom called Governor
15 Rhodes to advise him of the situation and the
16 violence that was in existence in the City of Kent.

17 At approximately 12:30 Mayor Satrom
18 declared a state of emergency. He forbade the
19 sale of firearms, ammunition and flammable
20 materials.

2-b 21 The evidence will show that many acts of
22 violence were committed that evening and many
23 arrests were made by the authorities of the City
24 of Kent.

25 We move now to early Saturday morning at

1 3:00 o'clock in the afternoon. The Governor's
2 office sent -- or the Guard, pardon me, sent to
3 the City of Kent and Kent State University a
4 Lieutenant Barnett of the Ohio National Guard,
5 who was, incidentally, a Kent graduate, to observe
6 what was going on and to report the situation.

7 Early on Saturday morning the businessmen
8 of the community of Kent, many of them were
9 threatened unless they put certain placards and
10 posters in their windows.

11 At about 5:30, late in the afternoon of
12 Saturday, May 2nd, the police department of Kent
13 received information that the students and others
14 planned to burn down the ROTC Building and other
15 buildings at the University.

16 All throughout the day of Saturday, May
17 the 2nd, there were constant meetings between the
18 Mayor, the police chief, the officials at Kent and
19 others involved, in attempting to quell the
20 violence and disruption that was occurring.

21 At approximately 5:30 on that afternoon
22 Mayor Satrom of the City of Kent requested
23 assistance from the National Guard. Very early
24 that evening, then, hundreds of students, the
25 evidence will show, became congregated in and around

1 the Commons and the ROTC Building.

2 The evidence will show that these students
3 rounded up other students to assist them in setting
4 fire to and burning the ROTC Building.

5 This they did, the crowd set fire to and
6 did succeed in burning down the ROTC Building
7 located right close to the Commons there on Kent
8 State.

9 Firemen were called, policemen, to try to
10 put out the fire. They were assaulted. They were
11 struck. They were attacked. The fire hoses were
12 cut. The firemen were driven off. They were
13 unable to put out the fire.

14 The Guard had been requested to and at
15 about 9:00 o'clock that evening they did arrive
16 in the City of Kent.

17 The evidence will show that as they entered
18 the city they were stoned, they were threatened,
19 they did report to and get to the ROTC Building.
20 They were requested by the authorities to go to
21 the ROTC Building to attempt to protect the firemen
22 that were trying to put out the fire.

23 It was too late, however, the building
24 had burned.

25 The crowd was still violent, very violent.

1 Rocks were being thrown, missiles of all descrip-
2 tions were being thrown and several of the Guard
3 were injured.

4 Finally, though, late that evening the
5 authorities, including the Kent State Police, the
6 Guard and others present were successful in dispers-
7 ing the crowd and no other buildings, fortunately,
8 were burned.

9 We go now to Sunday, May the 3rd. Governor
10 Rhodes came to the City of Kent to observe the
11 damage, see the destruction that had been wrought
12 personally and to discuss the very critical situ-
13 ation with the prosecutor, the highway patrol,
14 Kent State University Police, Kent State Univer-
15 sity personnel and all other officials that were
16 concerned with the situation that existed in and
17 around the City of Kent.

18 It was decided on that day that all classes
19 would remain open, however it was decided that
20 rally would be banned, in view of what had
21 happened previously, it was thought to be very
22 unwise to have rallies on the campus.

23 A letter banning rallies was written by
24 Vice President Matson of the University and a
25 Mr. Frisina, who was the president of the

1 student body, banning rallies. They were unsafe,
2 unwise. And this letter was circulated throughout
3 the campus notifying all students that rallies
4 were banned.

5 This letter was justified.

6 Things for a while then calmed down on
7 Sunday and Governor Rhodes left and returned to
8 Columbus.

9 General Del Corso later also left and
10 returned to Columbus.

11 The evidence will show that President White
12 had not been at the university during the events
13 on May 1 and 2, he had been out of town at a
14 meeting and he flew in and arrived at Kent
15 approximately 3:00 o'clock in the afternoon.

