

(O R D E R O F May 9th, 1914.)

The recitals of fact contained in the grounds of the foregoing motion for new trial are hereby approved as true.

This 9th day of May, 1914.

B. H. Hill,
Judge S. C. A. C.

0011461

(RESPONSE TO EXTRAORDINARY MOTION FOR NEW TRIAL.)

STATE OF GEORGIA,

Vs.

Leo W. Frank.

() No. 9410

() Superior Court of Fulton County.

() Conviction of Murder. July Term of

() Fulton Superior Court: Affirmance of

() Judgment by Supreme Court; Entry of

() Remittur March Term, 1914, Fulton

() Fulton Superior Court.

() Extraordinary Motion for New Trial by

() Leo W. Frank.

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The State of Georgia in response to said motion and as

for specific ~~answer~~ *file* to the several grounds, the State of Georgia hereby shows:

GROUND 1.

In response to Ground 1, the State says that the same is not in any view sufficient.

The facts with reference to the hair, as developed on the original trial, are as follows:

R. P. Barrett, sworn for the State, was the machinist in the National Pencil Company's place of business. He swore that on Monday morning after the murder was committed, viz, April 28, 1913, he found blood spots near the ladies' dressing room, where Jim Conley afterwards swore he dropped the body when moving it under Frank's directions. Barrett was asked on examination in chief, as is shown by reference to p. 526, Vol. 2, of the stenographer's record filed in the Superior Court of Fulton County, the questions following, and gave thereto the answers set out, viz,

"Q. Did you or not find any hair anywhere there? A. I found the hair on a bench lathe, on the handle."

"Q. How far was this hair, what kind of a handle was it on?
A. It was in the shape of an "L".

Further on, on p. 527, the following questions were put by the State, and answers given, viz;

"Q. How was the hair caught in there? A. Swinging down like this (indicating)."

"Q. Was Miss Magnolia somebody there? A. As near as I can remember, Miss Magnolia was there."

Counsel for the defense cross-examined said Barrett, and for some reason best known to them, did not ask him whether or not he could identify the hair found by him as that of Mary Phagan, but, as is shown on p. 534, Vol. 2, contented themselves with asking him the questions following, to which they received the answers set out:

"Q. You called Mr. Quinn to see that? A. I called him.

"Q. Were they long strings of hair or were they knotted and matted strands? A. They were around my finger. I pulled

the handle and they got around my finger."

Quinn was a witness for the defendant on the main trial.

Miss Grace Hicks was sworn by the State, and in Vol. 1, p. 337, of the official stenographer's report is found the following questions and answers, viz:

"Q. How did you know that that was Mary Phagan? A. I just knowed by her hair being so long.

"Q. Knew her by her hair? A. Yes sir."

On cross examination counsel for the defendant asked said witness, among others, the following questions, and received the answers following, viz:

"Q. Miss Grace, what sort of hair did little Mary Phagan have? A. Well, she had a kind of sandy color of hair.

"Q. Was it lighter than yours or less light? A. It was darker than mine.

"Q. Darker than your hair? A. Yes sir.

"Q. Much darker? A. Well, it was about two shades darker than mine.

"Q. You would say about two shades; she was still a blond girl, though? A. Yes sir."

So far as the State is able to recall, this is all the evidence introduced by the State in reference to the hair found by Barrett on the lathe.

The defendant introduced as his witness Miss Magnolia Kennedy.

Barrett had already shown in his evidence that Miss Magnolia Kennedy was present, and the State, ~~as, is~~ shown on p. 527 of the record, undertook to show by him that the hair was identified by Miss Magnolia Kennedy, and such evidence, on objection of attorneys for the defendant, was excluded.

Counsel for Frank, after putting Miss Magnolia Kennedy up, as will be seen by reference to Vol. 5, p. 2250, did not ask said witness anything about the hair. On cross examination by the Solicitor General, as shown on p. 2252, the following questions were asked and answers given by said witness:

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"Q. Did you discover any hair on there anywhere, identify any hair? A. Mr. Barrett called me and showed me the hair at the machine.

"Q. And you identified it, didn't you? A. Yes sir.

"Q. Whose hair was it? A. It looked like Mary's hair.

"Q. Where was it when you saw it? A. It was on the lathing machine."

On p. 2253 of said record, these cross questions were asked and these answers given:

"Q. Now, what was the color of Mary's hair, and what was the color of this hair you found there? A. Mary's hair was a light brown, kind of a sandy color.

"Q. Was this light brown that you found? A. Yes sir."

So far as the State is able to find or recall, this evidence constitutes all of the evidence introduced on the trial of the case with reference to the hair found on the lathe on the office floor of the National Pencil Company. If not, all, this is the important evidence, and there is no evidence in the record contradicting this.

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The State ~~attaches hereto and incorporates herein a copy of~~ affidavit of W. A. Gheesling, the undertaker who had charge of the remains of Mary Phagan, the murdered girl, and who was a witness on the trial in behalf of the State. This affidavit, the State submits, in itself completely answers the contention of the defendant. ~~Said affidavit is as follows:~~

The attorneys for the defendant, under the law, propounded in this case certain questions to Dr. H. F. Harris, sworn by the State on the trial of this case, said Harris not having been asked either by the State or the defendant any question with reference to the hair. Said Harris, before D. O. Smith, Commissioner duly appointed to take his evidence in answer to questions propounded by defendant's attorneys, testified substantially as follows, viz: "I am state health officer and director of laboratories of the State Board of Health. I made two examinations of the body of Mary Phagan. The Solicitor General sent some hair found on a machine and asked me to compare this hair with hair taken from the corpse of Mary Phagan. I examined these specimens under a microscope. I did not make an exhaustive examination, though the examination was sufficient to show that the hair given me was almost certainly that of a female, and was certainly from the head of a Caucasian. The specimen of hair given me by the Solicitor General's assistant, and that obtained from the head of Mary Phagan resembled each other so much that it was impossible for me to say definitely that it was not Mary Phagan's hair. I have recently examined hair taken from the head of several persons, and have found that individual hairs from the same individual differ as much in shape as the hair given me by Mr. Dorsey."

The State will show, in opposition to this ground of the motion, the entire evidence obtained by the State from Dr. H. F. Harris, and the State contends that in no view of the facts developed under the law does this constitute any ground for a new trial being granted.

The contention of the State was, under the evidence adduced as shown by the brief of evidence, that this was the hair of Mary Phagan. The State now insists that the evidence adduced warranted the contention that it was the hair of the deceased, and the State did not ask the question of Dr. H. F. Harris because the State was fully apprised as to the fact that said Harris' evidence could not have any probative effect.

The said Harris was sworn, as the record shows, long after counsel for the defense had cross examined Miss Grace Hicks, as shown by the record, and the State submits that the record itself shows that counsel for the defense are shown by this record to have been lacking in diligence in reference to the subject matter involved in Ground 1.

GROUND 2.

The State contends that the record of questions and answers given under Ground 1 and the other evidence contained in the brief of evidence approved by the court when the motion for a new trial was had, shows that the evidence of Miss Jimmie Mayfield, as referred to in Ground 2, is merely cumulative. In no event should a new trial be granted because of this evidence. Under the record, even if at all material, it is not of sufficient materiality to produce a different result upon another trial of this case, if it should be granted.

Frequently during the trial of the case, Mr. Reuben R. Arnold stated that the defense were putting on the stand and asking certain questions of all the ladies employed in the National Pencil Company's place of business.

--7--

For one illustration of such a statement on the part of Frank's attorney aforesaid, see ~~p. 2984 of the stenographer's report of the evidence, where Mr. Arnold asked Miss Julia Foss, a witness for the defendant, "Well, inasmuch as you worked on that floor, I am going to ask you a question. Have you ever been to Mr. Frank's office after hours, when anything wrong or immoral was done of any sort?"~~

~~For another illustration, see p. 2984 of the report, where the witness, for the defendant, Miss Corinthia Hall, was asked: "Now, I will ask you a question that I am asking every lady who works on the fourth floor. Did you ever meet Mr. Frank at the factory, or at any time or place, for any immoral purpose."~~

For another illustration, see p. 2986, where the witness, Miss Ida Hayes, was asked by Mr. ^{Arnold} ~~Rosser~~, "Now I am going to ask you a question that I am asking every lady on the fourth floor. Did you ever at any time or place meet Mr. Frank for any immoral purpose whatever, down in that office or anywhere else?"

The State submits, in view of the fact that Barrett was the State's witness and Grace Hicks was the State's witness, and both had testified earlier in the case and before the defendant introduced his evidence with reference to hair, and inasmuch as it is shown in Ground 2 of the extraordinary motion for a new trial that the witness Miss Jimmie Mayfield was an employee of the National Pencil Company at that time, that the defendant, ~~and~~ his counsel, show an absolute lack of diligence in not making inquiry of Miss Jimmie Mayfield and all other employees in that factory with reference to this hair, and the State insists that had this been a very material question involved, that said counsel would have made diligent inquiry. Counsel for defendant, Frank, were put upon notice, when they sought to show by Barrett that the hair was identified by a witness, viz, Miss Magnolia Kennedy, introduced by the defendant Frank, as to what the State expected to show. The diligence of counsel for the defendant in reference to this hair is well illustrated by the fact that, notwithstanding this evidence of Barrett, who testified in behalf of the

--8--

State, that Magnolia Kennedy, the defendant's witness, saw the hair, they failed to ask any question with reference to the identity of this hair, and the State could with much more show of plausibility contend that because counsel for Frank did not ask their witness this question when they knew, or ought to have known by diligent inquiry, that she could probably identify the hair as being that of Mary Phagan, that said attorneys for Frank were suppressing material evidence, than can said attorneys, as they have done in the first ground of this motion, assert that the State was suppressing material evidence, when the State failed to ask Dr. H. F. Harris about said hair, or when the said H. F. Harris refused to volunteer a statement to the effect that he could not tell whether it was her hair or not.

The State contends that the finding of the hair was not relatively very material, there being other and more important facts showing that the murdered girl met her death on the office floor, occupied by Leo M. Frank, viz, the evidence of the blood spots found at the ladies' dressing room, within several feet of where the hair was discovered by Barrett.

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GROUND 3.

In answering Ground 3, the State ^{submits} ~~attaches a copy of~~ an affidavit executed by Mrs. Cora Falta, which in itself amply disproves the contention of the defendant. The statements with reference to diligence in respect to this subject matter, as set forth in response to grounds 1 and 2 in this answer, are also likewise applicable to Ground 3.

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GROUND 4.

With reference to this Ground, the same objection is urged against the granting of a new trial, as heretofore referred to.

We submit that if a verdict rendered after a trial lasting approximately thirty days, where evidence was introduced covering, as shown by the stenographer's report, seven large volumes, and 3,647 pages of legal cap paper, a voluminous record, can be upset, - where the same has been rendered by a unanimous verdict of the jury, as shown by the affidavits from all of the jurors as attached to the motion for a new trial made by defendant, Leo M. Frank, and to which said affidavits reference is prayed, where said verdict was approved by the judge who tried said case, and thereafter affirmed by the Supreme Court of Georgia, one of the grounds of the motion for new trial being as to the sufficiency of the evidence, - then verdicts of juries and judgments of courts are not ^{the} binding and conclusive adjudications which they have heretofore been supposed to be, and the trial is little more than a farce.

This witness is at present in the employ of the National Pencil Company.

The volume of the record is shown by the affidavit of Bass Rosser, ~~copy of which is attached hereto.~~

Ground 5.

5. Replying to paragraph 5 of the extraordinary motion, the State, for answer, submits the following as being a complete answer and reason why no extraordinary motion under the law should be granted on this ground. The State herewith sets out an affidavit obtained of Albert McKnight on the 21st day of April, 1914, and also one obtained on the 16th day of April, 1914, ~~which are as follows~~

Also the State submits as a complete answer, the affidavit of Angus Morrison, and

Also affidavit of R. L. Craven.

