

Ga. Code Ann., § 5-5-41



West's Code of Georgia Annotated [Currentness](#)

Title 5. Appeal and Error ([Refs & Annos](#))

↳ [Chapter 5](#). New Trial

↳ [Article 3](#). Procedure

→ § 5-5-41. Motion made after time expires

(a) When a motion for a new trial is made after the expiration of a 30 day period from the entry of judgment, some good reason must be shown why the motion was not made during such period, which reason shall be judged by the court. In all such cases, 20 days' notice shall be given to the opposite party.

(b) Whenever a motion for a new trial has been made within the 30 day period in any criminal case and overruled or when a motion for a new trial has not been made during such period, no motion for a new trial from the same verdict or judgment shall be made or received unless the same is an extraordinary motion or case; and only one such extraordinary motion shall be made or allowed.

(c)(1) Subject to the provisions of subsections (a) and (b) of this Code section, a person convicted of a serious violent felony as defined [in Code Section 17-10-6.1](#) may file a written motion before the trial court that entered the judgment of conviction in his or her case, for the performance of forensic deoxyribonucleic acid (DNA) testing.

(2) The filing of the motion as provided in paragraph (1) of this subsection shall not automatically stay an execution.

(3) The motion shall be verified by the petitioner and shall show or provide the following:

(A) Evidence that potentially contains deoxyribonucleic acid (DNA) was obtained in relation to the crime and subsequent indictment, which resulted in his or her conviction;

(B) The evidence was not subjected to the requested DNA testing because the existence of the evidence was unknown to the petitioner or to the petitioner's trial attorney prior to trial or because the technology for the testing was not available at the time of trial;

(C) The identity of the perpetrator was, or should have been, a significant issue in the case;

(D) The requested DNA testing would raise a reasonable probability that the petitioner would have been acquitted if the results of DNA testing had been available at the time of conviction, in light of all the evidence in the case;

(E) A description of the evidence to be tested and, if known, its present location, its origin and the date, time, and means of its original collection;

(F) The results of any DNA or other biological evidence testing that was conducted previously by either the prosecution or the defense, if known;

(G) If known, the names, addresses, and telephone numbers of all persons or entities who are known or believed to have possession of any evidence described by subparagraphs (A) through (F) of this paragraph, and any persons or entities who have provided any of the information contained in petitioner's motion, indicating which person or entity has which items of evidence or information; and

(H) The names, addresses, and telephone numbers of all persons or entities who may testify for the petitioner and a description of the subject matter and summary of the facts to which each person or entity may testify.

(4) The petitioner shall state:

(A) That the motion is not filed for the purpose of delay; and

(B) That the issue was not raised by the petitioner or the requested DNA testing was not ordered in a prior proceeding in the courts of this state or the United States.

(5) The motion shall be served upon the district attorney and the Attorney General. The state shall file its response, if any, within 60 days of being served with the motion. The state shall be given notice and an opportunity to respond at any hearing conducted pursuant to this subsection.

(6)(A) If, after the state files its response, if any, and the court determines that the motion complies with the requirements of paragraphs (3) and (4) of this subsection, the court shall order a hearing to occur after the state has filed its response, but not more than 90 days from the date the motion was filed.

(B) The motion shall be heard by the judge who conducted the trial that resulted in the petitioner's conviction unless the presiding judge determines that the trial judge is unavailable.

(C) Upon request of either party, the court may order, in the interest of justice, that the petitioner be at the hearing on the motion. The court may receive additional memoranda of law or evidence from the parties for up to 30 days after the hearing.

(D) The petitioner and the state may present evidence by sworn and notarized affidavits or testimony; provided, however, any affidavit shall be served on the opposing party at least 15 days prior to the hearing.

(E) The purpose of the hearing shall be to allow the parties to be heard on the issue of whether the petitioner's motion complies with the requirements of paragraphs (3) and (4) of this subsection, whether upon consideration of all of the evidence there is a reasonable probability that the verdict would have been different if the results of the requested DNA testing had been available at the time of trial, and whether the requirements of paragraph (7) of this subsection have been established.

(7) The court shall grant the motion for DNA testing if it determines that the petitioner has met the requirements set forth in paragraphs (3) and (4) of this subsection and that all of the following have been established:

- (A) The evidence to be tested is available and in a condition that would permit the DNA testing requested in the motion;
 - (B) The evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material respect;
 - (C) The evidence was not tested previously or, if tested previously, the requested DNA test would provide results that are reasonably more discriminating or probative of the identity of the perpetrator than prior test results;
 - (D) The motion is not made for the purpose of delay;
 - (E) The identity of the perpetrator of the crime was a significant issue in the case;
 - (F) The testing requested employs a scientific method that has reached a scientific state of verifiable certainty such that the procedure rests upon the laws of nature; and
 - (G) The petitioner has made a prima facie showing that the evidence sought to be tested is material to the issue of the petitioner's identity as the perpetrator of, or accomplice to, the crime, aggravating circumstance, or similar transaction that resulted in the conviction.
- (8) If the court orders testing pursuant to this subsection, the court shall determine the method of testing and responsibility for payment for the cost of testing, if necessary, and may require the petitioner to pay the costs of testing if the court determines that the petitioner has the ability to pay. If the petitioner is indigent, the cost shall be paid from the fine and forfeiture fund as provided in Article 3 of Chapter 5 of Title 15.
- (9) If the court orders testing pursuant to this subsection, the court shall order that the evidence be tested by the Division of Forensic Sciences of the Georgia Bureau of Investigation. In addition, the court may also authorize the testing of the evidence by a laboratory that meets the standards of the DNA advisory board established pursuant to the DNA Identification Act of [1994, Section 14131 of Title 42 of the United States Code](#), to conduct the testing. The court shall order that a sample of the petitioner's DNA be submitted to the Division of Forensic Sciences of the Georgia Bureau of Investigation and that the DNA analysis be stored and maintained by the bureau in the DNA data bank.
- (10) If a motion is filed pursuant to this subsection the court shall order the state to preserve during the pendency of the proceeding all evidence that contains biological material, including, but not limited to, stains, fluids, or hair samples in the state's possession or control.
- (11) The result of any test ordered under this subsection shall be fully disclosed to the petitioner, the district attorney, and the Attorney General.
- (12) The judge shall set forth by written order the rationale for the grant or denial of the motion for new trial filed pursuant to this subsection.
- (13) The petitioner or the state may appeal an order, decision, or judgment rendered pursuant to this Code section.

Laws 1873, p. 47, § 1; [Laws 2003, Act 37, § 1, eff. May 27, 2003](#).

Formerly Code 1863, § 3645; Code 1868, § 3670; Code 1873, § 3721; Code 1882, § 3721; Civil Code 1895, § 5487; Penal Code 1895, § 1064; Civil Code 1910, § 6092; Penal Code 1910, § 1091; Code 1933, § 70-303.

HISTORICAL AND STATUTORY NOTES

The 2003 amendment by Act 37 added new subsec. (c).

Laws 2003, Act 37, § 5, provides:

"This Act shall become effective upon its approval by the Governor or upon its becoming law without such approval. Notwithstanding the provisions of subsection (b) of Code Section 5-5-41, any person convicted of a serious violent felony as defined [in Code Section 17-10-6.1](#), which conviction was imposed prior to the effective date of this Act, who has, prior to the effective date of this Act, filed an extraordinary motion for new trial, may file an extraordinary motion for new trial pursuant to Section 1 of this Act if the issue of DNA testing was not raised or denied in the prior extraordinary motion for new trial. In any extraordinary motion for new trial allowed pursuant to Section 1 of this Act, the court shall not have jurisdiction to reconsider any other issue raised in the first extraordinary motion for new trial. Notwithstanding the provisions of subparagraph (c)(4)(B) of Code Section 5-5-41, any person convicted of a serious violent felony as defined [in Code Section 17-10-6.1](#), which conviction was imposed prior to the effective date of this Act, who has, prior to the effective date of this Act, previously litigated in a court of this state or the United States the issue of postconviction DNA testing and who was denied DNA testing may file an extraordinary motion for new trial pursuant to Section 1 of this Act."

LAW REVIEW AND JOURNAL COMMENTARIES

Death Penalty Law. Holly Geerdes and Nikki Cox, [57 Mercer L. Rev. 139 \(2005\)](#).

LIBRARY REFERENCES

Criminal Law ☞951.

New Trial ☞117 to 120.

Westlaw Key Number Searches: 110k951; 275k117 to 275k120.

[C.J.S. New Trial §§ 154 to 156, 158 to 159, 161, 163 to 164](#).

RESEARCH REFERENCES

ALR Library

[51 ALR, Federal 482](#), Time Limitations in Connection With Motions for New Trial Under [Rule 33 of Federal Rules of Criminal Procedure](#).

[76 ALR 5th 239](#), Validity, Construction, and Operation of State Dna Database Statutes.

Forms

Ga. Code Ann., § 5-5-41

[Georgia Appellate Practice with Forms § 11-11](#), Extraordinary Motion for New Trial -- Generally.

[Georgia Appellate Practice with Forms § 12-15](#), Selecting the Proper Procedure -- Discretionary Applications -- Particular Cases.

[Handbook on Georgia Practice with Forms § 21-3](#), Procedure.

[3 Pindar's Ga. Real Estate Law & Proc. with Forms § 26-33](#), Appeal Period.

Treatises and Practice Aids

[Daniel's Georgia Handbook on Criminal Evidence § 7:28](#), Blood Analysis.