16 Later that afternoon demonstrators met on
17 the Commons and moved toward the ROTC Building.
18 The troops, that is the National Guard, moved to
19 protect the building. The riot act was read to
20 the students and they did disperse. But then
21 they started marching toward the President's home
22 and troops were sent there to protect the
23 President's home. Then they started marching
24 toward downtown.

25 The crowd was very violent on Sunday, they

1 threw rocks, yelled all kinds of epithets, which
2 I am certainly not going to repeat now, attacked
3 the Guard. Several of the Guard were injured.
4 Tear gas was used. Local authorities made arrests.

5 Finally at about 11:00 P.M. a Colonel
6 Findley read the riot act. They were still
7 throwing rocks, very rough crowd, and finally,
8 finally, they were dispersed and left at about
9 1:00 o'clock in the morning.

2-c 10 So those are the brief facts of necessity
11 brief, as to what the evidence will show was
12 happening at Kent and on Kent State University
13 before May 4, 1970.

14 Now, getting to the date of this tragic
15 event, wherein we are representing the defendants.
16 At about 10:00 o'clock in the morning on May the
17 4th, the evidence will show that there was a
18 meeting at the fire house. The meeting was with
19 the police, the highway patrol, the Ohio National
20 Guard, President White of Kent State University,
21 Mr. Matson, the Sheriff's department, all of the
22 people in and around Portage County who were
23 concerned with what was happening and how to keep
24 more violence and destruction from occurring.

25 There was a unanimous agreement that there

1 should not be a rally at noon. Word came that
2 there was to be a rally at noon and of all of the
3 folks present at the fire house it was unanimous
4 that there should not be a rally and that clearly
5 any gathering should be dispersed by the Ohio
6 National Guard.

7 A crowd started gathering at the Commons
8 and it grew and grew and grew. There were thous-
9 ands around the victory bell.

10 The evidence will show that they were there
11 knowing that rallies were banned, not by the Ohio
12 National Guard but by the University.

13 General Canterbury went from the fire
14 house to the burned out ROTC Building. General
15 Canterbury will not, incidentally, be here. He
16 has suffered a coronary and will not be here. His
17 testimony will be read to you.

18 The Guard assembled in front of the burned
19 out ROTC Building. You will hear evidence, ladies
20 and gentlemen, that the students did not know that
21 the weapons of the Ohio National Guard were loaded.
22 Contrary to that the evidence will clearly show
23 that the order to lock and load was made in full
24 view of everyone and the Guardsmen loaded their
25 weapons in front of the students. So the evidence

1 will show, if they did not know they were loaded,
2 they were not looking or were blind.

3 The riot act was read to the students at
4 this time. They were told to leave, that assem-
5 blies are illegal, they are banned. The rally was
6 unlawful.

7 In response to that there was rock throw-
8 ing and the vilest kind of epithets that you could
9 imagine, and just rebellion. They said, in effect,
10 "We are not going to leave."

11 At this point the evidence will show a
12 Sergeant Rice from the Kent State University
13 Police Department in a jeep with a bull horn made
14 not one, not two, but three passes in the jeep with
15 his bull horn in front of these rioting students
16 saying, "Disperse. Disperse. Go back to your
17 dorms." Three different times, the evidence will
18 show, he rode back and forth in front of the
19 students. Not the Ohio National Guard but Sergeant
20 Rice of the University Police Department.

21 He was met with all kinds of language, all
22 kinds of language, "Seig heil. Nazis." All kinds
23 of language. Rocks were thrown at him. Two of
24 them struck him.

25 Sergeant Rice saved the rocks that hit him

1 and when he testifies he will show the size of
2 those rocks.

3 This is the peaceful demonstration.

4 The crowd did not disperse. They did not
5 leave. It was clear that they had no intention of
6 leaving and the order to disperse was given. Tear
7 gas was used. It did not work. The canisters
8 were thrown back. The rocks were thrown at the
9 Guard.

10 The Guard moved out, up the hill, as has
11 been described to you, toward the pagoda. They
12 were constantly assaulted, constantly assaulted.
13 All kinds of vile language was used as they
14 marched up the hill to disperse the students.
15 The students that should not even have been there.

