No. S19A0554

IN THE

SUPREME COURT OF GEORGIA

ROBERT MITCHUM
Appellant,

v.

STATE OF GEORGIA
Appellee.

Brief of Appellant

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JURISDICTIONAL STATEMENT

This Court entered an order granting Robert Mitchum's discretionary application for appeal from the Superior Court of Bryan County on November 1, 2018. R. 440. Pursuant to Article VI, Section VI, Paragraph III of the Georgia Constitution, unless otherwise provided by law, this Court has appellate jurisdiction over all cases involving extraordinary remedies and cases where "a sentence of death was imposed or could be imposed." Ga. Const. art. VI, § VI, para III(5) and (8). Because this case involves a murder conviction and a subsequent extraordinary motion for new trial, this Court has appellate jurisdiction.

STANDARD OF REVIEW

"The grant or denial of an extraordinary motion for new trial is reviewed under an abuse of discretion standard." *Patterson v. Whitehead*, 224 Ga. App. 636, 639 (1997). Thus, a trial court's ruling will be set aside only if "it affirmatively appears that the court abused its discretion." *Davis v. State*, 283 Ga. 438, 440 (2008) (quoting *Young v. State*, 269 Ga. 490, 491–92 (1998)). In reviewing a lower court's decision for abuse of discretion, courts consider whether any evidence exists to support the trial court's factual findings. *Bell v. State*, 227 Ga. 800, 809 (1971) (quoting *Stephens v. State*, 99 Ga. 200 (1896)). *See also Cohen v. Nudelman*, 269 Ga. App. 517 (2004). Though the trial court sits as the finder of fact and has wide latitude to determine the merits of an extraordinary motion for

new trial, a lower court judge's discretion is not unlimited. *Dick v. State*, 248 Ga. 898, 901 (1982). Accordingly, where a trial court fails to consider the evidence before it, this Court should exercise its judicial oversight to ensure that the ends of justice are met. *King v. State*, 174 Ga. 432, 441–442 (1932).

SUMMARY OF THE ARGUMENT

Extraordinary circumstances call for extraordinary remedies. Criminal defendants, victims, and the public at large deserve a justice system that takes into account all of the facts, weighs the implications of its actions, and hands down a judgment that comports with our ideals of what is just.

By their very nature, most jury contamination claims present issues that were not discovered during trial. Instead, these issues involve post-trial discoveries that tend to vitiate a verdict and are only viable through an extraordinary motion more than thirty days after the trial court's judgment.

In the case below, Robert Mitchum submitted evidence that calls into question whether officials responsible for prosecuting and presiding over his murder trial may have had improper communications with the jury that convicted him. Because this claim involves facts that were not presented at trial, his extraordinary motion for a new trial is proper.

STATEMENT OF THE CASE AND FACTS

More than two years after Robert Mitchum filed his pro se Extraordinary Motion for New Trial (R. 391), the Superior Court of Bryan County denied relief in a two-page order filed on September 6, 2018. R. 430–31. Robert Mitchum, having filed a Notice of Intent to Seek Writ of Mandamus to compel an order in his case (R. 424) and a second Rule Nisi requesting a hearing on his motion (R. 427),

then filed his notice of appeal. R. 434. This Court granted discretionary review and instructed parties to address the following two questions:

1) Could Robert Mitchum properly raise his claim in an extraordinary motion for new trial?

2) If Robert Mitchum's claims were properly raised, did the trial court err in denying the motion?

Thereafter, the Mercer Law School Habeas Project entered as pro bono appellate counsel and requested an extension so that supervising counsel and students might receive and become familiar with the record. The Court granted a twenty-day extension, and a copy of the Order granting the extension is attached as Exhibit A. This brief follows, signed by counsel and by third-year law students approved to practice before this Court in accordance with Ga. Sup. Ct. Rule 4(i).

Mr. Mitchum's extraordinary motion for new trial challenges his 1999 convictions for felony murder and aggravated assault. Tr. 398. During his two-day murder trial, Mr. Mitchum asserted defenses of justification and self-defense in charges related to the death of the victim, Charles Howell. Tr. 8, 112, 241, 285. Mr. Mitchum's trial counsel, however, failed to give proper notice of his intention to present evidence of the victim's prior violent acts, and was thus precluded from doing so. Tr. 3–8. Remaining eyewitnesses offered conflicting testimony about the events at issue in the case (Tr. 52, 87), and the jury returned a guilty verdict only a few hours after its recess on October 27, 1999. Tr. 397–98.

