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Broad street during the morning and up to one O'clock in the afternoon; that at one o'clock they left the local store of said Cotton States Belting and Supply company at No. 9 South Broad street and walked to Jacobs' Pharmacy corner, at Whitehall and Alabama Streets, arriving there between 1:03 and 1:05; that the said Samuel A. Pardee saw defendant leaning against the power pole of the Georgia Railway and Power Company; that he recalls the defendant had a newspaper in his hand and as said Pardee passed defendant he waved his hand at him and defendant answered the salutation by waving the paper.

Defendant further shows that the theory of the state was and evidence was introduced at the trial in the endeavor to show that Mary Phagan was killed by Leo W. Frank, at the factory of the National Pencil Company between 12:05 and 12:20 on April 26th, 1913, and that between 12:56 and 1:30 o'clock P. M. of that day the said defendant assisted by James Conley moved the dead body of Mary Phagan from the second floor of the factory down to the basement. The solicitor general proved by the witness James Conley that Leo W. Frank was in the factory of the National Pencil company the entire time between 12:56 and 1:30 o'clock on that day assisting the said Conley to move the body from the second floor to the basement.

The defendant here and now offers to show and prove to the court all of the facts herein set forth and swears to the existence of these facts as the truth and asks the court to investigate them in this extraordinary motion.

Defendant further submits that the discovery of the foregoing facts is material, and that it is such an extraordinary state of facts as would probably produce a different result on another trial, that said facts were unknown to defendant and to his counsel, and that it was impossible to have ascertained the same by the exercise of proper diligence, the said Samuel A. Pardee and W. V. Green not being witnesses on said trial and the fact that they were in possession of the facts hereinbefore set forth was unknown to the defendant and his counsel until after the motion for new trial had been heard and passed on.

13. Defendant further show that he should be granted a new trial upon the newly discovered evidence of Mary Rich, which has come to