

**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*

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## Technology Eroding the Rule...?

### H.B. 1060 (2009)

Authorized 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)

Further promoted the use of technology by allowing appearance before a magistrate by an “**electronic broadcast system**”

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## Technology Eroding the Rule...?

“Oath by Phone” - **Clay v. State** (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.”

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

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## and now, H.B. 326 (2015)

Amends Article 18 to add “18.01(b-1)” to C.C.P.

- Authorizes magistrates 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.
- Requires 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

- Majority of **States** allow Telephonic Search Warrants:
- Including Alaska, Arizona, Arkansas, California, Colorado, Delaware, Idaho, Illinois, 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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### Protocols for 18.01(b-1)



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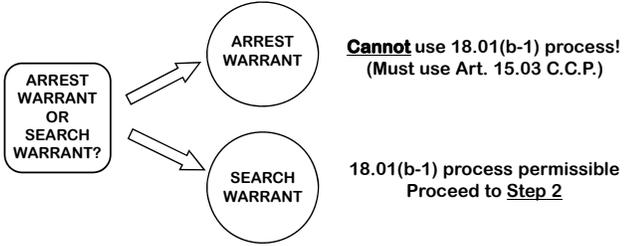
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**18.01(b-1) ANALYSIS (Step 1)**



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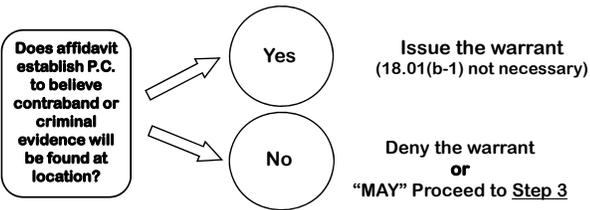
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**18.01(b-1) ANALYSIS (Step 2)**



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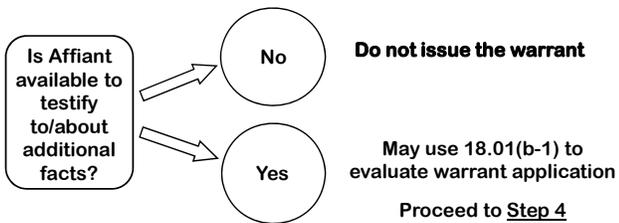
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**18.01(b-1) ANALYSIS (Step 3)**



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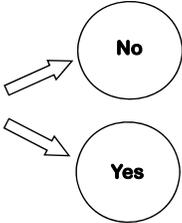
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**18.01(b-1) ANALYSIS (Step 4)**

Is application requested by "telephone or other electronically reliable means"?



No statutory authority to consider additional testimony / exhibits

May consider additional testimony / exhibits, but Magistrate must follow specific procedures

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**(Step 4 – Cont'd.)**



Pursuant to Article 18.01(b-1), the Magistrate shall:

- place applicant(s) or additional affiants(s) under oath
- ensure any testimony is **recorded verbatim**
- acknowledge attestations in writing on the affidavit

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**(Step 4 – Cont'd.)**



The Magistrate shall:

- ensure contents of proposed warrant are read or transmitted verbatim to magistrate
- enter contents into original search warrant
- ensure information used to determine probable cause is transcribed, certified as accurate, and properly preserved

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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
- transmit warrant by “reliable electronic means” to applicant, OR direct applicant to “sign the judge’s name”
- enter date and time on duplicate original

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**18.01(B-1) ANALYSIS (Cont’d.)**

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

**Agreement on:**

- Standardized form of Affidavit and Warrant
- File format (pdf, word, etc.)
- Method of document transmission (email, fax, etc.)
- Method of video transmission (Skype, Facetime, etc.)
- Method of recording supplemental testimony

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### Suggested Jurat for Telephonic Search Warrants

Submitted by electronic means, sworn to and signature attested electronically pursuant to Art. 18.01(b-1) C.C.P.

Date: \_\_\_\_\_ at \_\_\_\_\_ (a.m.)(p.m.)

Signature: \_\_\_\_\_

Printed Name: \_\_\_\_\_

Title and Court: \_\_\_\_\_

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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 the 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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**Check List for Magistrate's Consideration of Collateral Material through Electronically Reliable Means pursuant to Section 18.01(b-1), Code of Criminal Procedure.**

1. *Is the application for an arrest warrant or a search warrant?*
  - a. Arrest? – May not use 18.01(b) process.
  - b. Search? - May use 18.01(b-1) process. **Proceed to Step 2.**
  
2. *Does the affidavit establish probable cause to believe that contraband or evidence of a crime will be found in a particular place?*
  - a. Yes. Issue the warrant.
  - b. No. The Magistrate may **proceed to Step 3**, if you wish. Using 18.01(b-1) is not required under the law. Alternately, the Magistrate may simply deny the issuance of the warrant.
  