Mr. Mitchum challenged his conviction and sentence in a Motion for New Trial and direct appeal; both were affirmed by this Court in *Mitchum v. State*, 274 Ga. 75 (2001). Over the next several years, he filed a number of other requests for transcripts and other material related to his case. *See* R. 358–90.

On April 15, 2016, Robert Mitchum submitted along with his Bryan County Extraordinary Motion for New Trial two affidavits stating that officials responsible for prosecuting his case had engaged in improper communications with impaneled jury members.[1] R. 404- 14. According to these affidavits, the first series of improper communications occurred immediately after voir dire proceedings were concluded on October 5, 1999 (R. 404–05, 409–10), and the second series of improper communications occurred while the jury was deliberating October 27, 1999 (R. 406–08, 411–12).

The affidavits alleged that on October 5, 1999, the prosecutor in the case, the prosecutor's father (the senior superior court judge of that county), the presiding trial judge, and the lead Bryan County investigator on the case, ate dinner with sworn jury members. R. 404–14. One affidavit stated, "The entire group seated themselves together at two long adjacent tables, located in back corner dining area of Cowart's Cafe." R. 410.

[1] Mr. Mitchum's Extraordinary Motion for New Trial was filed on February 8, 2016 (R. 391–403), followed on April 15, 2016 by motions, a brief, and affidavits in support. R. 394–414

Both affidavits further allege that on the second day of trial, while the jury was excused from deliberations for lunch recess, the affiants "watched as Sr. Judge John R. Harvey and Trial Judge David L. Cavender seated themselves at a long table with the group of hereinabove named jury members." R. 405.

The Superior Court of Bryan County denied Mr. Mitchum's Extraordinary Motion for New Trial without granting a hearing on the grounds presented. R. 430 –31.

ARGUMENT

"In all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury . . . and to have the assistance of counsel for his defense." U.S. Const. amend VI. This Court has recognized that we must strive for justice to be "both pure and free from the suspicion of impurity." *Harris v. State*, 150 Ga. 680, 682 (1920) (recognizing that unauthorized communication with jury members "ought to vitiate a verdict").

Today, Georgia's Constitution notes the invaluable role every citizen plays in our democracy when they serve on an empaneled jury. *See generally* Ga. Const. art I, § I, para. XI; *id.* art. VI, § II, para. VI. Georgia's Bill of Rights recognizes that "[t]he right to trial by jury shall remain inviolate," guaranteeing criminal defendants the right to "a public and speedy trial by an impartial jury." Ga. Const.

art I, § I, para. XI. Article 6 of Georgia's Constitution recognizes that when an impartial jury cannot be obtained where venue would ordinarily lie, courts of this State have the duty to transfer the case in order to avoid circumstances that would undermine public confidence in the system. *See* Ga. Const. art. VI, § II, para. VI.

I. ROBERT MITCHUM PROPERLY RAISED HIS JURY CONTAMINATION CLAIM IN AN EXTRAORDINARY MOTION FOR NEW TRIAL.

This Court has recognized since the 19th Century that an extraordinary motion for new trial requires evidence of an unusual situation—a situation that would not typically occur in the orderly pursuit of justice. *Cox v. Hillyer*, 65 Ga. 57, 59–60 (1880). There is not, however, an exhaustive list or bright-line rule establishing which claims may or may not be brought through an extraordinary motion.[2] Instead, any claim that meets the six statutory factors set forth in *Timberlake v. State*, 246 Ga. 488 (1980), qualifies as an appropriate claim for an extraordinary motion. *See Williams v. Georgia*, 349 U.S. 375 (1955) (equal protection and petit jury selection); *State v. Simmons*, 321 Ga. App. 688 (2013)

[2] Although extraordinary motions typically involve newly discovered evidence, O.C.G.A. § 5-5-41 does not require new evidence—"the late filing of a motion for new trial may also be predicated on circumstances other than newly discovered evidence." *Ford Motor Co. v. Conley*, 294 Ga. 530, 540 (2014) (quoting *Fowler Props., Inc. v. Dowland*, 282 Ga. 76, 79 (2007)).