Also the State submits affidavit of E. H. Pickett.

Also the State submits the affidavit of W. W. Boyd taken on April 22nd, 1914.

(22)

The State submits that Albert McKnight has told the absolute truth, and that no new trial could possibly, under the rules of law as ^{Laid} ~~laid~~ down by the Courts, be granted under the showing made in ground 5 of this motion. The State submits that Albert McKnight could not truthfully change the evidence given on the trial, and would not do so, and that he never would have made the false affidavit referred to in ground 5 except for the improper influences shown to have been exerted on him by agents and representatives of the defendant Leo M. Frank.

GROUND 6.

6. Referring to ground 6 with reference to the newly discovered evidence of Mrs. J. B. Simmons, the State shows that this constitutes no satisfactory ground for a new trial, because first, this evidence could not have been produced and would not have ~~www~~ produced a different result in view of the overwhelming and preponderance of the evidence that this girl was dead not later than one-thirty o'clock, and could not have screamed at the time and place referred to by Mrs. Simmons. Second, the said Mrs. Simmons is shown by the following affidavits to be one of the most disreputable and worthless characters that ever disgraced any community. The worthlessness, the lack of character on the part of the said Mrs. J. B. Simmons, is shown by the following affidavits, ~~and the fact that she was with the~~

(James J. Green,)

(R. S. Ozburn,)

(Mrs. Willie M. Blacker,)

(C. H. Brannon,)

(George H. Phillips,)

(L. O. Askew,)

(Isaac Wheeler,)

(J. F. McGill,)

(James T. Moser,)

(Jim Daly,)

(R. G. Patton,)

(E. W. Crump,)

(Thos. Christian,)

(T. E. Street,)

(Mrs. J. B. Simmons,)

(A. B. Williams) (Mrs. Simmons' son-in-law).

The evidence as to the general character of this witness, ~~as stated above~~, is sufficient answer to the charge that the State did not introduce her, even if there had not been, as there are other reasons set out.

GROUND 7~

The State submits, with reference to Ground 7, that the same is wholly insufficient; the evidence set out as having been given by Mrs. Ethel Harris Miller and ~~she~~ ^{Mrs. LERNOFF} being merely cumulative evidence; the question of alibi having been mainly relied upon by the defendant, Leo M. Frank, in the trial in which he was convicted of the offense of murder.

The State is informed and believes that these witnesses are non-residents of the City of Atlanta, and nothing is known as to their character, reputation, standing, associations or connections.

The State is informed and believes that the defendant, Leo M. Frank, has stated that he saw Mrs. Ethel Harris Miller on the day in question, and can even remember the character and kind of dress in which she was attired; and if this be true, it is an additional reason why the ground urged should not be the basis for granting the motion for a new trial.

GROUND 8.

The State, answering Ground 8, submits that, under the law, the fact that Dewey Hewell has changed, if such be the fact, her evidence as given on the trial of Leo M. Frank, would not be a ground for granting this extraordinary motion. In addition to the evidence given by Dewey Hewell, showing that Leo M. Frank personally knew Mary Phagan, the deceased, the State introduces the evidence of J. M. Gentz, Book-keeper, who swore that Leo M. Frank remarked to him that he seemed to know Mary pretty well. The State also introduced Ruth Robertson, a witness who swore that Frank personally knew the deceased; also the testimony given by a witness named W. E. Turner. And the State therefore submits that, if Dewey Hewell should testify otherwise on the trial of this case, it could in no wise produce a different result. Turner swore to having seen the defendant insisting on speaking with Mary Phagan at a time when there were no other employees in the room, and intruding his attentions upon the deceased.

In answer to the allegations in Ground 8, the State makes reference further to the affidavit of Miss Carrie Smith, likewise fully set out in Ground 9, ~~a copy of which is as follows:~~

Also, the affidavit given by Mrs. Maggie Nash, nee Griffin.

These affidavits establish the falsity of the claims as contained in Ground 8, and show in a measure the tactics pursued by this defendant in his effort to overturn the verdict of guilty.

9.

Answering Ground 9 of the so-called extraordinary motion of the defendant, Leo M. Frank, the State submits, as a full and complete refutation to the said ground, even if it were otherwise sufficient in law to warrant the setting aside of the verdict of guilty, as rendered, the affidavit of Miss Ruth Robertson; a copy of which said affidavit is hereto attached. This said affidavit is supported by the W. T. Robertson, affidavit of her father, a copy of which is as follows:

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GROUND 9

Also with reference to Ground 9, the State respectfully refers the Court to the affidavit of Mrs. Carrie Smith, and the affidavit of Mrs. Nash, nee Griffin, ~~full set out in this answer~~ ^{read} under Ground 8.

With reference to this Ground 9, as is insisted by the State with reference to all of the grounds contained in this motion, it is submitted that the same does not present extraordinary situations such as are contemplated by the law, and could not possibly, in any view of the case, be reasonably expected to produce a different result to that which has been obtained, namely, the verdict of guilty.

10.

To Ground 10, as a full and complete answer, in view of the law containing with reference to such matters, the State submits that the affidavit of Mrs. Mamie Edmunds, nee Miss Mamie Kitchings, is a full and complete answer to the allegations of Ground 10. ~~Said affidavit of Mrs. Mamie Edmunds, nee Kitchings, is as follows:~~

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As to Ground 11. The State insists that the same does not constitute an extraordinary situation such as is contemplated shall exist before the Court shall set aside a solemn verdict rendered unanimously by a jury of twelve, where the verdict is approved by the trial judge and affirmed by the Supreme Court. Under the law, even if the witness referred to, namely, Miss Marie Karst, had repudiated her evidence, the Court could not grant the movant this motion. This affidavit of Miss Marie Karst is also supported by the affidavits of Miss Nellie Pettus and Miss Lillie Pettus. As a matter of fact, however, the defendant has wholly and totally misrepresented the facts, as is shown by three affidavits voluntarily signed by Miss Marie Karst. Said affidavits of Miss Karst and the affidavits of Misses Nellie and Lillie Pettus, as follows:

9

- 12 -

As to Ground 12: The State submits that, at best, this evidence, if true, is merely cumulative. The plea of alibi constituted, as will be seen by reference to the brief of evidence filed in this case, about the only defense set up by Frank, the defendant, and numerous witnesses were introduced along that line. Among other alibi witnesses testifying to almost the same state of facts to which in this ground it is said Pardee and Green will testify, was Miss Helen Kern. Even the testimony, however, of Miss Kern, and the evidence here referred to, which could be on another trial shown through Pardee and Green, was not in conformity with the statements made by Leo M. Frank, the defendant himself, as will be hereinafter shown. In the brief of evidence on the original trial, Frank is shown to have stated, as will be seen by reference to the State's "Exhibit B,"- that he was still at the National Pencil Company's place of business as late as 1:10 p.m., when he went to dinner. Frank was shown to be wonderfully accurate with figures, and says, as will be noted by reference to his statement, in which he says that "Mary Phagan came into the factory between 12:05 and 12:10, maybe 12:07," said statement being contained in the State's "Exhibit B,"; and when he says that he locked the door of the pencil factory at 1:10. This was a matter of vital importance to Frank, and if what he then said was true, then he could not have been at the corner of Whitehall and Alabama Streets, either at the time Miss Kern swore he was, or at 1:03 and 1:04, when Pardee and Green are alleged to say he was. On the trial of the case, the State endeavored to introduce the evidence given by the defendant, Frank, himself before the Coroner's jury, when inquiry was being made by that Court into the question as to how Mary Phagan came to her death. Astute and learned counsel for the defendant, Frank, then and there objected to the introduction of said statement, and the Court, the same being an ordinary proceeding at law, then and there rejected the same. The State now,

on this extraordinary motion, says however, that it is nothing but right and proper that the Court should be informed as to what Frank himself said in the evidence on the hearing before the Coroner, as to where he was at the time Pardee and Green now say they saw him at the corner of Alabama and Whitehall Streets. On page 55 of the stenographer's minutes of the Coroner's inquest, as reported by Harvey L. Barry, Official Reporter of Fulton Superior Court at that time, and as filed, as required by law, in the Clerk's Office of the Superior Court of Fulton County, the following questions were put by Coroner Paul Donehoo, who was examining said Leo M. Frank at that inquest, and the following answers were given, viz: "Q. What time do you say it was when you left the building? A. It might have been a trifle after 1, two or three minutes, four minutes; it was a trifle after 1." On page 59, occur the following questions and answers: "Q. When you went out of the office, 5 minutes after 1 o'clock, tell us where you went, just what direction you took, etc.? A. I went up from the factory to Alabama Street, went up Forsyth to Alabama, down Alabama to Broad and Alabama, and I think I caught a car there. Q. Do you remember the car you caught? A. I think it was a Washington Street car. A. It came first? A. I don't remember which came first."

In connection with this alibi evidence, and in connection with the evidence as given by Leo M. Frank before the Coroner's inquest, and on the trial of the case, the State insists that this evidence quoted immediately above, where Leo M. Frank states at the Coroner's inquest that he caught the car at the corner of Broad and Alabama Streets, is very material, in view of the evidence now given, or said to be obtainable from Pardee and Green, that they saw him at the corner of Whitehall and Alabama. It will also be observed that, when Frank, after having sworn as above indicated on the hearing before the Coroner's Jury, as to where he boarded the car, and what car he boarded,

changed these statements on the trial, and said, as will be seen by reference to page 3201 of the stenographer's report: "I continued on up Forsyth street to Alabama and down Alabama to Whitehall, where I waited a few minutes for a car, and after a few minutes a Georgia Avenue car came along," etc. There was good reason for the change; first, Whitehall street was a more popular thoroughfare; the corner of Whitehall and Alabama Sts., is one of the most congested streets in the City; more people by far catch cars there than do at the corner of Broad and Alabama, where Frank said when he was sworn before the Coroner's jury he caught the car; and he also swore that he caught a different car, namely, the Washington Street car, instead of, as he stated on the trial of the case, the Georgia Ave. car.

The State insists that it would be a futile consumption of time to split hairs about a proposition of this kind, when the said Leo M. Frank is convicted by the records out of his own mouth of having deliberately falsified, either when he was sworn ~~he was~~ and under oath before the Coroner, or when he was under oath on trial for his life before a jury.

The State submits that the late hour at which this cumulative evidence is produced is of itself sufficient reason, as is recognized by all courts, for refusing to set aside this verdict.

But the State fortunately for the truth and in the interest of justice has a voluntary repudiation of defendants claims on the part of said Pardee in the shape of a duly executed affidavit which will be shown and the State alleges that said witness approached L. Z. Rosser Sr., Atty. for Frank and asked said Rosser to let him withdraw the affidavit here introduced by the defense and before the same was read to the Court on this hearing.

13

As to Ground 13. The State, in answer to this ground, submits the evidence taken by the defendant before D.O. Smith, Commissioner appointed by this Court, and also attaches hereto affidavits by Mary Rich, which not only absolutely and completely refute the contentions, but which, if true, show the policy and tactics pursued by this defendant, Leo M. Frank and his friends in their desperation to set aside the verdict of guilty; and further show that the motion is not made in good faith. In no view of the facts as here presented, should a new trial be granted. ~~The affidavits as made by said Mary Rich are as follows:~~

The defendant has not stated frankly at this time why he is so anxious to procure this evidence from Mary Rich.

Also the State, in response to this ground, submits an affidavit of F. J. Wellborn, ~~a copy of which is as follows:~~

The absolute worthlessness of the evidence of Mrs. J. B. Simmons, as referred to in Ground 13 of the extraordinary motion, has been dully disposed of in replying to the ground dedicated alone to a discussion of the evidence of the said Mrs. Simmons.

