The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

Name: John Gary McDougal

Office Address: (including county) 1010 Market Street, Suite 306, Chattanooga, TN 37402, Hamilton County

Office Phone: (423) 756-0536 Facsimile: (423) 756-0533

INTRODUCTION

The State of Tennessee Executive Order No. 41 hereby charges the Governor's Council for Judicial Appointments with assisting the Governor and the people of Tennessee in finding and appointing the best and most qualified candidates for judicial offices in this State. Please consider the Council's responsibility in answering the questions in this application questionnaire. For example, when a question asks you to "describe" certain things, please provide a description that contains relevant information about the subject of the question, and, especially, that contains detailed information that demonstrates that you are qualified for the judicial office you seek. In order to properly evaluate your application, the Council needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

This document is available in word processing format from the Administrative Office of the Courts (telephone 800.448.7970 or 615.741.2687; website www.tncourts.gov). The Council requests that applicants obtain the word processing form and respond directly on the form. Please respond in the box provided below each question. (The box will expand as you type in the document.) Please read the separate instruction sheet prior to completing this document. Please submit original (unbound) completed application (*with ink signature*) and any attachments to the Administrative Office of the Courts. In addition, submit a digital copy with electronic or scanned signature via email to debra.hayes@tncourts.gov, or via another digital storage device such as flash drive or CD.

THIS APPLICATION IS OPEN TO PUBLIC INSPECTION AFTER YOU SUBMIT IT.

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

McDougal Law Office (Sole-Proprietorship)

2. State the year you were licensed to practice law in Tennessee and give your Tennessee Board of Professional Responsibility number.

Licensed in 1994. Bar Number 016488

3. List all states in which you have been licensed to practice law and include your bar number or identifying number for each state of admission. Indicate the date of licensure and whether the license is currently active. If not active, explain.

State of Tennessee: Bar Number 016488

4. Have you ever been denied admission to, suspended or placed on inactive status by the Bar of any state? If so, explain. (This applies even if the denial was temporary).

No.

5. List your professional or business employment/experience since the completion of your legal education. Also include here a description of any occupation, business, or profession other than the practice of law in which you have ever been engaged (excluding military service, which is covered by a separate question).

Since graduation from law school and being licensed to practice law, I have been self-employed as the sole-proprietor of McDougal Law Office. For the first two years of my practice, I worked for Sears since I had insurance through them. When they stopped supplying insurance, I quit work and just practiced law.

6. If you have not been employed continuously since completion of your legal education, describe what you did during periods of unemployment in excess of six months.

Not applicable.

7. Describe the nature of your present law practice, listing the major areas of law in which you practice and the percentage each constitutes of your total practice.

Solo-practitioner in the fields of law as follows: State Criminal (40%), Federal Criminal Law (25%), Family Law (15%), Probate (5%), Personal Injury (5%) and other (10%)

8. Describe generally your experience (over your entire time as a licensed attorney) in trial courts, appellate courts, administrative bodies, legislative or regulatory bodies, other forums, and/or transactional matters. In making your description, include information about the types of matters in which you have represented clients (e.g., information about whether you have handled criminal matters, civil matters, transactional matters, regulatory matters, etc.) and your own personal involvement and activities in the matters where you have been involved. In responding to this question, please be guided by the fact that in order to properly evaluate your application, the Council needs information about your range of experience, your own personal work and work habits, and your work background, as your legal experience is a very important component of the evaluation required of the Council. Please provide detailed information that will allow the Council to evaluate your qualification for the judicial office for which you have applied. The failure to provide detailed information, especially in this question, will hamper the evaluation of your application.

I have argued cases before the General Sessions Courts, the Circuit Courts, Juvenile Courts and Criminal Circuit Courts in Hamilton County, Rhea County, Bradley County, McMinn County, Bledsoe County, Knox County and Davidson County, as well as the Courts in Hamilton County and the Federal Courts in the Eastern District of Tennessee. I have had trials from first degree murder, aggravated robbery, and all other felonies to most all of the misdemeanors in state court. In federal court, I have tried cases dealing with drugs, complex fraud cases, money laundering cases, bank robbery cases and Hobbs Act robberies. I have tried over a hundred cases both before both the judge and before juries. I am well versed in the Tennessee Rules of Civil Procedure, the Tennessee Rules of Criminal Procedure and the Rules of Evidence. I have filed motions in all the courts regarding motions to suppress, motions of discovery, motions to exclude as well as all sorts of motion in limine. I have handled many cases in my over twenty years in private practice in Juvenile, Circuit, and Criminal Courts as well as Federal Court. Each case is individual, some simple, some complex.

9. Also separately describe any matters of special note in trial courts, appellate courts, and administrative bodies.

I am licensed to practice before the Tennessee Supreme Court and the U.S. Supreme Court. I have argued in the Tennessee Court of Criminal Appeals, the Tennessee Court of Civil Appeals and the Sixth Circuit Court of Appeals.

10. If you have served as a mediator, an arbitrator or a judicial officer, describe your experience (including dates and details of the position, the courts or agencies involved, whether elected or appointed, and a description of your duties). Include here detailed description(s) of any noteworthy cases over which you presided or which you heard as a judge, mediator or arbitrator. Please state, as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency; (3) a summary of the substance of each case; and (4) a statement of the significance of the case.

I have on many occasions sat as a special judge for the Hamilton County General Sessions Court for Judges Shattuck, Moon, Durby, Sells, and Bales, in criminal and civil court as well as for the mental health docket. In sitting for the judges, I have heard misdemeanor cases, accepted pleas of guilty and held mental health hearings. This was 2004 to 2013. I have sat and continue to sit in Chattanooga City Court for Judges, Bean, Paty and Williams on their traffic, environmental, and animal dockets. From 2005 to 2015. I sat for Judge Disharoon in Red Bank on a several occasions when he was still judge until 2005.

11. Describe generally any experience you have of serving in a fiduciary capacity such as guardian ad litem, conservator, or trustee other than as a lawyer representing clients.

Not Applicable

12. Describe any other legal experience, not stated above, that you would like to bring to the attention of the Council.

Not Applicable

13. List all prior occasions on which you have submitted an application for judgeship to the Governor's Council for Judicial Appointments or any predecessor commission or body. Include the specific position applied for, the date of the meeting at which the body considered your application, and whether or not the body submitted your name to the Governor as a nominee.