(mobile phone records); *Humphrey v. State*, 207 Ga. App. 472 (1993) (newly discovered witness); *Britten v. State*, 173 Ga. App. 840 (1985) (paternity testing).

Title 5, Chapter 5, Article 3 of the Official Code of Georgia governs the procedure for granting motions for new trial, and Section 5-5-41 governs extraordinary motions for new trial. O.C.G.A. § 5-5-41 (2018). After the thirty-day window for a typical motion for a new trial has ended, a criminal defendant may, for "good reason," submit an extraordinary motion for a new trial. *O.C.G.A. § 5-5-41(a) (2018)*. The only statutory requirement for such a motion is that the case must present "extraordinary" circumstances. O.C.G.A. § 5-5-41(b) (2018).

As the name implies, extraordinary motions are designed to handle exceptional matters. *See Harris*, 150 Ga. at 682 (reasoning that the grounds for an extraordinary motion "must be laid in the very foundations of the purity of jury trial"). When the nature of a claim presents issues that do not typically lend themselves to discovery at trial—such as when jury members willfully conceal their partiality—those claims implicate "the purity of jury trial[s]" and can be properly brought through extraordinary motions. *Id.* at 684 (reasoning that extraordinary motions are the proper vehicle for claims alleging jury member partiality) (citing *Doyal v. State*, 73 Ga. 72 (1884) and *Smith v. State*, 2 Ga. App. 574 (1907)).

As early as 1885, this Court recognized that extraordinary motions for new trial were meant to replace bills in equity. *East Tenn., Va. & Ga. R.R. v. Whitlock*, 75 Ga. 77, 81 (1885). Prior to the creation of a statutory right, litigants were forced to rely on courts sitting in equity to enjoin a prior judgment and order a new trial, which required proof "of some fact that would render enforcement of the judgment inequitable." BILL, Black's Law Dictionary (10th ed. 2014). In order to do so, litigants were required to plead the existence of a fact that was "either unavailable or unknown to the party at trial through fraud or accident." *Id.* The new statute authorized parties to petition courts at law to provide necessary relief from a judgment when, because of fraud or accident, a party was unaware of a fact that would tend to undermine confidence in the outcome. *See Whitlock*, 75 Ga. at 81.

Despite the codification of extraordinary motions, this Court has recognized that "[t]here is no affirmative statutory authority for extraordinary motions for new trial. Instead, they are authorized indirectly" by the Official Code of Georgia. *Dick*, 248 Ga. at 899 n.2. As a result, this State has, over time, established through case law the types of claims that may or may not be brought through extraordinary motions. *Id.* at 899. Under current standards, individuals must satisfy six factors: (1) the evidence relied on as grounds for a new trial must have been discovered by the movant after trial; (2) the failure to discover the evidence at an earlier date was

not a result of the defendant's lack of diligence; (3) the evidence would have been material at the original trial; (4) the evidence was not merely cumulative; (5) if affidavits are required, they were procured; and (6) the evidence would not be solely for the purpose of impeaching a witness's credibility. *Timberlake*, 246 Ga. at 491.

In its simplest form, the extraordinary motion was designed for evidence "relat[ing] to a particular material issue concerning which no witness has previously testified, or [evidence] of a *higher and different grade* from that previously had on the same material point" such that it would not have been merely cumulative from what was presented at trial. *See Simmons*, 321 Ga. App. 688 (emphasis in original). As a result, where an extraordinary motion raises facts that, if true and timely presented, authorize the grant of a new trial—judges have the duty to meaningfully consider these facts to ensure that ends of justice are achieved. *See King*, 174 Ga. at 442 (Russell, C.J., dissenting) (The refusal of the trial judge to even dignify the proceedings by which the defendant sought to obtain a new trial with his notice was certainly such an error that the judgment of the lower court should have been reversed. As a consequence, I dissent").

Although trial judges have discretion to determine whether an extraordinary motion should be granted, this Court, through its "powers and prerogatives," has a

constitutional duty to exercise judicial oversight. *See Id.* at 441–42 (Russell, C.J., dissenting) (reasoning that if the Supreme Court of Georgia provided trial courts with too much deference, "the Supreme Court [would be] a useless body, constituted only to decide such questions as to which the trial judge wishes to obtain direction and instruction"); *Bell*, 227 Ga. at 809 ("While the statute states that a new trial 'may be granted' this does not mean that in a proper case, where all the rules of law have been met, a new trial may or may not be granted . . . it means that in such a case a new trial must be granted.").