Also affidavit of James Conley amply refutes said charge

In reply to Ground 14, the State says that, even if it be true that the said G. Burtis Dalton has changed his evidence as given by him on the trial of the original case, it would not be ground for a new trial. Said Dalton merely sustains Jim Conley. As a matter of fact, Dalton's recitals were denied by one Daisy Hopkins, but Daisy Hopkins was overwhelmingly impeached for general bad character, much more effectively than the defense impeached Dalton for general bad character. But in this connection, the attention of the Court is called to the evidence of Merck, an unimpeached witness for the State, who testified, as will be seen by reference to the brief, to a state of facts positively impeaching Daisy Hopkins, and sustaining Dalton's evidence, and thus sustaining Conley. As a matter of fact, the State does not believe that the said Dalton has recanted the evidence introduced on the trial, and does not believe that the said Leo M. Frank will be able to produce any bona fide evidence to the contrary.

As to Ground 14-1/2. With reference to this ground of the motion, the State submits affidavits of J. M. Gantt

Also affidavits of Phillip Chambers,

As a matter of fact, no one could possibly tell what the number of the order was on the order blank used in this case. The State submits that the number, as developed under a colored photographic lens, is not 1018., as contended by the defendant, but is 1818, as shown by the affidavit of the photographer who took the picture, and the only pictures which have been taken of said note. The affidavit of the photographer will be shown on the hearing substantuating this allegation.

Also, in refutation of this ground, the State submits the affidavit of H. W. Oattis.

The State will show a properly certified copy of the ordinance of the City of Atlanta, under which said Leo W. Frank and the officials of the Pencil Company would have been amenable to prosecution for permitting papers like this to remain in the basement.

(As to the 15th Ground. While submitting that the same does not constitute an extraordinary case, even if true, the State says that this ground, among other grounds, in view of the facts as shown by the affidavit of Ivy Jones, which will be set out and shown to the Court, shows the methods being pursued and the lack of good faith on the part of movant, and shows conclusively that the motion for a new trial was not a bona fide motion filed upon newly discovered evidence, but was merely a motion for the purpose of delay. The ~~following is a copy of the~~ affidavit of the said Ivy Jones, which fully disposes of the allegations made by the movant?

As to Ground 16: In answer to Ground 16, the State contends itself with setting out a copy of an original affidavit given by Miss Helen Ferguson.

Under no view of this case, could this state of facts referred to in Ground 16 warrant or justify any Court in granting the defendant a new trial.

As to Ground 17. The State, recognizing that the law is that a new trial could never be granted upon the mere ground that some witness sworn in a case has repudiated the evidence given on the stand, has not made any great effort to locate J. E. Duffy, the witness referred to. The law is that, before a verdict can be set aside, the witness repudiating his evidence must be convicted of the offense of perjury. The State asserts that Duffy has not only not been convicted, but that no effort whatsoever has ever been made to obtain his conviction. If the law of the land is applied to the case of the State against Leo M. Frank, convicted of the offense of murder, in this case, as the Judges and Courts have applied it in other cases, this constitutes no ground for setting aside the verdict and granting a new trial, even if it should be true; first, because, as a naked proposition, no matter how material the evidence may have been; and second, because the evidence of J. E. Duffy was only material in impeaching evidence introduced by the defendant through a witness by the name of Lee. The State insists that the evidence of Lee itself, on its face, was ridiculous and absolutely so false that no honest jury could have given credence thereto; and the State insists that in no view of the facts with reference to Duffy's evidence, could Leo M. Frank expect a different result than a verdict of guilty.

Answer Ground 18, the State contents itself with showing the general bad character of the witness referred, to, viz. Mrs. M. Jaffe. This is shown by affidavits of P. H. Orr, and J. L. Moore and Bass Rosser, also the affidavit of P. P. Cooper.

Thus it is, that when each one of the eighteen grounds of this extraordinary motion are considered and measured by the standards set up by the law of the land, each one of them is seen to amount to nothing. And unless nothing added to nothing makes something, a proposition which the State submits is not true, then there is absolutely nothing in this original so-called extraordinary motion.

Respectfully submitted.

E. A. Stephens,

Hugh W. Dorsey,

Solicitor General, Atlanta Judicial Circuit.

Filed in office this the 23rd day of April, 1914.

John H. Jones, D. Clk.

0011496

(STATES RESPONSE TO AMENDMENT S 1,2,3, & 4.)

State of Georgia,	().	No. 9410.
Vs.	().	Fulton Superior Court.
Leo M. Frank.	().	Extraordinary Motion for New
	().	Trial.

:-----:

GEORGIA, FULTON COUNTY.

State of Georgia, answering the several amendments to the extraordinary motion for a new trial, as filed by movant, Leo M. Frank, and taking them up in the order in which they were presented to the Court, says:

1. As to the amendment claiming that J. W. Boozer, on the afternoon of April 26, 1913, at about 4:15 o'clock met Jim Conley on Peters street near Castleberry street; The State says that, in the first place, the said Boozer is absolutely mistaken as to the date that he saw said Jim Conley. The State submits that said Jim Conley did see said Boozer on several occasions, and probably the day before, and that the defendant, Leo. M. Frank, was looking after, for the said Jim Conley, the payment of certain dues, which Jim Conley owed on a certain watch. The said Boozer, the State submits, is not sustained by any other witness, so far as this record shows, in his claim as to seeing Conley at the time and place stated, and is flatly contradicted by said Conley, who is sustained as to his whereabouts by Lvey Jones and other witnesses.

But the State submits that at best, even if the affidavit of the said Boozer should be true, that it merely amounts to impeaching evidence, insofar as Jim Conley is concerned, and under the law furnishes no ground for setting aside the verdict of guilty, as rendered against said Frank. This would be true, even if the said Boozer had contradicted the said Conley as to his whereabouts at an hour which would have rendered it impossible for the said Conley to have aided the said Frank in the manner and form as testified to by said Conley on the trial of

the case of the State Vs. Leo M. Frank. As a matter of fact, the said Conley could have assisted the said Leo M. Frank in the disposition of the body of Mary Phagan, as testified to, and have been seen by the said Boozer. In other words, the testimony of the said Boozer, even if true, a thing that the State denies, is with reference to immaterial matter.

2. State of Georgia, answering the second amendment says that C. B. Ragsdale has repudiated this affidavit, and insists that he was procured to swear to the falsehoods as contained in the allegations as embodied in this amendment, and says that he was paid money to swear as he did. The true history of this transaction is well known to the agents of one William J. Burns, a detective in the employ of Frank or some of Frank's friends, who has been co-operating with the defense in getting up evidence to overturn the verdict of guilty, and the particulars of the transaction, the State alleges, were handled by one Lehon, an agent of the William J. Burns Detective Agency.

In addition to this, the said Ragsdale is absolutely unworthy of belief, being impeached, as the State will show, by the affidavits of many reputable citizens who knew the said Ragsdale, in the county of Cherokee State of Georgia, where he formerly resided, and in the city of Atlanta, Also the State says that one R. L. Barber, who is alleged to corroborate and sustain the story as told by said Ragsdale, is a notoriously worthless character, and the said Barber's general reputation for veracity is impeached by many affidavits, which will be submitted on the hearing.

In addition, the said Barber has absconded and cannot be found and the information given the officers and officials of the State in control of the management of this case is, that the said Barber has absconded for the purpose of evading punishment for the wilful and deliberate lies he has sworn in connection with this transaction, and the state alleges that the said Barber was paid \$100 to make said false affidavit, submitted by the attorneys for the defendant, Leo M. Frank.

These allegations, the State will prove by affidavits to be submitted herewith.

This will illustrate the methods, the State is informed.

and believes, being pursued and followed in reference to other matters in connection with this extraordinary motion for new trial in behalf of the defendant, Leo. M. Farnk. The State will be able to show that this transaction is in keeping with other similar transactions, viz, the Mincey incident and the Fisher incident, not to mention other transaction in the course of this case of less importance. Hence the State submits that under no circumstances should a new trial be granted by reason of these perjured affidavits.

3. A third amendment embodies a claim on the part of the defendant, set forth through affidavits signed by Mrs. May Barrett and her daughter, Mrs. Maud Bailey.

It will be noted that the contention of the State originally was that Jim Conley was sitting in the area near the elevator down stairs. The State introduced the evidence of Jim Conley to that effect, and showed by Mrs. Arthur White that a negro man was seated exactly where Jim Conley claimed he was seated at about the time the murder was committed. Furthermore, it was shown, by Tillander and Graham, two unimpeached white men, that a negro man was sitting at the place where Conley claims he was sitting, waiting for the defendant, Leo M. Frank. By an abundance of circumstantial evidence, the State was able to show a state of facts which the State submitted corroborated Jim Conley in his evidence, but it remained for the defendant himself to produce in the affidavit of Mrs. Maud Bailey conclusive evidence that the negro Jim Conley was sitting at this particular place, as he contends. This said witness in her affidavit, says: "Deponent further says that when she entered the pencil factory, that day, Jim Conley was sitting on a box between the stairway and the elevator on the first floor.

Deponent says she would not have noticed Conley but for the fact that he made a noise with his foot upon the box upon which he was sitting, which attracted her attention and caused her to look up and see him. "But The State insists that the affidavit of the said Bailey, as to seeing Jim Conley there is unworthy of belief, because the State will show that among the first people sent for and examined fully as to everything that they knew about this transaction was this said Mrs. Maud Bailey, and her

CONFIDENTIAL

mother, Mrs. Mary Barrett. If Mrs. Maud Bailey and Mrs. May Barrett, who was an employee of the pencil factory at the time this thing occurred, really knew what she now would have this court believe that she does know, then she was deliverately making misstatements as to her knowledge, and as the State believes and charges, for the purpose of protecting Leo M. Frank, who saw the importance of keeping the officers ignorant that Jim Conley was where he said he was, and where the State insists he was.

The state submits that the contention of the defendant Leo M. Frank, as disclosed by the affidavits of these two women, is untrue. In addition to having the evidence of statements made to the Solicitor General immediately following the murder, the State submits other affidavits from reputable people, showing that at no time, though the matter was frequently discussed, did either of these women ever give any intimation of knowing any such fact as are now brought forward at the eleventh hour.

4. Answering the 4th amendment in reference to the claim of Annie Maud Carter

First, the State says that Annie Maud Carter is a worthless character, unworthy of belief.

Second, the evidence, even if true, under the law could not be heard on the trial of Leo M. Frank, under repeated rulings of the Supreme Court. The opportunity to defend the case by this kind of evidence would open the door for all kinds of fraud and enable a man with sufficient wealth to have some one confess to the crime, send them away to the uttermost parts of the earth, and then acquit, as is sought to be done in this case, the real culprit and murderer.

