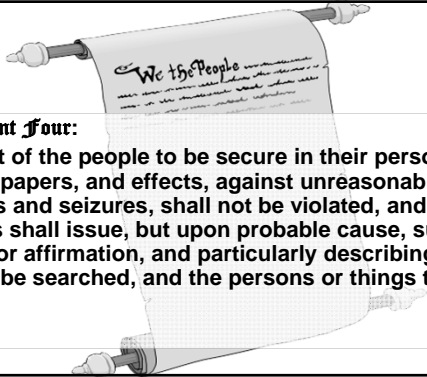


E-WARRANTS: a brave new world

Judge Brian Holman
Tom Bridges, Prosecutor

Lewisville Municipal Court
Portland Municipal Court

1



Amendment Four:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2

Article 1, Section 9, Texas Constitution

Article 1.06, Tex. Code Crim. Proc.

Chapter 15, Tex. Code Crim. Proc.

Chapter 18, Tex. Code Crim. Proc.

3

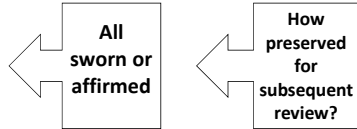
Warrant Pre-requisites Constitutional/Statutory

For Arrest Warrants:

1. Probable cause
2. Person to be seized

For Search Warrants:

1. Probable cause
2. Place to be searched
3. Things to be seized



4

Preserving what the magistrate considered . . .

- Traditionally preserved in writing
- Affidavits can be used to meet the pre-requisites
- Texas is an affidavit state →

5

Arrest Warrants (In Texas)

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

Art. 15.04, 15.05 C.C.P. establishes:

Affidavit used to establish probable cause and identify person to be seized called a "Complaint." (Must also charge an offense, state time and place of offense, and be signed by affiant.)

6

Search Warrants
(In Texas)

Art. 18.01, C.C.P. states:

“A sworn affidavit setting forth substantial facts establishing probable cause shall be filed in every instance....”

7

? Oath or Affirmation ?

- ❖ Constitutions and Art. 1.06, C.C.P. say prerequisite components must be under “oath or affirmation.”
- ❖ Articles in Chapters 15 & 18 of C.C.P. use terms “oath” and “sworn” when establishing components of affidavits.

⇒ May they be affirmed instead of “sworn?”

8



9



Rule of Construction

- Origins in Contract Law

Context Determines Scope

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

10

Technology Eroding the Rule...?

H.B. 1060 (2009) became Art. 15.08, C.C.P.:
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) became Art. 15.03 (c)-(f) C.C.P.:
Further promoted the use of technology by allowing
appearance before a magistrate by an **“electronic
broadcast system”**

11

Technology Eroding the Rule...?

and now . . .

H.B. 326 (2015) became Art. 18.01(b-1), C.C.P.:

- Authorizes magistrates to consider information
communicated by telephone or other **“reliable
electronic means”** in determining whether to issue
search warrant
- Requires a magistrate to ensure all testimony is
recorded **“verbatim”**

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Telephonic Search Warrants Not New

Federal --

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

Many States --

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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Consequences for Four Corners Rule?

In principle, probably none

- ✓ verbatim recordings enable same thorough review as affidavits
- ✓ reviewing authorities will consider only what is preserved to determine what was presented to magistrate
- ✓ record -- whether spoken or written, recording or affidavit -- should limit consideration of whether Constitutional and statutory pre-requisites were met

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Chapter 18 Amendments

"No man's life, liberty, or property are safe while the legislature is in session." Mark Twain



Nor, it seems, is criminal procedure . . .

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Art. 18.01(b-1) Telephonic Search Warrants

- ❖ Issuing magistrate may consider information communicated by telephone or other reliable electronic means.
- ❖ The scheme still contemplates written documents – affidavit and search warrant.
- ❖ The statute is written to authorize more than one specific procedure – facsimile, email, or anything that will enable the magistrate to see the affidavit and for the applicant to obtain the issued search warrant.

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Art. 18.01(b-1) Telephonic Search Warrants

- ❖ Person on whose testimony the warrant is based must be placed under oath by the issuing magistrate.
- ❖ Applicant must prepare an original of the affidavit and must read or otherwise transmit its contents verbatim to magistrate.
- ❖ After magistrate examines caller to confirm identity as affiant, magistrate must acknowledge, in writing, the attestation of the oath on a copy of the affidavit.

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Art. 18.01(b-1) Telephonic Search Warrants

- ❖ Applicant must prepare a duplicate original of the search warrant and must read or otherwise transmit its contents verbatim to magistrate.
- ❖ Magistrate must transmit the signed and dated warrant to the applicant by reliable means or direct applicant to sign magistrate's name, date and time to duplicate original.

18

Art. 18.01(b-1) Telephonic Search Warrants

- ❖ Magistrate may modify the submitted search warrant.
- ❖ Modified search warrant must be
 - ➔ transmitted back to applicant ;
 - or
 - ➔ filed and applicant directed to conform modifications in applicant's duplicate copy of search warrant.