Not Applicable

EDUCATION

14. List each college, law school, and other graduate school that you have attended, including dates of attendance, degree awarded, major, any form of recognition or other aspects of your education you believe are relevant, and your reason for leaving each school if no degree was awarded.

Graduate of the University of Tennessee at Chattanooga, 1988;
Degree in Political Science (Pre-Law)
Graduate of the Nashville School of Law, 1993
Doctorate of Jurisprudence

PERSONAL INFORMATION

15. State your age and date of birth.

Age- 50 years; Date of Birth- November 25, 1964

16. How long have you lived continuously in the State of Tennessee?

Forty two years.

17. How long have you lived continuously in the county where you are now living?

Twenty years

18. State the county in which you are registered to vote.

Hamilton County

19. Describe your military service, if applicable, including branch of service, dates of active duty, rank at separation, and decorations, honors, or achievements. Please also state whether you received an honorable discharge and, if not, describe why not.

Not Applicable

20. Have you ever pled guilty or been convicted or are you now on diversion for violation of any law, regulation or ordinance? Give date, court, charge and disposition.

1/4/2013 General Sessions Court of Davidson County, Speeding 60/50 Plead Guilty, paid fine.

21. To your knowledge, are you now under federal, state or local investigation for possible violation of a criminal statute or disciplinary rule? If so, give details.

No.

22. Please state and provide relevant details regarding any formal complaints filed against you with any supervisory authority including, but not limited to, a court, a board of professional responsibility, or a board of judicial conduct, alleging any breach of ethics or unprofessional conduct by you.

Back in 1998 I had a private reprimand for missing a filing date with the Tennessee Supreme Court due to a secretary filing a judgment from the Criminal Court of Appeals and not telling me. I told the Supreme Court and the Board of Professional Responsibility who allowed the Defendant to file the Writ of Certiorari.

In 2008, T. Clifton Harveil represented a former client of mine that had gone to trial in Federal Court in a 2255 hearing. Mr. Harveil used the complaint system of the Board of Professional Responsibility as a mechanism to investigate and ask for paperwork. The Complaint number was 31392-3-JV and was dismissed after investigation.

23. Has a tax lien or other collection procedure been instituted against you by federal, state, or local authorities or creditors within the last five (5) years? If so, give details.

In 2014 the IRS garnish my bank account while I was waiting for a letter for them to tell me how much I owed.

24. Have you ever filed bankruptcy (including personally or as part of any partnership, LLC, corporation, or other business organization)?

No.

25. Have you ever been a party in any legal proceedings (including divorces, domestic proceedings, and other types of proceedings)? If so, give details including the date, court and docket number and disposition. Provide a brief description of the case. This

question does not seek, and you may exclude from your response, any matter where you were involved only as a nominal party, such as if you were the trustee under a deed of trust in a foreclosure proceeding.

Johnny Cross v. John McDougal, Circuit Court, Dismissed. Criminal client sued, case dismissed as baseless. Mr. Cross has sued most of the lawyers, who have been appointed to his cases.

Charlena Harris v. John McDougal, Chancery Court, Dismissed. I was the guardian for the ward. When I stepped down as guardian, the guardian, who took over, ran out of money; then tried to collect on my bond. The case was dismissed as baseless.

In the matter of the estate of John J. Burnett, Chancery Court, Pending, I was co-executor on an estate. The other co-executor took the money and distributed it without the leave of the court and went back to Florida. The county executor is suing me, as I am the person in the county. He has not sued the other executor. The case has been pending for five years.

26. List all organizations other than professional associations to which you have belonged within the last five (5) years, including civic, charitable, religious, educational, social and fraternal organizations. Give the titles and dates of any offices that you have held in such organizations.

Greater Chattanooga Darting Association- 2009-2013 Treasurer/ 2015 Rules and Protest

The G.C.D.A. is an organization that promotes darts in the Chattanooga Area. The organization also raises money for various organizations, particularly the Area 4 Special Olympics.

27. Have you ever belonged to any organization, association, club or society that limits its membership to those of any particular race, religion, or gender? Do not include in your answer those organizations specifically formed for a religious purpose, such as churches or synagogues.

a. If so, list such organizations and describe the basis of the membership limitation.

b. If it is not your intention to resign from such organization(s) and withdraw from any participation in their activities should you be nominated and selected for the position for which you are applying, state your reasons.

No

ACHIEVEMENTS

28. List all bar associations and professional societies of which you have been a member within the last ten years, including dates. Give the titles and dates of any offices that you have held in such groups. List memberships and responsibilities on any committee of professional associations that you consider significant.

Tennessee Bar Association (TBA) 2000-2012
Chattanooga Bar Association (CBA)1995-
Chattanooga Area Criminal Defense Lawyers (CACDL)
Tennessee Association of Defense Attorneys (TACDL)
Certified to try Federal Cases since 1995

29. List honors, prizes, awards or other forms of recognition which you have received since your graduation from law school that are directly related to professional accomplishments.

Chattanooga Bar Association- Young Lawyer of the Year 1995

30. List the citations of any legal articles or books you have published.

Not Applicable

31. List law school courses, CLE seminars, or other law related courses for which credit is given that you have taught within the last five (5) years.

Not within the last five years

32. List any public office you have held or for which you have been candidate or applicant. Include the date, the position, and whether the position was elective or appointive.

Ran for position as Tennessee State Representative 2006
Ran for Soddy Daisy Judge 2012

33. Have you ever been a registered lobbyist? If yes, please describe your service fully.

No

34. Attach to this questionnaire at least two examples of legal articles, books, briefs, or other legal writings that reflect your personal work. Indicate the degree to which each example reflects your own personal effort.

ESSAYS/PERSONAL STATEMENTS

35. What are your reasons for seeking this position? ***(150 words or less)***

My past and present experiences, as an attorney and a special judge, have provided me with the abilities necessary to properly administer the Court while maintaining high standards of professional ethics and conduct. I believe this combined experience allows me to fairly and impartially administer justice through proper interpretation of the law, sentencing, and assessing fines, all commensurate with the crime or crimes committed. This will be especially important when dealing with the correct standard of review when setting bonds, issuing arrest and search warrants, finding guilt beyond a reasonable doubt in a trial, or finding probable cause in a preliminary hearing case.

