

# Drop charges against Oregon refuge occupiers awaiting trial, defense lawyers say



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The government should drop charges against other occupiers of the Malheur National Wildlife Refuge who are awaiting trial in February now that a jury has acquitted the takeover's leaders, Oregon's federal public defender says.

"There are serious questions concerning the fairness of continuing to prosecute a conspiracy charge when a jury of 12 citizens unanimously agreed the leaders of the alleged conspiracy are not guilty of it," Federal Public Defender Lisa Hay said.

Twenty-six people were indicted on a federal conspiracy charge in the 41-day refuge seizure. Of those, 11 pleaded guilty, including key organizer Ryan Payne, a U.S. Army veteran from Montana who led tactical training at the refuge and is Hay's client. Seven are scheduled for trial on Feb. 14. Ammon Bundy, his older brother, Ryan, and five others were acquitted last Thursday. Prosecutors dropped the charge against Pete Santilli, a self-described independent broadcaster.

Payne filed a [motion in mid-October to withdraw his guilty plea](#) to the conspiracy charge, saying an expected plea deal in a pending Nevada indictment had fallen through. The Nevada case stems from the April 2014 standoff with federal agents over cattle grazing rights outside rancher Cliven Bundy's ranch in Bunkerville.

Payne, the Bundy brothers, Ammon Bundy's bodyguard Brian Cavalier, Joseph O'Shaughnessy, Blaine Cooper and Santilli also were indicted on similar charges in Nevada, including conspiracy to impede and assault federal officers. Payne is being held in Nevada. The Bundys, as of 4:25 p.m. Monday afternoon, are still in jail in Oregon awaiting transfer to Las Vegas.

Payne also didn't have full information about FBI informants at the refuge during the occupation when he entered his guilty plea, Hay said.

Payne's statements during his Oregon plea hearing were equivocal, suggesting he had "serious misgivings and reservations" regarding the basis for the deal, according to his motion.

"The jury's verdict is a clear statement that harsh criminal laws should not be used to suppress free speech and expression of opinion, even if the message may be disagreeable to others," Hay said.

Prosecutors had a Monday deadline to file a response to Payne's request to withdraw his plea, but the court granted their request to delay their response until next Monday. They're expected to object to Payne's motion.

A judge has discretion in deciding whether to allow a defendant to withdraw a plea. Federal law says a court will permit a defendant to withdraw a guilty plea before sentencing only "if the defendant shows any fair and just reason." The judge should apply that standard liberally, the law says.

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Among the things a judge considers, whether the defendant asserts his or her innocence, whether the government would be "prejudiced" by a plea withdrawal and how much time has passed between the guilty plea and the motion to withdraw. Prejudice to the government could arise if prosecutors would have difficulty presenting its case at a subsequent trial because witnesses aren't available or can't be located or evidence has been destroyed.

U.S. attorneys in Portland are expected to meet Tuesday to discuss how to respond to Payne's motion.

They also will consult with attorneys in the main Washington, D.C., office of the U.S. Department of Justice on how to proceed with the remaining defendants set for trial in February.

Other defendants are expected to follow Payne's lead and file their own motions to withdraw their pleas.

Defense lawyer Andrew Kohlmetz, who represents Jason Patrick who is set for trial next year, said he sent a polite email Monday to the three prosecutors in the case, urging them to announce their plan soon.

"Obviously we all feel strongly that if the government really respects the jury's verdict, they'd dismiss the charges on the remaining defendants," Kohlmetz said.

That would be the most practical, economical and fair course of action, he said. "It's clear in my mind the jury considered the government's claims and rejected them," he said.

The defense lawyers "are burning tens of thousands of dollars, if not hundreds of thousands of dollars on a daily basis" on the Oregon case, Kohlmetz said. If the charges stand, they would need to start sending out an initial round of subpoenas for potential jurors.

It's unlikely prosecutors would pursue other, less serious federal charges against the acquitted defendants, even though double jeopardy laws are pretty lenient in favor of the government, legal observers said.

Separate state prosecutions aren't barred under Oregon law, but such occurrences are rare.

"Right now, the ball is with the prosecutors," said attorney Per C. Olson, who represented David Fry of Blanchester, Ohio, the last holdout at the refuge who was found not guilty of conspiracy last week. "If I were the prosecution, I would just drop the whole thing. It seems silly to go after the little guys when the leaders have been acquitted."

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