Third, when the case of the State of Georgia, Vs. Leo M. Frank, was on trial, evidence was introduced of a paper drawn by William Smith, Attorney for Conley, who endeavored to have His Honor Judge Roach, previous to the trial, permit him to remain away from the Fulton County Jail. Among other things Conley alleged in his petition that the condition of the county jail was such that he could not be safeguarded, and his interests protected as they could be elsewhere, and in paragraph 11 of

CONFIDENTIAL

said paper, which was introduced on the trial of the original case, said Conley said, responding to said rule:

"11. Respondent shows that through no fault of the County Sheriff, a sufficient inside force of guards has been ^{not} provided by the County Authorities, only one man being paid by the County to guard twenty cell blocks distributed in twenty wings and over five floors; that it is a physical impossibility for this one man to keep up or even know what is transpiring on five different floors, or twenty separate immense wall and steel blocks, distributed through a large building; that with this inadequate force, which this Respondent is advised the Sheriff of this County has complained about, it is an absolute impossibility for the best Sheriff in the world or the best trained deputies to know exactly what is going on at any and all times or any reasonable part of the time; that the keys to practically all of the cell blocks are garried by 'convicted criminals', known as 'trusties', who turn in and out parties entering or leaving cell blocks, and while they have general instructions covering their duties, it is an impossibility for the inside deputy to know whether each is discharging his duty properly at all times; that the food is prepared and distributed in the County prison itself and practically by 'convicted criminals,' whose disregard for law and principle is written upon the criminal records of this State, that owing to this condition men have been known to saw through solid steel bars and cages and escape to freedom; that it would be easy for any one to reach or harm respondent or to poison him through his food, that the 'trusty turn keys' who are convicts can easily swear to admissions against the interest of this respondent, even though such admissions might not be made; that the friends of the Defendant in this case are allowed to pour constantly into the jail at all hours of the day and up to a late hour of the night, and are in close touch with many of these 'trusty turnkeys', and 'trusty attaches' of the jail; that while a prisoner at the County Prison before his transfer to the City Prison, a goodly number of people were admitted to the cell block to talk with Respondent,

whose presence was not requested or desired; that among those visitors was one whom this Respondent has every reason to believe was working in the interest of the defendant; that this party presented Respondent with sandwiches which this Respondent did not eat, that this same party also offered to present Respondent with whiskey; that Deponent was threatened with physical harm while in the County prison to the extent of the possibility of taking his life; that he was denounced as a liar, relative to his testimony in this case; and this Respondent is sure without the knowledge or through the neglect of the Sheriff or any of his men, but directly attributable to the construction physically of the County Prison and the inadequate force allowed the Sheriff to oversee and care for it, that respondent is advised and believes that one of the parties friendly to the defendant is already priming himself to swear that Respondent made certain admissions while he was in the County prison, which this Respondent did not make, and which testimony will be false, but will be given, if given to help the defendant and damage this Respondent."

In this respect the State submits that the said James Conley was a prophet, because the State will show by affidavits that an effort was made to poison said Jim Conley, and they have, through convicts, men unworthy of belief, so shaped and directed matters as to make it appear that this disreputable woman, Annie Maud Carter, who was convicted of highway robbery, did get such an admission from said Conley, and the State insists that the entire transaction is merely in keeping with the Ragsdale incident, and that the whole thing is founded upon falsehood.

Fourth, the said Annie Maud Carter, after making said affidavit, was, as the State insists, it will be able to show, placed in hiding, where not only the State's officers and officials cannot see her or interview her with reference to the matters and things to which she has sworn, but her whereabouts is being kept concealed from her own family, a circumstance which the State submits in and of itself should demand at the hands of

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this court a judgment overruling and denying this application for a new trial, because the State insists that if the transaction referred to in this amendment was worthy of belief, there would be no occasion or necessity for the said Annie Vaud Carter to be spirited away and beyond the jurisdiction of the Court, as the State is informed and believes said Annie Vaud Carter to be, and rendered inaccessible to the officers.

That the contention of the movant, Leo M. Frank, is false is furthermore shown by a statement on the part of the said Annie Vaud Carter, made in the shape of an affidavit, in which it will be shown that she made many contradictory statements to what is alleged by movant to have been the facts.

5. At the time of drawing this answer, the State is not informed as to what notary attested said alleged affidavit of Annie Vaud Carter. But the State says that the prosecution read affidavits either witnessed or attested by C. W. Burke, alleged to have been made by Ivey Jones, which the State insists is a forgery, and furthermore, that the State insists that another affidavit witnessed by Burke, viz, the affidavit of Miss Ruth Robison, is a forgery, and in this connection the ~~said~~ ^{State} calls the attention of the court to the fact that one C. W. Burke attested, not only some of the affidavits of the defendant Leo M. Frank, but witnessed the affidavit of Dewey Hewell, who is in Cincinnati, O., and inaccessible, and likewise witnessed the affidavit of C. Burtis Dalton, who is in Florida and inaccessible, and the affidavit of Mary Rich was attested by C. W. Burke.

Wherefore, the State insists that the extraordinary motion be overruled, as under no circumstances could a different result obtain by virtue of any of the various contentions as set up in either the original or the several amendments to the original extraordinary motion for new trial.

Respectfully submitted,
E. A. Stephens,
Hugh M. Dorsey, Sol. Gen'l.

Filed in office this the 1st, day of May, 1914.

John H. Jones, D. Clk.

REPLY TO FIFTH AMENDMENT TO EXTRAORDINARY MOTION FOR NEW TRIAL.

oooOooo

STATE OF GEORGIA, (). No. 9410.
Vs. (). Fulton Superior Court.
Leo M. Frank. (). Extraordinary Motion for New
 (). Trial.

:-----:

State of Georgia, responding to the fifth amendment to the extraordinary motion for new trial, as allowed on May 1, 1914, says:

1. With reference to the alleged newly discovered evidence disclosed in affidavit of Georgia Denham, the State says:

The contention of the State was that Conley had assisted Leo M. Frank in removing the body. Even if it should be conceded that the said Conley had blood on his shirt, it would, the State insists, be another fact corroborating the State's contention that said Conley assisted the real murderer of Leo M. Frank in removing said body, and in no event would it be a material fact, if it be a fact, showing that Conley had himself committed the crime.—

The State introduced as a witness Holleway, an employee of the National Pencil Company. Said Holleway entrapped and misled the State in several particulars. With reference to said Conley and the shirt worn by the said Conley, the brief of evidence shows that said Holleway swore as follows: "On Monday morning I saw Conley. Instead of being upstairs where he ought to be, sweeping, he was down in the shipping room, watching the detectives, officers and reporters. I caught him washing his shirt. Looked like he tried to hide it from me. I took it up and looked at it carefully and looked like he didn't want me to look at it at all".

The State insists that had there been any blood on said shirt that said Holleway undoubtedly would have seen the same, because he says he looked at the shirt carefully. The brief of

SECRET

evidence shows that said Holleway was thoroughly in sympathy with the defendant, and hence the State insists that the affidavit of said Georgia Denham is shown by the record, through the mouth of Holleway, who was really in sympathy with the defendant, to be false. As a matter of fact, the state says that there was never any blood on said Conley's shirt. If there had been, said Georgia Denham would have immediately, being herself an employee of the Pencil Company's factory, have made such fact known.

Referring to the contention of the defendant Frank that Georgia DeDham knows that the hair found by Barrett on the lathe was not that of Mary Phagan, the State makes the same response as made to the first and other grounds of the original motion in the extraordinary motion. Likewise the same response is made by the State to the contention as disclosed in the affidavit of Cora Lavender Leffeu.

3. With reference to the contention in this fifth amendment that certain notes alleged to have been written by Annie Maud Carter show Conly to be the real murderer, the State says that these letters were never shown to said Jim Conley and the State has not been apprised as to whether said Conley admits or denies that he wrote said notes. The State, however, is content on this proposition to rest with reference to these notes on the statement of Annie Maud Carter herself, as contained in an affidavit introduced by the State, to the effect that whatever letters she did receive from said Conley did not have the vile and filthy language as contained in the notes set up by the movant Frank, and the State insists that said notes are forged and manufactured by means of a conspiracy engineered by a convict in the Fulton County jail at that time, viz, George Wrenn.

3. The movant insists that the cut on the drawers of Mary Phagan, deceased, was "not with a sudden rip but deliberately by one who must have taken his own time in doing it."

The State says that such contentions as this are so utterly absurd that it is unnecessary to make answer thereto. The idea that any man or person, by merely looking at garments, could tell that, is absurd.

SECRET

The State insists that this fifth amendment does not contain a single extraordinary situation such as is contemplated by law should exist before the solemn adjudication of a court and jury should be set aside. However, the State denies the truth of each and all of the contentions as set out in this fifth amendment, and says that the manner in which the same is shown to have been obtained, together with the length of time elapsing since the murder, all go to show that the claims are false.

Wherefore, the State submits that under no circumstances should a new trial be awarded the said Leo M. Frank.

E. A. Stephens,

Hugh M. Dorsey,

Sol. Gen.

Filed in office this the 8th day of May, 1914.

C. H. Brotherton, D. Clk.

SECRET

(ORDER OVERPULING EXTRAORDINARY
MOTION.) °

After hearing evidence and argument on the application of
Leo M. Frank, his extraordinary Motion for a new trial the
same is hereby overruled and denied.

May 8th, 1914.

Benj. H. Hill,
Judge Superior Court Atlanta Judicial.

STATE OF GEORGIA,
County of Fulton.

I Hereby Certify, That the foregoing pages, hereunto attached, contain a true Transcript of such parts of the record as are specified in the Bill of Exceptions and required, by the order of the Presiding Judge, to be sent to the

Supreme Court in the case of

Leo M. Frank
Plaintiff in Error.

vs.

The State of Georgia
Defendant in Error.

*I was unable to send up this
record in the time prescribed
on account of the length of this
and my inability to get the papers
in the case.*

Witness my signature and the seal of Court affixed
this the *30* day of *June* 191*4*

Samuel D. Jones
Clerk Superior Court Fulton County, Georgia,
Ex-Officio Clerk City Court of Atlanta.



File
Superior Court
Atlanta Circuit,
Term, 191

See, M. Stewart,

VERSUS

Shirley of Ala,

Transcript of Record

Filed in office 191

Clerk.

No. 32
Original Docket
Term, 1894
SUPREME COURT OF GEORGIA

11314

Frank

THE STATE

TRANSCRIPT OF RECORD

11314

JUN 30 1894

W. B. Sullivan, Jr.

LEO E. FRANK

VS.

STATE OF GEORGIA

EXTRAORDINARY MOTION FOR NEW TRIAL

FROM CONVICTION OF MURDER

IN SUPERIOR COURT.

BILL OF EXCEPTIONS.

INDEX TO BILL OF EXCEPTIONS PREPARED BY ATTORNEYS FOR PLAINTIFF IN ERROR

MOVANT'S EVIDENCE 1-80

STATE'S EVIDENCE 81-225

MOVANT'S EVIDENCE IN REBUTTAL 224-264

WITNESSES

ADKINS, J. A. (State) 140

ALEXANDER, H. A. (Movant) 77, 78, 121

ALLEN, AARON (State) 157

ALLEN, KATE (State) 157

AMENDMENT, FIRST, TO MOTION NEW TRIAL 56

AMENDMENT, SECOND, " " " " 58

AMENDMENT, FOURTH, " " " " 61

AMENDMENT, FIFTH, " " " " 65

AMENDMENT, THREE, STATE'S EVIDENCE 132

AMENDMENT, FOURTH, " " 141

AMENDMENT, FIFTH, " " 141

AMENDMENT, THIRD, (MOVANT - REBUTTAL) 250

AMENDMENT, FOURTH, " " 250

AMENDMENT, FIFTH, " " 250

In Poor Condition

ARMSTRONG, MRS. L. L. (State)	82
ARNOLD, MELL (State)	131
ARNOLD, R. R. ET AL. (Movant)	37
BACHEMAN, PROF. G. A. (Movant)	8
BAILEY, MRS. MAUD (Movant)	58
BAKER, HARRY, (State)	141
BARNETT, MRS. MAY (Movant)	60
BARRETT, R. P. (State - transcript evidence trial) ..	156
BARRETT, R. P. (State)	204
BECKER, H. F. (Movant)	30
BERNARD, B. (Movant)	254
BLACK, JNO. R. (Movant)	10
BLACK, JNO. R. (State)	82, 94, 202
BOOZER, J. W. (Movant)	56
BOYD, W. W. (State)	92
BRANCH, HARLEE (Movant)	6
BRANDON, MORRIS ET AL. (Movant)	37
BRANDON, MORRIS (Movant)	51
BURKE, C. W. (State - Telegram from)	17
BURKE, C. W. (Movant) 224, 225, 236, 240, 242, 243, 247, 248, 257	
BURNS, Wm. J. (Movant)	79, 230
BURNS, Wm. J. (State)	179
BUTLER, R. P. ET AL. (Movant - Conley's writing)	77
CARTER, ANNIE MAUDE, (Movant)	61, 62
CARTER, ANNIE MAUD, (State)	141
CARTER, ANNIE MAUD (State - sentence)	156
CARTER, JULIA (Movant)	63
CARTER, JULIA (State)	154
CHAMBERS, PHILIP (State)	118
COLEMAN, J. F. (State)	91, 203
CONLEY, JIM (State)	114, 144
CONROY, JOSEPH W. (Movant)	256
COUNTER SHOWING OF STATE	81-223
GRAVEN, R. L. (State)	87
CRUSSELL, E. E. (Movant)	11
GULBERSON, H. L. (State)	131