A judge who does not exhibit fair and impartial administration of the law, either by being too harsh or too lenient then lends the impression, to the citizens, that they are not likely to receive fair and equitable justice from the Court. I would be able to do this in Criminal Court.

36. State any achievements or activities in which you have been involved that demonstrate your commitment to equal justice under the law; include here a discussion of your pro bono service throughout your time as a licensed attorney. ***(150 words or less)***

I have taken many pro bono cases over my twenty years of practicing, mostly divorces. I also take many appointed cases in Criminal and General Session Court for which I do not bill. When I sit for judges, I am not compensated, except for the fact that I receive a /Riverbend Band and a gift card from the City Court Judges. This is our duty as attorneys, to assist the court in whatever way we can. I also accept appointment for difficult cases that other attorneys cannot work with and either settle or try the cases.

37. Describe the judgeship you seek (i.e. geographic area, types of cases, number of judges, etc. and explain how your selection would impact the court. ***(150 words or less)***

I am seeking the judgeship for the Criminal Court of Hamilton County Tennessee, 10th Judicial District, Second Division. The Criminal Court deals with felonies, misdemeanors, probation

violations, habeas corpus petitions and post convictions. The Criminal Court will also handle appeals from General Sessions Court and the various city courts in Hamilton County. The Criminal Courts also regulate the bondsman that provide bond for those charged with criminal charges in Hamilton County. The Second Division also deals with Drug Court, trying to help those with drug problems to conquer their addictions and become productive members of society. There are three divisions of Criminal Court and if I am appointed to fill the post, I will work with the other judges to work the various dockets, to assist them with pleas if they are in trial and to help with the administration of the Criminal Courts.

38. Describe your participation in community services or organizations, and what community involvement you intend to have if you are appointed judge? ***(250 words or less)***

I am a member of the Republican Party and a precinct chairman. Even as a judge I would still serve as a member of the Republican Party.

I would also still be a member of the Greater Chattanooga Darting Association based upon the fundraising that it has done with the Special Olympics over the years where we have raised thousands of dollars. I would also continue to participate with various lawyer associations to assist those people who cannot afford attorney such a Southeast Legal Services.

I have assisted with the mock trial competition that various school participate in by sitting as a judge.

39. Describe life experiences, personal involvements, or talents that you have that you feel will be of assistance to the Council in evaluating and understanding your candidacy for this judicial position. ***(250 words or less)***

I have been involved with the local defense attorney association since its inception. The Chattanooga Area Criminal Defense Lawyers (CACDL) has helped many young lawyers who are just starting out with how to work their cases or how to try a case. This allows me to give back to the profession based on my time as a young lawyer just starting out, and repay the help I received from the seasomed attorneys. I have found that many of my accomplishment in life will assist me. When I achieved the rank of Eagle Scout in Boy Scouts, I learned of hard work and never giving up. When I was an intern in the State Legislature, I learned the art of compromise, and how certain laws get passed when they shouldn't and other laws passed that should fail. As I have practiced these many years I have been before many judges, and learned the different ways that judges run their courtroom, and how they make decisions. I have seen how judges treat those that come before them, most with good judicial decorum, some that have not treated those who come before them with respect. I feel this will help me be a better judge should I receive the appointment.

40. Will you uphold the law even if you disagree with the substance of the law (e.g., statute or rule) at issue? Give an example from your experience as a licensed attorney that

supports your response to this question. ***(250 words or less)***

A judge is required to uphold the law as passed by the legislature. A judge is also bound by the rulings of superior courts. As a judge I would uphold the law and make the proper decisions based upon the law. That being said, there are time where certain laws that are passed can be in conflict with other laws or the constitution. I had a case where I felt that the statute of limitation was violated. In that case, I filed the proper motion to dismiss. The judge made her ruling denying my motion. I then asked for permission to appeal to the Criminal Court of Appeals which the Court allowed. That was proper to determine whether the law was proper and that is how I would handle the issue if I am judge.

REFERENCES

41. List five (5) persons, and their current positions and contact information, who would recommend you for the judicial position for which you are applying. Please list at least two persons who are not lawyers. Please note that the Council or someone on its behalf may contact these persons regarding your application.

A. Judge Russell Bean,
B. Frank Pinchak,
C. Jeffrey Schaarschmidt,
D. Rita Bowen,
E. Al Lewis

AFFIRMATION CONCERNING APPLICATION

Read, and if you agree to the provisions, sign the following:

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the Criminal Court of Tennessee, and if appointed by the Governor and confirmed, if applicable, under Article VI, Section 3 of the Tennessee Constitution, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended questionnaire with the Administrative Office of the Courts for distribution to the Council members.

I understand that the information provided in this questionnaire shall be open to public inspection upon filing with the Administrative Office of the Courts and that the Council may publicize the names of persons who apply for nomination and the names of those persons the Council nominates to the Governor for the judicial vacancy in question.

Dated: February 26, 2015.

Signature

When completed, return this questionnaire to Debbie Hayes, Administrative Office of the Courts, 511 Union Street, Suite 600, Nashville, TN 37219.

THE GOVERNOR'S COUNCIL FOR JUDICIAL APPOINTMENTS
ADMINISTRATIVE OFFICE OF THE COURTS

511 UNION STREET, SUITE 600
NASHVILLE CITY CENTER
NASHVILLE, TN 37219

TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY
TENNESSEE BOARD OF JUDICIAL CONDUCT
AND OTHER LICENSING BOARDS

WAIVER OF CONFIDENTIALITY

I hereby waive the privilege of confidentiality with respect to any information that concerns me, including public discipline, private discipline, deferred discipline agreements, diversions, dismissed complaints and any complaints erased by law, and is known to, recorded with, on file with the Board of Professional Responsibility of the Supreme Court of Tennessee, the Tennessee Board of Judicial Conduct (previously known as the Court of the Judiciary) and any other licensing board, whether within or outside the State of Tennessee, from which I have been issued a license that is currently active, inactive or other status. I hereby authorize a representative of the Governor's Council for Judicial Appointments to request and receive any such information and distribute it to the membership of the Governor's Council for Judicial Appointments and to the Office of the Governor.

John G. McDougal
Type or Print Name

Signature

2/26/15
Date

016488
BPR #

Please identify other licensing boards that have issued you a license, including the state issuing the license and the license number.