16 They moved up the hill, as has been
17 described to you, and then moved down the hill
18 onto the practice field. While there they did
19 kneel, they did get in a formation hoping that by
20 doing this the crowd would realize that this was
21 a very dangerous situation and they should do
22 what they had been asked to do numerous times;
23 leave the area, go back to your classes, go back
24 to your dorms. They did not.

25 The evidence will show that while the Guard

1 is on the practice field they were assaulted
2 constantly by rocks of all kinds. The Guard that
3 was on the practice field then, in roughly a wedge
4 formation, as we will refer to it, moved back up
5 the hill. As they moved back up the hill the
6 crowd numbering in the hundreds and perhaps
7 thousands started closing in on them. They had
8 run out of tear gas. The students knew that.
9 They started yelling, "They're out of gas. Get
10 them. Kill them. Charge." And they did.

11 And perhaps the heaviest barrage of rocks
12 and missiles of the entire day was thrown at these
13 troops who were there at the request of all of
14 the authorities in and about the City of Kent.
15 The students were charging, yelling, "Kill. Kill.
16 They are out of gas."

17 Some of the Guardsmen clearly felt that
18 their lives were in eminent danger. Some of them
19 felt they were in danger of eminent bodily harm
20 if not death.

21 At this moment, as the crowd was closing
22 in, some of the Guardsmen fired. They were in fear
23 of their lives.

24 There will be testimony that a shot other
25 than a Guardsman's weapon was the first shot fired.

1 There will be evidence from a Dr. Rich of Walter
2 Reed Hospital in Washington that the wound to Mr.
3 Mackenzie, or a bullet, the evidence will show,
4 went in the back of his neck and came out his
5 cheek and he was not killed. He is a plaintiff
6 in these cases, could not have been a military
7 weapon like a .30 caliber or a .45, that it was
8 a weapon other than that.

9 You will see Dr. Rich's testimony by a
10 videotape deposition.

11 There was clearly no order by any officer
12 or any person in the Ohio National Guard to fire.
13 The evidence will show there was no order to fire.
14 The firing that was done was by Guardsmen who were
15 in fear.

16 As soon as the firing commenced General
17 Canterbury and Major Jones immediately said,
18 "Cease fire. Cease fire." Immediately. And the
19 firing that lasted, as you had heard stated a few
20 moments ago by Mr. Rosen and also referred to by
21 the Court, only lasted a few seconds.

22 Unfortunately students were wounded and
23 some were killed.

24 The evidence will show that some of the
25 Guardsmen fired in the air. The evidence will show

1 that some of the Guardsmen fired in the ground. The
2 evidence will show that undoubtedly there were
3 some ricochets of bullets off of the ground.

JP:8

4 I'm going to wind up here in just a few
5 moments and Mr. Fulton will speak as well as Mr.
6 Shanklin on behalf of Governor Rhodes.

7 The Guardsmen carried the weapons that
8 they were issued, which were M-1 rifles. They
9 were loaded and locked in front of the students.

10 Clearly, the evidence will show -- and the
11 Court will tell you the law; that is not our func-
12 tion; the Judge will tell you the law -- but,
13 clearly, the evidence will show that the Guardsmen,
14 as they fired, many of them were in fear of
15 imminent bodily harm or death.

16 The evidence will show that from this
17 alleged peaceful demonstration thousands of
18 rocks were thrown, that the Ohio National Guard,
19 the Highway Patrol, the FBI and others picked up
20 many of these rocks, and you will see some of
21 them.

22 That, ladies and gentlemen, is a brief
23 prelude or picture, if you will, of what we, on
24 behalf of the defendants in this case, expect the
25 evidence to show, and on behalf of our clients we

1 are confident that after you hear all of the evidence
2 your verdicts will be for the defendants.

3 Thank you.

4 MR. DAVIS: Your Honor, may I
5 make a request?

6 THE COURT: Step over to side bar.

7 - - - - -

8 (The following proceedings were had at the
9 side bar.)

10 MR. DAVIS: I would like at this
11 time to request an instruction that evidence pertain-
12 ing to May 1, 2 and 3 and the events on it go to
13 the affirmative defenses of the Guardsmen.

