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**IN THE SUPREME COURT  
STATE OF GEORGIA**

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**ROBERT MITCHUM,**

**Appellant,**

**v.**

**STATE OF GEORGIA,**

**Appellee.**

**Case No. S19A0554**

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**BRIEF OF APPELLEE**

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**J. THOMAS DURDEN, JR.**

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**BRIEF OF APPELLEE**

**STATEMENT OF JURISDICTION AND PROCEDURAL HISTORY**

Appellant, Robert Mitchum, was convicted of the offense of Felony Murder after a jury trial in Bryan County, Georgia on October 27, 1999. Tr. 398. Accordingly, said matter falls within the jurisdiction of the Supreme Court of the State of Georgia for the purpose of an appeal. Ga. Const. Art. VI, § VI, Para III (5) and (8). Pursuant to Georgia law, Defendant received a sentence of life imprisonment. Tr. 399. Following said conviction, Appellant filed a Motion for New Trial which was denied in the Superior Court of Bryan County, Georgia on September 29, 2000. R. 348-353. Accordingly, Appellant filed a Notice of Appeal and the conviction was affirmed by this honorable Court. R. 357. Appellant then filed an Extraordinary Motion for New Trial in the Superior Court of Bryan County, Georgia on April 15, 2016, which was denied on September 6, 2018. R. 430-431. This honorable Court granted Appellant's Application for Discretionary Appeal of the trial court's denial of his Extraordinary Motion for New Trial for his felony murder conviction on November 1, 2018. R. 440.

**SUMMARY OF THE ARGUMENT**

The Appellee contends that the Appellant's argument regarding the Trial Court Judge (David L. Cavender), Senior Superior Court Judge (John R. Harvey),

Assistant District Attorney (John D. Harvey) and Law Enforcement Officer (Joseph Waters) eating in close proximity to trial jurors does not provide a valid basis for an Extraordinary Motion for New Trial and that the trial court did not abuse its discretion in denying Appellant's Extraordinary Motion for New Trial. In support of said argument, the Appellee asserts that Appellant's claim was not properly raised because it does not constitute newly discovered evidence and does not meet the requirements under Georgia law to constitute a valid Extraordinary Motion for New Trial. Furthermore, the trial court did not abuse its discretion in denying said Motion because Georgia law provides broad authority to the trial court judge to rule on said Motions when the Extraordinary Motion for New Trial fails to show any merit. For these reasons, the Appellees argue that the Appellant's claims should be denied.

### **ISSUES RAISED ON APPEAL**

The issues raised on appeal are, as follows:

- I. Could Mitchum properly raise his claim in an extraordinary motion for new trial?
- II. If Mitchum's claims were properly raised, did the trial court err in denying the motion?

In addressing said issues raised on appeal, the State answers both questions in the negative for the reasons listed below.

## ARGUMENT AND CITATION OF AUTHORITY

### **I. Could Mitchum properly raise his claim in an extraordinary motion for new trial?**

A Motion for New Trial made subsequent to the 30-day period after entry of judgment is referred to as an Extraordinary Motion for New Trial. O.C.G.A. § 5-5-41. Such motions are not favored and are granted only when there is “some good reason” shown as to why the motion was not made during the 30-day period. O.C.G.A. § 5-5-41(a); *see also Patterson v. State*, 228 Ga. 389, 390-91 (1971); *Dyal v. State*, 121 Ga. App. 50, 50 (1970). Normally, the “good reason” necessary to justify the filing of an Extraordinary Motion for New Trial consists of “newly discovered evidence.” *See Dyal*, 121 Ga.App. at 50. An Extraordinary Motion for New Trial cannot be based on matters that were known to the movant and could have been articulated in a timely-filed motion or that could have been discovered in time through the exercise of proper diligence. *See Patterson*, 228 Ga. at 390-391. Furthermore, for an Extraordinary Motion for New Trial on the ground of newly discovered evidence to be a valid motion, it must appear that the newly discovered evidence is not merely cumulative or impeaching, and that the newly discovered evidence would likely produce a different result. *Id.* at 51.