[Davis and Shulman's Georgia Practice and Procedure § 24:2](#), Time for Making.

[Davis and Shulman's Georgia Practice and Procedure § 24:3](#), Extraordinary Motion for New Trial.

[Georgia Criminal Trial Practice § 28-12](#), Extraordinary Motion for New Trial.

[Georgia Divorce, Alimony, and Child Custody § 13:2](#), Direct Attack -- Motion for New Trial.

[Georgia Divorce, Alimony, and Child Custody § 13:3](#), Direct Attack -- Extraordinary Motion for New Trial.

[Georgia Procedure Criminal Procedure § 20:45](#), Extraordinary Motion for New Trial.

[Georgia Procedure Criminal Procedure § 25:28](#), Dna.

[Georgia Procedure Criminal Procedure § 34:39](#), Procedure.

[Georgia Procedure Post-Trial Motions and Appeals § 1:41](#), Time to Bring Motion; Extensions -- Extraordinary Motions.

UNITED STATES CODE ANNOTATED

Debbie Smith Act of 2004 (DNA evidence), see [18 U.S.C.A. §§ 3297](#) and [3600](#); [42 U.S.C.A. §§ 14135](#), [14136](#), [14136a](#), [14136b](#).

DNA testing-Kirk Bloodsworth Post-Conviction DNA Testing Grant Program, see [42 U.S.C.A. § 14136e](#).

Innocence Protection Act of 2004, see [18 U.S.C.A. § 3600A](#); 42 U.S.C.A. §§ 4136e, 4163 et seq.

UNITED STATES SUPREME COURT

New trial,

Criminal procedure, new trial motion, time limits, nonjurisdictional claim processing rules, waiver and forfeiture, see [Eberhart v. U.S., 2005, 126](#)

[S.Ct. 403.](#)

NOTES OF DECISIONS

- In general** [1](#)
- Affidavits and other proofs** [16](#)
- Conclusiveness of adjudication** [6](#)
- Court or judge to which application may be made** [3](#)
- Cumulative evidence, newly discovered evidence** [23](#)
- Diligence, newly discovered evidence** [21](#)
- Directed verdict** [13](#)
- Discretion of lower court** [4](#)
- Effect of opinion evidence** [17](#)
- Form and entry of judgment** [18](#)
- Hearing** [14](#)
- Impeachment of witnesses, newly discovered evidence** [24](#)
- Jurisdiction** [2](#)
- Materiality, newly discovered evidence** [22](#)
- Misconduct of or affecting jurors** [26](#)
- Nature and scope of remedy of new trial** [7](#)
- Necessity of ruling or order on motion** [5](#)
- Newly discovered evidence** [20-25](#)
 - Newly discovered evidence - In general** [20](#)
 - Newly discovered evidence - Cumulative evidence** [23](#)
 - Newly discovered evidence - Diligence** [21](#)
 - Newly discovered evidence - Impeachment of witnesses** [24](#)
 - Newly discovered evidence - Materiality** [22](#)
 - Newly discovered evidence - Sufficiency and probable effect** [25](#)
- Notice of appeal** [27](#)
- Opening and vacating judgements** [19](#)
- Petition after term of court** [12](#)
- Record** [15](#)
- Requisites of motion** [9](#)
- Right of accused to new trial** [8](#)
- Scope and extent of review** [28](#)
- Subsequent appeals** [29](#)
- Successive applications for new trial** [10](#)
- Sufficiency and probable effect, newly discovered evidence** [25](#)
- Time for making application** [11](#)
 - 1. In general**

Extraordinary new trial motion authorized by Georgia statute is available in proper case even though objection is to jury panel. Code Ga. § 70-303. [Williams v. State of Georgia, 1955, 75 S.Ct. 814, 349 U.S. 375, 99 L.Ed. 1161](#). Criminal Law ⇨ 951(5)

Statute governing post-conviction DNA testing of evidence mandated testing by laboratory certified as meeting standards of state DNA advisory board established pursuant to federal

law. [State v. Clark, 2005, 273 Ga.App. 411, 615 S.E.2d 143](#), reconsideration denied. Criminal Law ☞ 1590

Post-conviction court had statutory duty, in entering final written order granting motion for DNA testing, to order that sample be provided to state bureau of investigation for inclusion in state DNA data bank. [State v. Clark, 2005, 273 Ga.App. 411, 615 S.E.2d 143](#), reconsideration denied. Criminal Law ☞ 1224(3); Criminal Law ☞ 1590

The trial court was required to determine whether defendant was entitled to a hearing on his motion for a new trial, as well as set forth in writing the rationale for the grant or denial of the motion for a new trial. [Johnson v. State, 2005, 272 Ga.App. 294, 612 S.E.2d 29](#), reconsideration denied, certiorari denied, certiorari dismissed. Criminal Law ☞ 959; Criminal Law ☞ 964

An extraordinary motion for new trial may be filed more than 30 days after judgment, and it may be based on circumstances other than newly discovered evidence. [Mountain Creek Hollow, Inc. v. Cochran, 2004, 270 Ga.App. 612, 607 S.E.2d 210](#). New Trial ☞ 118; New Trial ☞ 120

Motions for new trial on grounds of newly discovered evidence are not favored and are addressed to the sole discretion of the trial judge, which will not be controlled by an appellate court unless abused. [Craft v. State, 2002, 254 Ga.App. 511, 563 S.E.2d 472](#), certiorari dismissed. Criminal Law ☞ 938(1); Criminal Law ☞ 1156(3)

Motion for correction of record and new trial following affirmance on direct appeal were "extraordinary motions for new trial," and, thus, appeal from denial of motions was subject to discretionary appeal procedure. [O.C.G.A. §§ 5-5-40, 5-5-41, 5-6-35, 5-6-35\(a\)\(7\)](#). [Hooks v. State, 1993, 210 Ga.App. 171, 435 S.E.2d 617](#). Criminal Law ☞ 951(5)

Challenged to sufficiency of evidence does not present sufficiently good reason to grant extraordinary motion for new trial. O.C.G.A. § 5-5-41(a). [Franz v. State, 1993, 208 Ga.App. 677, 432 S.E.2d 554](#). Criminal Law ☞ 951(5)

Bases for granting extraordinary motion for new trial are much stricter than normal motion. O.C.G.A. § 5-5-41(a). [Gordon v. State, 1989, 193 Ga.App. 94, 387 S.E.2d 40](#). Criminal Law ☞ 951(5)

Where defendant filed extraordinary motion for new trial, but failed utterly to be diligent and to support his motion with reference to newly discovered evidence by affidavits as to same, extraordinary motion would be denied. O.C.G.A. § 5-5-41. [Collier v. State, 1983, 169 Ga.App. 69, 311 S.E.2d 242](#). Criminal Law ☞ 951(5)

Extraordinary motions for new trial based on newly discovered evidence are not favored by law and are addressed to sound discretion of trial judge. Code, §§ 70-204, 70-301, 70-303. [Dyal v. State, 1970, 121 Ga.App. 50, 172 S.E.2d 326](#). Criminal Law ☞ 951(5)

When alleged extraordinary motion for new trial is entirely without merit, it is proper for judge to decline to entertain same and to refuse to grant rule nisi thereon. [Fulford v. State, 1967, 222 Ga. 846, 152 S.E.2d 845](#). Criminal Law ☞ 953

Extraordinary motions for new trial are not favored. [Cade v. State, 1962, 107 Ga.App. 30, 129 S.E.2d 405](#). Criminal Law ⚡ 951(5)

Extraordinary motions for new trial are contemplated for events that do not ordinarily occur in the transaction of human affairs. [Cade v. State, 1962, 107 Ga.App. 30, 129 S.E.2d 405](#). Criminal Law ⚡ 951(5)

Extraordinary motions for new trial are not favored. [Loomis v. Edwards, 1949, 56 S.E.2d 183, 80 Ga.App. 396](#), certiorari denied [70 S.Ct. 989, 339 U.S. 970, 94 L.Ed. 1377](#), rehearing denied [71 S.Ct. 11, 340 U.S. 847, 95 L.Ed. 621](#). Criminal Law ⚡ 951(5)

Where extraordinary motion for new trial is palpably without merit, taking into consideration the extraordinary motion together with the whole record of the case, trial judge may refuse to entertain the extraordinary motion as a matter of law. [Loomis v. Edwards, 1949, 56 S.E.2d 183, 80 Ga.App. 396](#), certiorari denied [70 S.Ct. 989, 339 U.S. 970, 94 L.Ed. 1377](#), rehearing denied [71 S.Ct. 11, 340 U.S. 847, 95 L.Ed. 621](#). Criminal Law ⚡ 951(5)

An extraordinary motion for new trial will not lie to review any of grounds in original motion for new trial. [Loomis v. Edwards, 1949, 56 S.E.2d 183, 80 Ga.App. 396](#), certiorari denied [70 S.Ct. 989, 339 U.S. 970, 94 L.Ed. 1377](#), rehearing denied [71 S.Ct. 11, 340 U.S. 847, 95 L.Ed. 621](#). Criminal Law ⚡ 951(5)

2. Jurisdiction

The granting of a rule nisi by a judge having authority upon an extraordinary motion for a new trial filed in due time is a grant of authority to file the same, as effectual as if permission had been expressly conferred by special order or by precise recitals in rule nisi itself. [Cox v. State, 1917, 19 Ga.App. 283, 91 S.E. 422](#). Criminal Law ⚡ 950

