

1 MICHAEL W. MERKLEY,

PLAINTIFF'S WITNESS, SWORN

2
3 THE CLERK OF THE COURT: Please state your full
4 name for the Court and the jury and spell your last
5 name.

6 THE WITNESS: Michael W. Merkley, M-E-R-K-L-E-Y.

7
8 DIRECT EXAMINATION

9
10 BY MR. BREITSAMETER:

11 Q How are you employed, sir?

12 A I'm a Special Agent, criminal investigator for the
13 U.S.D.A., Forest Service.

14 Q How long have you been employed by the Forest
15 Service?

16 A 25 years.

17 Q And are you assigned to a particular location?

18 A Yes, I'm responsible for the criminal investigations
19 on the Nez Perce National Forest and Clearwater National
20 Forest.

21 Q How long have you been a criminal investigator on
22 the Nez Perce and Clearwater Forests?

23 A Ten years.

24 Q And your office is in Grangeville, Idaho?

25 A Yes, it is.

1 Q And your responsibilities then include this Powell
2 Ranger District?

3 A Yes, it does.

4 Q And were you made aware of the tree-spiking incident
5 in April of 1989?

6 A Yes, I was.

7 Q Subsequently, did you view the site, as testified to
8 yesterday afternoon by Pete Deane?

9 A Yes, I was present with Pete Deane on one of his
10 trips.

11 Q And you conducted numerous interviews, did you not?

12 A Yes, I did.

13 Q Did you subsequently obtain a search warrant for a
14 particular residence?

15 A Yes, I obtained a federal search warrant for the
16 Sherwood residence that's been testified to earlier.

17 Q You recognize those photographs that are before you?
18 I believe they are marked as Exhibit 35.

19 A Yes, Exhibit 34.

20 Q Exhibit 34, excuse me. Do you recognize those
21 photographs?

22 A Yes, I do.

23 Q And how do you recognize them?

24 A I was a search team leader during the time that the
25 search took place at the residence and was in charge of

1 the photography of the particular residence and items.

2 Q Approximately when was that search conducted?

3 A April 29, 1989.

4 Q And are those photographs -- you personally
5 preserved the scenes that are depicted in those
6 photographs, did you not?

7 A Yes.

8 Q Are those photographs true and accurate -- do they
9 truly and accurately replicate the scenes represented
10 therein?

11 A Yes.

12 Q And is there also a spike contained in that
13 Exhibit 34?

14 A Yes, there is.

15 Q Where was that spike obtained?

16 A It was obtained in one of the kitchen drawers of the
17 Sherwood residence.

18 MR. BREITSAMETER: At this time we move for
19 admission of Exhibit 34.

20 MR. MAILE: Could I take a look at that,
21 please?

22 MR. MITCHELL: I'm going to object, Your Honor,
23 on the ground that it's not relevant to any of the three
24 defendants. Certainly isn't relevant --

25 THE COURT: I haven't seen it. I'll look at

1 it.

2 MR. CHASTAIN: Your Honor, as to Mr. Blount, I
3 have no objection.

4 (Document passed up to the court.)

5 MR. CHASTAIN: Well, Your Honor, could I ask
6 one thing? I just want to clarify something.

7 THE COURT: Let me look at it, please.

8 (Pause.)

9 THE COURT: Well, it's one spike in one drawer
10 of a house.

11 MR. MITCHELL: It sure is. What's the
12 relevance?

13 THE COURT: Well, that's not my role to answer
14 your question. I'll overrule the objection.

15 MR. MITCHELL: Okay. That's fair.

16 THE COURT: It has minimal value, it would
17 appear, but Mr. Breitsameter may connect it up as we
18 move along here.

19 Q (By Mr. Breitsameter) Mr. Merkley, perhaps you
20 could just describe in the photographs contained in
21 Exhibit 34.

22 A Yes, on the front page where the sticker, "34"
23 sticker is, there is an upper portion, which is a copy
24 of the outside photograph of the Sherwood residence; the
25 photograph directly below it shows a spike within a

1 drawer, in a kitchen drawer; the spike -- and down below
2 that is the actual spike, which is an 8-inch spike
3 considered a ring shank-type spike.

4 On the back side is a garage or shed-type building
5 directly behind the Sherwood residence, an overall
6 picture.

7 The middle photograph depicts just the clutter
8 inside the garage.

9 The lower photograph depicts a box of ring shank
10 spikes, a close-up of it, located within the garage-type
11 building.

12 Q And just to be clear then, there were some 8-inch
13 spikes that were located in the garage as well as that
14 one spike in the kitchen?

