



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

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The Honorable Dennis J. Kucinich
U.S. House of Representatives
Washington, D.C. 20515

Dear Congressman Kucinich:

This responds to your letter to the Attorney General dated April 7, 2011, regarding the shootings by Members of the Ohio National Guard at Kent State University on May 4, 1970, during the fourth day of a demonstration against the American invasion of Cambodia during the Vietnam War, at which four students were killed and nine others wounded. Your letter referred to a newly enhanced audio recording of the shooting made by Terry Strubbe, a Kent State University student who recorded the demonstrations on a reel-to-reel machine from his dormitory room in the vicinity of the demonstration. Our response was delayed in order to obtain and analyze the best possible copy of this audio recording.

Mr. Strubbe's tape was one of many audio and video recordings made available to the Federal Bureau of Investigation (FBI) following the incident as part of its investigation into the shootings. During that investigation, the Department of Justice contracted with the acoustics analysis firm Bolt Beranek & Newman, Inc., (now BBN Technologies) in Cambridge, Massachusetts, to remove static, enhance the audio, and provide a complete gunshot analysis.

In your letter, you refer to reports that the newly enhanced copy of this tape contains evidence of an unlawful order to fire upon the unarmed students and that four .38 caliber gunshots were fired more than a minute prior to the barrage of gunfire resulting in death and injury. The Department has completed an exhaustive review of this matter and our findings are described in detail below.

As an initial matter, the Department pursued a federal prosecution of this incident in 1974. Eight of the guardsmen were indicted by a federal grand jury on March 28, 1974. The case went to trial on October 29, 1974, before U.S. District Judge Frank Battisti. On November 8, 1974, after federal prosecutors presented the government's case in chief, Judge Battisti, over the government's objection, granted the defendants' motion for judgment of

acquittal on the basis that the government had failed to prove beyond a reasonable doubt that the guardsmen had willfully intended to deprive the students of their civil rights. Under the Double Jeopardy Clause of the Fifth Amendment, the federal government may not again prosecute the guardsmen, some of whom are now deceased, regardless of any newly developed or discovered evidence.

Additionally, even if further investigation revealed evidence that state or federal government officials orchestrated the shooting or participated in a "cover-up" to minimize or conceal evidence of wrongdoing, the applicable statute of limitations precludes a federal civil rights prosecution of this matter. While the Civil Rights Division has used other federal statutes, with no or longer statutes of limitations, for incidents occurring on federal land or kidnapping resulting in death, the facts of the Kent State shooting incident do not lend themselves to federal prosecution under those statutes. Consequently, a second federal prosecution of this matter is legally barred by the double jeopardy clause and the statute of limitations.

Nonetheless, the Department decided to conduct a further review of the audio recording of the shooting incident. Upon request from the Civil Rights Division, the Forensic Audio, Video, and Image Analysis Unit (FAVIAU) of the Federal Bureau of Investigation (FBI) provided research and examination services concerning Mr. Strubbe's recording. Specifically, the FBI was asked to determine whether there was 1) evidence of an unlawful order to fire upon the students; and 2) evidence that a series of four shots was fired prior to the known sequence of shots fired by the guardsmen. The results of our review are summarized below.

Following extensive efforts to locate Mr. Strubbe's original recording, covering all probable leads, the FAVIAU Supervisory Special Agent concluded that the original reel-to-reel tape provided by Mr. Strubbe to the FBI was destroyed by the Cleveland Division on February 6, 1979. As the original reel-to-reel tape no longer exists, FAVIAU examiners obtained copies from multiple sources. In July 2011, Mr. Strubbe provided his copy of the original reel-to-reel tape to the FBI, from which FAVIAU examiners made a digital copy. On September 27, 2011, as part of this inquiry, the FBI made its own digital copy of the recently discovered cassette tape given to Yale University for its archives in 1979 by an attorney representing some of the shooting victims in a lawsuit filed against the State of Ohio. The actual origins of this tape are unknown, but FAVIAU examiners found it to be consistent with the tape provided to them by Mr. Strubbe. In addition, a digital version of what was purportedly an enhanced copy of Mr. Strubbe's recording was downloaded from the National Public Radio internet website. The origins of the recording are unknown, but it was used for comparison purposes. The FBI also obtained three reel-to-reel tapes from the Ohio Attorney General's Office, but they were determined not to contain a recording of the designated area.