DALTON, G. BURTIS	(Movant)	27
DALTON, G. B.	(State)	115
DARLEY, H. V.	(Movant - explaining use order blanks)	32
DENHAM, MRS. GEORGIA	(Movant)	65, 66
DENNISTON, AUSTIN G.	(Movant-rebuttal)	237
DEVORE, R. A.	(State)	120
DOCUMENTARY EVIDENCE	(State - indictments)	221
DONALDSON, J. Y.	(State)	154
DOYAL, J. H.	(State)	130
DUFFY, J. E.	(Movant)	34
DUFFY, J. E.	(State)	128
DUFFY, B. C.	(State)	130
DUNCAN, G. H.	(State)	140
EARNEST, FLORENCE	(State)	138
EDMUNDS, MRS. MAMIE	(Movant)	24
EDMUNDS, MRS. MAMIE	(nee Kitchens) (State)	102
EDMUNDSON, MRS. H. V.	(State)	214
EDMUNDSON, H. V.	(State)	216
ENNIS, JAMES I.	(Movant)	79
EPES, GEORGE V.	(State)	195, 201, 209, 223
EPES, GEORGE,	(Movant - rebuttal)	251
EUBANKS, I. B.	(State)	176
FALTA, CORA	(Movant)	12
FALTA, MRS. CORA	(State - recanting)	82
FERGUSON, HELEN	(Movant)	34
FERGUSON, HELEN	(State)	126
FRANK, LEO M.	(Movant)	61
FRANK, LEO M.	(Movant - in reference to Boozer affidavit)	56
FRANK, LEO M.	(Movant - in reference to Bailey affidavit)	61
FRANK, LEO M.	(Movant - in reference to Annie Maude Carter affidavit)	64
FRANK, LEO M.	(State - transcript testimony corner's inquest)	220
FREER, T. J.	(Movant - rebuttal)	236
FYFFE, J. P.	(Movant)	1

GANTT, J. M. (State)	119
GARNER, N. A. (State)	98, 129, 130, 203, 206, 223
GHEESLING, W. A. (State)	81
GILLEBLAND, WILLIS J. (State)	149
GOODLIN, DAN M. (State)	209
GRAHAM, C. J. (State)	154
GROUND 1, MOTION NEW TRIAL	1
GROUND 2, " " "	12
GROUND 3, " " "	12
GROUND 4, " " "	13
GROUND 5, " " "	14
GROUND 7, " " "	16
GROUND 8, " " "	19
GROUND 9, " " "	21
GROUND 10, " " "	24
GROUND 11, " " "	25
GROUND 13, " " "	26
GROUND 14, " " "	27
GROUND 14½, " " "	30
GROUND 15, " " "	33
GROUND 16, " " "	34
GROUND 17, " " "	34
GROUND 18, " " "	36
GROUND 1, STATE'S EVIDENCE	81
GROUND 4, " " "	84
GROUND 5, " " "	84
GROUND 4, " " "	92
GROUND 7, " " "	92
GROUND 8, " " "	93
GROUND 11, " " "	106
GROUND 13, " " "	112
GROUND 14, " " "	115
GROUND 14½, " " "	118
GROUND 15, " " "	123
GROUND 16, " " "	126
GROUND 17, " " "	128
GROUND 18, " " "	132

GROUND 1, (MOVANT - REBUTTAL)	224
GROUND 2, " "	224
GROUND 3, " "	224
GROUND 5, " "	225
GROUND 9, " "	236
GROUND 10, " "	240
GROUND 11, " "	241
GROUND 13, " "	242
GROUND 14, " "	243
GROUND 14½, " "	245
GROUND 15, " "	247
GROUND 16, " "	248
GROUND 17, " "	248
GUNTER, MAGGIE (State)	153
HAAS, H. J. ET AL. (Movant)	37
HAAS, H. J. (Movant - rebuttal)	233
HAAS, LEONARD (Movant - rebuttal)	11, 51, 78
HARRIS, H. F. (Movant - affidavit presented to but not signed)	2
HARRIS, DR. H. F. (Movant)	7
HARRIS, DR. H. F. (Movant - rebuttal)	224
HARRIS, JACOB (State)	153
HALL, MISS CORINTHIA (State - transcript testimony at trial)	174
HANCOCK, DR. THOS. H. (Movant - rebuttal)	232
HAYES, MISS IDA (State - transcript testimony at trial)	174
HAYES, JOHN L. (State 150)	150
HEWELL, DEWEY, (Movant)	19
HICKS, MISS GRACE (State - transcript testimony at trial)	174
HOLLOWAY, E. F. (State)	156
HOLT, B. H. (State)	140
HOPKINS, STILES (Movant - rebuttal)	254
INDEX TO WITNESSES SUSTAINING AFFIARMS (See separate index below)	
INDICTMENTS, (State)	221
ISOM, C. A. (State)	98, 169, 216
ISOM, C. A. (State - telegram to from C. ... Burke)	156
JACKSON, L. (State)	153
JAFEE, MRS. M. (Movant)	36

JEFFERSON, MRS. GEORGE W. (State)	212
JONES, IVY (Movant)	33
JONES, IVY. (State)	123
KARST, MARIE (Movant)	25
KARST, MARIE (State)	106, 107
KENNEDY, MISS MAGNOLIA (State - transcript testimony at trial)	174
KNIGHT, J. O. (Movant - rebuttal)	224, 237, 242
LAFFEY, MRS. CORA L. (Movant)	34, 65
LANEY, W. J. (State)	172
LATIMER, W. CARROLL (ALEXANDER & HAAS) (Movant)	78
LEFKOFF, MAIER (Movant)	17
LEHON, DAN S. (State)	191
LEHON, DAN S. (Movant - rebuttal)	228, 236, 241, 242, 243, 248
LYNN, FRED (Movant)	230
MACINTYRE, Dan, Jr. (Movant - rebuttal)	229
MACINTYRE, D. I. (Movant - rebuttal)	240
MARK, DAVID ET AL. (Movant)	79
MARK, DAVID (Movant - rebuttal)	242
MAYFIELD, MISS JIMMIE (Movant)	12
MAYFIELD, MISS JIMMIE (recanting) (State)	62
MCCORD, ALICE MARJORIE (Movant)	13
MCCORD, ALICE MARJORIE (State)	62
MCKNIGHT, ALBERT (Movant)	14
MCKNIGHT, ALBERT (recanting) (State)	64
MCKNIGHT, MINOLA (Movant - rebuttal)	227
MEYER, MRS. MAX (Movant)	18, 19
MILLER, MRS. ETHEL HARRIS (Movant)	16
MINOR, PLENNIE (State)	136
MINAR, JOHN (Movant - rebuttal)	233
MOORE, J. L. (State)	132
MORRISON, ANGUS (State)	91
MORRIS, S. L. (State)	126
MORRIS, T. D. (State)	137
NASH, MRS. MAGGIE (Nee Griffin) (state)	94
OATTS, H. W. (State)	122

PAPEZ, PROF. J. W. (Movant)	8
PAPPENHEIMER, OSCAR (Movant)	4
PATRICK, G. W. ET AL. (Boozar) (Movant)	57
PERKERSON, FRED (State)	210
PERRY, EUGENE, (State)	124
PETTIS, NELLIE (State)	110, 111
PHILLIPS, JR., CHARLES, (State)	92
PHILLIPS, JR., CHARLES T. (Movant - rebuttal)	235
PICKETT, E. H. (State)	90
PIRK, MARY ET AL. (Movant)	65
PUCKETT, O. H. (State)	126
QUINN, H. I. (State)	128
QUINN, W. T. (State)	140
QUINN, LEMMIE, (Movant - rebuttal)	241
REBUTTAL ON BEHALF OF MOVANT	224
REESE, FRANK (State)	146
RICH, MARY (Col.) (Movant)	26
RICH, MARY (State)	112
ROBERTSON, RUTH (Movant)	21
ROBERTSON, RUTH (State)	99, 102
ROBERTSON, W. T. (State)	101
ROBERTS, WILEY B. (State)	151
ROSSER, BASS (State)	84
ROSSER, L. Z. ET AL. (Movant)	57
ROSSER, L. Z. ET AL. (Boozar) (Movant)	58
ROSSER, L. Z. ET AL. (Bailey) (Movant)	61
ROSSER, L. Z. ET AL. (A.L. Carter) (Movant)	64
ROSSER, S. L. (State)	102, 130, 137, 208, 236
SCHIFF, H. G. (explaining use order blanks) Movant	32
SCHIFF, H. G. (Movant - rebuttal)	225, 245, 246
SHIELDS, JOHN (State)	152
SIMS, ELLEN (State)	148
SMITH, B. S. (State)	152, 154
SMITH, MRS. CARRIE (State)	93
SMITH, D. C. (Commissioner) (Movant)	27
SMITH, W. M. (Movant)	4

SMITH, ORSON ET AL., (Ennis) (Movant)	80
STALLINGS, DR. RUSSELL D. (State)	140
STARNES, J. N. (State)	118
STATE'S COUNTER SHOWING	81
STELKER, JOSEPH (Movant)	24
STELKER, JOSEPH (Movant - rebuttal)	246
STEVENS, G. A. K. (Affidavit as to Harris' refusal to sign affidavit) (Movant) ...	3
STOVER, MONTEEN (State)	216
TEITLBAUM, S. N. (Movant)	10, 17, 79
TESTIMONY INTRODUCED BY MOVANT IN REBUTTAL	224
THOMAS, E. D. (Movant)	225
THOMPSON, JOE (Movant)	231
WAGGONER, ROBERT L. (State)	130
WAITS, JAMES H. (State)	125
WAITS, MRS. HATTIE (State)	125
WELLBORN, F. J. (State)	113
WHITE, MRS. J. ARTHUR (State)	139
WHITE, ARTHUR (State)	139
WILLIAMS, ED. (State indictment)	156
WILSON, T. F. (State)	141
WILSON, MRS. MINNIE (State)	139
WITNESSES SUSTAINING AFFIANTS (See separate index below)	
WOOD, NELLIE (State)	169, 175
WOOD, NELLIE (Movant) (Testimony at Inquest)	258
WRENN, GEORGE (Movant - rebuttal)	256
WRENN, J. E. (Movant - rebuttal)	247, 257, 259, 263
ZIGANKI, F. (Movant - rebuttal)	246

CHARACTER WITNESSES

ADKINS, J. A. (Bailey) (State)	140
ASMUS, G. J. (Pappenheimer) (Movant)	7
BYINGTON, JOHN R. ET AL. (Movant) (J. C. Knight)	250
CAMPBELL, DR. J. L. (Papez) (Movant)	10
CARTER, JULIA (Annie Maud Carter) (Movant)	63
DONALDSON, J. Y. " " " (State)	154
DUNCAN, E. H. (Bailey) (State)	140
ESKRIDGE, FRANK ET AL. (D. I. MacIntyre) (Movant - rebuttal)	220
FLOWERS, EULA MAY (Miss Jennie Mayfield) (Movant)	12

