

CRIMINAL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

CASE NO. 468-443

STATE OF LOUISIANA

VERSUS

JAMIL JOYNER, ET AL

FILED: \_\_\_\_\_ DEPUTYCLERK: \_\_\_\_\_

**MOTION AND MEMORANDUM IN SUPPORT FOR A NEW TRIAL**

NOW INTO COURT, through undersigned counsel, comes Defendant, Jamil Joyner, who respectfully moves this Honorable Court, pursuant to Louisiana Code of Criminal Procedure, Article 851, to grant a new trial, as this Court erred on various ruling on written motions which showed prejudicial error, newly discovered evidence, the judgment was contrary to the facts presented at trial and juror confusion on the possible verdicts. As will be explained in detail below, the errors which occurred at trial created an injustice to the Defendant and a new trial should be granted.

**LAW AND ARGUMENT**

Louisiana Code of Criminal Procedure, Article 851 states:

The motion for a new trial is based on the supposition that injustice has been done to the defendant, and unless such is shown to have been the case the motion shall be denied, no matter upon what allegations it is grounded.

The court, on motion of the defendant, shall grant a new trial whenever:

- (1) The verdict is contrary to the law and evidence;
- (2) The courts ruling on a written motion, or an objection made during the proceedings shows prejudicial error;
- (3) New and material evidence that notwithstanding the exercise of reasonable diligence by defendant was not discovered before or during the trial is available, and, had the evidence been introduced at the trial, it would probably change the verdict or judgment of guilty;
- (4) The defendant has discovered, since the verdict or judgment of guilty, a prejudicial error or defect in the proceedings that, notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before the verdict or judgment; or
- (5) The court is of the opinion that ends of justice would be served by the granting of a new trial, although the defendant may not be entitled to a new trial as a matter of strict legal right.

### STANDARD FOR NEW TRIAL

Defendant argues that this Motion for New Trial shall be granted when any one of the above subsections of Article 851 are violated. Defendant avers that La. C.Cr.P. Art. 851 (1), (2), (3) and (5) have created an injustice to the Defendant and requires this Court to grant a new trial.

A summary of Louisiana case law states that a motion for a new trial shall be granted when, on survey of the whole case, it appears to judicial conscious and judgment that otherwise a miscarriage of justice will result. A motion for a new trial must rest on a finding of prejudice to the accused. Defendant asserts that prejudice occurred with the return of the verdict of guilty as charged to attempted 1<sup>st</sup> degree murder of a police officer, when the facts and circumstances require a different verdict.

A verdict contrary to the law and the evidence, is a ground on which the trial judge has a wide discretion and may order a new trial if he feels that the jury was wrong in convicting the defendant. It is the duty of the trial judge to pass upon the sufficiency of the evidence, and his refusal to do so is reversible error. *State v. Daspit*, 167 La. 53, 118 So. 690 (1928).

In *State v. Plummer*, 281 So.2d 716 (La. 1973), the court stated that LSA-C.Cr.P. Art. 851 (1) permits the trial judge to grant the defendant a new trial if the verdict rendered by the jury is contrary to the law and the evidence. This power is exclusively that of the trial judge when inquiry is directed to the alleged insufficiency of the evidence (as contrasted with no evidence at all).

Prejudicial error occurred in this Court's rulings and Article 851(2) embraces trial irregularities and erroneous rulings to the prejudice of the defendant shown by bills of exceptions reserved at the time of the conduct or ruling complained of. Such irregularities include errors committed by the court in the decision of any matter in the course of the trial, improper instructions to the jury, refusal of the court to give a proper instruction requested by the defendant, and erroneous rulings as to the admissibility of evidence.

Additionally, a new trial should be granted as the Defense has discovered new evidence which may have produced a different outcome if known during the trial, pursuant to Article 851(3). As will be shown below, the four elements necessary to establish the granting of a new trial have been satisfied and the failure of this Court to grant a new trial will be contrary to law and the rights afforded a Defendant for a fair and impartial trial.

Finally, Article 851(5) continues the plenary authority of the judge to order a new trial to do justice, even when the motion is not based on a legal ground for a new trial.