IN THE CRIMINAL COURT OF APPEALS
FOR THE STATE OF TENNESSEE

STATE OF TENNESSEE	*	
	*	
Appellee/Petitioner	*	**ON APPEAL FROM THE**
	*	**HAMILTON COUNTY**
	*	**CRIMINAL COURT**
	*	
vs.	*	No. E2013-01697-CCA-R3-CD
	*	
LONTA BURRESS	*	
	*	
Defendant/Appellant,	*	

BRIEF OF THE APPELLANT

ORAL ARGUMENT REQUESTED

FOR THE APPELLANT:

John G. McDougal, Esq. Bar#, 16488
1010 Market Street, Suite 306
Park Plaza Building
Chattanooga, Tennessee 37402
Telephone (423) 756-0536
Fax (423) 756-0533
Counsel for Defendant/Appellant, Lonta Burress

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MAY IT PLEASE THE COURT:

INTRODUCTION

This appeal of conviction involves an appeal by Lonta Burress from a judgment of conviction by a jury from the Hamilton County Criminal Court. Mr. Burress will be referred to herein as Petitioner, Defendant or Appellant. The State of Tennessee will be referred to as State or Appellee. The Technical Record will be referred to herein as (T.R., p.__). and the Transcript of the Trial will be referred to as (Trans., p.__).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. The Court improperly allowed mention of gangs in the testimony. There was a motion in limine that gangs were not to be mentioned in the case which the Court had granted. An officer of the Chattanooga Police Department stated that he was primary purpose was to investigate gang activity.

2. There was not sufficient evidence to support a conviction.

3. The Court should not have allowed Lajuana Woods to testify. Originally the Court was going to allow her previous testimony over the objections of the Defendant as being unavailable. Defendant was able to have Ms. Woods appear. Then the State introduced the prior testimony of Ms. Woods. As Ms. Woods stated she did not have any recollection of stating the testimony, it was not for impeachment purposes, and therefore should not have been allowed.

4. . The Court should have granted the mistrial when the office testified that the co-defendant said the Defendant was with him when they fled the scene. This is a *Bruton* violation.

STATEMENT OF THE CASE

This case is an appeal of right for the Appellant's conviction for three counts of aggravated assault, a Class C felony, one count of possession of a deadly weapon a Class E felony, one count of evading arrest a Class E felony, one count of evading arrest, a Class A misdemeanor, and on one count of theft of property a Class D felony.

The Appellant was charged that, on or about December 7, 2010, that the Defendant did unlawfully, intentionally or knowingly cause Tramelvin Simmons, Fredrick Jones, Jr., and Jamichael Eubanks to reasonably fear imminent bodily injury by use of a dangerous weapon in violation of Tennessee Code Annotated 39-13-102. The Appellant was also charged that on that date for the other charges.

The Defendant, along with his co-defendants Darius Gustus and Lajuana Woods were juveniles at the time of the incident. A transfer hearing was held in the Hamilton County Juvenile Court, and the juvenile judge deemed there was enough evidence to transfer the case and two of the defendants, Lonta Burress, and Darius Gustus would be tried as adults. The other defendant, Lajuana Woods, testified against the Defendant and his co-defendant at the transfer hearing. On March 25, 2011 the Defendant was indicted by the Hamilton County Grand Jury.

On July 11, 2011 the Defendant was arraigned on the above named charges. On July 10, 11, 12, and and 13, 2012, the Appellant appeared before the Criminal Court of Hamilton County, Division III, was tried before a jury, and found guilty on all counts. On November 13, 2013, the Appellant was sentenced to six years on the aggravated assault, two years on the possession of a deadly weapon, 11 months and 29 day for the misdemeanor evading arrest, four years on the theft of property, and two year for the felony evading arrest. All charges to run concurrent with each other and to serve in the Department of Corrections at thirty (30) percent on each of the counts. At the trial the Defendant had one co-defendant, Darius Jerel Gustus. The Defendant requested a new trial that was denied on July 22, 2013. Defendant appeals both the conviction to the Criminal Court of Appeals.

STATEMENT OF THE FACTS

On December 7, 2010, the police received a call of shots fired at Through Street in Hamilton County. Police spoke to Fredrick Jones Jr., Jamichael Eubanks, and Tramelvin Simmons who, at the time stated that they had been shot at by two people in a red truck. One of the people that they identified was Lonta Burress. The Police put out an all points bulletin to be on the look out for a red truck. An Officer Allen spotted a red truck fitting the description and attempted to put it over. A chase ensued after which three people could be seen running from the truck. After a search of the surrounding area, Lonta Burress, and Darius Gustus, were taken into custody. Later, LaJuana Woods was arrested for being in the truck as well. Two firearms were found on Darius Gustus by the police. Police discovered that the vehicle had been stolen from Rodney Billingsley on December 6, 2010.

ARGUMENT

1. The Court improperly allowed mention of gangs in the testimony. There was a motion in limine that gangs were not to be mentioned in the case which the Court had granted. (Trans., p. 25 line 18-20)

An officer of the Chattanooga Police Department stated that he was primary purpose was to investigate gang activity. (Trans., p.246 line 2 to p. 247 line 13)

Before trial, the Defendant, through counsel filed a motion in limine on the following:

That the Court not allow any testimony in the foregoing case in relation to gangs or gang activity. Defendant would aver that such testimony will only be used to inflame the jury and would serve no purpose in the instant case. (T.R., p. 33)

The Court granted the motion. (Trans., p. 21 line 1-7) The Court did say that if any statements were to be used as character evidence, than a jury out hearing per Tenn. Rule of Evidence 404(b) would be used.

One of the things that the Defendant most feared is that this would become a case about gangs without actually having any evidence about gang activity introduced.