A. When litigants discover evidence of jury contamination after a verdict has been rendered, their claims may be properly brought through an extraordinary motion for new trial.

Issues regarding the right to a fair trial by jury have always been considered appropriate claims for an extraordinary motion because "[t]here is no higher purpose to be subserved in the administration of the criminal law than that every defendant shall be accorded a trial by jury, and jury trial[s are] a mockery unless the jury be not only impartial, but also beyond just suspicion of partiality." *See, e.g., Smith v. State*, 2 Ga. App. 574, 574 (1907) ("evidence of the juror's disqualification . . . presented a good extraordinary ground [for] a motion for a new trial.") This recognition that extraordinary motions are proper procedural vehicles for jury impartiality claims stems from the notion that defendants should not have

the burden of "making a searching investigation out of court to determine whether the jurors who are summoned are disqualified." *See id.* ("Not only is such a duty not placed by the law upon parties and their counsel, but the contrary practice is to be encouraged for obvious reasons.").

As early as 1920, this Court recognized that extraordinary motions for new trial may rely on newly discovered evidence that an individual interfered with a jury member's impartiality. *See generally Harris*, 150 Ga. 680. In doing so, this Court recognized that "after a jury shall have been charged . . . all communication between them and the rest of mankind shall be suspended, except by permission of the court, until they shall have been discharged from the case," and "[t]he ascertainment that some unauthorized communication had been had with the jury, the nature and purport of which was unknown, ought to vitiate a verdict." *Id.* at 682–83. Jury impartiality claims, however, are not limited to instances where there was improper contact. It is sufficient grounds for an extraordinary motion for a new trial if a jury member's ability to remain impartial is called into question by a distant familial relationship, *Crawley v. State*, 151 Ga. 818 (1921),[3] or by

[3] Although *Crawley* held that a relationship within the ninth degree disqualified a juror, this Court recognized that a subsequent act by the Georgia legislature fixed the "disqualifying degree" at the sixth degree. *Garrett v. State*, 203 Ga. 756, 769 (1948).

statements made to third parties indicating a predetermination of guilt. *Williams*, 349 U.S. at 387 n.13 (citing *Doyal v. State*, 73 Ga. 72 (1884)). Thus, when a verdict has been rendered by a jury lacking impartiality, it results in a miscarriage of justice that soils a jury trial's purity, "and no matter how heinous the crime committed, the preservation of that purity is of more consequence than the speedy punishment of any one man for any one offense, and public policy, as well as individual right[s], demand a new trial." *Id.*

After his trial in 1999, Robert Mitchum submitted two affidavits alleging multiple instances of improper communications with impaneled jury members R. 404–14. As alleged, these repeated instances of improper communication between jurors and trial officials raise serious constitutional questions.

As a result, the affidavits tendered by Robert Mitchum raise sufficient grounds to support an extraordinary motion, and, tracking language from *Williams*, public policy and individual rights demand a new trial. 349 U.S. at 387 n.13. Accordingly, we answer this Court's question about whether Robert Mitchum could properly raise his claim in an extraordinary motion for new trial in the affirmative.

II. THE TRIAL COURT IMPROPERLY DENIED MR. MITCHUM'S EXTRAORDINARY MOTION FOR NEW TRIAL.

Extraordinary circumstances call for extraordinary remedies. O.C.G.A. § 5-5-41 (2018). That is precisely why, since *Berry v. State*, 10 Ga. 511, 513,was decided in 1851, this Court has repeatedly held that a defendant's discovery of new evidence that "is so material that it would probably produce a different verdict" requires an evidentiary fact finding by a fair and impartial judge.

Here, Robert Mitchum alleges evidence of jury contamination discovered since his 1999 capital murder trial that constitutes structural error requiring a new trial. *See* R. 404-14. However, when the weight or credibility of the evidence is in question, Georgia courts should conduct evidentiary hearings to resolve disputes of fact. *See Drake v. State,* 248 Ga. 891 (1982); *Stroud v. State,* 247 Ga. 395 (1981); *Brown v. State,* 209 Ga. App. 314, 316 (1993).