**EVIDENCE PRODUCED WAS NOT BEYOND A REASONABLE DOUBT**

The facts and law presented at trial could not have produced a guilty as charged verdict. In *State v. Miller*, 923 So.2d 625, 626 (La. 2006), the Supreme Court affirmed the trial court's granting of a new trial, recognizing that the trial judge is in a unique position to get the feel of the case by observing witnesses first hand as they testify and is allotted wide discretion to grant a motion for a new trial under C.Cr.P. Art. 851(5), to discharge its duty to administer justice. The *Miller* court found that the granting of a new trial was warranted to serve the ends of justice, even though the defendant was not entitled to a new trial as a matter of strict legal right. The basis for granting the new trial in *Miller* was based on hearing all the testimony and reviewing all the evidence, the judge became convinced that one of the state's principal witnesses "was someone who was accustomed to lying."

The facts in the present matter are analogous with the *Miller* case. This trial came down to three witnesses, Officer John Mitchell, Lieutenant Robert Italiano and Officer Kevin Thomas. The testimony at trial from Officer Mitchell was that only one person had a gun, Sye Carter, a co-defendant previously tried in a separate trial. Officer Mitchell testified no less than 5 times during the course of the Sye Carter matter and the matter before this Honorable Court consistently that Sye Carter was the only perpetrator with a gun. On each occasion, Officer Mitchell testified that Sye Carter was the shooter, not the Defendant, Jamil Joyner.

Contrary to Officer Mitchell's overwhelmingly consistent testimony over the course of 4 plus years, Officer Thomas, for the first time ever, testified that Jamil Joyner was the shooter. In fact, testimony elicited during trial showed that shortly after the shooting, Officer Thomas did not know who shot him.

Finally, Lieutenant Italiano, designated as the case investigator, sat in during the trial, testified without ever creating a report and, what will be discussed later, has federal charges pending against him for false statements and representations to FBI agents in a separate post-Katrina shooting and death. Lieutenant Italiano's testimony specifically named the Defendant as the shooter and was included in other reports created by other detectives whom did not have any knowledge of the events. Italiano's hearsay testimony, which was never documented in a report

and his history of false statements and misrepresentations fit within the legal precedent set by the *Miller* case.

This Honorable Court is in a unique position to judge the credibility of the witnesses and decide if a verdict is contrary to the facts and evidence in the case. The Defendant asserts that this is the specific situation to grant a new trial. There were no other eyewitness testimony or evidence linking Jamil Joyner as the shooter of Officer Thomas. With Officer Thomas' sketchy recollection of the case and apparent epiphany at trial that Jamil Joyner was the shooter, this Court should grant a new trial, based on the numerous consistent and unwavering testimony of Officer Mitchell that Jamil Joyner was not the shooter. Furthermore, Lieutenant Italiano's impermissible hearsay testimony that Officer Mitchell told him that the Defendant was the shooter, can be characterized only as a false statements and used only to impeach a consistent Office Mitchell, after listening to his entire testimony. Therefore, the verdict is contrary to the facts and evidence presented at trial and the Defendant should be granted a new trial.

Furthermore, this Court's erroneous decision to not allow Officer Thomas's disciplinary record to be admitted, causing irreparable harm and prejudice to the Defendant. Part of the Defense in this matter and what was elicited at trial had to do with a confrontation between Officer Thomas and the four individuals at the scene. Because there was testimony that words were exchanged, the extensive disciplinary record of Officer Thomas should not have been excluded, but allowed to be introduced during trial to show the propensity of Officer Thomas' aggressive nature. This disciplinary record, which included suspension for an unprovoked attack on a fellow officer and striking him in the jaw, neglect of duty, insubordination, violation of department rules, lack of truthfulness, mishandling of evidence and mishandling of injured subjects, was excluded before any testimony from Office Thomas had been taken. These violations would have lead to credibility determinations by the trier of fact and weighed in their decision to judge the credibility of Officer Thomas. This ruling was clearly erroneous and provided an injustice of presenting a viable defense and irreparable prejudice to the Defendant.