> Objections to the introduction of evidence must be timely and specific. See Overstreet v. Shoney's, Inc., 4 S.W.3d 694, 702 (Tenn. Ct. App. 1999). HN2 An evidentiary objection will be considered timely either if it is made in a motion in limine or if it is made at the time the objectionable evidence is about to be introduced. See Wright v. United Servs. Auto. Ass'n, 789 S.W.2d 911, 914 (Tenn. Ct. App. 1990).
>
> *Grandstaff v. Hawks*, 36 S.W.3d 482, 488, 2000 Tenn. App. LEXIS 355, 10 (Tenn. Ct. App. 2000)

In the instant case, Defendant avers that the prejudicial value of having the Defendant be determined to be in a gang or have a suggestion of gang involvement, outweighed the probative value of the evidence. The fact that the police officer stated he was in the gang task force and that was their primary duty, allowed the jury to determine that the Defendant was in a gang, even though there was no evidence was presented to prove this as fact. At the motion for new trial, the counsel for the Defendant put forth the fact that the jury had stated gangs were a factor in their finding the Defendant guilty. (Trans. New Trial, p. 4 line 4-15) The Court has put forth the factors to follow in *Judge v. State.* The Court stated that the factors were:

> the test to be applied by the appellate court in reviewing instances of improper conduct, i.e., "whether the improper conduct could have affected the verdict to the prejudice of the defendant."
>
> The courts and commentators seem to agree that there are some five factors which should be considered in making this determination: 1
>
> 1. The conduct complained of viewed in context and in light of the facts and circumstances of the case.

2. The curative measures undertaken by the court and the prosecution.

3. The intent of the prosecutor in making the improper statement.

4. The cumulative effect of the improper conduct and any other errors in the record.

5. The relative strength or weakness of the case.

Judge v. State, 539 S.W.2d 340, 344, 1976 Tenn. Crim. App. LEXIS 381, 10-11 (Tenn. Crim. App. 1976)

In the instant case, the State control the witnesses and had knowledge that the Court had ordered that until a jury out was held, that no mention of gangs should be made. Officer Justin Allen testified that he was a Chattanooga Police Officer who worked for the Crime Suppression Unit. All though he mentioned that he responded to gang activities, he mixed it in with shootings, major activities and crime. (Trans., p. 111 line 21-25) he does not make it about gangs. However when Officer Josh May testified, he testified that he worked for the Crime Suppression Unit, but specified that it was the de facto gang unit in the city and keep track of them. (Trans., p. 245 line 14 to p. 246 line 5) Counsel for the Defendant objected and asked for a mistrial, the Court allowed him to testify and gave no curative instructions. (Trans., p. 246 line 6 to p. 247 line 9) The Defendant would aver to the Court that this violated the trial Court's original instructions and the trial Court should have declared a mistrial.

On the second prong, the Court took no curative measures. The Court ask the State to try to soften the blow, but the Defendant would aver that the damage had been

done. Afterward, the Court said nothing as to the testimony of Officer May, and should have granted the mistrial.

On the third prong, the State was under an obligation to instruct its witnesses that they could not put the Defendant in a gang or insinuate that he was in a gang. Officer Allen, even though he mentioned gang, mixed in other things the Crime Suppression Unit did besides gangs. Officer May only stated that the unit was the "de facto gang unit". Officer May meant to place the Defendant in a gang or put gangs in the mind of the jury.

On the fourth prong, This made the case about gangs rather than evidence before the jury, which was what the motion in limine and the Court's instructions were to prevent in the first place. The Defendant would aver that his case was irrevocably damaged when Officer May brought gangs into it. The Defendant mentioned this in his motion for New Trial (Trans., New Trial p. 4 lines 4-15)

As to the fifth prong, the evidence against the Defendant was weak. Both Ms. Woods stated that Mr. Gustus had fired at the people, but only through prior testimony and hearsay. Ms. Woods could not remember, and had to be reminded through prior testimony from the Juvenile Court transfer hearing. Even then, she stated Mr. Gustus had fired the gun. The only witness to put a weapon in the hand of the Defendant was Ronald Madden. Mr. Madden's testimony directly

contradicts Ms. Woods testimony. Mr. Madden's testimony was that the Defendant, wearing a bandana over his face and turned away from Mr. Madden , and firing a gun as he was speeding down the road was recognizable. (Trans., p. 82 line 2 to p. 84 line 24)

2. There was not sufficient evidence to support a conviction.

This Court stated in the past as to the sufficiency of the evidence:

> The question on appeal when the sufficiency of the evidence to support the verdict is raised is whether there is sufficient evidence from which a rational trier of fact can find guilt beyond a reasonable doubt. T.R.A.P. 13(e). *State v. Bowers* 673 S.W.2d 887 (Tenn.Cr.App.,1984)

But the Defendant, while the case is heard de novo, can not re-weigh or re-evaluate the evidence presented. In *State v. Vaughn* the Court stated:

> When an appellant challenges the sufficiency of the evidence, this Court does not re-weigh or reevaluate the evidence. *State v. Cabbage,* 571 S.W.2d 832, 835 (Tenn.1978). A jury verdict approved by the trial judge accredits the state's witnesses and resolves all conflicts in favor of the state. *State v. Bigbee,* 885 S.W.2d 797, 803 (Tenn.1994); *State v. Harris,* 839 S.W.2d 54, 75 (Tenn.1992). On appeal, the state is entitled to the strongest legitimate view of the evidence and all legitimate or reasonable
> *State v. Vaughn* 29 S.W.3d 33, *39 (Tenn.Crim.App.,1998)

The Appellant would ask the Court to review the evidence and would aver

that the Court will find that the evidence does not meet criteria beyond a reasonable doubt. The Tennessee Supreme Court set out criteria for the Courts to follow to determine if a defendant was innocent or guilty based upon insufficient evidence. The Court stated:

> We have described the nature of this requirement as follows:
> [There must be some fact testified to, entirely independent of the accomplice's testimony, which, taken by itself, leads to the inference, not only that a crime has been committed, but also that the defendant is implicated in it; and this independent corroborative testimony must also include some fact establishing the defendant's identity. This corroborative evidence may be direct or entirely circumstantial, and it need not be adequate, in and of itself, to support a conviction; it is sufficient to meet the requirements of the rule if it fairly and legitimately tends to connect the defendant with the commission of the crime charged. It is not necessary that the corroboration extend to every part of the accomplice's evidence. Whether sufficient corroboration exists is a determination for the jury.
> *State v. Bigbee,* 885 S.W.2d at 803.
> *State v. Shaw* 37 S.W.3d 900, *903 (Tenn.,2001)

In the instant case, there was no proof from the victims as to who shot at them or that they were being shot at the time.) In the testimony of Ms. Woods, she testified that she had testified before that Lonta Burress had not fired a gun. (Trans., p. 377 line 10-16)

And one of the alleged victims, Fredrick Jones, Jr. did not testify at all nor was there any proof that he was in fear of his life. At the very least the Court should have granted the Defendant's Rule 29 motion to dismiss as to Fredrick Jones, Jr. Also, as there was one witness that said Darius Gustus shot at the victims and

another said Lonta Burress shot at them, there is sufficient evidence to determine which defendant shot the guns. There was no evidence that both were firing guns.

