

**E-WARRANTS:**  
a brave new world

Judge Brian Holman  
Lewisville Municipal Court

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**Rule of Construction**

- Origins in Contract Law

**Context Determines Scope**

- Civil – expands the inquiry
- Criminal – restricts the inquiry

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## Four Corners Rule

### Adopted into Criminal Law – Search Warrants

- Art. 18.01, C.C.P. states:  
“A sworn affidavit setting forth substantial facts establishing probable cause shall be filed in every instance....”

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## Four Corners Rule (cont'd.)

### Application to Arrest Warrants is Less Clear

- Art. 15.03, C.C.P. states:  
“A magistrate may issue a warrant of arrest ... when any person shall make oath before the magistrate that another has committed some offense against the laws of the State”

“Rounding the Corners: Criminal Application of the Four-Corners Rule” – Mark Goodner, *The Recorder Vol. 21, Pg. 16*  
“Standing in the Corner: The Shifting Role of Magistrates in the Age of E-Warrants” – Mark Goodner, *The Recorder Vol. 25, Pg. 1*

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## Technology Eroding the Rule...?

**H.B. 1060 (2009)**  
Authorized the issuance of arrest warrants “**by any method**” that ensures the transmission of a duplicate of the original warrant (i.e., secure fax or other secure electronic device).

**H.B. 976 (2011)**  
Authorized the use of an “**electronic broadcast system**” to perform Art. 15.17 hearings (Magistrations)

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**The Erosion continues...**

**“Oath by Phone”**

**Clay v. State 391 S.W.3d 94 (Tex.Crim.App. 2013)**

“We see no compelling reason to construe the ‘sworn affidavit’ contemplated by Article 18.01(b) necessarily to require that the oath always be administered in the corporal presence of the magistrate, so long as sufficient care is taken in the individual case to preserve the same or an equivalent solemnizing function to that which corporal presence accomplishes.”

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**Clay v. State - Dissent**

**“If the legislature had meant to allow warrants to be sworn to by telephone, it would have said so.  
...  
[O]nly the legislature can amend or supplement the statute to specifically regulate the process of obtaining a search warrant by electronic means.”**

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**...and so they did.**

**H.B. 326 (eff. September 1, 2015)**

**adds “18.01(b-1)” to C.C.P.**

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### Article 18.01(b-1), C.C.P.

- Authorizes magistrate to consider “additional testimony and exhibits” communicated by telephone or other “reliable electronic means” to determine probable cause for the issuance of a search warrant
- Requires magistrate to ensure all testimony is recorded “verbatim”, transcribed and certified as accurate, and preserved
- Authorizes magistrate to transmit warrant back to applicant or direct applicant to sign judge’s name

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### Federal Rules

Since 1977, Federal Rules of Criminal Procedure (Rule 41) have allowed telephonic applications for search warrants

A majority of **states** (37) allow Telephonic / Electronic Search Warrants:

- Including Alaska, Arizona, Arkansas, Alabama, California, Colorado, Delaware, Florida, Idaho, Illinois, Louisiana, Michigan, Minnesota, Montana, Nebraska, New York, New Jersey, Oklahoma, Oregon, South Dakota, Utah, Washington and Wisconsin

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### Pitfalls And Protocols



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### Pitfalls of 18.01(b-1)



- 18.01(b-1) is permissive, not mandatory
- Practical Implications
  - Technology may be unavailable/inoperative
  - Encourages incomplete (“sloppy”) police work
  - Police may view refusal to use procedure as antagonistic or not neutral
  - Invitation to Testify

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### Testifying as a Magistrate

- Suppression Hearings
  - Juvenile Confessions
  - Challenges to Probable Cause Sufficiency
- Statements made during 15.17 Hearings
- Now, Art. 18.01(b-1)
  - Invitation to come to the party!

