

Lavoy Finicum's death with jury instructions

Lavoy Finicum's death, caused by Oregon state police and FBI on January 26, 2016, will be litigated as his family will likely bring a lawsuit against Oregon and federal government for police' excessive use of force. When the parties litigate the case, they will be bound by the law on the issues of excessive force. Citizens observing and judging the situation should likewise apply the law to the facts to reach a conclusion, regardless of one's impression of Finicum and other protesters.

Below are the jury instructions that the Ninth Circuit Court of Appeals has posted on its website for claims of excessive use of force. There are 6 main factors in the instructions. I list the instructions below (in italics) with my general comments following each factor.

In determining whether the officers used excessive force in this case, consider all of the circumstances known to the officers on the scene, including:

1. The severity of the crime or other circumstances to which the officers were responding;

Finicum may have committed a crime when he refused to leave the refuge, but nothing violent happened at the refuge: no property or persons were hurt. During the occupation, media was present, who apparently felt safe near the protesters. Police were present and underwent negotiations with the protesters and likewise felt no serious threat to their safety. Citizens were coming and going to observe or support the protest. Supposedly, the neighboring county sheriff, among other public officials, empathized with the protesters and worked on their behalf.

Perhaps there was probable cause to arrest Finicum and others (a common occurrence in the United States). If any warrants had been issued by a court, police could have served them at the refuge with media cameras and public present. Instead of arresting Finicum and others in this fashion, they concocted a plan to stop them on the road while isolated with plans of a roadblock party, which some onlookers have deemed as unlawfully conducted. Apparently, police had prior knowledge of the community event to which Finicum was travelling well in advance of January 26.

When police stopped Ammon Bundy's vehicle, Finicum was in his truck ahead of Bundy. Finicum stopped his vehicle some distance ahead of Bundy. Police pulled behind Finicum's rested vehicle, got out, had assault rifles drawn and pointed at Finicum and the occupants—an obviously provocative encounter. Two witnesses in Finicum's truck say that police fired a shot at the vehicle while Finicum was stopped during this time. Shortly thereafter, Finicum decided to flee the stop and drive to the next county where the "friendly" county sheriff was, whom Finicum was told would provide protection for him and the other protesters.

Finicum's response to avoid contact with state police and FBI and travel to the next county was in rational keeping with what Oath Keeper president, Stewart Rhodes, and two other Oath Keeper leaders told Finicum two days prior to his trip to the adjoining county: namely, they told Finicum that he should make a "lateral move" to the adjacent county because police were about to shut them down.

During this conversation, the Oath Keepers implied that the FBI would be doing more than just arresting them. This news, of course, changed the game for the protesters because up to this point, there was normal access to the refuge by police and public. Oath Keepers must have put much fear in Finicum when they claimed that FBI had gathered in Burns, OR in the hundreds to end the protest. They also told Finicum that there

would be more than drones hovering over the refuge to ascertain their positions in the refuge, such as helicopters and other assaultive tactics. According to Oath Keepers, who were supposedly negotiating for the protesters and there to help, the game was about to change drastically for the worse.

This conversation was recorded, but Oath Keepers removed the audio recording of conversation with Finicum because they recorded it without Finicum's permission, and then after his death, posted it on the internet without permission from Finicum's family or attorney. Notably, even though Oath Keepers knew of the community event to which Finicum and others were traveling and had promised Finicum that they would provide him an escort to ensure safe passage to the next county, they were nowhere to be found when police stopped, blocked and killed Finicum.

When Finicum was traveling to the community event (where hundreds of citizens were gathered waiting for him), police knew exactly who he was, where he was going and why. Finicum had no criminal history, and his protest was, in many ways, a political protest with no property or persons being damaged by him or other protesters. FBI and media had been in continual contact with him and the others for weeks.

Police were not responding to a violent crime Finicum had committed, like, for example, chasing an armed robber who had just committed the crime and fleeing therefrom. Rather, Finicum was traveling to a community event; and knowing this, police planned this event, which had the elements of an ambush specifically designed for Finicum or Bundy attempting to drive to the next county where the "constitutional sheriff" and community were waiting for Finicum.

2. Whether Finicum posed an immediate threat to the safety of the officers or to others;

Finicum posed no immediate threat to police when he exited his

truck. This situation was not like a duel where two people are within a short range under equal or similar footing, opportunity and readiness. Just the opposite: police secured an advantageous perimeter and had rifles pointed and sights on him from the beginning. Finicum had his hands raised, faced no officer, was not in position to shoot, and was stumbling in the snow. Finicum had no legitimate chance of timely drawing and shooting a pistol (as if a pistol is worth much in this situation) to shoot anyone—even himself.