The Appellant was charged under T.C.A. 39-13-102 under three counts that he did unlawfully, intentionally or knowingly caused Tramelvin Simmons, Jamichael Eubanks, and Fredrick Jones, Jr. , to reasonably fear imminent bodily injury by use of a deadly weapon. (T.R., p.3-6). There was no proof that the Defendant, Lonta Burress shot the gun or at anytime had possession of a dangerous weapon. There was also no proof that Lonta Burress had stolen the truck belonging to Rodney Billingsley. Mr. Billingsley could only testify that his truck was taken, that he had left the keys in the truck and his wallet. (Trans., p. 55 line 23 to p. 57 line 10)

3. The Court should not have allowed Lajuana Woods to testify.

Originally the Court was going to allow her previous testimony at the Juvenile Court transfer hearing to be introduced over the objections of the Defendant. The State put forth Ms. Woods as being unavailable under Tennessee Rules of Evidence 804 as to an unavailable witness. Defendant objected under two provisions. First the State had sent its own subpoena out and did not file them through the Criminal Court Clerks Office as they were supposed to do. Second, the Defendant averred that Ms. Woods was available and that they could get her to the Court. Defendant was able to have Ms. Woods appear. During questioning of Ms. Woods, Ms.

Woods testified that she had been in an accident and could not remember anything. The Court stated that she was lying. The Defendant through counsel objected to the fact that the State said she was unavailable as the Defendant was able to get her to Court. The Court then stated she was unavailable. (Trans., p. 323 line 11 to p. 347 line 25) Then the State introduced the prior testimony of Ms. Woods as an adverse witness. As Ms. Woods stated she did not have any recollection of stating the testimony, it was not for impeachment purposes, and therefore should not have been allowed under Tennessee Rules of Evidence 804 or as an adverse witness. The Court of Appeals has addressed this in *State v. Malone* in which it said:

> Tennessee Rules of Evidence 612 and 613 establish the circumstances and procedures for refreshing the memory of a witness using a prior statement of the witness. Rule 612 explains the procedures when a witness uses a writing to refresh his or her memory, "If a witness uses a writing while testifying to refresh memory for the purpose of testifying, an adverse party is entitled to inspect [52] it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. . . ." The Advisory Commission Comment to this section explains the foundation necessary and procedure to be used when the memory of a witness is refreshed by a writing, "Only if a witness's memory requires refreshing should a writing be used by the witness. The direct examiner should lay a foundation for necessity, show the witness the writing, take back the writing, and ask the witness to testify from refreshed memory."
> The use and admissibility of the prior statement of a witness is governed by Tennessee Rule of Evidence 613, which provides in pertinent part:
> (a) HN10 Examining Witness Concerning Prior Statement. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the

same shall be shown or disclosed to opposing counsel.
(b) Extrinsic Evidence of Prior Inconsistent Statement of Witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless and until the witness is afforded an [53] opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require.
Tennessee Rule of Evidence 803(5) explains the limited circumstances under which the prior statement may be entered as exhibit in a trial:
HN11 Recorded Recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness's memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.
The Advisory Commission Comment to this subsection explains the showing which must be made before the prior statement of a witness may be used to refresh at trial the recollection of the witness:
The proposed rule recognizes the traditional Tennessee hearsay exception for past recollection recorded, but it expands common law in two respects. It allows the admissibility of the contents of a document reflecting [54] past-recollection recorded even though the witness has some recollection of the recorded facts but not enough to testify "fully and accurately." Second, it permits the witness to adopt a record made by another not acting under the witness's supervision. The safeguard is the requirement of adoption at the time when the witness could vouch for the document's correctness.
Tenn. R. Evid. 803(5), Advisory Commission Cmt.
HN12 The admission of evidence generally lies within the sound discretion of the trial court and will not be reversed on appeal absent a showing of an abuse of discretion. See State v. Gilliland, 22 S.W.3d 266, 270 (Tenn. 2000); State v. Edison, 9 S.W.3d 75, 77 (Tenn. 1999); State v. Cauthern, 967 S.W.2d 726, 743 (Tenn. 1998). As our supreme court has explained:
Because the term "discretion" essentially "denotes the absence of a hard and fast rule," we will reverse a decision to admit evidence "only when the 'court applied an incorrect legal standard, or reached a

decision which is against logic or reasoning that caused an injustice to the party complaining.'"
Gilliland, 22 S.W.3d at 270 (quoting State v. Shirley, 6 S.W.3d 243, 247 (Tenn. 1999)).
Having reviewed the applicable law, [55] we now will consider the defendant's complaint that the trial court erred by not giving a limiting instruction. First, we note that the defendant's initial objection was to "asked and answered," then to "[i]t's improper trying to rehabilitate his own witness," and finally to "[h]e's not allowed to impeach his own witness without laying the proper foundation . . . . [a]nd that being that she is a hostile witness." The defense never requested a limiting instruction at trial and is therefore in essence alleging a new ground on appeal. HN13 It is well-settled that this court will not consider a new theory that was not presented to the trial court. See State v. Alder, 71 S.W.3d 299, 303 (Tenn. Crim. App. 2001).
In any event, it is not entirely clear that the State used Tijerina's statement for impeachment purposes because the majority of the prior statement was actually duplicative of her testimony, and we can discern no logical reason for the State to attack the credibility of one of its crucial witnesses. We acknowledge that the State, at trial, eventually argued it was trying to use the statement for impeachment, but that was after a long and confusing discourse between the attorneys and the [56] court in which a variety of objections and theories were lodged. In actuality, the procedure the State utilized, albeit not succinctly, more closely resembled a blending of the procedures for present recollection refreshed and past recollection recorded. As noted above, the State initially said that it was "laying a foundation for refreshing the witness . . . ."
Regardless, in the context of the overall trial, the additional information that came out of Tijerina's statement was rather innocuous. By this point, the jury had already heard Chapa's entire testimony about the murders and Tijerina's testimony about the defendant telling her that he had murdered two people before for Chino. The additional information that the murders had happened in a maroon Envoy was of little consequence.
In sum, we cannot conclude that the trial court erred by not giving a contemporaneous limiting instruction because it is not evident that the prior statement was actually used for impeachment, and, even if the court did err, the error was harmless in light of the other evidence

as set out in this opinion.