#### **IMPERMISSIBLE HEARSAY TESTIMONY**

The state elicited improper hearsay testimony from Lieutenant Italiano and Detective Fred Austin, as it related to identification of Jamil Joyner as the shooter. The State offered Detective Italiano as their main witness and case agent, who had not created or authored a report

and did not document any statements of anyone during his investigation. Italiano had no first hand knowledge of the events of the case and was only called to impeach the State's own witness, Officer Mitchell. The State offered Lieutenant Italiano under the hearsay exception of prior inconsistent statements. It is clear from the trial transcript that a proper foundation was never laid by the State during their direct examination of Officer Mitchell to allow any impeachment. The Court's error in this regard is that Officer Mitchell's testimony had been consistent and he was never questioned on any inconsistent statements.

The State shortly after Officer Mitchell's testimony, offered Detective Italiano, who over the Defense's objection was allowed to testify to hearsay of Officer Mitchell. Furthermore, Detective Fred Austin took the stand and the hearsay objection was sustained for the exact information that was allowed by this Court from the witness stand by Italiano. This testimony is clearly hearsay and properly ruled upon when the objection was made during Detective Austin's testimony. Unfortunately, Lieutenant Italiano had already testified and the jury was tainted regardless of how Detective Austin may had testified. The Court's ruling as to hearsay was not only improper, but contradictory, as to Italiano and Austin, as they testified to the same out of court statement by Officer Mitchell.

The Court eventually allowed Detective Fred Austin to state what was in his report, because of another erroneous ruling that the Defense "opened the door" to allow the hearsay to be elicited. The Defendant avers that the "door" was never opened and the hearsay remained hearsay and was improperly allowed.

In *State v. Rubin*, 649 So.2d 1240 (La.App. 3 Cir. 1995), the court stated that when an out-of-court statement, such as information received by a police officer during an investigation of a crime, has both an impermissible hearsay aspect and a permissible non-hearsay aspect, the issue of relevancy becomes significantly interrelated with the hearsay issue. If the non-hearsay content of the statement has little or no relevance, then the statement should generally be excluded on both relevance and hearsay grounds. Marginally relevant nonhearsay evidence should not be used as a vehicle to permit the introduction of highly relevant and highly prejudicial hearsay evidence which consists of the substance of an out-of-court assertion that was not made under oath and is not subject to cross-examination at trial. Reversal is mandated only when there is a reasonable possibility that the evidence might have contributed to the verdict.

A reversal is proper for this hearsay issue, as that evidence corroborated Officer Thomas' testimony, which was suspect, as best. The jury clearly used the testimony of Lieutenant Italiano and Detective Austin in their decision of a verdict of guilty as charged. The testimony of these two vital State witnesses was highly prejudicial and allowing such clearly impermissible hearsay into the trial was improper and erroneous. Therefore, a new trial should be granted.

**NEWLY DISCOVERED EVIDENCE AND FORMER NOPD LIEUTENANT ITALIANO**

A defendant seeking a new trial based on newly discovered evidence must establish four elements:

1. that the new evidence was discovered after trial;
2. that failure to discover the evidence before trial was not attributable to his lack of diligence;
3. that the evidence is material to the issues at the trial; and
4. that the evidence is of such a nature that it would probably produce a different verdict in the event of retrial.

*State v. Hammons*, 597 So.2d 990, 994 (La. 1992); *State v. Knapper*, 555 So.2d 1335, 1339 (La. 1990); *State v. Prudholm*, 446 So.2d 729, 735 (La. 1984). In ruling on the motion, “[t]he trial judge’s duty is not to weigh the evidence as though he were a jury determining guilt or innocence, rather his duty is the narrow one of ascertaining whether there is new material fit for a new jury’s judgment.” *Prudholm*, 446 So.2d at 736.

One case in particular describes the necessity of a new trial. In *State v. Perron*, 686 So.2d 994 (La. App. 4th Cir. 1996), Defendant was convicted of illegal discharge of a weapon. The lead detective was former NOPD officer Len Davis. Defense sought a new trial because Davis, who was the State’s primary witness, had an extensive internal affairs investigation, a reputation for brutality, and was later arrested for murder. The 4<sup>th</sup> Circuit affirmed the trial court’s denial of a new trial based on the officer’s involvement in a later murder as it was not “newly discovered evidence” but evidence that did not exist because it hadn’t occurred at the time of trial. Additionally, the Defendant did not establish the State possessed information that would have impeached the officer’s credibility at the time of trial. See *Perron* at 997.