Significantly, the closest police to Finicum were the two that rushed him, while the others had firing-line positions from protected positions behind vehicles and in the woods. When the officer at the bottom of the video pointed his rifle at Finicum, Finicum turned away from him, stumbled, briefly dropped his hands but tried to raise them in the air again after he stumbled. Immediately thereafter, the police from the woods rushed Finicum, tazed him and appears to have shot him with his pistol from his waist. Meanwhile, other police shot Finicum when he was in no position to harm anyone. Assuming Finicum ever posed a threat to police, it did not rise to the level of a serious and legitimate threat.

3. Whether Finicum was actively resisting arrest or attempting to evade arrest by flight;

Finicum actively resisted no police. When Finicum left the initial police stop (where Ammon Bundy was arrested), police knew his destination—the nearby county. Then, Finicum surrendered after he hit the snow and exited his vehicle. This surrender, of all things, required police to wait until there was a clear and legitimate sign that he intended to kill police and had the immediate and legitimate ability to do so. That Finicum's hands briefly dropping in this scenario cannot be equated to a clear and convincing intent to kill police, nor can it equate to legitimate ability to kill anyone.

Assume that Finicum had a design to deceive police (like this:

“I’m going to put my hands up and get dozens of police who are pointing rifles at me to think I’m surrendering. Then I’m going to, in such a sly way, pull my small pistol from my jacket—they’ll never see it coming, hahaha!—and I’ll kill all these police with their AR-rifles pointed at me”—really?!). Still, there was no way Finicum could have gotten “the drop” on any police under these circumstances.

4. The amount of time and any changing circumstances during which the officer had to determine the type and amount of force that appeared to be necessary;

Police had the advantage of planning, time and position throughout this incident. They always do in these kinds of tactical plans. That is what separates police operations from personal defense of citizens who are caught off guard from an intruder. This is why police cannot make a simple claim, “We thought he may have been going for a gun, so we killed him,” in the kind of circumstances we see with Finicum.

Police had time to determine if Finicum had a gun, drew a gun and demonstrated the intent to use it against police. As soon as police see a gun-like object in his hand, their fingers were on their rifles ready to kill him—instantly! There was no way Finicum was in the same or even similar position as police. Finicum was alone and surrounded. He was like a duck sitting in a barrel, but police did not even wait to make a clear determination under these circumstances. Instead, they quickly jumped to the conclusion to kill Finicum.

Their killing Finicum because they thought “he was going for a gun” was a type of pre-textual seizure. This is where police search and seize people and property with the pretext of some supposed or alleged lawful reason; but in fact, police either created the reason to search and seize or used a minor or apparent incident to exceed the scope of their authority.

5. The type and amount of force used;

Police used the most extreme of all force: death. This requires police to prove that all of the above jury instructions go in their favor. But the factors do not go in their favor: they go in favor of Finicum. The circumstances simply did not warrant using death as the means of subduing Finicum. After all, police were equipped with many non-lethal weapons, including flash-bang grenades, tear gas, rubber bullets, tasers, etc., which they used against the people in the truck. Finicum did not pose such a significant and legitimate threat of death towards the officers that killing him was within the scope of a lawful seizure.

6. The availability of alternative methods to take Finicum into custody or to subdue him;

Like #5 above, police had alternative non-lethal methods of disabling him; and they had the option of allowing him to get to his destination at the community event and arrest him in a safe, public environment—assuming they even had a warrant for him. Instead, they chose to stop him along and isolated and create an ambush-style operation to seize Finicum.

Conclusion

The government has a heavy burden of proof to prove that their force was not excessive. Given the jury instructions in an excessive use of force case against the government, the factors favor Finicum, not the government. Notably, the government knew they would have to prove their killing of Finicum, but according to FBI, there is no other surveillance that recorded what happened. The only surveillance that supposedly exists is the released video (and another one that was a lesser quality, which they have not released).

This is bizarre. I have handled many hundreds of criminal cases and know that police are almost always equipped with surveillance on their persons and vehicles during even ordinary and mundane course of business. Yet, during this

planned operation with state police and FBI, there is conveniently and strangely no other surveillance. Of course, not having any surveillance on the ground will put the government in a position at trial to have police testify about what happened, instead of the jury being able to see and consider much more objective evidence.

Not only does the video that was released demonstrate police' excessive use of force, but also the intentional plan not to properly surveil the incident creates a bad smell concerning the governments' actions against Finicum.

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