In county having city court, judge of that court when judge of superior court in whose circuit county is included is disqualified, cannot assume to act as judge of superior court and grant a rule nisi on extraordinary motion for new trial, and thus originate a proceeding in superior court. [Cox v. State, 1917, 19 Ga.App. 283, 91 S.E. 422](#). Criminal Law ⚡ 950

3. Court or judge to which application may be made

A motion for a new trial may be made before the judge of the trial court, though the trial was not had before him. [Hudgins v. Veal, 1896, 98 Ga. 137, 26 S.E. 479](#). New Trial ⚡ 114

4. Discretion of lower court

Post-conviction court had statutory duty, in entering final written order granting motion for DNA testing, to order that sample be provided to state bureau of investigation for inclusion in state DNA data bank. [State v. Clark, 2005, 273 Ga.App. 411, 615 S.E.2d 143](#), reconsideration denied. Criminal Law ⚡ 1224(3); Criminal Law ⚡ 1590

Post-conviction court's order requiring state to pay for cost of post-conviction DNA testing, read in conjunction with its prior order finding post-conviction movant indigent, satisfied statutory requirement that court determine responsibility for payment of costs. [State v. Clark](#),

[2005, 273 Ga.App. 411, 615 S.E.2d 143](#), reconsideration denied. Criminal Law ↪ 1669

Statute governing extraordinary motions for new trial gives the trial judge the discretion to allow the filing of an extraordinary motion for new trial after the expiration of the 30-day period following judgment for the filing of an ordinary motion for new trial where some good reason is shown why the motion was not made during such period. [Mountain Creek Hollow, Inc. v. Cochran, 2004, 270 Ga.App. 612, 607 S.E.2d 210](#). New Trial ↪ 118

Trial court did not abuse its discretion by permitting developer to file an extraordinary motion for new trial in action by contractor for the unpaid balance on a landscaping contract, where counsel for developer explained that delay in filing motion was result of a clerical error for which an employee had been fired. [Mountain Creek Hollow, Inc. v. Cochran, 2004, 270 Ga.App. 612, 607 S.E.2d 210](#). New Trial ↪ 120

Denial of request for post-conviction DNA testing as part of extraordinary motion for new trial is subject to discretionary, rather than direct, appeal. [Crawford v. State, 2004, 278 Ga. 95, 597 S.E.2d 403](#), reconsideration denied, for denial of stay of execution, see [125 S.Ct. 5, 542 U.S. 954, 159 L.Ed.2d 837](#), certiorari denied [125 S.Ct. 5, 542 U.S. 954, 159 L.Ed.2d 837](#). Criminal Law ↪ 1072

When the trial judge passes upon the grounds of an extraordinary motion for new trial, he occupies the position of a trier of fact, and his discretion in refusing the motion will not be disturbed unless manifestly abused. O.C.G.A. § 5-5-41. [Satterwhite v. State, 1998, 235 Ga.App. 687, 509 S.E.2d 97](#), reconsideration denied, certiorari denied. Criminal Law ↪ 1156(1)

Trial judge has discretion to allow filing of extraordinary motion for new trial. O.C.G.A. § 5-5-41(a). [Datz v. State, 1993, 210 Ga.App. 517, 436 S.E.2d 506](#). Criminal Law ↪ 951(1)

Extraordinary motion for new trial upon ground of newly discovered evidence is addressed to sound discretion of trial judge and refusal to grant motion will not be reversed unless discretion is abused. [Bradley v. Bradley, 1974, 232 Ga. 717, 208 S.E.2d 817](#). Appeal And Error ↪ 981; New Trial ↪ 99

Refusal to grant extraordinary motion for new trial based on newly discovered evidence will not be reversed unless trial judge's discretion is abused. Code, §§ 70-204, 70-301, 70-303. [Dyal v. State, 1970, 121 Ga.App. 50, 172 S.E.2d 326](#). Criminal Law ↪ 1156(3)

A trial judge in passing upon the grounds of an extraordinary motion for new trial occupies the position of a trier of fact, and in the event of conflicting facts, his discretion in refusing the motion will not be disturbed, unless manifestly abused. [Cade v. State, 1962, 107 Ga.App. 30, 129 S.E.2d 405](#). Criminal Law ↪ 1156(1)

The grant or refusal of an extraordinary motion for new trial lies within sound discretion of trial judge; such discretion is not unlike that in cases of motions made at the term to which judgment complained of was entered. Code, § 70-303. [Slusser v. Williams, 1959, 100 Ga.App. 599, 112 S.E.2d 7](#). New Trial ↪ 6

Refusal of trial judge to grant extraordinary motion for new trial will not be disturbed unless there has manifestly been abuse of discretion. [Allen v. State, 1953, 88 Ga.App. 200, 76 S.E.2d](#)

531. Criminal Law ↪ 1156(1)

The trial judge occupies position of a trier when passing on ground of extraordinary motion for new trial in criminal case based on alleged bias of one of jurors and determination of trial judge that juror was impartial will not be reversed unless it is apparent that he has abused discretion which law vests in him in such cases. [Allen v. State, 1953, 88 Ga.App. 200, 76 S.E.2d 531](#). Criminal Law ↪ 1156(1)

Order granting or refusing extraordinary motion for new trial will be overruled on appeal only if erroneous as a matter of law. [Stembridge v. State, 1951, 84 Ga.App. 413, 65 S.E.2d 819](#), certiorari granted [72 S.Ct. 552, 342 U.S. 940, 96 L.Ed. 699](#), certiorari dismissed [72 S.Ct. 834, 343 U.S. 541, 96 L.Ed. 1130](#). Criminal Law ↪ 1156(1)

Granting or refusal of extraordinary motions for new trial rests largely in discretion of trial court. [Stembridge v. State, 1951, 84 Ga.App. 413, 65 S.E.2d 819](#), certiorari granted [72 S.Ct. 552, 342 U.S. 940, 96 L.Ed. 699](#), certiorari dismissed [72 S.Ct. 834, 343 U.S. 541, 96 L.Ed. 1130](#). Criminal Law ↪ 911

Where trial judge looked to merits to determine whether extraordinary motion for a new trial should be entertained and had issued a rule nisi thereon, trial judge could thereafter on his own motion vacate rule nisi and refuse to entertain extraordinary motion after concluding that rule nisi was improvidently granted. Code, §§ 81-113, 110-707. [Loomis v. Edwards, 1949, 56 S.E.2d 183, 80 Ga.App. 396](#), certiorari denied [70 S.Ct. 989, 339 U.S. 970, 94 L.Ed. 1377](#), re-hearing denied [71 S.Ct. 11, 340 U.S. 847, 95 L.Ed. 621](#). Criminal Law ↪ 951(5)

Where an extraordinary motion for new trial is based on newly discovered evidence, and a counter showing is made which tends to refute the evidence relied upon, the action of the trial court in refusing a new trial will not be reversed unless it appears that the discretion vested in such court has been abused. [Ballard v. Harmon, 1947, 202 Ga. 603, 44 S.E.2d 260](#). Appeal And Error ↪ 981

An extraordinary motion for new trial is addressed to trial judge's discretion, and his discretion in overruling extraordinary motion for new trial will not be interfered with unless manifestly abused. [Gilpin v. Swainsboro Ice & Fuel Co., 1947, 75 Ga.App. 574, 44 S.E.2d 168](#). Appeal And Error ↪ 977(5); New Trial ↪ 6

Where state makes counter showing on accused's application for new trial based on newly discovered evidence, trial judge becomes trier of issue thus formed and his discretion is final and cannot be controlled by reviewing court, in absence of manifest abuse of discretion. Code, § 38-2401. [Herrin v. State, 1944, 71 Ga.App. 384, 31 S.E.2d 124](#). Criminal Law ↪ 1156(3)

Motions for new trial are addressed to sound discretion of the judge, and his exercise of such discretion will not be disturbed unless there is a manifest abuse of discretion. Code, § 38-2401. [Herrin v. State, 1944, 71 Ga.App. 384, 31 S.E.2d 124](#). Criminal Law ↪ 911; Criminal Law ↪ 1156(1)

Where newly discovered evidence is largely impeaching and cumulative in character, the discretion of trial judge in overruling extraordinary motion for new trial based on such evidence will not be disturbed. [Brannon v. State, 1940, 190 Ga. 203, 9 S.E.2d 152](#). Criminal Law ↪

1156(3)

Refusal of new trial for newly discovered evidence will not be interfered with on appeal, when such evidence is largely impeaching and cumulative in character. [Brannon v. State, 1940, 190 Ga. 203, 9 S.E.2d 152](#). Criminal Law ↪ 1156(3)

A denial of an ordinary motion for new trial upon evidential grounds, like denial of extraordinary motion when based upon conflicting evidence, is matter of sound discretion, which will not be corrected on writ of error unless abused. Code 1933, § 70-202. [Sumner v. Sumner, 1938, 186 Ga. 390, 197 S.E. 833](#). Appeal And Error ↪ 977(5); New Trial ↪ 6

Overruling extraordinary motion for new trial reversed only for abuse of discretion. [Edenfield v. Youmans, 1925, 33 Ga.App. 430, 126 S.E. 908](#). Appeal And Error ↪ 977(5)

The appellate court is powerless to interfere on the general grounds with the discretion of the trial judge in refusing defendant a new trial, the evidence being in dispute. [Williams v. Pilcher & Dillon, 1924, 31 Ga.App. 591, 121 S.E. 581](#). Appeal And Error ↪ 979(4)