In the opinion rendered by the 4<sup>th</sup> Circuit, the three judge panel stated that, “Generally, only offenses for which the witness has been convicted are admissible upon the issue of his credibility. The credibility of a witness may be attacked or supported by evidence in the form of general reputation only, but the evidence may refer only to character for truthfulness or untruthfulness.” See *Perron* at 997.

This point is important to the case at hand. Lieutenant Italiano was the main witness in establishing that the Defendant was the shooter. Italiano's credibility would have been attacked based on his truthfulness, with the impending indictment by the U.S. Federal Government. Credibility was the key issue throughout this trial and would have definitely changed the juror's impression of Italiano if the knowledge of his false statements and cover-up would have been presented at trial.

In meeting the four elements discussed above, it is clear that the Defendant is entitled to a new trial. Element numbers 1 and 2 are met, as Italiano's indictment was clearly after the trial of this matter and that the Defense could not have known about such indictment as it was filed under seal. Element number 3 is met, as Lieutenant Italiano was designated as the case investigator and his testimony was a key element in proving the State's case. Without Italiano, it becomes a case with no corroborating evidence as to who shot Officer Thomas. Finally, element number 4 is met, as the evidence is of such a nature that it would probably produce a different verdict.

Lieutenant Italiano was designated as the case investigator by the State, although he never created a report and only could testify to hearsay from other available witnesses. As designated as case investigator, Lieutenant Italiano was be considered the State's main witness and in charge of the investigation. As such, he would have control of the entire case.

During the trial, Lieutenant Italiano often left the courtroom to discuss matter with other potential witnesses and was able to testify as he wished, to impeach any witness that did not testify in accordance with the State's theory of the case. Lieutenant Italiano testified, based on memory, to hearsay as to what Officer Mitchell told him, without memorializing it in any report, taping any statements or creating a way to recall what occurred on that chaotic day after Hurricane Katrina.

Lieutenant Italiano is currently indicted for making false statements to the FBI in an incident after Hurricane Katrina in which he is accused of lying about the death of Henry Glover. This newly discovered evidence demonstrates that Lieutenant Italiano made false statements to the FBI about written reports regarding the shooting of Henry Glover, that he was not aware of the shooting of Henry Glover and the eventual burning of Glover's body after the shooting. This indictment shows that Italiano was making false statements shortly after Katrina and may have

made them in this case. The Defense was not aware of this information, and as the lead witness for the State, may have been impeached on this issue and a verdict may have been different.

Lieutenant Italiano's testimony was a crucial part of the evidence incriminating the Defendant. Italiano, based on the indictment, shows a pattern, at least after Hurricane Katrina of falsifying evidence and testimony, which shows dishonesty. Such crucial testimony, that was allowed over the Defendant's hearsay objection, caused irreparable harm to the Defendant and without such testimony, a not guilty verdict was likely. It is apparent from the totality of the testimony, that the only true eyewitness to the incident was Officer Mitchell. His consistent testimony never wavered and without the improper hearsay testimony of an indicted former lieutenant, the verdict more than likely would have been not guilty. The standard here is "probably produce a different verdict" and the evidence and testimony in this case, without Italiano's hearsay statements, would have been different. The basis of a new trial has been met and, as such must be granted.

#### **EVIDENCE IMPROPERLY ADMITTED**

This Court erroneously allowed the introduction of several weapons into evidence, over the Defense's objection, that were never linked to Jamil Joyner or even in his dominion or control. Specifically, two guns were found in a shed near the Defendant's home that were never linked to the Defendant. These guns were seized, removed from their location and placed in the back of the Defendant's grandmother's trunk and photographed. These guns were not linked in any way to the crime or any person involved in the case before the Court. The State introduced these weapons in an attempted to show an arsenal of weapons that the Defendant had at his disposal. Additionally, other weapons found in the Defendant's grandmother's vehicle were not linked to the crime nor in the proximity of the Defendant. These guns were also allowed into evidence and used extensively in closing argument.

There are three cases that demonstrate that the trial court erred in allowing extraneous weapons into evidence during a trial. Although the court did not find the requisite prejudice, all found it to be an error.

In *State v. Villavicencio*, 528 So.2d 215 (La.App. 4 Cir. 1998), the court held that in a murder trial, it was error to admit testimony about a rifle and ammunition removed from the defendant's car immediately after the shooting, as evidence was not relevant to the shooting;



however, the error was not prejudicial since the state did not attempt to link the rifle and the bullets with the shooting. The court stated that the defendant must show that potential prejudice outweighs any probative value of the evidence.