GILLESLAND, T. J.	(A. M. Carter)	(State)	149
GRAHAM, C. J.	(A. M. Carter)	(State)	154
GUNTER, MAGGIE	(A. M. Carter)	(State)	153
HARDIN, DR. L. SAGE	(Papez)	(Movant)	10
HARRIS, JACOB	(Carter)	(State)	153
HEREAN, JOSEPH	(Maier Lefkoff)	(Movant)	19
WILLOWAY, E. F.	(Mayfield)	(Movant)	12
HOLLOWAY, E. F. ET AL.	(Miss A. E. McCord)	(Movant)	14
HOLT, B. H.	(Bailey and Barrett)	(State)	140
JACKSON, L.	(A. M. Carter)	(State)	155
JACOBS, J.	"	(Movant)	64
LATIMER, R. CARROLL ET AL.	(H. A. Alexander)	(Movant)	78
MOGBERD, MARJORIE ET AL.	(LEFFER)	(movant)	34
MONTAG, SIG ET AL.	(Butler et al.)	(Movant)	77
MORGAN, HARRY E. ET AL.	(Becker)	(Movant)	31
MORRIS, S. L.	(Mrs. J. M. Waits)	(State)	126
ORR, H. H.	(Mrs. M. Jaffe)	(State)	132
PATRICK, D. T. ET AL.	(Boozar)	(Movant)	57
PULLIN, DR. J. E.	(Bachman)	(Movant)	10
PAXON, F. J. ET AL.	(MAIER Lefkoff and Mrs. F. M. Harris)		16
PERK, MARY ET AL.	(Mrs. C. F. Falta)	(Movant)	12
PERK, MARY ET AL.	(Mrs. C. Donham)	(Movant)	65
POWERS, F. M. ET AL.	(Jaffe)	(Movant)	37
PUCKETT, C. H.	(Mrs. Waits)	(State)	126
QUINN, H. I.	(Helen Ferguson)	(State)	128
QUINN, W. T.	(Mrs. Bailey)	(State)	140
QUINN, L. A. ET AL.	(Falta)	(Movant)	13
ROBERTS, WILEY B.	(A. M. Carter)	(State)	151
SCHIFF, W. G. ET AL.	(BECKER)	(Movant)	31
SCHWAB, OTTO ET AL.	(Pappenheimer)	(Movant)	7
SIMS, ELLEN	(A. M. Carter)	(State)	148
SMITH, ORSON	(J. L. Ennis)	(Movant)	80
WESTMORELAND, DR. W. F.	(Bachman)	(Movant)	10
WILDAUER, DR. B.	(M. Lefkoff)	(Movant)	19
WILSON, T. F.	(Bailey)	(State)	141

WITNESSES SUSTAINING AFFIANTS.

ALEXANDER, H. A.	(Schiff et al.) (Movant-rebuttal)	.....	245
ALEXANDER, H. A.	(W. J. Burns) (Movant)	.....	79
BARRETT, MAY	(Mrs. Bailey) "	.....	60
BERNARD, B.	(George Epps) (Movant - rebuttal)	.....	254
BURKE, E. W. ET AL.	(Ruth Robertson) " "	.....	256
BURKE, C. W.	" " "	.....	240
BURKE, C. W.	(Marie Karst) " "	.....	242
BURKE, C. W.	(F. E. Duffy) " "	.....	249
BURKE, C. W.	(Lillie Pettis) " "	.....	260
BURKE, C. W.	(Carrie Smith) " "	.....	263
BURNS, W. J.	(Albert McKnight) " "	.....	230
CAMPBELL, PAT	(C. B. Dalton) (State)	.....	118
CONROY, JOSEPH W.	(Dewey Hewell) (Movant - rebuttal)	....	256
DENNISTON, AUSTIN G.	(Ruth Robertson) " "	....	237
EARNEST, FLORENCE	(Mrs. T. D. Morris) (State)	.....	138
EDMONSON, H. W.	(Mrs. H. W. Edmondson) "	.....	216
FREER, T. J.	(Ruth Robinson) (Movant - rebuttal)	.....	236
HANCOCK, DR. THOS. H.	(Albert McKnight) " "	.....	232
HERMAN, JOS.	(Lefkoff) (Movant)	.....	19
JONES, DELBERT ET AL.	(M. R. Edmunds) "	.....	25
KNIGHT, J. O. ET AL.	(Annie M. Carter) (Movant - rebuttal)	.....	250
KNIGHT, J. O.	(Mayfield) " "	224	
KNIGHT, J. O.	(Duffy) " "	250	
KNIGHT, J. O.	(Ruth Robinson) " "	237	
KNIGHT, J. O.	(Marie Karst) " "	242	
LEFKOFF, MAIER,	(Ethel Harris Miller) (Movant)	.....	17
LEHON, DAN S.	(Albert McKnight) (Movant - rebuttal)	.....	228
LEHON, DAN S.	(Mamie Edwards) " "	241	
LEHON, DAN S.	(Marie Karst) " "	242	
LEHON, DAN S.	(Mary Rich) " "	243	
LEHON, DAN S.	(J. E. Duffy) " "	248	
LYNN, FRED	(Albert McKnight) " "	230	
MACINTYRE, DAN J.	(Albert McKnight) " "	229	
MACINTYRE, D. I.	(Mrs. Mamie Edwards) " "	240	
MARX, DAVID	(Mary Rich) " "	242	

MCKNIGHT, MINOLA	(Albert McKnight)	(Movant - rebuttal)	227
MEYER, MRS. MAX	(Mrs. Ethel Harris Miller)	(Movant)	18
MINOR, JOHN	(Albert McKnight)	(Movant - rebuttal)	233
PHILLIPS, CHAS. T. JR.,	"	"	235
QUINN, L. A. ET AL.	(Mayfield)	(Movant)	12
QUINN, L. A. ET AL.	(Falta)	(Movant)	13
QUINN, LEMMIE	(Marie Karst)	(Movant - rebuttal)	241
SCHWAB, OTTO ET AL.	(Bailey & Barrett)	"	250
SCHIFF, H. G. ET AL.	(Marie Karst)	(Movant)	26
SCHIFF, H. G. ET AL.	(J. H. F. Becker)	"	31
SCHIFF ET AL.	(Falta and Mayfield)	" rebuttal)	225
SMITH, ORSON ET AL.	(J. I. Ennis)	(Movant)	80
STEIKER, JOS. ET AL.	(Ruth Robertson)	(Movant)	24
STOVER, MONTEEN	(Mrs. H. W. Edmondson)	(State)	216
THOMPSON, JOE	(Albert McKnight)	(Movant - rebuttal)	231
WELLBORN, F. J.	(Mary Rich)	(State)	113
WILDAUER, B. ET AL.	(J. E. Duffy)	(Movant - rebuttal)	249
ZIGANKI, F. ET AL.	(Herbert Schiff)	"	246

First Division.

DOCKET NUMBER

32 CRIMINAL
March Term, 1914.

V. 11314

STATE OF GEORGIA

VS.

LEO M. FRANK.

EXTRAORDINARY MOTION FOR NEW TRIAL
CONVICTION OF MURDER
FULTON SUPERIOR COURT

FILE OF EXCEPTIONS

FILED IN OFFICE, THIS 11TH
DAY OF MARCH, 1914, at 9:30 A.M.
Charles J. Foy

ROBERT & BRADEN
Reuben E. Arnold
Herbert J. Deas
Leonard Hagg,

Attorneys for Plaintiff in Error.

STATE OF GEORGIA

vs.

LEO M. FRANK.

EXTRAORDINARY MOTION FOR NEW TRIAL
FROM CONVICTION OF MURDER
IN FULTON SUPERIOR COURT.

BILL OF EXCEPTIONS.

Be it remembered that at the March Term, 1914, of Fulton Superior Court there came on to be heard the case of the State of Georgia, vs. Leo M. Frank, the same being an extraordinary motion for new trial on behalf of said Frank from conviction of murder rendered at the July Term, 1913 of Fulton Superior Court.

A motion for new trial had been duly made during the July Term, 1913, and had been thereafter overruled. To the judgment of the Court overruling said motion for new trial exceptions were duly taken to the Supreme Court of Georgia, and on the 17th day of February, 1914, the judgment of the Court below was affirmed by said Supreme Court.

On the 27th day of March, 1914, said Leo M. Frank gave to the opposite party, to-wit: the State of Georgia, through the Solicitor General of the Atlanta Circuit, the notice provided in Section 6092 of the Civil Code of the State of Georgia, and Section 1091 of the Criminal Code of the State of Georgia, approved on August 15, 1910, which notice was in the following words:

"To Hugh M. Dorsey, Esq., Solicitor General:

Please take notice that twenty days from the date hereof, an extraordinary motion for new trial will be filed with His Honor, Ben J. Hill, Esq., Judge of the Superior Courts of the Atlanta Circuit, Criminal Division, or with one of the other Judges of said Court in behalf of the defendant in the above stated case, Leo M. Frank, Esq., convicted of murder; this notice being given you, as required by the laws of the State of Georgia, in such cases made and provided - Civil Code of 1910, sec. 6902, Criminal Code, sec. 1091.

Please take notice of the grounds of said extraordinary motion hereto attached pages 1 to 37, both inclusive; all of said grounds being made a part of this notice. Other grounds, including newly discovered evidence, will be added by amendment.

This March 26, 1914."

Attached to this notice was a copy of the original extraordinary motion for new trial, which is specified as a part of the record in this case.

Twenty days after giving the notice aforesaid, the extraordinary motion for new trial was submitted to the Judge of the Atlanta Circuit, who ordered the same filed, and on the 16th day of April, 1914, said judge issued a rule nisi thereon returnable on the

In Poor Condition

22nd day of April, 1914, which was during the March Term, of the said Atlanta Circuit.

Upon the hearing of said extraordinary motion for new trial, movant filed certain amendments which were duly allowed and which are of record in the case.

Upon the hearing of said extraordinary motion, the following evidence was introduced:

GROUND 1.

J.P. FYFFE, Sworn for the Movant. On April 2, 1914, I had a conversation with Dr. H. F. Harris at the latter's office, in Atlanta, Fulton County, Georgia, concerning an affidavit from the aforesaid Dr. Harris touching his knowledge of certain facts in connection with this case, and I presented to the said Dr. Harris a typewritten copy containing what I understood to be a statement which Dr. Harris would make in connection with the aforesaid facts. The said Dr. Harris, after reading the matter prepared for his signature, declined to sign the same, but with a lead pencil, made certain changes in the phraseology of said statement in order to make it conform to his own ideas, same being Exhibit B hereto attached, and then stated that if the document was recopied in conformity with the alterations made in pencil by him, same being Exhibit A hereto attached, that he would sign the same under oath and that the statements contained therein were true. After making the above declaration to me, the said Dr. Harris read the altered copy aloud to me and at the conclusion added in pencil an additional paragraph stating in connection therewith in substance as follows: "It would not be necessary to add my conclusion from the experiments made in this case under ordinary circumstances, or if I was dealing with gentlemen.

Accordingly I had the affidavit prepared in exact accordance with the pencil memorandum made by Dr. Harris, with the exception of the paragraph last above referred to, which was omitted, and upon April 3rd, 1914, presented the same to Dr. Harris for his signature. Dr. Harris, after reading the copy, declined to sign the same because of the omitted paragraph. He stated that the facts contained in the affidavit which he was asked to

sign were correctly set forth and that the same were true in every particular, but that he would not sign the same without the addition of the paragraph above referred to because the matter was going into the hands of counsel for the defense in this case.

The affidavit presented to the above mentioned Dr. Harris and which he was requested to sign under oath, and which had been prepared in accordance with the penciled memorandum made by the said Dr. Harris and the truth of which he admitted is hereto attached and marked Exhibit "A".

EXHIBIT "A".

"State of Georgia,) Extraordinary Motion for New Trial
vs. (From Conviction of Murder,
Leo M. Frank.) In Fulton Superior Court, March Term, 1913.

Georgia, Fulton County.

Personally came before the undersigned, H.F. Harris, who upon oath says that he is a practicing physician. Affiant further says that he performed the autopsy on the body of Mary Phagan after it was exhumed and that under the directions of Solicitor Dorsey, he obtained some of the girl's hair when the body was examined, to compare with the hair said to have been found on the lathe handle and which was given affiant by one of Mr. Dorsey's assistants.

Affiant states that the specimens of hair taken from the head of the girl, when compared with the specimens given him, appeared somewhat different in color and on microscopic examination, and his impression was that the two specimens of hair were not from the head of the same person.