Ga 1856. Whether damages found by a jury are excessive or not is a question for the discretion of the court, and a grant of a new trial will not be disturbed on appeal. [Williams v. Pilcher & Dillon, 1924, 31 Ga.App. 591, 121 S.E. 581](#). Appeal And Error ↪ 979(4)

The trial court's denial, after affirmance of a conviction, of an extraordinary motion, made pursuant to Civ.Code 1910, §§ 6089, 6092, for a new trial on the ground of newly discovered evidence, will not be disturbed in the absence of abuse of discretion. [Frank v. State, 1914, 142 Ga. 617, 83 S.E. 233](#). Criminal Law ↪ 1156(3)

Where a motion for new trial is made after the adjournment of court under Civ.Code 1892, § 5487, some good reason must be shown why the motion was not made during the term, and the latitude allowed the trial judge in determining the validity of the reason why the motion was not sooner presented will not be controlled, unless manifestly abused. [Dixon v. Mutual Life Industrial Ass'n of Georgia, 1908, 3 Ga.App. 524, 60 S.E. 207](#). Appeal And Error ↪ 977(2)

5. Necessity of ruling or order on motion

Issues raised in defendant's extraordinary motion for new trial were to be considered by trial court in first instance. [O.C.G.A. §§ 5-5-40, 5-5-41, 5-5-41\(b\)](#). [Pittman v. State, 1987, 183 Ga.App. 12, 357 S.E.2d 855](#). Criminal Law ↪ 1065

6. Conclusiveness of adjudication

Gwinnett Superior Court's denial of alternative motions to set aside default judgment and for new trial, affirmed on appeal, collaterally estopped movant's complaint in equity seeking to have the judgment set aside in DeKalb Superior Court on the same basis asserted in Gwinnett Court. [O.C.G.A. §§ 5-5-41, 9-11-60\(d, e\)](#). [Saxon v. Covington, 1986, 178 Ga.App. 271, 342 S.E.2d 754](#). Judgment ↪ 715(1)

7. Nature and scope of remedy of new trial

"Extraordinary motions for new trial" are such as do not ordinarily occur. [King v. State, 1932, 174 Ga. 432, 163 S.E. 168](#). Criminal Law ↪ 905

An extraordinary motion for a new trial institutes an entirely new case requiring discretionary action on the part of the judge having jurisdiction thereof to bring it into actual existence as a cause in the courts. [Cox v. State, 1917, 19 Ga.App. 283, 91 S.E. 422](#). Criminal Law ↪ 905

A motion for new trial in extraordinary cases, as provided in §§ 3719, 3721 of the Code, was intended, in a great degree, to take the place of a bill in equity for new trial. The parties are allowed, by this motion, to do at law what could have been done only in equity before that time; and hence it must follow that such a motion must contain clearly and specifically all the grounds necessary to have been averred in a bill for new trial. [East Tennessee, Virginia and Georgia R.R. v. Whitlock, 1886, 75 Ga. 77](#). New Trial ↪ 0.5

8. Right of accused to new trial

Where an alleged extraordinary motion for new trial is entirely without merit, it is proper for the judge to decline to entertain the same. [Harris v. Roan, 1904, 119 Ga. 379, 46 S.E. 433](#). Criminal Law ↪ 909

9. Requisites of motion

A general statement, in a motion for new trial, that all possible diligence was used to obtain newly discovered evidence, may need reduction to particular acts; and affirming that inquiry was made of numerous persons, every person, etc., may not suffice, where no names of any persons are mentioned, and no reason assigned for the omission. [Patterson v. Collier, 1887, 77 Ga. 292, 3 S.E. 119](#). New Trial ↪ 124(1)

10. Successive applications for new trial

Defendant's pleading seeking additional appellate review of conviction could not be considered extraordinary motion for new trial, given that criminal defendant was statutorily limited to filing one extraordinary motion for new trial, and defendant filed such motion after conviction. [Richards v. State, 2002, 275 Ga. 190, 563 S.E.2d 856](#). Criminal Law ↪ 951(1)

Extraordinary motions for a new trial are not favored by the courts. [Allen v. State, 1953, 88 Ga.App. 200, 76 S.E.2d 531](#). Criminal Law ↪ 912

Granting of extraordinary motion for new trial rests largely within discretion of trial judge. [Allen v. State, 1953, 88 Ga.App. 200, 76 S.E.2d 531](#). Criminal Law ↪ 912

In prosecution for carrying pistol without license, refusal to grant extraordinary motion for new trial of defendant who had been arrested one day and indicted, tried and found guilty on next day, who had been held from time of arrest until trial without bond and whose counsel was not allowed time after indictment to prepare for trial was not abuse of discretion. [Allen v. State, 1953, 88 Ga.App. 200, 76 S.E.2d 531](#). Criminal Law ↪ 912

Extraordinary motions for new trial cannot be based upon matters that were known to movant in time to have had them stated in his original motion or that could have been discovered by

due diligence. [Allen v. State, 1953, 88 Ga.App. 200, 76 S.E.2d 531](#). Criminal Law ↪ 912

Contention of defendant who had been convicted of carrying a pistol without license, that after trial he discovered that pistol had been stolen by his brother and taken to Jacksonville, Florida, and pawned, and that had he not been forced to trial the day after his arrest, he would have discovered such facts and would have been able to show to court that pistol and license to carry same had been taken to his father's home, did not constitute ground for holding that trial judge abused his discretion in overruling defendant's extraordinary motion for new trial. [Allen v. State, 1953, 88 Ga.App. 200, 76 S.E.2d 531](#). Criminal Law ↪ 912

Where motion for new trial is pending in the superior court, there is no statutory authority for a second separate original motion by movant for new trial complaining of the same verdict. Code 1933, § 70-303. [Harper v. Perry, 1940, 190 Ga. 233, 9 S.E.2d 160](#). New Trial ↪ 11(1)

Where defendant moved for new trial before decree was entered for plaintiff, and after decree was entered defendant filed a second motion for new trial, overruling of objection to consideration of second motion for new trial on ground that first motion was made and filed before signing of final decree was error. [Harper v. Perry, 1940, 190 Ga. 233, 9 S.E.2d 160](#). New Trial ↪ 11(1)

11. Time for making application

The general rule is that the granting or denying of extraordinary new trial motion provided for by Georgia statute, rests primarily in discretion of trial court, and appellate court will not reverse except for clear abuse of discretion. Code Ga. § 70-303. [Williams v. State of Georgia, 1955, 75 S.Ct. 814, 349 U.S. 375, 99 L.Ed. 1161](#). Criminal Law ↪ 951(5); Criminal Law ↪ 1156(1)

Defendant's motion for new trial was void as untimely where motion was not filed within 30 days of entry of his conviction and imposition of sentence and no time extension was sought, and thus, notice of appeal was untimely, even though defendant filed notice of appeal within 30 days of denial of motion, given that the void motion for new trial did not toll the 30-day limit for filing notice of appeal from the underlying judgment and sentence. [O.C.G.A. §§ 5-5-40\(a\), 5-5-41\(a\)](#). [Keller v. State, 2001, 252 Ga.App. 813, 558 S.E.2d 5](#), reconsideration denied, certiorari granted, reversed [275 Ga. 680, 571 S.E.2d 806](#), on remand [261 Ga.App. 769, 583 S.E.2d 591](#). Criminal Law ↪ 951(1); Criminal Law ↪ 1081(4.1)

Court could not construe defendant's untimely motion for new trial as an extraordinary motion for new trial, where it was unaccompanied by any attempt to show some good reason why the motion was not made during the 30-day period following entry of the judgment and sentence. [O.C.G.A. § 5-5-41\(a\)](#). [Porter v. State, 1999, 271 Ga. 498, 521 S.E.2d 566](#), on subsequent appeal [272 Ga. 533, 531 S.E.2d 97](#). Criminal Law ↪ 951(1)

Although the "good reason" necessary to permit filing of extraordinary motion for new trial normally consists of newly discovered evidence, late filing of motion for new trial may also be predicated on circumstances other than newly discovered evidence. [O.C.G.A. §§ 5-5-40, 5-5-41\(a\)](#). [Martin v. Children's Sesame, Inc., 1988, 188 Ga.App. 242, 372 S.E.2d 648](#). New Trial ↪ 120

Trial court did not abuse its discretion in concluding that late filing of motion for new trial was supported by "good reason," in personal injury action; movants claimed that clerk's office incorrectly informed them of filing date for judgment on two occasions during period in which timely motion for new trial could have been filed, and movant's motion would have been timely had filing date given by clerk's office been correct. [O.C.G.A. §§ 5-5-40](#), 5-5-41(a). [Martin v. Children's Sesame, Inc., 1988, 188 Ga.App. 242, 372 S.E.2d 648](#). New Trial ↪ 120

Defendant's supplemental brief containing affidavit of accomplice in which he recanted his trial testimony and alleged that he perjured himself at murder trial was in substance an extraordinary motion for new trial based on newly discovered evidence and would not be considered on appeal as it must first be directed to the trial court. [O.C.G.A. §§ 5-5-40](#), 5-5-41. [Williams v. State, 1985, 254 Ga. 6, 326 S.E.2d 444](#). Criminal Law ↪ 951(5); Criminal Law ↪ 1041