14 We allowed Mr. Brown a great deal of lati-
15 tude, but I would like that instruction.

16 MR. BROWN: The Court has
17 already informed us as to what we could and could
18 not do insofar as May 1, 2 and 3.

19 THE COURT: I think it's wiser
20 that, when evidence is first offered with reference
21 to any events prior to May 4, to give the instruc-
22 tion at that time. I will give it at that time.

23 MR. DAVIS: Thank you, your Honor.

24 THE COURT: You may remind me.

25 MR. DAVIS: I shall.

(The foregoing proceedings were had at the side bar.)

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THE COURT: Mr. Fulton, are you speaking next?

MR. FULTON: Yes, if the Court please.

THE COURT: Very well. Mr. Fulton?

MR. FULTON: Mr. Rosen, Ms. Goldblatt, Mr. Davis, Mr. Keller, Mr. Baker, Mr. Engdahl, ladies and gentlemen of the jury, all the plaintiffs.

I will do my very best here in these brief moments that I am taking to attempt not to go over in detail any of the areas that Mr. Brown has covered.

A lawsuit must be looked at in light of what occurred and what took place. We must attempt the best we can to produce evidence to you to let you know what occurred on that tragic day of May 4th.

We expect the evidence here to show, as it deals with these individual Guardsmen, that the events referred to by Mr. Brown were events that were important to the actions of each and every

1 single Guardsman who was on that hill and on that
2 Commons on May 4th, what that Guardsman had gone
3 through and observed in those days prior thereto
4 left in his mind, as it would in the mind of any
5 other reasonable person, what he was facing on that
6 hill during that last fateful charge which led to
7 the firing.

8 We expect the evidence in this case to
9 support the fact that the National Guard and the
10 State of Ohio complied with and in many instances
11 went beyond the requirements of the Department of
12 Army with respect to the training they used and
13 implemented in preparing their men for riot
14 control, civil disturbances and trouble facing
15 the nation during those years in 1969 and 1970.

16 In 1970 there were Department of Army
17 regulations and field manuals which set forth
18 those guidelines under which troops, Federal
19 troops, should operate when they are called out
20 or were called out in riot duty or civil disturbances,
21 and these guidelines were alluded to most recently
22 in testimony that was taken here in Mississippi.

23 (Conference was had at the bench.)

24 MR. FULTON: That those guidelines
25 put out by Continental Army or Cona, or by the

1 Department of Army called for the various steps that
2 should be taken by a commander on the scene when
3 faced with civil disturbance and the control of
4 civilian rioters. And that guideline permitted
5 instances in which weapons had their bayonets
6 fixed, instances in which the bayonets were fixed
7 and the ammunition was in the chamber and instances
8 when that ammunition was ready to be fired upon
9 the necessity under these guidelines, that lesser
10 means had been exhausted or were unavailable and
11 that to that individual soldier or Guardsman risk
12 of death or serious bodily harm and was not
13 increased by the use of that particular weapon
14 and when that individual Guardsman in his defense
15 to avoid death or serious bodily harm to himself.

16 These guidelines were implemented into
17 all 50 states utilizing the National Guard and,
18 infact, the General Walter Johnson of the Mississippi
19 National Guard, when deposed last week with respect
20 to what they did and how they operated, stated and
21 will state, "There is nothing I have ever read in
22 any field manual or any manual issued by myself
23 which precludes the use of ultimate force."

24 We expect the evidence to show that the
25 training of the Ohio National Guard was equivalent

1 to and, in effect, superior to the training given
2 by the Department of Army as well as by other
3 State Adjutant General offices.

4 We expect the evidence to show further
5 that back in 1970, by virtue of the setup of the
6 Ohio National Guard as well as every other national
7 guard in any state, these men were issued M-1
8 rifles. This was the only weapon they had. This
9 was the clip of ammunition they were provided
10 (indicating) and it was provided by the Federal
11 Government.