Affiant states that he reported the foregoing view to the Solicitor General and that the latter told him there would be no necessity for going any further with the hair investigation.

Affiant further states that he never considered the matter in any way material and dismissed it from his mind. He further states that he does not recall that he was asked about the girl's hair when he was upon the witness stand and states further that the samples of hair, with the exception of several microscopic sections, were turned back to the aforesaid assistant of the Solicitor General.

Affiant further states that there was no purpose on his part to conceal the fact that the hair given him appeared different from the hair of Mary Phagan and that he does not think anyone else had such a purpose.

Affiant states that he is quite positive in his assertions that the microscopic test was carefully made. He states that the microscope will show the size and shape of hair and that the hair of different persons differs in these particulars.

Sworn to and subscribed before me
this 3rd day of April, 1914.

Notary Public, Fulton County, Ga."

EXHIBIT "B"

2 "State of Georgia,) Extraordinary Motion for New Trial
vs. (From conviction of murder
Leo M. Frank.) In Fulton Superior Court, March Term, 1913.

Georgia, Fulton County.

2 Personally came before the undersigned, H.F. Harris, who upon oath says that he is a practicing physician. Affiant further says that he performed the autopsy on the body of Mary Phagan, after it was exhumed, and that under the directions

of Solicitor Dorsey, he obtained some of the girl's hair when the body was examined, to compare with the hair said to have been found on the lathe handle and which was given affiant by one of Mr. Dorsey's assistants.

Affiant states that the specimens of hair taken from the head of the girl, when compared with the specimens given him appeared somewhat different as to color and on microscopic examination, and his impression was that the two specimens of hair were not from the same person.

Affiant states that he reported the foregoing views to the Solicitor General and that the latter told him there would be no necessity for going any further with the hair investigation.

Affiant further states that he never considered the matter in any way material and dismissed it from his mind. He further states that he does not recall that he was asked about the girl's hair when he was upon the witness stand and states further that the samples of hair, with the exception of several of the microscopic sections, were turned back to the aforesaid assistant of the Solicitor General.

Affiant further states that there was no purpose on his part to conceal the fact that the hair given him appeared different from that of Mary Phagan's and that he does not think anyone else had such a purpose.

Affiant states that he is quite positive in his assertions that the microscopic test was carefully made. He states that the microscope will show the size and shape of hair, and that the hair of different persons differs in these particulars.

Affiant further says the two specimens were much alike that it was impossible for him to form any definite and absolute opinion as to whether they were from the head of the same person or not.

Sworn to and subscribed before me
this April 2nd, 1914.

Notary Public, Fulton County, Ga."

E. A. K. STEVENS, Sworn for the Movant. He accompanied J. P. Fyffe to the office of Dr. H. F. Harris in the City of Atlanta, Ga. on April 2nd, 1914; that the said Fyffe presented to the said Harris a typewritten sheet containing certain statements in connection with the case; that the said Dr. Harris declined to sign the same but with a lead pencil made certain alterations at the conclusion of which he stated that if the matter was prepared in that form, he would sign the same; that he afterwards added thereto an additional paragraph in lead pencil which he said was a conclusion which he desired to add to his affidavit.

Witness was present again on April 3rd when the matter was presented to Dr. Harris, with the paragraph last above referred to omitted; that the said Dr. Harris stated that the affidavit prepared and submitted for his signature stated the truth but that he desired that the additional paragraph referred to above be added, and refused to sign the same in its then condition. And when asked why he would not sign the affidavit in its existing

form, even though it be the truth, he stated that he would not do so because it was going into the hands of Messrs. Rosser and Arnold, counsel for Leo M. Frank.

OSCAR PAPPENHEIMER, Sworn for the Movant. He has been a stockholder in the National Pencil Company for a considerable period of time;

Sometime after witness read in the papers that Dr. Harris had exhumed the body of Mary Phagan, he called on Dr. Harris, who lives next door to witness, and with whom witness was on most friendly terms. Being interested in the Company of which Leo M. Frank was superintendent, and being friendly inclined towards Leo M. Frank, witness was interested in the accusations made against Frank. Witness says that the conversation herein referred to, took place in the home of Dr. Harris, and occurred before the trial. Witness, after stating to Dr. Harris the interest he had in the matter as hereinbefore referred to, asked Dr. Harris whether, if consistent with his duty, he could tell witness what he learned as a result of the examination of the body of Mary Phagan. Witness further stated to Dr. Harris that if there was any professional reason why he should not disclose the facts that witness did not want him to do so. In response thereto, Dr. Harris stated to deponent that he felt he was bound not to discuss the matter, and thereupon witness dropped the subject. Conversation on various other subject followed of a purely social nature, for ten or fifteen minutes, whereupon on his own volition, and without further inquiry on witness's part, Dr. Harris voluntarily stated to witness, substantially, as follows: "I may say this much to you, Mr. Pappenheimer, that what I found during the examination was of no importance whatsoever, and need give you no bother."

WILLIAM M. SMITH, Sworn for the Movant. His name is William M. Smith. Several months ago, on or about the time of the trial in the Superior Court of Fulton County of Leo M. Frank, he does not now recall the date, he had occasion to interview the Solicitor General, Hon. Hugh M. Dorsey. Upon inquiry, he finally learned that he was at the office of the State Board of Health,

in the basement of the Capitol Building. He went there and found Mr. Dorsey there and talked with him for a few minutes. He also saw Dr. Harris and Mr. Dorsey there. After completing his interview of a few minutes with Mr. Dorsey, he became interested in some experiments that were being conducted, a friend and neighbor of his, Dr. Fort, being engaged with Dr. Patillo, also a friend of his, in certain experiments that were then being conducted. A portion of the time, he was engaged in eating some watermelon, his friend, Dr. Patillo had given him. Dr. Harris, Dr. Dorsey and the Solicitor General were most of the time, in a different part of this Department, in the office of Dr. Harris, which is across the entrance hall from the room in which the experiments were being conducted. He was in the office of Dr. Harris but a very short time, and most of the discussion he heard was a scientific one, relative to the digestion of cabbage, and the staying of the processes of digestion, and the causes normal and otherwise affecting digestion. He would not undertake to give the language of anyone, not even the language he used himself upon that occasion. He did hear some discussion as to some hair, which to the best of his recollection, was that Dr. Harris had some of the hair that had been found on the lathe at the factory, possibly all of it, he does not now recall about that however. He does not know whether or not it was mentioned as to how much hair of the hair Dr. Harris had. As well as he can recall, Dr. Harris said he had a number of "sections". He thinks he said "sections", he might be mistaken in this however, but that is his best recollection. The occasion for his making this statement was that he spoke to Dr. Dorsey about a comparison that he (Dr. Harris) had made of the hair taken from the lathe and some hair Dr. Harris had taken from the head of Mary Phagan. He told Dr. Dorsey that he had made a large number of sections and had compared them to try and find out whether or not the two hairs came from the same head, that is the head of Mary Phagan. Dr. Harris told Dr. Dorsey that he had the sections there and that if Dr. Dorsey desired, Dr. Harris is perfectly willing for him to also examine the sections of hair and compare them for himself. Dr. Dorsey stated that he did not care to examine the sections of hair. Dr. Harris stated that the comparison showed the hair not to

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be alike, but the details of these variants were not discussed in witness's presence. It was stated, however, that it was the opinion of Dr. Harris from this comparison of hairs that the hair found on the lathe was not Mary Phagan's. His best recollection is that Dr. Harris so expressed himself, but he could not say positively.

HARLEE BRANCH, Sworn for the Movant. I am a reporter on the "Atlanta Journal." On February 20, 1914, I interviewed Dr. H. F. Harris, with reference to his examination of certain hair, said to have been found on a lathe at the National Pencil Factory by one Barrett. Dr. Harris admitted having performed the autopsy on the body of Mary Phagan and stated that under the directions of Solicitor Dorsey he obtained some of the girl's hair when the body was exhumed, in order to compare it with the hair found on the lathe. He stated that the specimens of hair taken from the head, when compared with the specimens found on the lathe, were widely different and were not from the head of the same girl. He stated that he examined both samples of hair under the microscope; that the hair taken from the lathe was not of the same shade, texture or shape as that taken by him from Mary Phagan's head. He stated that he reported this fact to the Solicitor General, and the latter told him that there would be no necessity of going any further with the hair investigation. He further stated that he had never considered the matter as a very material one and dismissed it from his mind; that the samples of hair with the exception of the two microscopic sections were turned back to the Solicitor General and that he (Dr. Harris) now had the latter somewhere in his laboratory. He said that when he notified the Solicitor that the two specimens of hair were not the same, the Solicitor simply remarked that he would let the matter end there. Dr. Harris was quite positive in his assertions that the microscopic test was an accurate one. Dr. Harris said that the microscope would show the shade, texture and shape and that the hair of different persons differed in these particulars. He explained how the shape was examined under the microscope showing that the end sections of the hair were looked at and that it would show if it was circular or any other shape.

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[REDACTED]

OTTO SCHWAB, C. J. ASMUS and GEORGE A. TILLANDER, Sworn

for movant. They are personally acquainted with Oscar Pappenheimer; that some of his associates are T.A. Hammond, Dr. C.E. Buchanan, R.S. Wessells, C.E. Currier, John K. Ottley; that the said Pappenheimer is a person of good moral character and credibility and they would believe him on oath

DR. H. F. HARRIS, Sworn for Movant (Before a Commissioner)
I am State Health Officer/ I made two examinations of the body of Mary Phagan at the request of Solicitor Dorsey. He told me he would send some hair found on a machine in the factory, and a day or so later it was brought to me by one of his assistants. He asked me to compare this hair with that of Mary Phagan's. I examined the hair under a microscope. I did not make an exhaustive examination though it was sufficient to show that the hair given me by Mr. Dorsey was almost certainly that of a female and from the head of a Caucasian. The two specimens of hair resembled each other so much that it was impossible for me to say definitely that it was not Mary Phagan's hair. There appeared to be a slight difference in shade and shape, but no difference in texture. The determination of the color had to be made by the naked eye, as the thin sections used for microscopic work are not suitable for such determination and the amount of hair given me was not sufficiently ~~great~~ ^{great} in amount for me to make an accurate estimate. I have recently ~~examined~~ ^{examined} hair taken from the head of several persons and have found that individual hairs from the same individual differ as much in shape as the hair given me by Mr. Dorsey's assistant and that of Mary Phagan. Mr. Dorsey did not appear to attach any particular importance to this examination, nor did I at that time think it was of any importance whatever. Some days after having made an examination, the subject was casually mentioned by Mr. Dorsey in a conversation with me, and I told him at that time that it was my impression that the two specimens of hair were different, though I was careful to say that there was no certainty as to this opinion and that I would not swear that they were different. This conversation took place between Mr. Dorsey and me in my office some days after the hair was given me. I made no further report. I told Mr. Dorsey that it was my impression that the two specimens of hair were different. I said to him that the two specimens appeared to differ slightly in shape and possibly in color. I told him that the specimen brought to me was not sufficient in amount to allow me to say very definitely as to its color. I was under the impression that the two specimens of hair were different. We were alone when I made my report to Mr. Dorsey. As to whether or not I suggested that Mr. R. T. Dorsey be allowed to make a test to satisfy himself, the only time that Dr. Dorsey discussed this matter with me was a few days before the trial, Solicitor Dorsey being present and two or three others. In a general sort of way my work was talked over and I may have at that time made some reference to the matter of the hair and may have possibly said to Dr. Dorsey he could examine it if he wished to do so. I have no recollection of what was specifically said by anyone and therefore can not answer as to what Mr. Dorsey said in case the hair was mentioned. I did not say specifically to Mr. Dorsey that the two specimens of hair were dissimilar. I merely informed him that I gained the impression that they were not the same. There was no question of proceeding further with the examination, as the only method likely to reveal anything had been employed, already. I returned the hair to Mr. Dorsey's assistant. I kept that part used for the microscopic examination. I have none left that I can find. I also returned to him the hair taken from Mary Phagan's head. There was not more than a dozen strands of hair delivered to me from Mr. Dorsey's office, if that many. I took several hundred strands of hair from Mary Phagan's head. I made examination of only about half of the total number of hairs given me by Mr. Dorsey's assistant. The hairs used were cut into short pieces. Several sections of them made of both ends and the middle portions of the hair. I made similar microscopic sections from 8 or 10 hairs from Mary Phagan's head. Taking both specimens together, I made somewhere

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from 50 to 100 sections in all. These tests were made shortly after my examination of Mary Phagan's body. I do not recall any conversation with Dr. Dorsey respecting the hair. It is possible these specimens of hair were returned to Mr. Dorsey after the trial.