Where tenant assumed that judgment in proceeding for dispossession and payment of past rent would be entered against him in the amount prayed for plus costs in that he had previously vacated the premises, and asserted that he received no notice of judgment in amount greater than that prayed for until dispossessory proceedings were begun, the tenant had an excuse for delay in moving for a new trial and sufficient ground to set aside the verdict and it was abuse of discretion to deny the extraordinary motion for a new trial. O.C.G.A. § 5-5-41(a). [Jones v. Cooke, 1984, 169 Ga.App. 516, 313 S.E.2d 773](#). New Trial ↪ 120

Extraordinary motions for new trial are not favored, and stricter rule is applied to an extraordinary motion for new trial based on ground of newly available evidence than to ordinary motion on that ground. [Dick v. State, 1982, 248 Ga. 898, 287 S.E.2d 11](#). Criminal Law ↪ 951(5)

Since absence of a transcript of prosecutor's closing arguments was a matter known to defense counsel at time of direct appeal, all alleged errors premised on absence of that transcript should have been enumerated in that appeal and they could not be raised in subsequent extraordinary motion for new trial. [Blake v. State, 1979, 244 Ga. 466, 260 S.E.2d 876](#), certiorari denied [100 S.Ct. 2974, 446 U.S. 988, 64 L.Ed.2d 846](#), rehearing denied [101 S.Ct. 28, 448 U.S. 912, 65 L.Ed.2d 1173](#). Criminal Law ↪ 951(5)

Any errors regarding competency to stand trial and as to whether the charge was impermissibly burden-shifting should have been raised in direct appeal and could not be raised by way of extraordinary motion for new trial. [Dix v. State, 1979, 244 Ga. 464, 260 S.E.2d 863](#), certiorari denied [100 S.Ct. 1346, 445 U.S. 946, 63 L.Ed.2d 781](#). Criminal Law ↪ 951(5)

New trial was improperly granted where motion for new trial, which was filed more than 30 days after entry of judgment, was not based upon matters that were not or could not have been discovered within normal 30-day period, and where motion was "extraordinary" only in sense that it came after expiration of such period. Code, §§ 70-301, 70-303. [Barfield v. McEntyre, 1975, 136 Ga.App. 294, 221 S.E.2d 58](#). New Trial ↪ 119

Defendant who based his extraordinary motion for new trial on contention that he was in police custody at time alleged crimes were committed who stated that reason for his failure to

raise issue in trial court was that he knew not his whereabouts at time alleged crime was committed, without stating reason for lack of knowledge on such issue, and whose arrest on October 3, the date alleged in indictments as date of commission of crimes, took place subsequent to crimes shown by evidence to have been committed on October 2, was not entitled to new trial. [Patterson v. State, 1971, 228 Ga. 389, 185 S.E.2d 762](#). Criminal Law ☞ 951(5)

When motion for new trial on ground of newly discovered evidence is made more than 30 days after entry of judgment, such motion is an "extraordinary motion for new trial" and if the evidence could have been discovered with ordinary diligence and presented at the trial, motion should be denied. Code, §§ 70-204, 70-301, 70-303. [Dyal v. State, 1970, 121 Ga.App. 50, 172 S.E.2d 326](#). Criminal Law ☞ 951(5)

Where extraordinary motion for new trial was based upon newly discovered evidence consisting of letter which had been in defendant's possession prior to and at time of trial, denial of motion was not an abuse of discretion. Code, §§ 70-204, 70-301, 70-303. [Dyal v. State, 1970, 121 Ga.App. 50, 172 S.E.2d 326](#). Criminal Law ☞ 951(5)

Petitioner was not entitled to have his extraordinary motion for new trial granted on ground that his attorney had failed to file motion for new trial at original trial, although requested to do so, where affidavit of the attorney stated that he told client that there was no ground for new trial and he was not employed to file motion for new trial or to seek new trial. [Dyal v. State, 1970, 121 Ga.App. 50, 172 S.E.2d 326](#). Criminal Law ☞ 951(5)

Although three letters and two photographs offered by state and admitted in original trial were made available by defendant to court on hearing of his extraordinary motion for new trial on ground of newly discovered evidence, when transcript and brief of evidence adduced at original trial were not, motion was properly denied. [Dyal v. State, 1970, 121 Ga.App. 50, 172 S.E.2d 326](#). Criminal Law ☞ 951(5)

Where a motion for a new trial is made more than 30 days after the entry of the judgment on the verdict, some good reason must be shown why the motion was not made within the time allowed by law. Code, §§ 70-301, 70-303. [Brawner v. Wilkins, 1966, 114 Ga.App. 263, 150 S.E.2d 721](#). New Trial ☞ 117(1)

Motion for new trial made after time specified by statute may not be entertained unless some good reason be shown why motion was not made within time required, which reason shall be judged by court. Code, §§ 70-301, 70-303. [Union Life Ins. Co. v. Aaronson, 1964, 109 Ga.App. 384, 136 S.E.2d 142](#). New Trial ☞ 120

To justify an extraordinary motion for new trial, the extraordinary state of facts must have been unknown to the movant or his counsel at the time when an ordinary motion for a new trial could have been filed, and must have been impossible to ascertain by the exercise of proper diligence. [Cade v. State, 1962, 107 Ga.App. 30, 129 S.E.2d 405](#). Criminal Law ☞ 951(5)

Defects which occur in the trial of a defendant should be taken advantage of by a timely ordinary motion for new trial unless good cause is shown for the failure to file the motion within the proper time. Code, § 70-303. [Cade v. State, 1962, 107 Ga.App. 30, 129 S.E.2d 405](#). Criminal Law ☞ 951(1)

Record of case disclosed that alleged newly discovered evidence was known to accused at, before and during prosecution for riot so that extraordinary motion for new trial could not be based thereon. [Loomis v. Edwards, 1949, 56 S.E.2d 183, 80 Ga.App. 396](#), certiorari denied [70 S.Ct. 989, 339 U.S. 970, 94 L.Ed. 1377](#), rehearing denied [71 S.Ct. 11, 340 U.S. 847, 95 L.Ed. 621](#). Criminal Law ⚡ 951(5)

Extraordinary motions for a new trial cannot be based upon matters that were known to movant in time to have them stated in his original motion for new trial. [Loomis v. Edwards, 1949, 56 S.E.2d 183, 80 Ga.App. 396](#), certiorari denied [70 S.Ct. 989, 339 U.S. 970, 94 L.Ed. 1377](#), rehearing denied [71 S.Ct. 11, 340 U.S. 847, 95 L.Ed. 621](#). Criminal Law ⚡ 951(5)

Variance between the allegata and the probata should properly be raised in an original motion for a new trial and cannot be a ground in an extraordinary motion for new trial. [Loomis v. Edwards, 1949, 56 S.E.2d 183, 80 Ga.App. 396](#), certiorari denied [70 S.Ct. 989, 339 U.S. 970, 94 L.Ed. 1377](#), rehearing denied [71 S.Ct. 11, 340 U.S. 847, 95 L.Ed. 621](#). Criminal Law ⚡ 951(5)

Extraordinary motion for new trial on ground of newly discovered evidence was properly denied where evidence relied upon as newly discovered was submitted or by exercise of diligence could have been submitted to trial court in exceptions filed to auditor's report which was overruled except affidavit as to errors in audit which was filed as part of auditor's report but which did not point out any errors and stated no facts authorizing a different finding. Code, § 70- 205. [Ballard v. Harmon, 1947, 202 Ga. 603, 44 S.E.2d 260](#). New Trial ⚡ 101; New Trial ⚡ 150(2)

Matters which have been submitted to the consideration of the trial court and an adverse ruling obtained thereon can never be a proper subject matter as grounds for an extraordinary motion for new trial. [Ballard v. Harmon, 1947, 202 Ga. 603, 44 S.E.2d 260](#). New Trial ⚡ 101

The only difference between effect of an "extraordinary motion for new trial" for newly discovered evidence and such ground in a regular "motion for new trial" is the time of filing, the latter being filed during the term of the court in which conviction was had and the extraordinary motion afterward. Code, § 70-204. [Herrin v. State, 1944, 71 Ga.App. 384, 31 S.E.2d 124](#). Criminal Law ⚡ 951(5)

A motion for new trial complaining of verdict rendered in an equitable action is not subject to attack because made and filed before rendition of decree. [Harper v. Perry, 1940, 190 Ga. 233, 9 S.E.2d 160](#). New Trial ⚡ 117(2)

Accused's extraordinary motion for new trial for disqualification of juror held properly denied, where supporting affidavits showed that movant had notice of juror's disqualification for a year before filing of motion, notwithstanding remittitur had not been sent down from court reviewing judgment and had not been made judgment of trial court until term at which motion was filed. Civ.Code 1910, § 6089. [Bivins v. McDonald, 1934, 50 Ga.App. 299, 177 S.E. 829](#). Criminal Law ⚡ 951(5)

Extraordinary motion for new trial will not lie to review grounds of original motion, where judgment denying new trial has been affirmed on account of failure to file bill of exceptions

within time. [King v. State, 1932, 174 Ga. 432, 163 S.E. 168](#). Criminal Law ↪ 964

Motions for new trial made after the adjournment of court are not favored, and should not be entertained, except on a strong showing of good reason. [Dixon v. Mutual Life Industrial Ass'n of Georgia, 1908, 3 Ga.App. 524, 60 S.E. 207](#). New Trial ↪ 117(3)

That counsel was taken sick, and that a brother attorney who had been requested by the sick counsel to file for him, as a matter of accommodation, a motion for new trial before adjournment of the term, forgot to do so, is not such good reason for failure to file a motion for new trial before adjournment as required the trial judge to consider a motion filed at the third term of the court after the rendition of the judgment. [Dixon v. Mutual Life Industrial Ass'n of Georgia, 1908, 3 Ga.App. 524, 60 S.E. 207](#). New Trial ↪ 120