12 That General Del Corso, the gentleman sitting
13 over there, on occasions went to the Legislature to
14 ask for the very newest equipment with regard to
15 riot control. He asked for implementation of
16 the use of the M-1, the only weapon given to
17 them by the Department of Army, and said, "We
18 need riot gear, we need shotguns, we need shields,
19 we need the newest equipment in smoke and in
20 water."

21 And he went to the Department of Army and
22 he went there because the Ohio National Guard in
23 its training had probably as much, if not more,
24 experience in its duty in riot control in Hough
25 and in Glenville, in Toledo, in Akron, in

Youngstown, and he knew what those men needed to do the job right.

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And we expect the evidence to show that every single solid guideline of the State of Ohio with respect to its orders, with respect to the implementation thereof and with respect to the training met or surpassed any standard dictated by the United States Government through the Department of Army which, in effect, had control over the plans and orders of each individual state.

We expect to have evidence here in the form of pictures. You were shown these pictures by Mr. Rosen which will show the destruction which took place on the Friday that was downtown. These pictures will be made available to you.

We expect to have evidence which will show the nature of the crowd on Saturday, the burning of the ROTC Building.

We expect to produce evidence of other pictures which will show the size of the crowds and certain students with gas masks and certain students with missiles in their hands, and we expect the evidence to show that on that fateful day, we will produce evidence, we believe, which

1 will place nearly every single plaintiff in this
2 scene of where this took place at a time either
3 before or shortly after that legal order was given
4 to disperse and get off the Commons, that every
5 single one of those students, all of those plain-
6 tiffs and the decedents, were aware of the nature
7 of that crowd, were aware of the order and were
8 aware, as Mr. Brown said, of the loading and
9 locking of those weapons.

10 We expect to produce evidence that will show
11 the size of the crowd, the nature of the crowd as
12 the Guardsmen ascended out of that practice field.

13 I believe Mr. Rosen used the words "An
14 emotional and physical tragedy." We expect the
15 evidence to show with respect to every single
16 group, one, two and three, emotional tragedy as
17 it referred, be he Governor Rhodes or the lowest
18 individual on that line.

19 We expect the evidence to show that certain
20 of these Guard officers were in a position where
21 they will say, "I was not afraid," because they
22 were in a position beyond and over a hill where
23 they were not subject to that final surge. Not
24 every single Guardsman who will get up here will
25 say he was in fear of his life. To the contrary,

1 some will say they were not. But we expect the
2 evidence to be in this trial when that Guardsman
3 takes the stand and tells you what was in his mind
4 on that fateful day, the tragic day,
5 why he shot. He will be the one you will either
6 believe or disbelieve.

8-a

7 We believe the evidence will show that
8 had not those individual Guardsmen who fired, who
9 fired their weapons, instead of contriving and
10 attempting to hide it, came forth and told their
11 officers, "I fired my weapon that day," and it
12 was through their signed statements, through their
13 admission of that firing that they have ended up
14 here as defendants, not by reason of some con-
15 trivance or conspiracy to hide.

16 That will be the case of the defendants
17 and I ask you to take the categories as given you
18 by Mr. Rosen, the ones responsible for the rules
19 of engagement and the implementation thereof, and
20 I will let Mr. Shanklin speak to the duties of
21 the Governor, and listen to the evidence with
22 respect to what they did and we believe it will
23 show that they acted as reasonably prudent indi-
24 viduals under the time and circumstances that
25 existed on that day, and I ask you next to listen

1 to the evidence of these Guard officers and about
2 their training and their combat duty and the
3 schools they went to and how they trained their
4 men and what they did and the orders they gave and
5 ask you: Did they not act as reasonably prudent
6 Guard officers in directing those troops that day?

7 And I ask you lastly, listen to the evidence
8 of these Guardsmen who fired as they tell you about
9 the rain of rocks on the pagoda and what happened
10 to them and measure that up with the evidence we
11 expect to show from witnesses that at that last
12 moment there was a surge and a charge and, had
13 that not happened, the Guard would have been
14 overrun.