In analyzing the allegations made by Appellant in the context of applicable Georgia law, Appellee contends that Appellant could not properly raise his claim

in an Extraordinary Motion for New Trial. First, Appellant's assertion that he is entitled to a granting of an Extraordinary Motion for New Trial based on newly discovered evidence lies solely in speculative claims made by parties who were present at the trial of the case. R. 404-414. Accordingly, Appellees do not acquiesce as to the validity of such claims and only use such allegations for the purpose of making legal arguments in this brief. In making said claims regarding parties to the case eating in close proximity to trial jurors, they acknowledge that Appellant's attorney was present and witnessed said alleged actions. R. 404-414. Thus, this would not be considered newly discovered evidence as his attorney had first-hand knowledge and witnessed the event that comprises the substance of said allegations.

In addition, Appellee contends that the Appellant likely knew of said allegations or could have obtained knowledge of them through proper diligence by conferring with his attorney or the affiants. In doing so, said allegations should have been raised in the original Motion for New Trial or in a Habeas Corpus petition. Furthermore, even assuming that Appellant's claims are valid and that his allegations do constitute newly discovered evidence, Appellant still does not satisfy the requirement in *Patterson* that the newly discovered evidence would likely produce a different result. Consequently, the Appellee contends that

Appellant's claim was not properly raised in an Extraordinary Motion for New Trial.

**II. If Mitchum's claims were properly raised, did the trial court err in denying the motion?**

In general, Extraordinary Motions for New Trial are not favored by Georgia courts. *Patterson*, 228 Ga. at 390. As to the requirements that must be met by a movant, a movant's extraordinary motion for a new trial based on newly discovered evidence must satisfy the court: (1) that newly discovered evidence has come to the movant's attention since his trial; (2) that want of due diligence was not the reason that his evidence was not acquired sooner; (3) that the evidence was so material that it would produce probably a different verdict; (4) that it was not cumulative only; (5) that the affidavit of the witness is attached to the motion or its absence is sufficiently explained; and (6) that the new evidence does not operate solely to impeach the credibility of a witness. *Dick v. State*, 248 Ga. 898, 899-900 (1982). Implicit in the above-referenced requirements is that the newly discovered evidence would have been admissible at trial. *Timberlake v. State*, 246 Ga. 488, 491 (1980). While a hearing by the trial court is normally required on an Extraordinary Motion for New Trial, an exception exists when the Extraordinary Motion for New Trial lacks merit. *Dick*, 248 Ga. at 899. Thus, if such circumstances exist, the trial court judge may deny the Extraordinary Motion for New Trial without a hearing. *Id.* at 901. As to the requirements for granting an

extraordinary motion for new trial, it is incumbent on a party who asks for a new trial on the ground of newly discovered evidence to satisfy the court as to each of the six necessary requirements, and the trial court's denial of the motion will not be reversed absent an abuse of discretion. *Id.* Likewise, when the trial court considers the ground(s) for an extraordinary motion for new trial, it acts as the trier of fact, and its ruling on the motion will not be disturbed absent a manifest abuse of discretion. *Cade v. State*, 107 Ga.App. 30, 30 (1962).

In analyzing the instant case under well-settled Georgia law, it is clear that the trial did not abuse their discretion in denying Appellant's motion. Appellant's argument, as stated by the trial court in their order filed September 6, 2018, fails to meet one of the mandatory requirements that the evidence was so material that it would produce probably a different verdict. Appellant's argument clearly does not meet said requirement and the trial court ruled accordingly when it denied Appellant's Extraordinary Motion for New Trial. Furthermore, in light of the fact that Georgia law provides broad discretion to the trial court to determine matters raised in an Extraordinary Motion for New Trial, and such determinations will not be reversed absent a manifest abuse of discretion, Appellees contend that the trial court took appropriate action in denying Appellant's Extraordinary Motion for New Trial.

**CONCLUSION**

After consideration of all issues raised in this appellate matter, and in light of all applicable Georgia law, the Appellee asserts that Appellant did not properly raise his issue in an Extraordinary Motion for New Trial and the trial court did not err in denying Appellant's Motion. Accordingly, the Appellee requests that Appellant's appeal be denied and the trial court's order denying Appellant's Extraordinary Motion for New Trial be affirmed.

Respectfully submitted, this 14<sup>th</sup> day of February, 2019.

s:\ J. Thomas Durden, Jr.

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**CERTIFICATE OF SERVICE**

This is to certify that Appellee has this date served opposing counsel and the Office of the Attorney General with a true and correct copy of the Brief of Appellee, by placing said Brief in the United States Postal Service with sufficient postage to ensure delivery addressed as follows:

The Honorable Chris Carr  
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Respectfully submitted, this 14<sup>th</sup> day of February, 2019.

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