Mistake in naming the parties in a motion for a new trial, and in suing out a writ of error thereon, is not a good ground for entertaining an extraordinary motion for new trial at a subsequent term of the court; nor is such mistake a good ground for obtaining a new trial by bill in a court of equity. [Southwestern R. Co. v. Craig, 1879, 62 Ga. 361](#). New Trial ↪ 117(3)

12. Petition after term of court

The court, after having overruled a motion for a new trial on general grounds only, did not have jurisdiction thereafter to grant an extraordinary motion for a new trial on general grounds which was filed more than one year after the rendition of the verdict in the case and more than six months after the judgment overruling the original motion for a new trial. [Brawner v. Wilkins, 1966, 114 Ga.App. 263, 150 S.E.2d 721](#). New Trial ↪ 166(1)

Where an extraordinary motion for a new trial failed to show therein providential cause for default or by exhibit attached thereto that defendant had a meritorious defense to plaintiff's claim, trial judge abused his discretion in granting the defendant's extraordinary motion for a new trial. [Brawner v. Wilkins, 1966, 114 Ga.App. 263, 150 S.E.2d 721](#). New Trial ↪ 166(3)

A motion for new trial after adjournment of term upon extraordinary grounds and newly discovered evidence not merely cumulative or impeaching in character is intended to take place of a bill in equity for new trial, although equitable petitions in nature of bills of review based upon extraordinary grounds and showing of due diligence are not wholly supplanted by extraordinary motions. Code 1933, § 70-303. [Sumner v. Sumner, 1938, 186 Ga. 390, 197 S.E. 833](#). New Trial ↪ 166(1)

Motion for new trial, based on jurors' incompetency, must be made promptly on discovery thereof. [Edenfield v. Youmans, 1925, 33 Ga.App. 430, 126 S.E. 908](#). New Trial ↪ 166(2)

Motion for new trial on extraordinary grounds and untimely not favored; facts asserted in motion for new trial on extraordinary grounds must have been unknown at time of first motion; on knowledge of juror's incompetency after trial due diligence requires that inquiry be made. [Edenfield v. Youmans, 1925, 33 Ga.App. 430, 126 S.E. 908](#). New Trial ↪ 166(1)

Denial of new trial because of lack of movants' diligence held not abuse. [Edenfield v. Youmans, 1925, 33 Ga.App. 430, 126 S.E. 908](#). New Trial ↪ 166(4)

A stricter rule is applied to extraordinary motions for new trial, based on newly discovered evidence, than to ordinary motions on that ground. [Reed Oil Co. v. Harrison, 1920, 26 Ga.App. 37, 105 S.E. 496](#). New Trial ⚡ 166(1)

The extraordinary motions or cases contemplated by the statute as ground for new trial are such as do not ordinarily occur in the transaction of human affairs. [Reed Oil Co. v. Harrison, 1920, 26 Ga.App. 37, 105 S.E. 496](#). New Trial ⚡ 166(1)

In an action between an employer and a former salesman, the affidavits in support of an extraordinary motion for a new trial for newly discovered evidence, that he voluntarily authorized his account to be charged with the amount shown to be due him, held insufficient, under Civ.Code 1910, § 6086, requiring a showing by the movant and each of his counsel that the evidence could not be discovered by the exercise of ordinary diligence, and requiring affidavits as to the residence, associates, means of knowledge, character, and credibility of the witnesses to such newly discovered evidence. [Reed Oil Co. v. Harrison, 1920, 26 Ga.App. 37, 105 S.E. 496](#). New Trial ⚡ 166(1)

A stricter rule is applied to extraordinary motions for new trial, based on newly discovered evidence, than to ordinary motions on that ground. [Jackson v. Williams, 1919, 149 Ga. 505, 101 S.E. 116](#). New Trial ⚡ 166(1)

A motion for a new trial, on extraordinary grounds, may be filed at the next term after that at which the verdict was rendered. [Hudgins v. Veal, 1896, 98 Ga. 137, 26 S.E. 479](#). New Trial ⚡ 166(2)

It is not an "extraordinary" ground, for which, under Code, §§ 3719, 3721, a new trial should be granted, that the presiding judge absented himself from his court, whereby the term was terminated, so that the ordinary motion for a new trial could not be heard during the term. [East Tennessee, Virginia and Georgia R.R. v. Whitlock, 1886, 75 Ga. 77](#). New Trial ⚡ 166(1)

Pending the term of court at which a trial took place, a motion for a new trial was prepared and presented to the judge, but opposing counsel stating that he desired time to examine the grounds, by permission of the judge, the papers were turned over to him for that purpose, and court was adjourned to a later day. Another adjournment followed from providential cause. At the time to which the court was last adjourned, the judge was absent, but not from providential or unavoidable cause, as stated by him. The clerk adjourned the court from Saturday until Monday, and then until Tuesday. The judge arrived on Tuesday, and the motion and brief of evidence were presented to him. The respondent moved to dismiss the motion, on the ground that the court was not in session, but had come to an end by operation of law. The judge overruled this motion, and afterwards corrected the brief of evidence, and approved it and the motion, and they were filed in office and overruled at a later day, to which he had deferred action. Both sides excepted. On the cross-bill of exceptions, because of the refusal to dismiss, the Supreme Court held that the motion for a new trial was not made in term-time, and thereupon leave was granted the plaintiff in error to withdraw the main bill of exceptions "without prejudice." At the next term of the superior court, a motion for a new trial was made on substantially the same grounds as before, with the above facts set out as warranting an extraordinary motion. The judge overruled a motion to dismiss this motion for a new trial, certified the grounds, and overruled the motion: Held, that the motion for a new trial so made

should have been dismissed; but having been overruled, the judgment will be affirmed, although counsel for the plaintiff in error were active and vigilant, and it was no neglect or fault of theirs that the term of court was lost, the only thing which they might have done, which was not done, being to have had the original motion filed in court, so that it could have been pending and gone over to the next term. [East Tennessee, Virginia and Georgia R.R. v. Whitlock, 1886, 75 Ga. 77](#). New Trial ↪ 166(2)

13. Directed verdict

Motion to set aside judgment and verdict and to grant new trial on ground that court erred in directing verdict for amount of damages and that neither defendant nor his counsel learned of verdict and judgment until time that fi. fa. was levied was in effect motion for new trial. [Uni-on Life Ins. Co. v. Aaronson, 1964, 109 Ga.App. 384, 136 S.E.2d 142](#). New Trial ↪ 109

14. Hearing

If pleadings in extraordinary motion for new trial do not contain statement of facts sufficient to authorize that motion be granted if facts developed at hearing warrant such relief, it is not error for trial court to refuse to conduct hearing on extraordinary motion. Code, §§ 70-301, 70-303. [Dick v. State, 1982, 248 Ga. 898, 287 S.E.2d 11](#). Criminal Law ↪ 959

On hearing of extraordinary or regular motion for new trial on ground of newly discovered evidence, trial court and reviewing court must consider alleged newly discovered evidence in light of and in comparison with evidence adduced at trial, and on which conviction was based, in order to determine whether alleged newly discovered evidence is merely cumulative or impeaching. Code, § 70-204. [Herrin v. State, 1944, 71 Ga.App. 384, 31 S.E.2d 124](#). Criminal Law ↪ 959; Criminal Law ↪ 1134(8)

The procedure in an extraordinary motion for a new trial in a criminal case is similar to that in application for injunction and practice for obtaining testimony at hearing on such extraordinary motion is same as an interlocutory hearing on application for injunction. Code, §§ 38-2401, 70-204. [Herrin v. State, 1944, 71 Ga.App. 384, 31 S.E.2d 124](#). Criminal Law ↪ 959

On motion for new trial based on newly discovered evidence, trial judge becomes trier of that issue. Code, § 38-2401. [Herrin v. State, 1944, 71 Ga.App. 384, 31 S.E.2d 124](#). Criminal Law ↪ 959

15. Record

Affidavits relating to a ground of a motion for new trial, which were not set out in the bill of exceptions nor attached to it, but were merely mentioned in it and separately filed, held not part of the record. [Central of Georgia Ry. Co. v. O'Kelley, 1915, 16 Ga.App. 594, 85 S.E. 938](#). Appeal And Error ↪ 528(4)

Where affidavits as to a ground of an extraordinary motion for new trial were specifically referred to in the motion, attached, and filed as part of it, they were part of the record. [Central of Georgia Ry. Co. v. O'Kelley, 1915, 16 Ga.App. 594, 85 S.E. 938](#). Appeal And Error ↪ 528(4)

Exhibits annexed to a motion for a new trial, and referred to therein, are part of the record, and, though constituting the evidence on which the motion was decided, they need not be incorporated in the bill of exceptions. [Patterson v. Collier, 1887, 77 Ga. 292, 3 S.E. 119](#). Appeal And Error ↪ 528(1)

16. Affidavits and other proofs

In prosecution for murder and armed robbery, in view of fact that there was no affidavit from defendant saying when he first learned of new evidence that he was "involuntarily drugged," defendant did not show due diligence necessary for grant of extraordinary motion for new trial. Code, §§ 70-301, 70-303. [Dick v. State, 1982, 248 Ga. 898, 287 S.E.2d 11](#). Criminal Law ↪ 958(3)