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### Protocols for 18.01(b-1)



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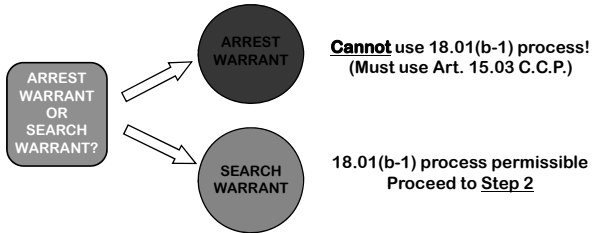
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### 18.01(b-1) ANALYSIS (Step 1)



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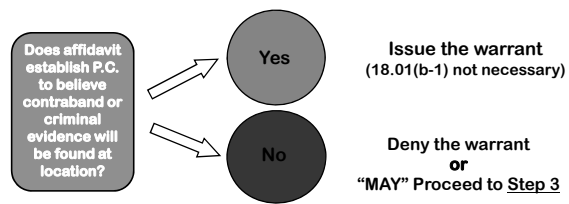
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### 18.01(b-1) ANALYSIS (Step 2)



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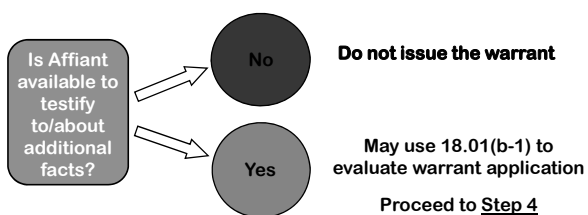
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### 18.01(b-1) ANALYSIS (Step 3)



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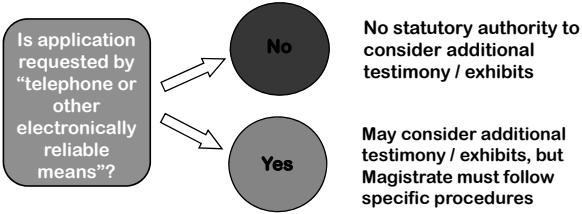
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**18.01(b-1) ANALYSIS (Step 4)**



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**(Step 4)**



If probable cause is based on affidavit *only*, Magistrate may:

- administer oath by telephone and acknowledge attestation in writing on affidavit

\*\*\* Verbatim electronic recording is required?

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**(Step 4 – Cont'd.)**



If probable cause is based on affidavit and "*additional testimony or exhibits*", Magistrate shall:

- place witness(s) under oath
- record all testimony *verbatim*
- ensure recording is transcribed, certified as accurate and signed by magistrate
- preserve all affidavits, recordings and/or exhibits

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(Step 4 – Cont’d.)



- Original Search Warrant
- Proposed Duplicate Original Search Warrant
- Modified Original Search Warrant

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(Step 4 – Cont’d.)



If the warrant is modified, the Magistrate shall:

- transmit modified version of warrant to applicant by “reliable electronic means”; or
- file modified original and direct applicant to modify proposed duplicate original accordingly.

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(Step 4 – Cont’d.)



Finally, the Magistrate shall:

- sign original documents (affidavit and warrant)
- enter date and time of issuance on warrant

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### Art. 18.01(B-1) - Suppression

Evidence obtained under 18.01(b-1) is not subject to suppression on grounds it was “*unreasonable under the circumstances,*” absent a finding of bad faith

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### Other Considerations – Police Protocols

**Agreement on:**

- Standardized form of Affidavit and Warrant\*
- File format
- Method of document transmission
- Method of video transmission
- Method of recording supplemental testimony

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### Suggested Jurat for Telephonic Search Warrants

“Information justifying the issuance of this search warrant was submitted to me by reliable electronic means, and was sworn to, signed and attested to electronically pursuant to Art. 18.01(b-1) C.C.P.”

Date and time issued:	<input type="text"/>	<input type="text"/>
	<small>Judge's signature</small>	<input type="text"/>
City and state:	<input type="text"/>	<input type="text"/>
	<small>Printed name and title</small>	<input type="text"/>
I certify that the judge named above authorized me to sign his or her name		
<input type="text"/>	<input type="text"/>	<input type="text"/>
<small>Applicant's printed name</small>	<small>Applicant's signature</small>	<input type="text"/>

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**New Protocol for  
all Search Warrants**



**HB 644 – Contents of Warrants (Art. 18.04)**  
• Magistrate’s name must appear in “clearly legible  
handwriting or in typewritten form” along with  
signature

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**Protocol for Particular  
Search Warrants**



**HB 1396 – Cell Phone Searches (Contents)**  
• Only by a “judge in the judicial district”  
• See “Search and Seizure” Webinar by Tom Bridges  
(suggested search warrant form)

**HB 324 – Body Cavity Searches During Traffic Stops**  
• No search without warrant

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