15 A That's correct.

16 Q Did you subsequently see similar type spikes at the
17 Plum Creek mills?

18 A Yes, I did.

19 MR. BREITSAMETER: And may the witness be
20 handed Exhibit 29?

21 MR. MITCHELL: 30? Oh, this is a new one?
22 It's not the one that's already in? I'm sorry. I
23 misled you. I'm still into this morning.

24 Q (By Mr. Breitsameter) Do you recognize that
25 Exhibit 29?

1 A Yes.

2 Q And how do you recognize that Exhibit 29?

3 A Some of the spikes that were obtained from the Pablo
4 mill outside of Poulsen, Montana, the Plum Creek mill.

5 Q And what's the length of those, approximately, of
6 those spikes?

7 A Approximately eight, 8-1/2 inches.

8 Q As you've testified you've been on the scene, have
9 you not, of the -- where the spiking occurred in April
10 of '89?

11 A Yes, I have.

12 Q And you've also personally observed some of those
13 logs at the mill, Plum Creek mills?

14 A Yes, I have.

15 Q And are there spikes larger than eight inches that
16 you personally observed?

17 A Yes, a considerable amount of larger spikes,
18 10 inches and a lot thicker in diameter.

19 Q The final matter is prior to Guenevere Lilburn
20 coming forward, did your Forest Service -- did your
21 investigation identify possibly anyone as a subject in
22 this matter?

23 A No, basically the investigation became inactive
24 after I exhausted all of the leads that was developed.

25 Q Has the Forest Service promised Guenevere Lilburn

1 anything?

2 A No.

3 MR. BREITSAMETER: We have no further
4 questions.

5 THE COURT: Any questions?

6 MR. MAILE: Just a couple.

7

8 CROSS-EXAMINATION

9

10 BY MR. MAILE:

11 Q Mr. Merkley, my name is Tom Maile, attorney for
12 Jeff Fairchild. You gave testimony before a Grand Jury
13 on two occasions; is that correct?

14 A Pardon? I didn't understand the date.

15 Q How many times did you give testimony before a Grand
16 Jury involving this case?

17 A Two, as I remember.

18 Q Do you remember testimony that you provided to the
19 Grand Jury back in February 10, 1993?

20 A I remember testifying, but without a copy of the
21 transcript, I'm not really sure what -- accurately what
22 I said.

23 Q Now, in your -- did you ever form an opinion as to
24 whether the nailing of an 8-inch or 10-inch spike in a
25 tree causes any damage to the tree?

1 A I can't remember during that --

2 Q No, I'm just asking, did you ever form an opinion as
3 to whether --

4 A It will cause damage if the material or the log or
5 the tree is cut and milled. It would be considered a
6 defect.

7 Q But if they weren't harvested, did you ever form an
8 opinion as to whether any damage is done to the tree?

9 A No, I have not.

10 Q You never formed an opinion?

11 A No.

12 Q Okay. I'm going --

13 MR. BREITSAMETER: Perhaps counsel or the
14 witness could be shown what he's being questioned about.

15 THE COURT: Is this a transcript?

16 MR. MAILE: Yes.

17 Q (By Mr. Maile) I have a copy of a transcript,
18 February Grand Jury Testimony, and I'm going to ask you
19 to look at Page 21, commencing at Line 8 where a Grand
20 Jury asked you a question, two lines below that is your
21 response. Just look at it to help you refresh your
22 recollection.

23 Do you recall now forming an opinion?

24 A Yeah, I responded, "I don't think so. We don't have
25 any knowledge that it damaged the tree at all." I

1 obviously, at this time, you know, was referring to
2 spikes that are in old fences and hunting camps as to
3 references to any possible damage.

4 Q Sir, what was the question that was posed to you by
5 the Grand Jury, Line 8, Page 2?

6 A Yes, it says, "What kind of damage will the spiking
7 do to trees if they weren't harvested?"

8 Q And that was to a question relating to a tree, not a
9 fence post; isn't that true?

10 A Yes. Well, I went on to explain in my testimony
11 about trees being used as fence posts.

12 Q Okay, but that specific question posed to you by the
13 Grand Jury was asking your opinion, was it not, of what
14 a nail does to a tree if it isn't harvested; and your
15 response was it didn't do any damage.

16 A Obviously, it's recorded that way, yes.

17 Q And you don't disagree with that today, do you?

18 A No, I don't.

19 Q May I have my copy back? Thank you, sir.

20 MR. MAILE: That's all I have. Thank you.

21

22 CROSS-EXAMINATION

23

24 BY MR. CHASTAIN:

25 Q Mr. Merkley, this was -- or I guess this trial

1 culminates about four years of investigative work on
2 your part?

3 A That's true.

4 Q And initially before Guenevere Lilburn came forward,
5 you at one point in your report said -- indicated you
6 had 60 possible leads to follow up, or something along
7 those lines; is that correct?