Affidavit of fellow prisoner that he committed crime for which prisoner was convicted and that prisoner did not participate therein would not be admissible evidence if new trial were granted prisoner and did not constitute ground for granting prisoner's extraordinary motion for new trial. [Fulford v. State, 1967, 222 Ga. 846, 152 S.E.2d 845](#). Criminal Law ↪ 958(4)

Affidavits of jurors in support of motion for new trial on ground of newly discovered evidence which illustrate that jurors would have voted different verdict if such evidence had been presented at trial suffices to show value of such newly discovered evidence and probability of different result at new trial. Code, § 70-204. [Stembridge v. State, 1951, 84 Ga.App. 413, 65 S.E.2d 819](#), certiorari granted [72 S.Ct. 552, 342 U.S. 940, 96 L.Ed. 699](#), certiorari dismissed [72 S.Ct. 834, 343 U.S. 541, 96 L.Ed. 1130](#). Criminal Law ↪ 958(1)

The overruling of motion for new trial of defendant convicted of seduction, on ground of newly discovered evidence of affiant that woman allegedly seduced had had previous intercourse with affiant, was not abuse of discretion where such woman testified that she had never had intercourse with any man except accused. Code, § 38-2401. [Herrin v. State, 1944, 71 Ga.App. 384, 31 S.E.2d 124](#). Criminal Law ↪ 958(6)

On hearing of an extraordinary motion for new trial, it is not error to admit, over objection, record of evidence taken at main trial bearing on question to be decided. Code § 70-204. [Herrin v. State, 1944, 71 Ga.App. 384, 31 S.E.2d 124](#). Criminal Law ↪ 956(1)

On hearing of extraordinary motion for new trial in criminal case, it is not error for trial court to allow, over objection, oral or parol testimony, and court has discretion to receive testimony in form of affidavit or oral or parol testimony, though it is better practice to state, in order setting hearing, whether testimony will be by affidavit or by parol, or both. Code, §§ 38- 2401, 70-204. [Herrin v. State, 1944, 71 Ga.App. 384, 31 S.E.2d 124](#). Criminal Law ↪ 956(1)

Presumption of negligence in failing to procure testimony of witnesses attending court is not rebutted by general statements in affidavit. [King v. State, 1932, 174 Ga. 432, 163 S.E. 168](#). Criminal Law ↪ 958(3)

17. Effect of opinion evidence

Trial court is not bound by opinion of expert witness and may find an accused sane even without positive testimony as to sanity. [O.C.G.A. §§ 5-5-40, 5-5-41](#). [Levitt v. State, 1984, 170](#)

[Ga.App. 32, 316 S.E.2d 6](#). Criminal Law ⚡ 494; Criminal Law ⚡ 570(1)

18. Form and entry of judgment

A motion for new trial is not the proper remedy to correct an alleged error in judgment or decree entered by the trial court. Code, § 110-501. [Ballard v. Harmon, 1947, 202 Ga. 603, 44 S.E.2d 260](#). New Trial ⚡ 24

The remedy by motion for new trial in the superior court applies to correction of errors committed on the trial and sufficiency of the evidence to sustain verdict, but does not apply to correction of errors in a judgment or decree based on a verdict. Code 1933, § 70-203 et seq. [Harper v. Perry, 1940, 190 Ga. 233, 9 S.E.2d 160](#). New Trial ⚡ 24; New Trial ⚡ 33; New Trial ⚡ 70

19. Opening and vacating judgements

Once state Board of Workers' Compensation has denied request for disability benefits it lacks authority to reopen case on grounds of newly discovered evidence, even within 30-day period during which appeal can be taken. Workers' Compensation Rules and Regulations, Rule 103(d), O.C.G.A. Tit. 34 App.; O.C.G.A. §§ 5-5-41(a), [34-9-1](#) et seq. [Cook v. Jordan Bradley Supply Co., 1990, 195 Ga.App. 604, 394 S.E.2d 400](#). Workers' Compensation ⚡ 1782

20. Newly discovered evidence--In general

No special circumstances were present to justify new trial pursuant to extraordinary motion based upon once unavailable testimony of co-defendant who had asserted his Fifth Amendment privilege not to testify at defendant's prior trial but had since pled guilty; substance of testimony was always known by defendant and co-defendant lacked credibility since he would have nothing to lose by testifying untruthfully regarding alleged innocence of defendant. [U.S.C.A. Const.Amend. 5](#); O.C.G.A. § 5-5-41. [Hester v. State, 1995, 219 Ga.App. 256, 465 S.E.2d 288](#). Criminal Law ⚡ 938(2); Criminal Law ⚡ 956(5)

Writ of coram nobis is simply extraordinary motion for new trial based on newly discovered evidence, and must be directed to trial court in first instance. [O.C.G.A. §§ 5-5-40, 5-5-41](#). [Wiley v. State, 1992, 204 Ga.App. 881, 420 S.E.2d 783](#), certiorari denied. Criminal Law ⚡ 1536; Criminal Law ⚡ 1588

Trial court was authorized to draw a conclusion that defendant's mental condition at time of trial was such that he adequately understood nature of charges against him and that he was capable of cooperating with his attorney if he had so chosen; hence, newly discovered evidence that defendant had previously received psychiatric treatment was not so material as to demand different verdict or otherwise to warrant grant of extraordinary motion for new trial. [O.C.G.A. §§ 5-5-40, 5-5-41](#). [Levitt v. State, 1984, 170 Ga.App. 32, 316 S.E.2d 6](#). Criminal Law ⚡ 951(5)

Requirements for granting extraordinary motion for new trial are that movant satisfy the court that newly discovered evidence had come to his knowledge since the trial, that want of due diligence was not reason that evidence was not acquired sooner, and evidence was so material that it would probably produce a different verdict, that it is not cumulative only, and affidavit

of witnesses attached to motion or its absence accounted for, and that new evidence does not operate solely to impeach credibility of witness and implicit in these requirements is that newly discovered evidence must be admissible as evidence. Code, §§ 70-301, 70-303. [Dick v. State, 1982, 248 Ga. 898, 287 S.E.2d 11](#). Criminal Law ⚡ 938(1)

Evidence of defendant's two psychiatrists was not newly discovered, for purposes of new trial, where defendant could have used the witnesses during trial and substance of their testimony was cumulative of findings of psychiatrists of forensic services division of state hospital who had examined defendant thoroughly over a period of several days and the psychiatrists, both of whom spoke with defendant only briefly, agreed with the state's psychiatrists as to nature of defendant's mental condition although they used different labels. [Dix v. State, 1979, 244 Ga. 464, 260 S.E.2d 863](#), certiorari denied [100 S.Ct. 1346, 445 U.S. 946, 63 L.Ed.2d 781](#). Criminal Law ⚡ 938(2)

Prisoner's extraordinary motion to vacate and set aside judgment and sentence on ground of newly discovered evidence is in reality extraordinary motion for new trial based on newly discovered evidence. Code, § 70-303. [Fulford v. State, 1967, 222 Ga. 846, 152 S.E.2d 845](#). Criminal Law ⚡ 938(1)

Trial judge in passing upon extraordinary motion for new trial based upon newly discovered evidence is vested with wide discretion and his judgment thereon will not be disturbed unless abuse of discretion is clear. Code, § 70-303. [Fulford v. State, 1967, 222 Ga. 846, 152 S.E.2d 845](#). Criminal Law ⚡ 938(1); Criminal Law ⚡ 1156(3)

Record failed to show due diligence of defendant in finding alleged newly discovered evidence so as to warrant granting of extraordinary motion for a new trial. [Loomis v. Edwards, 1949, 56 S.E.2d 183, 80 Ga.App. 396](#), certiorari denied [70 S.Ct. 989, 339 U.S. 970, 94 L.Ed. 1377](#), rehearing denied [71 S.Ct. 11, 340 U.S. 847, 95 L.Ed. 621](#). Criminal Law ⚡ 951(5)

An extraordinary motion for new trial on ground of newly discovered evidence is addressed to sound discretion of trial judge, whose denial of motion will not be reversed, unless such discretion is abused. Code, § 70-303. [Pulliam v. State, 1945, 199 Ga. 709, 35 S.E.2d 250](#). Criminal Law ⚡ 938(1); Criminal Law ⚡ 1156(3)

Applications for new trials for newly discovered evidence are not favored by the courts. [Herin v. State, 1944, 71 Ga.App. 384, 31 S.E.2d 124](#). Criminal Law ⚡ 938(1)

An extraordinary motion for new trial on ground of newly discovered evidence is addressed to the sound discretion of the trial judge, and refusal to grant it will not be reversed, unless the discretion is abused. [Brannon v. State, 1940, 190 Ga. 203, 9 S.E.2d 152](#). Criminal Law ⚡ 938(1); Criminal Law ⚡ 1156(3)

An extraordinary motion for new trial on ground of newly discovered evidence is not favored. [Brannon v. State, 1940, 190 Ga. 203, 9 S.E.2d 152](#). Criminal Law ⚡ 938(1)

Newly discovered evidence establishing a nervous disease in existence at the time the crime was committed, and known to the accused, is not sufficient ground for an extraordinary motion for a new trial. [Harris v. Roan, 1904, 119 Ga. 379, 46 S.E. 433](#). Criminal Law ⚡ 938(3)