Mr. Mitchum's extraordinary motion was denied without a hearing on September 6, 2018, in a two-page opinion issued more than two years after his initial filing. R. 390. In a one-sentence analysis of the legal issues raised below, the trial court found "the defendant ha[d] failed to make an adequate showing for an extraordinary motion for new trial" and denied the motion. R. 431. Questions about the credibility and materiality of Mr. Mitchum's evidence have been left unresolved.

Courts must grant a new trial on the basis of newly discovered evidence where a defendant shows that:

> (1) the evidence has come to his knowledge since the trial; (2) that it was not owing to the want of due diligence that he did not acquire it sooner; (3) that it is so material that it would probably produce a different verdict; (4) that it is not cumulative only; (5) that the affidavit of the witness himself should be procured or its absence accounted for; and (6) that a new trial will not be granted if the only effect of the evidence will be to impeach the credit of a witness.

Timberlake, 246 Ga. at 491; *Emmett v. State*, 232 Ga. 110, 117 (1974); *Bell*, 227 Ga. at 805; *Burge v. State*, 133 Ga. 431, 432 (1909); *Berry*, 10 Ga. at 527.

This Court has instructed Mr. Mitchum to answer whether the trial court erred in denying his motion. Mr. Mitchum answers that question in the affirmative and asks that his case be reversed and remanded for an evidentiary hearing on the *Timberlake* factors. Below, this brief will address why Mr. Mitchum is entitled to an evidentiary hearing on the jury contamination claim and how the claim he raises comports with the six-factor *Timberlake* test.

A. Because Robert Mitchum's jury contamination claim undermines confidence in the verdict, Robert Mitchum is entitled to an evidentiary hearing.

Where a criminal defendant proffers newly discovered evidence that facially establishes that it "is so material that it would probably produce a different verdict," due process requires that a new trial be granted. *Timberlake*, 246 Ga. at

491. However, when the discovery of this type of new evidence is alleged in an extraordinary motion, but specific questions remain as to the credibility and weight of the evidence, Georgia courts should order an evidentiary hearing. "[A]n extraordinary motion for new trial which fails to show any merit may be denied without the necessity of a hearing." *Dick,* 248 Ga. at 899 (citing *Shockley v. State,* 230 Ga. 869 (1973); *Foster v. State,* 230 Ga. 870 (1973)). Nonetheless, if the extraordinary motion for new trial contains facts sufficient to satisfy *Timberlake*, it is error—at a minimum—to fail to hold an evidentiary hearing.[4] *Id.*; *Bell,* 227 Ga. at 809 (reversing trial court's denial of a motion for new trial on the basis of newly discovered evidence because the court failed to exercise its discretion as finder of fact to determine the credibility of the evidence).

This issue calls into question whether Mr. Mitchum received a trial by a fair and impartial jury. The affidavits constituting newly discovered evidence allege repeated unauthorized communications and contact among Mr. Mitchum's trial judge, prosecution, and jury throughout his murder trial—extraordinary misconduct requiring an extraordinary remedy at law. Because Mr. Mitchum's sole defense at trial was justification and virtually every trial witness offered conflicting

[4] Georgia courts have routinely held evidentiary hearings to examine the value of criminal defendants' newly discovered evidence where questions of fact and materiality remain. *See, e.g., Drake,* 248 Ga. 891; *Stroud,* 247 Ga. at 396; *Brown*, 209 Ga. App. at 316.

testimony on crucial details of the night in question (Tr. 52,63, 87, 100, 114, 121), state officials' unauthorized contact with jurors was particularly prejudicial to Mr. Mitchum. However, the extent to which state officials may have influenced the jury has not yet been weighed or determined by a finder of fact. Accordingly, this Court should remand Mr. Mitchum's case to the Bryan County Superior Court for an evidentiary hearing on the merits.

B. Robert Mitchum is entitled to an evidentiary hearing because his jury contamination claim comports with *Timberlake*'s six-factor test.

To prevail on an extraordinary motion for new trial, a defendant must first show that the new evidence in question came to light only after the conclusion of trial. *Timberlake*, 246 Ga. at 488. Thus, any evidence acquired by the defense at any time after trial is considered "newly discovered." *Bharadia v. State,* 297 Ga. 567, 572 (2015).