15 I thank you.

16 THE COURT: Mr. Shanklin, on
17 behalf of Governor Rhodes, you may present your
18 opening statement.

19 MR. SHANKLIN: May it please the
20 Court. Counsel for the plaintiffs, ladies and
21 gentlemen of the jury, I represent Governor
22 Rhodes in these cases.

23 On behalf of all counsel I wish to thank
24 you for your patience in the lengthy process of a
25 selection of a jury in this case, and we all wish

1 to thank you for your thoughtful consideration of
2 the evidence that will be presented here in this
3 trial.

4 Trials of consolidated cases which involve
5 many parties tend to be confusing. I know that all
6 counsel and the Court will make every effort to
7 remove as much of that confusion as we can, and in
8 my opening statement I would hope to accomplish
9 some of that.

10 The plaintiffs claim that Governor Rhodes
11 acted intentionally, wantonly, recklessly in
12 causing certain rules of engagement of the Ohio
13 National Guard to be adopted. They claim that by
14 so acting that those rules allowed the shootings
15 to occur on May 4th which resulted in the death
16 and the injuries.

17 They also contend that Governor Rhodes
18 issued inflammatory orders to the National Guard
19 and the Guardsmen, which orders caused the shootings
20 and the resulting deaths and injuries to those
21 students on May 4th.

22 Governor Rhodes denies these claims. All
23 of the acts of Governor Rhodes were reasonable and
24 taken by him in good faith.

25 I think it is important for you to understand

1 that the Governor's position in this case is
2 different than the defendants, but though differ-
3 ent, there is no inconsistency between Governor
4 Rhodes and any of the other defendants. I endorse
5 and adopt each and every statement made by Mr.
6 Brown and Mr. Fulton in their opening statements,
7 and I do this on behalf of Governor Rhodes.

8 It is important to understand the func-
9 tions of a Governor. Governor Rhodes was first
10 elected in 1962, taking office in January of 1963.
11 He served two terms which concluded in 1970. The
12 Constitution didn't permit him to be reelected on
13 three consecutive terms, but he was reelected
14 after a hiatus of four years. He was reelected
15 and served from 1975 to the present time. As you
16 know, he was elected again this fall.

17 During his first two terms he adopted a
18 policy of selecting the most qualified people
19 available to him in the State of Ohio to run the
20 different departments of the State of Ohio.

21 As Governor, it is his duty and requirement
22 to fill positions of many, many agencies and
23 departments of government. He made the practice
24 of selecting the most qualified person and giving
25 that person complete authority to run the

1 department. Such a delegation of authority is not
2 only a good management technique but is indeed
3 reasonable and done by Governor Rhodes in good
4 faith.

5 The Constitution of Ohio governs the
6 office of Governor and in one instance the Consti-
7 tution makes him the commander in chief of the
8 Ohio Militia. The militia is now known as the
9 National Guard.

JC: 9 10 He didn't run for that office, that is
11 one of the duties of that office. As such, the
12 Governor was required to appoint an adjutant
13 general.

14 The evidence will show that Governor
15 Rhodes is not a military man, he was never able
16 to serve in the armed forces, he has no military
17 experience whatsoever and he was well acquainted
18 with his shortcoming in this regard. In view of
19 this and in accordance with his usual practice,
20 he searched for the most qualified person for the
21 job and selected a man with impeccable military
22 credentials, General Del Corso.

23 General Del Corso served in World War II,
24 Korea and Vietnam with distinction. The plain-
25 tiffs have stated that General Del Corso's

1 qualifications are beyond question.

2 The plaintiffs further stated that
3 General Del Corso is an expert in military
4 matters and civil disorders.

5 The evidence will show that Governor
6 Rhodes delegated all authority over military
7 matters to General Del Corso as the adjutant
8 general. He did this in view of the high quali-
9 fications of General Del Corso, but with the
10 knowledge of his own inexperience in such matters.

11 Governor Rhodes acted in good faith and
12 in a most reasonable manner when he didn't inter-
13 vene in the operation of the National Guard, when
14 he didn't take command and when he didn't issue
15 orders. He was not a military man.