> *State v. Malone*, 2008 Tenn. Crim. App. LEXIS 813, 51-56 (Tenn. Crim. App. Oct. 2, 2008)

In this case, the Court should not have name Ms. Woods an unavailable witness, nor should it have let the State question her in the manner that it did. It allowed the State to question her as an adverse witness and allowed the State to read from the transcript rather than allowing Ms. Woods to refresh her recollection and then testify.

4. The Court should have granted the mistrial when the office testified that the co-defendant said the Defendant was with him when they fled the scene. (Trans., p. 213 line 12 to line 19) This is a *Bruton* violation. The Defendant objected and asked for a mistrial. (Trans., p. 214 line 2 to p. 217 line 5) The Court gave curative instructions. (Trans., p. 217 line 7 to p. 217 line 21) The Criminal Court of Appeals explained this most recently in *Thomas v. State,* the Court explained:

> In Bruton, the United States Supreme Court reversed a defendant's conviction because the introduction of a non-testifying co-defendant's confession implicating the defendant violated the defendant's right to confront the witnesses against him in contravention of the Confrontation Clause of the Sixth Amendment to the United States Constitution. The confession added "substantial, perhaps even critical, weight to the Government's case in a form not subject to cross-examination, since [the co-defendant] did not take the stand. [The defendant] was thus denied his constitutional right of confrontation." Bruton, 391 U.S. at 128, 88 S. Ct. at 1623. The Court

> also doubted that a curative instruction would alleviate the prejudice and concluded that the risk that the jury may not follow such an instruction is too great. "[W]e cannot accept limiting instructions as an adequate substitute for [the defendant's] constitutional right of cross-examination. [67] The effect is the same as if there had been no instruction at all." Id. at 137, 88 S. Ct. 1628.
> The Bruton rule was subsequently limited by Richardson v. Marsh, 481 U.S. 200, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987). In Richardson, the Court held that HN8 "the Confrontation Clause is not violated by the admission of a non-testifying codefendant's confession with a proper limiting instruction when . . . the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence." Id. at 211, 107 S. Ct. at 1709. The Court specifically declined to consider at that time the admissibility of a confession in which the defendant's name "has been replaced with a symbol or neutral pronoun." Id. at 211 n.5, 107 S. Ct. at 1709 n.5.
> *Thomas v. State*, 2011 Tenn. Crim. App. LEXIS 131, 66-67, 2011 WL 675936 (Tenn. Crim. App. Feb. 23, 2011)

The instant case is right on point with *Bruton* in the fact the officer stated that Mr. Gustus admitted that the Defendant had picked him up. Officer Morrison used the Defendant name, rather than a pronoun or something that did not specifically identify the Defendant as required by the case law. It is injurious to the Defendant by the fact that it states he picked up Mr. Gustus, stating that they were together. Since you have the non-testifying co-defendants statement being used against him and it is an important part of the case in the fact that it places both parties together.

CONCLUSION

The Appellant would ask the Court to reverse his conviction for the three counts of aggravated assault, the possession of a deadly weapon, for the misdemeanor evading arrest, the felony theft of property, and for the felony evading arrest. and remand the case back to the trial court . In the instant case, the Appellant would aver to the Court that there was not sufficient evidence to support the jury's verdict of guilty in the counts and the State violated the Court's order on the motion in limine as to bringing gangs into the case. Also the *Bruton* violation injured the Defendant and should not have be allowed to stand by the Court. The Appellant would aver there were three instances where the Court failed to grant the Defendant's mistrial motion. Also, the Appellant would aver the trial Court committed reversible error in the way that it allowed Ms. Woods to testify that by the Tennessee Rules of Evidence, it should not have been allowed. The Appellant would ask the Court to reverse his conviction and remand a new trial.

Respectfully Submitted,

John G. McDougal, Bar # 16488
Attorney at Law
1010 Market Street, Park Plaza Building, Suite 306
Chattanooga, Tennessee 37402
Telephone (423) 756-0536

Counsel for Defendant/Appellant, Lonta Burress

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been sent by the Petitioner/Appellant, in this case to counsel for said parties by delivering it to the offices of said counselor or by placing it in the U.S. Mail to the parties or to said counsel with sufficient postage thereupon to carry the same to:

John Bledsoe, ASAG
State Attorney Generals Office
450 James Robertson Parkway
Nashville, TN 37219

Honorable William Cox
District Attorney General
City-County Courts Buildings
Chattanooga, TN 37402

Clerk
Criminal Court of Appeals
Eastern Division
P.O. Box 444
Knoxville, TN 37901

This _____ day of March 2014

John G. McDougal

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

UNITED STATES OF AMERICA Petitioner	)	No. 1:12-cr-042
v.	)	Judge Collier/Lee
PAUL GOTT, III	)	
Defendant	)	

MOTION FOR RULE 29 JUDGEMENT OF ACQUITTAL

Comes the Defendant, Paul Gott, and through counsel, would renew his previous motion for Judgment of Acquittal:

The Defendant was found guilty of the conspiracy count (Count 1) and guilty of the wire fraud and money laundering counts related to the gift letters in Counts 5, 6, 7, 8, 11, and 12. The Defendant was found not guilty of the transactions involving the option contract with Patricia Daniels and the ICV contract with Dennis Sanchez. In support of the Defendant's Motion, he would show as follows:

COUNT ONE

As to Count One of the Indictment, the Defendant, Paul Gott, would join with his co-defendant in stating that the forgoing indictment is defective in that it fails to state that the wire fraud is to scheme or defraud for the purpose of obtaining money or property. The Defendant would also aver to the Court that the Government fail to show that there was a conspiracy of any sort to defraud or to scheme for the purpose of obtaining money or property. Defendant would

aver that the Government failed to show beyond a reasonable doubt that the Defendant engaged in a conspiracy to defraud or scheme for Count One and should be acquitted of said count.