Furthermore, a defendant must show that the evidence was "previously impossible to ascertain by the exercise of proper diligence." *Patterson v. State,* 228 Ga. 389, 390 (1971). Persons seeking a new trial on the basis of newly discovered evidence have a duty to reasonably investigate their cases. *See Timberlake*, 246 Ga. at 491–492. Moreover, this Court has also recognized that litigants must exercise due diligence in bringing their claims to court. *See Drane v. State*, 291 Ga. 298, 304 (2012) ("[W]e note that the diligence requirement ensures that cases are

litigated when the evidence is more readily available to both the defendant and the State, which fosters the truth-seeking process.")

After trial, Mr. Mitchum submitted evidence alleging that his trial jury had a series of improper, unauthorized communications with the presiding judge, the prosecuting attorney, the lead investigator for the State, and a senior judge who was the father of the prosecutor. R. 404–14.

These affidavits attached to his 2016 Extraordinary Motion for New Trial describe two separate occasions in which the affiants observed state officials sharing meals and communicating with the trial jurors. R. 404–14. As the affiants described interactions, "The jurors were laughing and conversing back and forth with both Judges, as well as amongst each other" in a secluded area of a local restaurant, Cowart's Cafe. R. 406. The affidavits report a second prohibited interaction during jury deliberations, only a few hours before the jury returned a guilty verdict of felony murder in Mr. Mitchum's case. Tr. 397–98. Because Mr. Mitchum alleges in his Extraordinary Motion for New Trial that he did not learn of the jury contamination until after the conclusion of his trial, this evidence is newly discovered.

Mr. Mitchum has exercised due diligence in his case. Because Mr. Mitchum alleges that his trial counsel, trial judge, prosecuting attorney, and jury concealed the unauthorized communications from him before the conclusion of trial—and no

reasonable litigant would presume misconduct of this nature—evidence of this jury contamination claim was previously impossible to ascertain. He was able to procure these affidavits for the first time in 2015 because, as alleged in the sworn statements, the affiants were afraid to speak out publicly about the events they witnessed during trial "out of a real fear of reprisal and retaliation by Bryan County Court Officials." R. 407. Shortly after receiving the affidavits on December 8, 2015, Mr. Mitchum exercised due diligence in bringing his newly discovered jury contamination claim before the courts in the form of an extraordinary motion for new trial. R. 391.

Moving to the third prong of *Timberlake*, to secure a new trial on the basis of newly discovered evidence, a defendant must prove that the evidence is "so material that it would probably produce a different verdict." *Timberlake*, 246 Ga. at 491. In weighing the probative value of the newly discovered evidence, "the court does not ignore the testimony presented at trial." *Davis*, 283 Ga. at 447. But despite *Timberlake's* "high" standard of materiality viewed in the light most favorable to the verdict, *Crowe v. State*, 265 Ga. 582 (1995), claims of invidious error that undermine the entire trial process do not require the finder of fact to speculate as to the litigant's injury. *See Williams*, 349 U.S. at 384 ("It will not do to speculate on whether the accused suffered actual injury, when so vital a right has been violated. There are some conditions from which injury will be presumed.").

Here, the fairness of Mr. Mitchum's entire murder trial would have been undermined by unauthorized communications between the trial jury, the judge, and other state actors. The repeated instances of alleged improper communications between state officials responsible for prosecuting the death of the victim implicate Mr. Mitchum's right to trial by a fair and impartial jury. *See Harris*, 150 Ga. at 682. The facts averred in the affidavits paint an extreme picture of injustice, with a jury left ripe for influence from the moment it was empaneled. As such, Mr. Mitchum's evidence of jury contamination is just the sort of material issue that would undermine the verdict.

Next, a litigant seeking a new trial must prove that the newly discovered evidence is not merely cumulative of evidence presented at trial. *Timberlake*, 246 Ga. at 491. "The true test as to whether evidence is cumulative depends not only on whether it tends to establish the same fact, but it may depend on whether the new evidence is of the same or different grade." *Brown*, 265 Ga. at 806. This Court has held that "only when newly discovered evidence either relates to a particular material issue concerning which no witness has previously testified . . . . that it will ordinarily be taken outside the definition of cumulative evidence." *Id*. Here, the information presented in Mr. Mitchum's affidavits was never presented at trial. As such, it is not cumulative.

