

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
WESTERN DIVISION

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UNITED STATES OF AMERICA,

CR08-50079-02

Plaintiff,

v.

JOHN GRAHAM aka JOHN BOY  
PATTON, and VINE RICHARD  
MARSHALL aka RICHARD VINE  
MARSHALL aka DICK MARSHALL,

**UNITED STATES' RESPONSE IN  
OPPOSITION TO DEFENDANT  
MARSHALL'S NOTICE OF INTENT  
TO OFFER STATEMENTS OF  
COUNSEL**

Defendants.

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COMES NOW the United States of America, by and through United States Attorney Marty J. Jackley and Assistant United States Attorney Robert A. Mandel, and respectfully files its Response in Opposition to Defendant Marshall's Notice of Intent to Offer Statements of Counsel, based upon both legal and factual grounds.

It is a basic premise of law that statements of counsel are not evidence. See United States v. Smith, 508 F.3d 861, 865 (8th Cir. 2007); United States v. Gray, 369 F.3d 1024, 1028 (8th Cir. 2004); United States v. Stevens, 918 F.2d 1383, 1386 (8th Cir. 1990). The preliminary instruction universally provided to juries set forth in Eighth Circuit Pattern Jury Instruction 1.03 directly addresses this important legal concept:

I have mentioned the word “evidence.” “Evidence” includes the testimony of witnesses, documents and other things received as exhibits, any facts that have been stipulated — that is, formally agreed to by the parties, and any facts that have been judicially noticed — that is, facts which I say you may, but are not required to, accept as true, even without evidence.

Certain things are not evidence. I shall list those things for you now:

**1. Statements, arguments, questions and comments by lawyers representing the parties in the case are not evidence . . . .**

Eighth Circuit Pattern Jury Instructions, 1.03, Ed. 2007 (emphasis added). As a matter of law, Defendant Marshall’s invitation to expand the realm of evidence to include statements, arguments, and comments by lawyers should be declined.

The facts of this case further demonstrate the longstanding rationale for the definition of evidence in a trial. Defendant Marshall has made considerable representations with respect to his factual background that may or may not be borne out at trial through witness testimony and exhibits. At least with respect to the discovery that has been disclosed and provided to both Defendants, Defendant Marshall conveniently leaves out or fails to recognize several witness accounts, along with his very own admissions. See generally, United States’ Memorandum in Opposition to Defendants Graham and Marshall’s Motion for Severance, p.10-11, DE 95 (referencing additional witness accounts of Defendant Marshall’s conduct); Graham discovery 04885-04888 (additional

witness accounts of Defendant Marshall's conduct); and, DE 95, Exhibits 1-4 (Marshall's statements and associated witness notes).

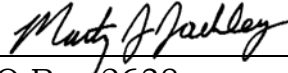
Defendant Marshall's attempts to create a factual discrepancy by mixing aider and abettor conduct at Defendant Marshall's residence with aider and abettor conduct at the bluff scene of Aquash's murder rings hollow. The conduct in both locations is certainly blended and an integral part of the criminal venture to murder Aquash. At his residence, Defendant Marshall provided the means, including the revolver, shells, and consultation, for other aiders and abettors to continue the criminal venture on to the bluff where Aquash was murdered. The United States has never alleged, nor does the law require, Defendant Marshall to have participated in each and every element of the offense. 18 U.S.C. § 2; United States v. Sigalow, 812 F.2d 783, 785 (2d Cir. 1987). Liability for the actions of a principal requires only that the defendant knowingly associated with the criminal venture and participated in a material respect. United States v. Stands, 105 F.3d 1565, 1577 (8th Cir. 1997)(quoting United States v. Dunlap, 28 F.3d 823, 826 (8th Cir. 1994)).

It is for these reasons that the "evidence" the jury ultimately considers should include the testimony of witnesses, documents and other things received as exhibits, any facts that have been stipulated, and any facts that have been judicially noticed. See Eighth Circuit Criminal Pattern Jury Instructions, 1.03.

Accordingly, the United States respectfully requests that this Court deny Defendant Marshall's request based upon both legal and factual grounds.

Dated and electronically filed this 16th day of March 2009.

MARTY J. JACKLEY  
United States Attorney



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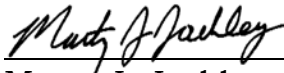
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies on March 16, 2009, a true and correct copy of the foregoing was served upon the following person(s), by placing the same in the service indicated, addressed as follows:

John R. Murphy  
Dana Hanna

- U.S. Mail, postage prepaid
- Hand Delivery
- Facsimile at
- Federal Express
- Electronic Case Filing



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Marty J. Jackley  
United States Attorney