21. ---- Diligence, newly discovered evidence

In view of defendant's failure to make any effort to obtain allegedly newly discovered evidence from the witness during four-year interval between trial and witness' deposition in civil suit, in which newly discovered evidence allegedly surfaced, and of defendant's delay of two years following witness' exculpatory testimony in deposition before bringing motion for a new trial based on newly discovered evidence, trial court did not err in denying motion. [O.C.G.A. §§ 5-5-23, 5-5-41. *Llewellyn v. State*, 1984, 252 Ga. 426, 314 S.E.2d 227.](#) Criminal Law ↪ 939(1); Criminal Law ↪ 951(1)

Extraordinary motion for new trial for newly discovered evidence is properly refused, if witnesses involved were subpoenaed and attended court. [King v. State, 1932, 174 Ga. 432, 163 S.E. 168.](#) Criminal Law ↪ 939(2)

22. ---- Materiality, newly discovered evidence

Where sheriff, arresting one accused of murdering his wife, advised accused that he was being arrested because "your house was burned and some of your folks", and accused made no reply, another sheriff's letter, informing accused before fire that warrant had been sworn out for him about an automobile wreck, was insufficient basis for extraordinary motion for new trial on ground of newly discovered evidence explaining accused's silence when arrested. Code § 70-303. [Pulliam v. State, 1945, 199 Ga. 709, 35 S.E.2d 250.](#) Criminal Law ↪ 940

23. ---- Cumulative evidence, newly discovered evidence

Newly discovered evidence of witness who merely corroborates other witnesses in attendance at trial will not warrant granting of extraordinary motion for new trial. [King v. State, 1932, 174 Ga. 432, 163 S.E. 168.](#) Criminal Law ↪ 941(1)

A new trial will not be granted for newly-discovered evidence which is merely cumulative. [Harris v. Roan, 1904, 119 Ga. 379, 46 S.E. 433.](#) Criminal Law ↪ 941(1)

24. ---- Impeachment of witnesses, newly discovered evidence

Under statute providing that new trial might be granted on ground of newly discovered evidence when such evidence is not merely cumulative or impeaching in its character, statements made by chief witness for state in manslaughter prosecution which were contradictory to statements made at trial were merely impeaching in character and went only to matter of credibility of witness and evidence came within inhibition of statute. Code, § 70-204. [Stembridge v. State, 1951, 84 Ga.App. 413, 65 S.E.2d 819,](#) certiorari granted [72 S.Ct. 552, 342 U.S. 940, 96 L.Ed. 699,](#) certiorari dismissed [72 S.Ct. 834, 343 U.S. 541, 96 L.Ed. 1130.](#) Criminal Law ↪ 942(2)

A new trial will not be granted for newly-discovered evidence which would only discredit or impeach a witness. [Harris v. Roan, 1904, 119 Ga. 379, 46 S.E. 433.](#) Criminal Law ↪ 942(1)

25. ---- Sufficiency and probable effect, newly discovered evidence

Capital defendant was not entitled to post-conviction DNA testing, absent showing that testing

would have raised reasonable probability of acquittal had it been available at trial, in light of all evidence in case. [Crawford v. State, 2004, 278 Ga. 95, 597 S.E.2d 403](#), reconsideration denied, for denial of stay of execution, see [125 S.Ct. 5, 542 U.S. 954, 159 L.Ed.2d 837](#), certiorari denied [125 S.Ct. 5, 542 U.S. 954, 159 L.Ed.2d 837](#). Criminal Law ☞ 1590

Newly discovered evidence, to entitle defendant to new trial after conviction of crime must be such as would probably cause return of different verdict on another trial. Code, § 70-204. [Stembridge v. State, 1951, 84 Ga.App. 413, 65 S.E.2d 819](#), certiorari granted [72 S.Ct. 552, 342 U.S. 940, 96 L.Ed. 699](#), certiorari dismissed [72 S.Ct. 834, 343 U.S. 541, 96 L.Ed. 1130](#). Criminal Law ☞ 945(1)

A new trial after conviction should not be ordered on ground of newly discovered evidence, unless probability that new facts would produce different verdict is reasonably apparent to judicial mind. Code, § 70-303. [Pulliam v. State, 1945, 199 Ga. 709, 35 S.E.2d 250](#). Criminal Law ☞ 945(2)

Evidence that one convicted of murdering his wife by burning dwelling house, in which bodies of wife and accused's children were found after fire, first learned, when he filed suits on three of children's life policies, naming accused as beneficiary, about two years after homicide, that such policies were not enforceable, was insufficient to establish abuse of discretion in overruling extraordinary motion for new trial on ground of such newly discovered evidence refuting state's evidence that one motive for crime was to collect such life insurance. [Pulliam v. State, 1945, 199 Ga. 709, 35 S.E.2d 250](#). Criminal Law ☞ 945(2)

Where an accused has been convicted and has filed motion for new trial and judgment denying it has been affirmed, and an extraordinary motion for new trial is made based on ground of newly discovered evidence, it should be made to appear that the evidence is so material that it would probably produce a different verdict. [Brannon v. State, 1940, 190 Ga. 203, 9 S.E.2d 152](#). Criminal Law ☞ 945(1)

The overruling of extraordinary motion for new trial on ground of newly discovered evidence which was filed by accused, who was convicted of murder, was not abuse of discretion, where the evidence at best would furnish only another version of the homicide which was not disputed, and it was doubtful under the record whether newly discovered evidence would have made an issue such as to require a charge on voluntary manslaughter. [Brannon v. State, 1940, 190 Ga. 203, 9 S.E.2d 152](#). Criminal Law ☞ 945(1)

Overruling extraordinary motion for new trial is not error, where facts shown by affidavits would probably not change result. Pen.Code 1910, § 871. [Baskin v. State, 1931, 43 Ga.App. 760, 160 S.E. 539](#). Criminal Law ☞ 945(1)

Showing that juror who gave occupation as clerk was also supernumerary policeman did not require granting extraordinary motion for new trial for newly discovered evidence. Pen.Code 1910, § 871. [Baskin v. State, 1931, 43 Ga.App. 760, 160 S.E. 539](#). Criminal Law ☞ 945(2)

26. Misconduct of or affecting jurors

Juror misconduct involving two jurors' communication of information to other jurors about visit to crime scene and discussion of case with others was not so prejudicial that verdict was

inherently lacking in due process, and thus, defendant was not entitled to new trial pursuant to extraordinary motion, where four years passed between verdict and third juror's realization that there had been juror misconduct during deliberations, third juror conceded his inability to recall all evidence properly presented to jury, no other jurors corroborated third juror's contentions regarding alleged misconduct and impact misconduct had on jury, and third juror's testimony regarding how he reached decision was inconsistent. O.C.G.A. § 5-5-41. [Satterwhite v. State, 1998, 235 Ga.App. 687, 509 S.E.2d 97](#), reconsideration denied, certiorari denied. Criminal Law ⚡ 925.5(2)

Where neither juror who allegedly engaged in misconduct during deliberations was called to testify at hearing on defendant's extraordinary motion for new trial, substance of their statements, that is, that they visited crime scene and discussed case with others, constituted "hearsay" and could not be used to prove that they actually undertook those actions. O.C.G.A. § 5-5-41. [Satterwhite v. State, 1998, 235 Ga.App. 687, 509 S.E.2d 97](#), reconsideration denied, certiorari denied. Criminal Law ⚡ 957(5)

27. Notice of appeal

Defendant's motion for new trial that was not timely made was extraordinary motion for new trial and did not extend time for filing notice of appeal from convictions and sentences, and Court of Appeals did not have jurisdiction to entertain that appeal, in absence of assertion of error of counsel in perfecting appeal; defendant had forfeited review of convictions on merits by failure to follow required procedure. O.C.G.A. §§ 5-5-41, [5-6-38\(a\)](#). [Knox v. State, 1986, 180 Ga.App. 564, 349 S.E.2d 753](#), certiorari denied. Criminal Law ⚡ 1081(6)

28. Scope and extent of review

State did not waive appellate consideration of its contention, on appeal from order granting post-conviction motion for DNA testing, that post-conviction order improperly failed to require that movant's DNA profile be furnished to state sex offender data bank by opposing movant's draft of consent order which did provide for reference samples to be collected from movant, where state opposed alleged consent order because it addressed unspecified matters that were not ordered by court, not provided to the state, and not discussed with state, and did not specifically oppose taking of reference samples from movant. [State v. Clark, 2005, 273 Ga.App. 411, 615 S.E.2d 143](#), reconsideration denied. Criminal Law ⚡ 1137(2)

Defendant's motion that record of murder trial be opened to allow submission of new evidence which allegedly cast doubt on verdict would not be addressed on appeal, but could be raised in trial court by extraordinary motion for new trial. O.C.G.A. § 5-5-41. [Maxwell v. State, 1993, 263 Ga. 57, 428 S.E.2d 76](#). Criminal Law ⚡ 1134(1)

29. Subsequent appeals

Post-conviction court's order granting movant DNA testing was final order and directly appealable, especially where movant did not file extraordinary motion for new trial; post-conviction court was ruling on only motion before it. [State v. Clark, 2005, 273 Ga.App. 411, 615 S.E.2d 143](#), reconsideration denied. Criminal Law ⚡ 1023(15)

Subsequent direct appeal of criminal conviction is authorized without application if it is not

Ga. Code Ann., § 5-5-41

separate from original appeal. O.C.G.A. §§ 5-5- 41, [5-6-35\(a\)\(7\)](#). [Walls v. State, 1992, 204 Ga.App. 348, 419 S.E.2d 344](#). Criminal Law ↪ 1180

Ga. Code Ann., § 5-5-41, **GA ST § 5-5-41**

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