Professor G. Bachman and Professor J.W. Papez, Sworn for

the Movant. We have made a study of the subject of scalp hair and as to whether hair from the same scalp may be identified as such; ~~that~~ the hair is divided into two parts, the root and the shaft. The root is that part of the hair that is imbedded in the skin; the shaft is that part which projects above the surface of the skin. "In their thickness the hairs show much variation, not only in different races, individuals and regions, but also in the same person and part of the body as on the scalp where fine and coarse hairs may lie side by side. The thickest scalp hairs have a diameter of 162 micra and the finest one of ten micra with all intermediate sizes. In a general way hairs of light color are finer than dark ones. On attaining their full growth without mutilation, hairs do not possess a uniform thickness throughout their length, since they diminish not only towards the tip, where the shaft ends in a point, but also towards the root. . . . In the case of straight hairs the follicle is unbent and the shaft is cylindrical, and therefore circular in cross section; hairs that are wavy or curly spring from follicles more or less bent and are flattened or grooved with corresponding oval, reniform or irregularly triangular outlines when transversely cut." When examined under the microscope, the shaft is seen to consist of a central core and of two layers arranged concentrically around the core. The central core is called the medulla and ~~the~~ consists of polygonal cells lying side by side and end to end. There are from two to four cells in the row side by side. The medulla is absent in small hairs while in large hairs it does not extend to the free end. The medulla is uneven in outline and its appearance varies with the illumination appearing as a dark band with transmitted light and as light one with reflected light. This is due to the presence of air between the shrunken and irregular medullary cells. The layer surrounding the medulla is called the cortex. It forms the greater bulk of the hair shaft. It consists of elongated, spindle shaped cells which are so closely arranged that the individual cells are indistinguishable. Fine febrils pass between individual cells. The cortex contains the pigment that gives col-

or to the hair. The pigment occurs in two forms. (1) The solution throughout the cortical substance; (2) in granules varying in size arrangement and depth of color. The granules are located within and between the cells of the cortex. The layer surrounding the cortex and forming the external covering of the hair shaft is called the cuticle. It is the thinnest of the three layers, is glassy in appearance, and free from pigment. It consists of a layer exceedingly thin, scale-like cells that overlap one another like the shingles of a roof giving the surface of the hair a serrated appearance. From the foregoing description, it is evident that in a comparative study of scalp hair, the thickness of the hair can not be used as a criterion in the answer of the question, whether hair from the same scalp may be identified as such, inasmuch as hair varies very widely in thickness on the scalp of anyone individual. Hair from the same scalp may be identified as such with the aid of the microscope by the following points of identity: (1) The presence or absence generally of the medulla. Its appearance, whether it is continuous, or segmented, its relative width and the occurrence of air between the medullary cells. (2) The relative amount of the cortical pigment found in a soluble form and in granules. The arrangements, size and depth of color of the pigment granules. Their position in reference to the other layers of the hair. (3) The comparative thickness of the cuticle. That in order to make a comparative study of the scalp hair eighteen specimens of brown hair as similar to each other as can possibly be obtained were procured. Among these, three groups of two specimens were selected, the two specimens in each group appearing alike to the unaided eye. After a careful study under the microscope of the medulla, the cortex and the cuticle, scalp hair looking alike to the unaided eye showed points of difference under the microscope which enabled us to differentiate the specimens of hair from the scalp of one person from the scalp of another person. It is impossible without the aid of the microscope to determine any of the points of difference mentioned herein, and it is therefore impossible to establish with any degree of accuracy the identity of scalp hair without the aid of the microscope. Washing the hair with tar soap does not change the color of the

hair as shown under the microscope, nor is there any change in the texture of the hair and in the amount and distribution of its pigment. The apparent lightening of the hair which occurs after washing and is visible to the naked eye is due to the removal of dust and of the oil which covers the hair and which mats it together in a more or less compact mass, but under the microscope there is no change in the color of each individual hair. Some of our associates are Dr.C.W.Strickler, Dr.W.F.Westmoreland and Dr. J.E.Paullin, Dr.L.Sage Hardin, Dr.J.L.Campbell and Dr.E.G.Jones.

DR. W.F.WESTMORELAND, DR. J. E. PAULLIN, Sworn for the Movant. We know Dr.G.Bachman.His character for truth and veracity is good and we would believe him on oath.

DR.L.SAGE HARDIN, DR.J.L.CAMPBELL, Sworn for the movant. We know Dr. J.W.Papez. His character for truth and veracity is good and we would believe him on oath.

JOHN R. BLACK, Sworn for the Movant. I am a city detective. On Monday, April 28, 1913, I was called to the National Pencil Factory on Forsyth Street, and was shown by one Barrett several strands of human hair on a lathe in the metal room in said factory. I took the hair from said lathe and together with E.A. Stephens, Assistant Solicitor General, took said hair to Dr.H.F. Harris, at the State Capitol and left the hair with said Harris.

S. N. TEITZBAUM, Sworn for the Movant. I am a court reporter, and reported the oral argument made by Solicitor General Hugh M.Dorsey, to the jury in the matter of the State vs.Leo M. Frank, in Fulton Superior Court on August 22nd, 23 and 25th; Said Solicitor General, did, at four different times in his argument before the jury, refer to the hair found on the lathe in the metal room by Barrett, as follows:

"Barrett, Christopher Columbus Barrett, if you will, that discovered the hair that was identified, I believe, by Magnolia Kennedy, Monday morning, as soon as they began work". . ."Barrett, the man who discovered the hair on his machine early in the morning". . . "I say to you that this man Barrett stands an oasis in a mighty desert, standing up for truth. . . that Barrett when he sworn that he found blood there at the place where Conley said he dropped the body, told the truth; and when he said he found that hair on that machine". . . "that Mr.Barrett of the metal department had claimed he had found blood spots and where he had found some hair."

E. E. CRUSSELLE, Sworn for the Movant. I am a court reporter and reported part of the testimony of Dr. H. F. Harris, at the trial of Leo M. Frank during the month of August, 1913, in Fulton Superior Court; The following testimony is a portion of the testimony of Dr. Harris, which I reported, and which appears on pages 1481 and 1482 of the stenographic record of the testimony in said cause:

Q. Doctor, when did Mr. Dorsey first talk with you about making this autopsy? A. I don't remember.
Q. How long before you made the examination did he talk with you? A. I don't recall.
Q. Do you recall when you made the first examination? A. It was on May 5th, if I remember correctly.
Q. May 5th? The child died on April 26th or 27th - that would be about nine days afterwards? A. Yes sir, if I am correct, in that statement, it was.
Q. Did Mr. Dorsey request you not to make the examination public? A. He did.
Q. Did he request you not to tell it to anybody? A. He did.
Q. And you observed that request? A. Yes.
Q. Did you understand he was making the request as a Solicitor General or as an individual? A. Well, he didn't state there; he just called me up and asked me if I would make the examination. I told him that I was not well, and that I would prefer very much not having anything to do with it. He talked to me a little while, and finally I said 'If you really wish me to do it, ~~just because~~ and you think I can be of any service to you, I will do it, just because I like you.' I felt that way about it; otherwise I would not have had anything to do with it.
Q. What did he tell you to examine? What parts of the body did he tell you to examine? A. He told me he wanted me to examine the case and tell him all I could about it.
Q. What had you in your mind - what were you seeking to determine by the autopsy? What did you understand you were seeking? A. There was some suggestion of poisoning at the time when I went out there, but I saw at once that there was no reason for assuming that. I failed to state on my direct examination that the stomach content was tested for alkaloid poisoning, and there was none present. Of course I dismissed that from my mind. As soon as I saw the girl, I saw that it was a matter of strangulation."

LEONARD HAAS, Sworn for the Movant. I have read the brief filed by Solicitor General Dorsey in the Supreme Court of Georgia in the case of Leo M. Frank vs. State of Georgia. Pages 58 and 59 of said brief contain the following language:

"FIRST: HAIR.

R. F. Barrett (p. 42) was a machinist for the National Pencil Company. He says, 'On Monday morning, April 28th. . . between 6:30 and 7 o'clock. . . I found some hair on the handle of a bench lathe. . . The hair was hanging on the handle, swinging down. Mell Stanford saw the hair. The hair was not there Friday.'

"Counsel for defendant tried to make it appear that the girls sometimes curled their hair about where Barrett found this hair, but as to this Barrett says, 'The gas jet that the girls sometimes used to curl their hair on is about ten feet from the machine where the hair was found. . . I ~~don't~~ know' he says, 'the hair wasn't there on Friday, for I had used that machine up to quitting time, 5:30.'

"Mary Phagan, it will be remembered was not there Friday.

"Barley, at the beginning of his cross-examination, says, 'Barrett showed me some hair on a lever of the lathe. It was 20

or 30 feet from Mary Phagan's machine, on the north side of the room. . They were wound around the lever. I don't think there were over six or eight at the outside.'

"Miss Magnolia Kennedy, a witness for the defendant, corroborated Barrett when she says (p.168) 'On Monday, April 28th, Mr.Barrett called my attention to the hair which he found on the machine. It looked like Mary's hair. . . Mary's hair was a light brown, kind of sandy color.'

"This hair and blood spots - to be discussed hereafter - were found by Barrett early Monday morning, and before any rewards had been offered.

"The location of the machine where the hair was found can be readily seen by reference to State's Exhibit A, No. 10, (p.371) - and in connection with this State's Exhibit A, we will remark that the photograph here is ~~not~~ from a newspaper cut, we presume, but certainly it is not from the exhibit which the State really had incourt. It does not correspond in several particulars to the one used in court, but the location of the machine on which the hair was found is accurate."

GROUND 2.

MISS JIMMIE MAYFIELD, Sworn for the Movant. I worked at the National Pencil Factory in Atlanta, Georgia, for about eight months and knew Mr.Frank when I saw him. I was acquainted with Mary Phagan and knew the color of her hair. I know Mr.Barrett and on Monday, April 28th, Mr.Barrett showed me the hair he said he had found on a lathe machine. It is my positive opinion that the hair was entirely too light in color to be that of Mary Phagan's.

EULA MAY FLOWERS, RUDOLPH LOEB, H.G.SCHIFF and E. F. HOLLOWAY, Sworn for the Movant. We know personally Miss Jimmie Mayfield. Some of her associates are Mary Pirk, Mrs.G.Denham, Marjorie McGord, Mamie Stephens, Mrs.O. Johns; The said Miss Jimmie Mayfield is a person of good moral character and credibility and ~~they~~ ^{we} would believe her on oath.

L. A. QUINN, EULA FLOWERS, H. G. SCHIFF, Sworn for the movant. We are acquainted with Miss Jimmie Mayfield. She was well acquainted with Mary Phagan in her lifetime. She could know the color of Mary Phagan's hair and by reason of seeing the hair claimed to have been found by the witness Barrett upon the second floor of the factory, she was in a position to determine whether the hair found by Barrett looked like Mary Phagan's hair, and was thereby enabled to form an opinion as to whether the hair of Mary Phagan and that found by Barrett were identical.

GROUND 3.

MRS.GORA TALTA, sworn for the movant. I have worked