COUNT FIVE

Defendant would aver to the Court that the Government fail to show that the Defendant engaged in any fraud or scheme concerning the transaction or that the Defendant had engaged in any fraud. It was testified that Shirley Conners told the Defendant that he was to send the money to her. It was also testified to that the Defendant was told by Keith Smart that the transactions would be allowed under certain rules and Mr. Gott followed these rules. Mr. Gott and Mr. Smart both testified that they were not in a conspiracy nor did they intent to defraud anyone. There was nothing to show that Mr. Gott presented anything that he thought was false to the bank. There was nothing to show that the Defendant was engaged in a scheme to defraud for the purpose of obtaining money or property. There was nothing to show that the Defendant intent was to defraud one of tangible property rights (money or property) or had gained anything from the transaction as required by the statute 18 U.S.C.A. 1343.

COUNT SIX

Defendant would aver to the Court that the Government fail to show that the Defendant engaged in any fraud or scheme concerning the transaction or that the Defendant had engaged in any fraud. It was testified that Shirley Conners told the Defendant that he was to send the money to her. It was also testified to that the seller was not Southern Group, LLC or any other aspect of Southern but someone else had owned the property. As in Count Five, the Defendant followed the rules as set forth by Mr. Smart. Mr. Smart also testified that he had spoken to Ms. Conners and she had told him she was the cousin of the buyer. She had handled all the transactions in this case, and Mr. Smart had presented the application to the bank. Southern Group provided the

money in the transaction. There was nothing to show that the Defendant was engaged in a scheme to defraud for the purpose of obtaining money or property. There was nothing to show that the Defendant was to gain or had gained anything from the transaction as required by the statute 18 U.S.C.A. 1343.

COUNT SEVEN and EIGHT

Defendant would aver to the Court that the Government fail to show that the Defendant engaged in any fraud or scheme concerning the transaction or that the Defendant had engaged in any fraud. In the instant offense, the was nothing to show that the Defendant was engaged in a scheme to defraud for the purpose of obtaining money or property. There was also nothing to show that the alleged fraud had been committed in this venue. The e-mail was received in California, and the wire came from a Compass Bank. The Government failed to show how the money came to Compass Bank. It was testified to that the Defendant, Mr. Gott, had sent the money via wire from Compass Bank, even though he did not have an account from Compass Bank or where Compass Bank was located. The Government has a duty to show where it is to show venue. "Venue in a mail fraud case is limited to districts were the mail was deposited, received, or moves through, even if the fraud's core was elsewhere". U.S. v. Wood, 364 F.3d 704, 713 (6th Cir., 2004). In a like manner, wire fraud is limited to the jurisdictions where it was sent and where it was received. Prosecution shall be held in the district where the crime was committed under Rule 18, Fed. R. Crim. P. More significantly, the 6th Amendment to the United States Constitution requires that the trial should be heard in the state and district where the crime shall have been committed. Defendant respectfully submits that a judgment of acquittal should be entered on Count 7 and Count 8 due to the failure to establish venue.

Furthermore, there was nothing to show that the Defendant was to gain or had gained anything

from the transaction as required by the statute 18 U.S.C.A. 1343.

COUNT 11

Count 11 alleges that a monetary transaction occurred on February 23, 2010 involving a deposit to Southern Group, LLC for $166,487.13. The evidence at trial established no such monetary transaction. A deposit did occur on February 23, 2010 involving $167,249.63 to Southern Property Management Group, LLC. The Government acknowledges that a variance has occurred between the allegations and the proof. However, the Government argues that the variance does not affect substantial rights and should be disregarded.

Under the 6th Amendment of the United States Constitution, the Defendant has a right to be informed of the nature and cause of the accusation. In addition, under the 5th Amendment of the Constitution, he is entitled to due process of law and is entitled to only answer to a grand jury indictment. The Government can not simply make the indictment conform to its evidence. Instead, the evidence must conform to the indictment.

The evidence at trial established that substantially more financial transactions involving the sale of property occurred than simply those alleged in the indictment. As such, multiple transactions and deposits were occurring. In addition, the evidence established that some purchasers were acquiring multiple properties. Thus, many monetary transactions occurred.

Even viewing the evidence in the light most favorable to the Government as required under U.S. v. Conatser, 514 F.3d 508 (6th Cir., 2008), the Government failed to prove the monetary transaction alleged. In reviewing the indictment, Count 11 is broken down to two portions, the date, and the monetary transaction. Based upon the failure to prove the monetary transaction, the Defendant respectfully requests that a judgment of acquittal be entered as to Count 11.

COUNT 12

In Count 12, the indictment alleged that money laundering occurred on April 29, 2010 with a deposit to Southern Mountain Resorts for $67,000.00. Proof at trial established that a deposit was made to Southern Management's account on April 30, 2010. As such, the only matter that matches is the amount of the transaction.

The Defendant adopts the legal argument set forth as to Count 11. As such, Defendant respectfully submits that a judgment of acquittal should be entered as to Count 12.

WIRE FRAUD COUNTS

In Mr. Gott's Motion for Judgment of Acquittal at trial, he joined in Mr. Dobson's Motion of Acquittal which noted that the wire fraud statute, 18 U.S.C. §1343 requires as an element that the scheme must include the intent to defraud one of tangible property rights (money or property). The Defendant, Mr. Gott once again joins with Mr. Dobson motion and adopts his arguments. Mr. Gott would also note that if the Court should dismiss or acquit the Defendant, Mr. Gott of any of the wire fraud transactions, than the corresponding money laundering charge should be dismissed as well. The Defendant, Mr. Gott, renews his previous Motion for Judgment of Acquittal as to Counts 5, 6, 7, and 8 based on the failure to allege an essential element in the indictment. By necessity, upon acquittal of said Counts, the Defendant should also be acquitted of Counts 11 and 12. A Motion in Arrest of Judgment on this issue is being filed contemporaneously and Defendant adopts the legal analysis from said Motion.

Respectfully Submitted,

McDOUGAL LAW OFFICES

s/John G. McDougal
John G. McDougal Bar # 16488
Attorney for Defendant, Paul Gott
Suite 306, Park Plaza Building
1010 Market Street
Chattanooga, TN 37402
(423) 756-0536

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of this document has been served upon all opposing parties in this case or counsel for said parties by delivering it to the offices of said counselor by placing it in the United States Mail addressed to the parties or to said counsel with sufficient postage thereupon to carry the same to its destination to:

John McCoon, AUSA
Perry Piper, AUSA
United States Attorney General
1110 Market Street, Suite 301
Chattanooga, TN 37402

This the 5th day of May, 2013.

s/ John G. McDougal
John G. McDougal Bar # 16488