16 The evidence will show that the constitution
17 of Ohio requires the Governor, however, to make
18 the decision to call up the Guard when requested
19 by civil authorities to do it. That is a decision
20 the Governor cannot delegate to others and, indeed,
21 does not. Governor Rhodes makes the decision
22 whether to call up the Guard. He has done that
23 throughout his terms as Governor.

24 In this particular situation, the evidence
25 will show that Governor Rhodes did call up the

1 Guard in response to the request by Mayor Satrom
2 of Kent and after proper investigation carried out
3 by the Chief of the Ohio Highway Patrol and the
4 National Guard. The office was first alerted by
5 Mayor Satrom on Friday, May 1, and then on May 2,
6 Saturday, Mayor Satrom made the request. And by
7 that time the investigations were in and the
8 Governor made the decision to call up the Guard
9 to Kent.

10 The Court will instruct you that Governor
11 Rhodes acted lawfully in calling up the Guard in
12 this instance.

13 The Guard was called from duty, from the
14 F.A.S.H. Truckers' strike that was occurring at
15 that time as it is today, and that call up had
16 occurred sometime before --

17 THE COURT: Excuse me. I don't
18 believe it was.

19 MR. SHANKLIN: Yes, it was.

20 THE COURT: Come over to side bar.

21 (Thereupon a discussion was had at side
22 bar off the record.)

23 MR. SHANKLIN: Throughout Governor
24 Rhodes' terms, and the many times that the Guard
25 was called up, it was required of them to quell

1 riots of mobs and to protect the lives of citizens
2 and their property.

3 The evidence will show that in each
4 instance the Guard performed well and exhibited
5 the results of their outstanding training. The
6 Governor was well acquainted with the excellence
7 of the Ohio National Guard.

8 On Saturday, May 2, the Guard arrived in
9 Kent and the unit -- the rioters had burned the
10 ROTC building. After this burning the Governor
11 made one trip to Kent and that was made on the
12 morning of Sunday, May 3. He made that trip to
13 receive the reports of all the civil authorities
14 with regard to what was going on in Kent and at
15 the university. He met with the Mayor, police
16 chief, fire chief, the prosecuting attorney of
17 Portage County and the United States District
18 Attorney Robert Krupansky, who was there in part
19 because property of the United States Government
20 had been destroyed in the ROTC Building.

9-b 21 During this meeting a request was made by
22 the press and media representatives for a press
23 conference, and that was a reasonable request
24 since the public is anxious to know the situation
25 under such circumstances.

1 As soon as the meeting concluded, such a
2 press conference was held and each of the civil
3 authorities, including the Governor, made state-
4 ments to the press and answered questions of the
5 reporters. Each expressed their purpose was to
6 restore peace in the community and to save the
7 Guard, the citizens and students in Kent.

8 The Governor expressed his desire to keep
9 the university open so that those students who
10 wanted to go to class could go to class.

11 After the press conference Governor
12 Rhodes left Kent.

13 The evidence will show that Governor Rhodes
14 did not take command of the Ohio National Guard at
15 any time, he delegated such command to his
16 adjutant general, General Del Corso. No orders
17 to the Guard were issued by Governor Rhodes and
18 no commander or guardsman understood or had any
19 information that Governor Rhodes had issued any
20 orders to the Guard.

21 The evidence will show that the National
22 Guard rules of engagement, weaponry and training
23 in Ohio were authorized and formulated by the
24 adjutant general and his staff. Since Governor
25 Rhodes had no military experience he did not

1 become involved, but rather delegated that
2 authority to his adjutant general, who was
3 amply experienced in such matters.

4 The evidence will show and the plaintiffs'
5 expert will testify that the United States Govern-
6 ment did not require each state to adopt the same
7 rules of engagement, rather the National Guard
8 Bureau and the Department of Army prepared field
9 manuals and regulations regarding such matters
10 and stated that they were guidelines which the
11 states might consider in the formulation of
12 their own rules of engagement.

13 The evidence will show that the Ohio
14 Rules of Engagement were thoughtful, reasonable,
15 and also in accordance with the guidelines and
16 regulations of the National Guard Bureau and the
17 United States Department of the Army.