Finally, the last two requirements to obtain a new trial on the basis of newly discovered evidence are that (a) a defendant must provide an affidavit in support of his new evidence and (b) he must show that the new evidence does not serve merely to impeach the credibility of a trial witness. *Timberlake,* 246 Ga. at 491.

In this case, Mr. Mitchum has provided two affidavits in support of his claim. R. 404-14. Therefore, Mr. Mitchum has satisfied the fifth prong of Timberlake. *Id.* Moreover, Mr. Mitchum's newly discovered evidence of jury contamination does not in any way impeach the testimony of any witness presented at trial. Accordingly, Mr. Mitchum also satisfies the sixth and final prong of *Timberlake*. *Id.*

In its order summarily denying Mr. Mitchum's extraordinary motion for new trial, the trial court neither engaged in an analysis of the *Timberlake* factors nor weighed the evidence put forth by Mr. Mitchum. R. 440. In similar cases decided by this Court, where there has been "no counter-showing by the State" as to the evidence presented to the trial court, a summary denial of a motion for new trial was found to have constituted an abuse of discretion. *Bell*, 227 Ga. at 809 (quoting *Stephens v. State*, 99 Ga. 200 (1896)). More to the point, "While the statute states that a new trial 'may be granted,' this does not mean that in a proper case, where all the rules of law have been met, a new trial may or may not be granted, but on the contrary it means that in such a case a new trial *must* be granted." *Bell* at 809

(emphasis supplied). Accordingly, Mr. Mitchum answers this Court's second question in the affirmative: the trial court erred in denying his Extraordinary Motion for New Trial.

CONCLUSION

Because Mr. Mitchum's jury contamination claim is a viable issue for litigation in an extraordinary motion for new trial, Mr. Mitchum's claim was properly raised. Moreover, because Mr. Mitchum's jury contamination claim was denied despite the fact that it comports with the *Timberlake* factors, Mr. Mitchum is entitled relief—or at the least, to an evidentiary hearing on the merits. As such, Mr. Mitchum respectfully requests that this Court reverse the Bryan County Superior Court's denial of his extraordinary motion for new trial and remand the case for an evidentiary hearing.

Respectfully submitted on this, the 28th day of January, 2019.

S:/Sarah L. Gerwig-Moore

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SUPREME COURT OF GEORGIA
Case No. S19A0554

Atlanta, January 07, 2019

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

ROBERT EARL MITCHUM v. THE STATE

Your request for an extension of time to file the brief of appellant in the above case is granted. You are given an extension until January 28, 2019.

Appellee's brief shall be filed within 20 days after the filing of appellant's brief.

A request for oral argument must be independently timely filed, except in direct appeals from judgments imposing the death penalty, every interim review which is granted pursuant to Rule 37, appeals following the grant of petitions for writ of certiorari, applications of certificates of probable cause to appeal in habeas corpus cases where a death sentence is under review, and appeals in habeas corpus cases where a death sentence has been vacated in the lower court, where oral argument is mandatory. Rule 50(1)-(2). No extensions of time for requesting oral argument will be granted. Rule 50(3).

A copy of this order **MUST** be attached as an exhibit to the document for which you received this extension.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

, Clerk

EXHIBIT A

CERTIFICATE OF SERVICE

This is to certify that I have this date served opposing counsel with a true and correct copy of the within and foregoing BRIEF OF APPELLANT by mailing a copy of the same to their offices at:

The Honorable Chris Carr
Ms. Paula K. Smith
Ms. Patricia B. Attaway Burton
Office of the Attorney General
Department of Law
40 Capitol Square, S.W.
Atlanta, GA 30334-1300

Billy Joe Nelson
EDENFIELD, COX, BRUCE & CLASSENS, P.C.
115 Savannah Avenue
Statesboro, Georgia 30458

John Thomas Durden
ATLANTIC JUDICIAL CIRCUIT DISTRICT ATTORNEY'S OFFICE
945 E.G. Miles Parkway
Hinesville, Georgia 31313

This, the 28th day of January, 2019.

Respectfully Submitted,

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