*State v. Landry*, 388 So.2d 699, 704 (La. 1980) held that in a murder trial, the introduction into evidence of a pocket knife found on the defendant at the time of his arrest was error; however not a reversible error since there was little possibility that the jury inferred the pocket knife was associated with the fatal stabbing. *Landry* stated that before demonstrative evidence can be admitted into evidence it must be shown that, more probably than not, the evidence is connected to the case.

*State v. Manieri*, 378 So.2d 931 (La.1979) held that the admission into evidence of three knives that were similar to the ones used in the murder and were in the victims residence was error, but not a reversible error since there was no effort to connect the knives with the crime and there was little possibility that the jurors associated the defendants with the knives.

These cases show that an error occurred but it did not prejudice the Defendant. In this matter it is distinguishable, as the guns were clearly used to show the Defendant as violent and had numerous weapons at his disposal. Most egregious is the two guns found in the shed. These guns had nothing to do with the shooting and were in another yard. The fact that the State used these guns in closing argument and were allowed to be published to the jury created a prejudice that the Defendant could not overcome. The Court's error caused an injustice to the Defendant, as the guns could not be linked to the shooting and allowed the jury to see these guns and decide this matter on the quantity of guns and not the facts of the case. Therefore, a new trial should be granted on the grounds that the extra guns that were not associated with the crime were allowed to be introduced into evidence and shown to the jury during closing arguments.

### **JUROR CONFUSION**

The final basis for a new trial was that this Court's jury instructions were unclear and confusing to the jurors. This Court, through the affidavit of juror Seimone Gilbert was confused on the possible jury verdicts in the case. (See attached affidavit). Specifically, the verdicts enunciated by the Court did not include police officer in the responsive verdicts. Therefore, confusion occurred between several jurors. On the verdict form, the possible verdicts were attempted first degree murder of a police officer, attempted second degree murder, attempted

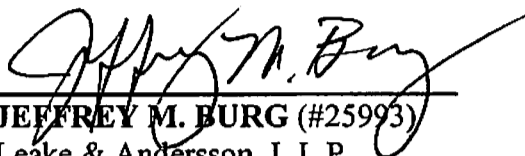
manslaughter, aggravated battery and not guilty. The confusion occurred when it was not explained that all responsive verdict, although not saying police officer, could be a verdict. In other words, the killing of a human being could include a police officer. As in the affidavit, the jurors believed since the only verdict that had police officer in it was attempted first degree murder of a police officer, that was the only proper verdict. Therefore, the verdict form and the instructions, were confusing and lead to an patently confusing and definitionally deficient instruction on the responsive verdicts.

In *State v. Taylor*, 683 So.2d 1309 (La.App. 3 Cir. 1996) the court held that failure to instruct the jury that specific intent to kill is required for attempted manslaughter conviction was not harmless error and thus the defendant was entitled to a new trial. In moving for a new trial the defendant argued that there was proof that the jury verdict could have reasonably been based on incorrect element of specific intent to commit great bodily harm. The defendant was charged with attempting to kill a peace officer engaged in the performance of his lawful duties. He was charged with attempted first degree murder but found guilty of attempted manslaughter on a responsive verdict. The court found that the trial court erred in instructing the jury on the definition of attempted manslaughter in the original jury charges and erred on re-reading the charges in failing to state that the crime of attempted manslaughter requires a specific intent to kill and in omitting the responsive verdict of not guilty. The jury was instructed by the judge that the specific intent to kill was a required element for attempted first and second degree murder but the judge did not expressly inform the jury that the specific intent to kill is required for an attempted manslaughter conviction, but instead simply stated the definition of manslaughter and referred to the previously defined definition of attempt. The facts showed that the verdict could have reasonably been based on the incorrect element, specific intent to inflict severe bodily harm, and the court found this as grounds for defendant to be entitled to a new trial. In finding that a new trial was warranted, the court held that it could not say whether the jury verdict was surely unattributable to the patently confusing and definitionally deficient instruction on the responsive verdict of attempted manslaughter.

Therefore, based on the confusion of the jury as to the responsive verdicts, a new trial is warranted, as a different verdict may have been attained through a clearer explanation of the possible responsive verdicts.