3. *Is the Affiant, and any person on whose testimony the application is based, available to testify to/about additional facts?*
  - a. No. Do not issue the warrant.
  - b. Yes. Consider using 18.01(b-1) to evaluate the warrant application. **Proceed to Step 4**, if you wish.
  
4. *Is the warrant application requested by telephone or other electronically reliable means?*
  - a. No. There is no statutory authority to consider additional testimony or exhibits to determine probable cause.
  - b. Yes. The Magistrate may proceed with 18.01(b-1) procedure by considering additional testimony or exhibits. If so, the Magistrate shall:
    - i. place the applicant, or person on whose testimony the application is based, under oath.
    - ii. ensure that any testimony is recorded verbatim by an electronic recording device, by a court reporter, or in writing.
    - iii. ensure that the contents of a proposed duplicate original warrant are read or otherwise transmitted verbatim to the magistrate and entered into an original warrant, which then may serve as the original search warrant.
    - iv. ensure that any electronic recording, court reporter's notes, exhibits and any other written record are transcribed, certified as accurate and is properly preserved.

- v. acknowledge any attestation in writing on the affidavit if the applicant, or person on whose testimony the application is based, attests to the contents of the affidavit;
- c. The Applicant shall:
  - i. prepare a proposed duplicate original of the warrant.
  - ii. read or transmit the contents of the duplicate original warrant verbatim to the magistrate.
- d. The Magistrate who modifies a warrant for which information is provided under 18.01(b-1) shall:
  - i. transmit the modified version of the warrant to the applicant by reliable electronic means; or
  - ii. file the modified original and direct the applicant to modify the proposed duplicate original accordingly.
- e. The Magistrate who issues a warrant for which information is provided under 18.01(b-1) shall:
  - i. sign the original documents;
  - ii. enter the date and time of issuance on the warrant; and
  - iii. transmit the warrant by reliable electronic means to the applicant; or
  - iv. direct the applicant to sign the judge's name and enter the date and time on the duplicate original.

Evidence obtained pursuant to a search warrant for which information was provided in accordance Section 18.01(b-1) is not subject to suppression on the ground that issuing the warrant in compliance with this subsection was unreasonable under the circumstances, absent a finding of bad faith.

AN ACT

relating to information provided by electronic means in support of the issuance of a search warrant.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Article 18.01, Code of Criminal Procedure, is amended by adding Subsection (b-1) to read as follows:

(b-1)(1) For purposes of this article, a magistrate may consider information communicated by telephone or other reliable electronic means in determining whether to issue a search warrant. The magistrate may examine an applicant for a search warrant and any person on whose testimony the application is based. The applicant or other person must be placed under oath before the examination.

(2) If an applicant for a search warrant attests to the contents of an affidavit submitted by reliable electronic means, the magistrate must acknowledge the attestation in writing on the affidavit. If the magistrate considers additional testimony or exhibits, the magistrate must:

(A) ensure that the testimony is recorded verbatim by an electronic recording device, by a court reporter, or in writing;

(B) ensure that any recording or reporter's notes are transcribed and that the transcription is certified as accurate and is preserved;

(C) sign, certify the accuracy of, and preserve any other written record; and

(D) ensure that the exhibits are preserved.

(3) An applicant for a search warrant who submits information as authorized by this subsection must prepare a proposed duplicate original of the warrant and must read or otherwise transmit its contents verbatim to the magistrate. A magistrate must enter into an original search warrant the contents of a proposed duplicate original that are read to the magistrate. If the applicant transmits the contents by reliable electronic means, the transmission received by the magistrate may serve as the original search warrant.

(4) The magistrate may modify a search warrant that is submitted as described by Subdivision (3). If the magistrate modifies the warrant, the magistrate must:

(A) transmit the modified version to the applicant by reliable electronic means; or

(B) file the modified original and direct the applicant to modify the proposed duplicate original accordingly.

(5) A magistrate who issues a search warrant for which information is provided by telephone or reliable electronic means must:

(A) sign the original documents;

(B) enter the date and time of issuance on the warrant; and

(C) transmit the warrant by reliable electronic means to the applicant or direct the applicant to sign the judge's name and enter the date and time on the duplicate original.

(6) Evidence obtained pursuant to a search warrant for which information was provided in accordance with this subsection is not subject to suppression on the ground that issuing the warrant in compliance with this subsection was unreasonable under the circumstances, absent a finding of bad faith.

SECTION 2. The change in law made by this Act applies only to a search warrant that is issued on or after the effective date of this Act. A search warrant that was issued before the effective date of this Act is governed by the law in effect on the date the warrant was issued, and the former law is continued in effect for that purpose.

SECTION 3. This Act takes effect September 1, 2015.