The FAVIAU examiners determined that the Yale University recording was the best available recording and likely came from Mr. Strubbe's original tape. However, because Mr. Strubbe's original recording no longer exists, an authenticity exam could not be conducted. The FBI contacted BBN Technologies and requested additional information about the gunshot analysis of the audio and video recordings conducted by BBN in 1974. BBN reported that they

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do not possess the report or any of the audio. A copy of the BBN's 1974 report, from FBI records, was reviewed and found by FAVIAU to contain no information about voices in the designated area.

Several FAVIAU examiners, working independently and with consensus, conducted an enhancement examination on the Yale University digital copy of the cassette tape. The FAVIAU examiners used at least five separate audio enhancement tools to attempt to improve the intelligibility of the voices in the designated area. At least eight audio examiners and technicians contributed to this audio review.

Turning to the question of whether there is evidence of an unlawful command to fire upon the students, the FAVIAU review resulted in an overall conclusion of unintelligibility. FAVIAU examiners found the quality of the audio recordings to be poor and found that the distortion, frequency response, and low quality microphone used to make the recording rendered the audio quality insufficient for gunshot analysis. Because the background noise (to include shouting) is continuous, a definitive chronology cannot be established. FAVIAU examiners found much of the shouting to be unintelligible and reached no consensus on many words. They also found that all intelligible voices coming from the designated area were off-microphone, but were much closer to the microphone than the gunshot sounds. While a finding of unintelligibility, by definition, evidences an inability to state with certainty what was heard, we are willing to share with you our impressions of the tape: No military-like voice commands to fire or otherwise were heard; rather, many of the words heard were probably uttered by several different individuals located closer to the microphone. Additionally, the voice sounds recorded following the gunshots are not what one would expect; for example, there are no loud commands or pronouncements from male voices, no shouts or sounds indicating terror, or remarks about fallen victims.

FAVIAU examiners also reviewed the enhanced version of the Yale University recording to determine whether there is evidence that a series of four shots was fired approximately 70 seconds prior to the known sequence of shots fired by the guardsmen. As part of its analysis, the FBI Supervisory Special Agent also reviewed FBI case files from prior Kent State investigations, the 1974 analysis prepared by BBN, the 1970 President's Commission On Campus Unrest: Kent State Special Report, and a 2011 interview of Terry Strubbe conducted by the FBI.

The analysis by BBN of the original recording provided by Mr. Strubbe states that the entire equalized recording was analyzed for events related to the shooting during the ten-minute periods prior to and after the sequence of shots fired by the guardsmen. According to the BBN report, no sounds resembling gunfire were recorded by Mr. Strubbe, apart from the known sequence of gunfire by the guardsmen, which lasted for a period of 12.53 seconds. It notes that Mr. Strubbe's recording was continuous for at least ten minutes prior to the gunshot sequence of the guardsmen.

An extensive review of FBI and DOJ files, as well as the Kent State Special Report, revealed no evidence of any shots fired prior to the gunshot sequence produced by the

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guardsmen. All of these documents indicated that the only shots fired were by the guardsmen, during a period of 12.53 seconds, as corroborated through interviews of guardsmen, students, and other witnesses.

According to the original FBI interviews of students who were present before and during the shooting, no shots or noise resembling gunfire prior to the guardsmen's shooting sequence was heard, and several people were in the dormitory room where the Strubbe recording equipment was located. It was also reported that people were entering and leaving the room at different times, but everyone left the room when tear gas began to enter it through an open window. At some point after the guardsmen fired, Mr. Strubbe and others returned to the dormitory room, not all at one time.

Based upon a review of the enhanced recording and given all of the available information discussed above, FAVIAU examiners concluded that the four "thud" sounds which can be heard on the tape during the minute before the sequence of shots fired by the guardsman are not gunfire. Rather, while we cannot be certain, it is probable that those sounds were made by the door to Mr. Strubbe's room shutting as people entered and exited the room. The same sounds are also heard seven times after the guardsmen fired, beginning approximately ten seconds after the shooting stopped, over a period of approximately 2.5 minutes. The conclusion that the "thud" sounds were caused by the door opening and closing would also be consistent with the voices speaking inside Mr. Strubbe's room. It should also be noted that following the shooting, a complete and thorough search of the Kent State University grounds revealed no ammunition casings that were not attributed to the weapons used by the guardsmen.

In sum, there are insurmountable legal and evidentiary barriers to bringing a second federal case in this matter. The Department conducted an exhaustive search for the original audio recording, completed a thorough forensic examination of the best available audio recordings, and carefully reviewed all of the information you have provided. For the reasons set forth above, the Department has determined that our review does not disclose a newly prosecutable violation of federal statutes.

We hope this information is helpful. Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matters.

Sincerely,



Ronald Weich
Assistant Attorney General