WHEREFORE, Defendant, Jamil Joyner, respectfully requests that this Honorable Court grant a new trial based Article 851 and the reasons more fully explained above.

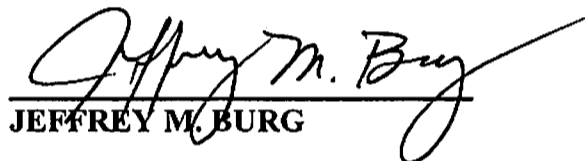
Respectfully submitted:



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**CERTIFICATE OF SERVICE**

I **HEREBY CERTIFY** that on the 19<sup>th</sup> day of July, 2010, the foregoing has been served on all counsel of record herein by hand delivery.



**JEFFREY M. BURG**

CRIMINAL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

CASE NO. 468-443

SECTION "L"

STATE OF LOUISIANA

VERSUS

JAMIL JOYNER, ET AL

FILED: \_\_\_\_\_ DEPUTYCLERK: \_\_\_\_\_

**ORDER**

Considering the foregoing Motion,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that defendant, Jamil Joyner's, Motion for New Trial be granted and a status conference be set for this \_\_\_\_\_ day of \_\_\_\_\_, 2010 at \_\_\_\_\_ o'clock \_\_\_\_\_.m.

New Orleans, Louisiana, this \_\_\_\_\_ day of July, 2010.

\_\_\_\_\_  
JUDGE

**AFFIDAVIT**

STATE OF LOUISIANA

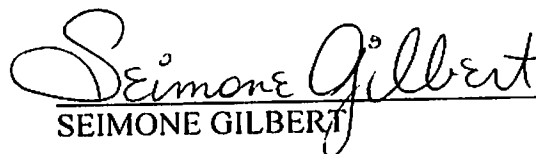
PARISH OF ORLEANS

BEFORE ME, the undersigned notary public, personally came and appeared:

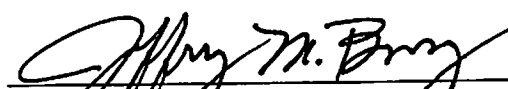
**SEIMONE GILBERT**

being of the full age of majority and a resident of the Parish of Orleans, State of Louisiana, who after being duly sworn did depose and state:

1. That I was selected and served as a juror in the case entitled *State of Louisiana v. Jamil Joyner and Vincent Walker*, Criminal District Court for the Parish of Orleans, Case # 468-443, which trial proceeded between the dates of January 11, 2010 and January 15, 2010.
2. That, as a juror, I participated in deliberations and discussions with fellow jurors on the facts and circumstances of the case and the law as it was explained to us by the Judge, after being present throughout the entirety of the trial, and after hearing the testimony of the witnesses and available evidence from both the State and the defense.
3. That during deliberations, the jurors had questions about the definitions of the crimes and the possible responsive verdicts. Specifically, there was a question whether or not any verdict other than attempted first degree murder could be returned if the jury found the victim was a police officer.
4. That after sending the question to the judge and being brought into the courtroom, the judge advised that he was prohibited from answering any questions of the jury and simply re-read the definitions of the verdicts and did not clear up the question of what verdicts were available and responsive.
5. That when the jury retired to the jury room, the majority decided that since the only verdict that mentioned a police officer was attempted first degree murder, that that was the only verdict applicable, and subsequently 10 of the 12 jurors voted for the verdict.
6. That attempted manslaughter was considered, but was refused by the jurors because it did not contain the words "police officer".
7. That I know if each of the other verdicts would have contained the words "police officer", or if it would have been explained by the judge that the other verdicts would have been nevertheless responsive, then the verdict would have been different.
8. That because of this confusion on the applicability of the verdicts, I do not believe that a just verdict was reached.
9. Further, affiant saith not.

  
SEIMONE GILBERT

SWORN TO AND SUBSCRIBED  
BEFORE ME, NOTARY PUBLIC,  
THIS 1<sup>st</sup> DAY OF July, 2010.

  
NOTARY PUBLIC  
**JEFFREY M. BURG**  
NOTARY PUBLIC  
LSBA # 25993  
STATE OF LOUISIANA  
MY COMMISSION IS ISSUED FOR LIFE.