18 Further the evidence will show and the
19 plaintiffs' expert will testify that the rules of
20 engagement were even subject to change or modifica-
21 tion in the field as circumstances required, since
22 the National Guard Bureau and the United States
23 Army knew and understood that in the final analysis
24 the decision of what must be done and in what order
25 had to be determined by the commander in the field

1 in each situation.

2 The evidence will show that there was no
3 reasonable way for any governor to control such
4 rules of engagement and their modification since
5 he could not be in the field, particularly when the
6 National Guard was on duty in many places in Ohio
7 at the same time, as they were on May 4th, 1970.

8 In this instance the field commander, when
9 he committed his troops on the Commons on May 4,
10 1970, gave the order to lock and load before
11 dispersing the unlawful assembly, this order was
12 in accordance with the Ohio Rules of Engagement
13 and within the regulations, guidelines and sugges-
14 tions made by the United States Government and also
15 was standard operating procedure for national guards
16 of other states.

17 Governor Rhodes was not the field commander
18 and was not present at Kent on May 4. The evidence
19 will show, the Court will instruct you that on May
20 4 there was an unlawful assembly in the Commons and
21 that a lawful order to disperse was initiated and
22 that the National Guard was properly dispersing the
23 crowd.

24 Governor Rhodes was not involved in any way
25 in any of those actions, decisions or orders on

1 May 4. And any act of Governor Rhodes occurred
2 prior to May 4 and in each such instance he made
3 reasonable and good faith decisions.

4 In summary, the Ohio rules of engagement
5 were not authored by the Governor, he was not in-
6 tentional, wanton, reckless or anything of the
7 sort.

8 The evidence will show he acted reason-
9 ably, understanding his own capacities and the
10 qualifications of those that had the responsi-
11 bility.

12 There will be no evidence that will
13 indicate that Governor Rhodes ever issued any
14 order to the National Guard on May 4, 1970
15 inflammatory or otherwise. Governor Rhodes
16 operated in a most reasonable and good faith
17 manner.

18 I appreciate the opportunity to give you
19 these brief comments prior to the evidence being
20 presented to you, and I can assure you that the
21 evidence that we indicate will be presented will,
22 indeed, be presented.

23 Thank you, your Honor.

24 THE COURT: Ladies and gentlemen
25 of the jury, we are going to take a short break and

1 then the first witness of the trial will be called
2 to the stand.

3 Several times as we were impaneling the
4 jury, a juror would inquire whether it is permis-
5 sible for a juror to ask a question of a witness.
6 I explained each time, and I now tell all of the
7 jurors the following:

8 I am sure that at times you will be think-
9 ing of a question that you hope will be asked and
10 very often those questions eventually get asked.

11 But lawyers ask questions in their own way, in a
12 certain manner and, therefore, you must not assume
13 that they are not going to ask the question.

14 But if, indeed, after the interrogation has
15 proceeded and your question is not getting
16 answered, we will provide for the jury paper, you
17 may write out the question, of course indicate your
18 name, and then submit that question to either
19 Deputy Room Clerk Johnson, who will be here at
20 times, or one of my law clerks, Ms. Kuzma, who
21 will be here at times, or Mr. Hammond, if he
22 happens to be in the courtroom, my senior law
23 clerk.

24 Then I will take that question up with
25 counsel and if it is a proper question it will be

1 asked either by counsel or by myself.

2 At this time, then, the jurors may go to
3 the jury room and we will recall you just as soon
4 as the first witness is ready to testify.

5 You may proceed to the jury room following
6 all the instructions previously given you.

7 We will be in recess until the jury has
8 been recalled.

9

10 (Recess had.)

11

JP: 12 THE COURT: Counsel step over to
13 the side bar, please.

14 (Conference was had at the side bar.)

15 THE COURT: If at any time the
16 alternates cannot hear a witness or, indeed, see
17 a witness testifying from the witness chair, please
18 raise your hand.

19 Mr. Paul, are you able to see? Can you see
20 me sitting here? (Indicating witness chair.)

21 MR. PAUL: No. I have to move
22 over.

23 THE COURT: Maybe you better move
24 your chairs over a little so you don't have to
25 crane your necks.