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MR. BUTLER: That is all we have
pursuant to this motion.

THE COURT: All right.

MR. VANCE: We will call the
Defendant pursuant to this motion.

THE COURT: All right.

MR. VANCE: With the limited
purpose of this motion.

He has already been sworn, I
believe.

THE COURT: Not at the trial.

D A V I D W A Y N E S P E N C E, called as
a witness on behalf of the Defendant, having been
duly sworn, testified as follows:

DIRECT EXAMINATION

QUESTIONS BY MR. VANCE:

Q Would you state your name for the record, please?

A David Wayne Spence.

Q And you are the Defendant in Cause No. 15,976 for
which we are on trial here today?

A Yes.

Q I will direct your attention back to May 4, 1983.
Where were you at that time located?

A McLennan County jail.

Q And do you recall Captain Weyenberg coming to your --

1 May 5, 1983, do you remember the Captain coming to
2 see you regarding the taking of teeth impressions?

3 A Yes.

4 Q Would you recount to the Court how he first approached
5 you?

6 A I don't know if he came upstairs or if he just sent
7 someone after me, but when I first come in contact
8 with him, he said he had a court order from Judge Allen
9 to take my teeth prints.

10 Q Okay, what was your reaction to that?

11 A If I am not mistaken, I told him that I would like
12 to talk to my lawyer first, and he told me that he
13 had an order from the Judge and that he was going
14 to fill that order and I could talk to my lawyer
15 tomorrow, talking about the next day.

16 Q Okay, what then did you do after he made that remark?

17 A I am not sure of the exact wording, but I am pretty
18 sure I think I wrote, "I consent to this under
19 protest and ask for my lawyer to be present. I want
20 to talk to my lawyer."

21 Q Do you recall what you wrote that inscription on?

22 A It was one of the copies of the court's order.

23 Q And after you wrote this protest and request for
24 your attorney, what did you then do?

25 A I asked Captain Weyenberg to sign it.

1 Q Did he?
 2 A He signed it. And dated it.
 3 Q All right, then what happened?
 4 A Then they went ahead and took my teeth impressions.

5 MR. VANCE: That is all the
 6 questions I have.

7 MR. BUTLER: No questions.

8 THE COURT: All right, you may
 9 step down.

10 (Witness excused.)

11 MR. VANCE: That is all we have
 12 on this, the testimony that we have on this motion,
 13 with the understanding that we will be able to
 14 submit that as an exhibit.

15 THE COURT: All right.

16 MR. VANCE: We have to argue
 17 this. I have got --

18 THE COURT: Are you going to
 19 argue anything beyond Patterson and Frye?

20 MR. VANCE: Yes.

21 THE COURT: All right, I have
 22 already read the memorandum with the Patterson case.

23 MR. VANCE: It is our contention
 24 that this particular motion, we are not sure whether
 25 or not it comes under a search warrant under the

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Fourth Amendment, and our contention is that Patterson applies to the Fifth Amendment.

The basis of the Court's opinion on that was based on the Fifth Amendment U.S. Constitution. Our particular contention is here that if, in fact, this motion to compel is, in fact, a search warrant, then the Fourth Amendment would apply and also Article 1 Section 9 of the Texas Constitution.

Furthermore, a search warrant seeking teeth impressions is not specifically set out in Article 18.01 or 18.02 of the Code of Criminal Procedure.

Therefore, the taking of these teeth imprints was impermissible under those particular provisions.

THE COURT: Now, what was that?

MR. VANCE: Sir?

THE COURT: You said what?

MR. VANCE: 18.01 or 18.02 of the Code of Criminal Procedure.

THE COURT: Now, 18.02, 10, what are you saying about that?

MR. VANCE: I said teeth impressions are not listed specifically.

THE COURT: No, there is a lot

1 of things that aren't. Anything constituting
2 evidence of an offense -- it covers everything that
3 is not covered anywhere else.

4 MR. VANCE: It is our contention
5 that teeth impressions do not -- the Supreme Court
6 has not at this point in time ruled on it, while
7 the Court of Criminal Appeals has. So basically,
8 it is our contention that if this document is a
9 search warrant, it is in violation of the Fourth
10 Amendment, Article 1 Section 9 of the Texas
11 Constitution and Article 18.01 and 18.02 of the
12 Texas Code of Criminal Procedure.

13 If it is ruled that this particular
14 document is not a search warrant, then there has been
15 no proof of -- or it is our contention that it is
16 not valid because there has been no probable cause
17 shown in the absence of exigent circumstances in
18 this case.

19 THE COURT: You said --

20 MR. VANCE: Furthermore, it is
21 the taking of dental casts is not a critical stage
22 of the criminal prosecution, but it is a critical
23 stage that would require counsel to be present.

24 There are no cases on that
25 particular issue, at this time.

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THE COURT: What did you say about Patterson?

MR. VANCE: It is our contention that Patterson while it is the lead case in Texas on teeth impressions, that the court in that particular case referred to some old cases that dealt with Fifth Amendment rights rather than Fourth Amendment rights, and that is why we are raising the issue under --

THE COURT: Patterson is a Fourth Amendment case.

MR. BUTLER: May it please the Court, if I may quote from Patterson, it says requiring defendant to produce a mold of his teeth was not in violation of the search and seizure provisions of the Fourth and 14th Amendment of the Federal Constitution, and further, it quotes Olson versus State and says there we held handwriting examples to be compellable. We now hold requiring a defendant's teeth marks likewise compellable.

They do not -- the reason they are not listed as items properly subject to evidentiary search warrant is because they are not subject to search warrants. It is not required.

They are compellable just as are

1 fingerprints, just as are handwriting examples.

2 It is not considered an intrusion
3 and does not require a search warrant, does not
4 require exigent circumstances.

5 There is no question of arrest
6 here. It is purely and simply a matter of a motion
7 to compel, and that is all.

8 MR. VANCE: If I may add one last
9 thing. Also, in the case of Patterson, they cited
10 Doyle versus State, 263 SW 2nd 779, and in that
11 particular case of Doyle, the Code of Criminal Appeals
12 held that dental impressions were identical to
13 fingerprints and neither violated the Fifth Amendment.
14 That is at Page 780 of that particular opinion.

15 Its argument is the Fourth
16 Amendment provides more protection than just the
17 Fifth Amendment and the court in Patterson by citing
18 Olson is answering -- it is in error when they answer
19 a Fourth Amendment question based on the Fifth
20 Amendment and Article 1 Section 9 of the Texas
21 Constitution.

22 THE COURT: All right, anything
23 else?

24 MR. VANCE: One further thing.
25 Regarding these orders to take dental impressions,

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the Supreme Court has held that no warnings shall issue except upon probable cause supported by oath or affirmation, that is Franks versus Delaware, 438 U.S. 162.

It is obvious from this particular document, there is no probable cause existing in the order.

MR. BUTLER: Again, Judge, he is talking about the requirements for a search warrant, and this is clearly under our law does not require a search warrant but merely a motion to compel.

THE COURT: Franks/Delaware is a Fifth Amendment case. All right, anything else?

MR. VANCE: No.

THE COURT: All right, motion is denied. Call the jury back in.

(Whereupon the jury returned into the courtroom and the following proceedings took place:

THE COURT: All right, let us proceed.

MR. BUTLER: We call Captain Weyenberg.

D A N W E Y E N B E R G, called as a witness