8 A The best as I can remember, it was right around 60
9 leads.

10 Q Now, I gather that one of the reasons you chose to
11 search the Sherwood House was based at least on some
12 indication that you might find some relevant evidence at
13 that location?

14 A Yes, there was enough probable cause developed for a
15 federal search warrant.

16 Q And, indeed, part of that probable cause was focused
17 on a person by the name of John Lilburn; is that
18 correct?

19 A That's correct. I don't remember exactly what I had
20 in the affidavit without looking at it, though.

21 Q Well, isn't it true in your investigation you
22 discovered that Mr. John Lilburn actually went to the
23 Pablo Ranger Station and requested copies of sale maps,
24 such as the one that's on the easel there to your right?

25 A That's true.

1 Q And in fact Mr. Lilburn, prior to the time these
2 trees were spiked, went and obtained such same maps?

3 A That's true.

4 Q And these are available to the public. There is
5 nothing sinister or wrong about it; anybody can ask for
6 them, right?

7 A That's correct.

8 Q And when you searched the house, you actually found
9 the one spike that's in Exhibit 34 there in a drawer?

10 A That's correct.

11 Q And there was also -- how long is that particular
12 spike?

13 A Approximately 8 inches.

14 Q Okay, and then there is also a box of spikes that
15 were found in what, a garage or adjoining storage area?

16 A Yes, in the garage directly behind the residence.

17 Q Okay, and at some point you actually seized all that
18 evidence; is that correct?

19 A That's true.

20 Q Did you also have information concerning footprints
21 that were found or reserved up at the site at Post
22 Office Creek after you were notified?

23 A That's true.

24 Q And what was unique about these footprints?

25 A Well, as I remember they were an air pop, round-type

1 footprint.

2 Q And were those found on your initial investigative
3 trip up there?

4 A I didn't find them at that time.

5 Q Okay.

6 A I'm not sure. The location that they were found at
7 had not been walked in the first trip up.

8 Q When were they found?

9 A I can't remember.

10 Q Was it shortly after the time that you or Mr. Deane
11 began the investigation in the Post Office Creek sale?

12 A It must have been very soon after, but I can't say
13 when.

14 Q And actually, you went to the trouble of -- well,
15 actually had a tracker go in with you or with Mr. Deane
16 and attempt to follow these footprints?

17 A That's true.

18 Q And you actually made plaster casts of the
19 footprints?

20 A That's right.

21 Q And, indeed, at one point you had occasion to
22 compare the footprints to Mr. John Lilburn's footwear,
23 didn't you?

24 A I obtained another search warrant for the Sherwood
25 residence.

1 Q And they pretty closely matched?

2 A No, the shoes were missing. We never located those
3 shoes in the house.

4 Q At any time, did you ever have an opportunity to
5 physically observe Mr. Lilburn in shoes or boots that
6 appeared to be similar to the tracks that you preserved?

7 A I think prior to the first search warrant there was
8 some indication that he was wearing foot gear that was
9 similar, yes.

10 Q And just so the jury knows, the spikes you've got in
11 front of you and the other spikes were actually all sent
12 back to the FBI at one point, weren't they?

13 A No, these ones obtained from the Pablo mill were
14 never sent to the FBI. The ones that Officer Deane
15 testified to were sent -- I sent them to the FBI lab.

16 Q And you were looking for fingerprints, metal traces,
17 I mean, any kind of scientific evidence that might help?

18 A That's true.

19 Q And you didn't turn up any fingerprints or anything
20 else of any particular value?

21 A That's true.

22 Q Oh, and the photos in Exhibit 34, they are all taken
23 the same day, or the day of the search?

24 A That's correct.

25 Q Both sides. Thank you. That's all I've got.

1 ///

2 CROSS-EXAMINATION
3

4 BY MR. MITCHELL:

5 Q When you conduct a search of a dwelling, among other
6 things, what you look for is what they call "evidence of
7 occupancy;" is that right?

8 A That's correct.

9 Q You found no indication whatever that Dan La Crosse
10 had been living there?

11 A That's correct.

12 MR. MITCHELL: That's all.

13 THE COURT: Anything further?

14 MR. BREITSAMETER: No, Your Honor.

15 THE COURT: All right, you may step down.

16 MR. BREITSAMETER: We would call Larry Magone.

17
18 LARRY MAGONE,

PLAINTIFF'S WITNESS, SWORN

19
20 THE COURT: Just be seated and state your name
21 and spell your last name, please.

22 THE WITNESS: It's Larry Magone, M-A-G-O-N-E.

23 MR. BREITSAMETER: Mr. Wilcox, we'll need
24 Exhibits 4 and 6.
25