19

Art. 18.01(b-1) Telephonic Search Warrants

- ❖ Use of this procedure should be preceded by mutual arrangement and adoption between the magistrate and search warrant applicants.
- ❖ Telephonic/electronic means used by both must be able to communicate with the other.
- ❖ Strongly recommended that step-by-step procedures for applicants and magistrates be written and meticulously followed by all parties when using this new provision.

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**Pitfalls and
Other
Considerations**

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Pitfalls of 18.01(b-1), C.C.P.

- Record may suggest lack of neutrality by magistrate if conversation becomes informal
- If magistrate considers additional testimony or exhibits to originally submitted affidavit, they may not become incorporated sufficiently to allow their intended effect upon review
- Modifications by magistrate to search warrant may not be clearly included or appended to final, issued search warrant

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Pitfalls of 18.01(b-1), C.C.P.

- Magistrate may direct applicant to sign judge's name and fail to record verbatim instructions accordingly
- Technology may be unavailable/inoperative
- Increased probability magistrate may have to testify in hearing to suppress evidence seized pursuant to warrant

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Other Considerations

Agreement on:

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

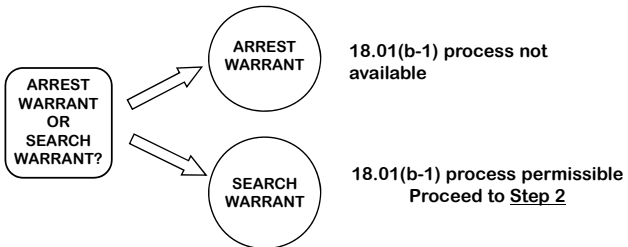
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Protocols for Art. 18.01(b-1)

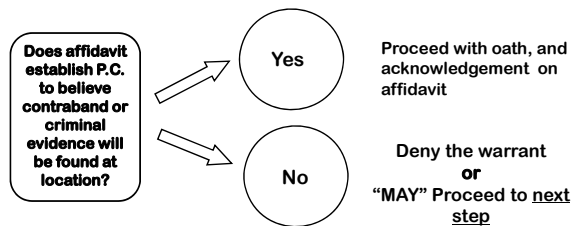
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18.01(b-1) ANALYSIS



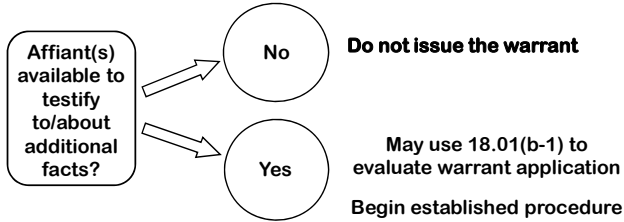
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18.01(b-1) ANALYSIS



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18.01(b-1) ANALYSIS



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Art. 18.01(b-1) Telephonic Search Warrants

Example procedure:

1. Applicant/affiant (A.) prepares an Affidavit for Search Warrant and a Search Warrant
2. A. establishes contact on telephone with the Magistrate (M.) who will issue the Search Warrant
3. A. transmits Affidavit and proposed Search Warrant to M.
4. M. places applicant(s) or additional affiants(s) under oath
5. A. reads Affidavit to M.

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Art. 18.01(b-1) Telephonic Search Warrants

Example procedure:

IF M. NEEDS NO ADDITIONAL FACTS OR INFORMATION IN AFFIDAVIT OR CHANGES TO SEARCH WARRANT:

6. M. acknowledges oath on Affidavit (See special acknowledgment suggested in later slide)
- 7a. M. signs and print name on Search Warrant and transmits signed copy to A.

Or

- 7b. M. orders A. to sign M.'s name, print M.'s name, date and time to duplicate original of Search Warrant

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Art. 18.01(b-1) Telephonic Search Warrants

Example procedure:

IF M. ASKS FOR ADDITIONAL FACTS OR INFORMATION IN AFFIDAVIT OR WISHES TO MODIFY SUBMITTED SEARCH WARRANT

- 8. M. ensures any testimony is **recorded verbatim**, transcribed, certified as accurate, and properly preserved
- 9. M. ensures information used to determine probable cause is clearly made a part of the affidavit, either by specifying on recording its content and importance or requiring re-submitted amended affidavit
- 10. M. ensures modifications to search warrant are specific as to intent and purpose, then transmits modified version to A.

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Art. 18.01(b-1) Telephonic Search Warrants

Example procedure:

IF M. ASKS FOR ADDITIONAL FACTS OR INFORMATION IN AFFIDAVIT OR WISHES TO MODIFY SUBMITTED SEARCH WARRANT: : (continued)

- 11. M. acknowledges oath on Affidavit (See special acknowledgment suggested in later slide)
- 12a. M. signs and prints name on Search Warrant and transmits signed copy to A.
- Or
- 12b. M. orders A. to sign M.'s name, print M.'s name, date and time to duplicate original of Search Warrant

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Art. 18.01(b-1) Telephonic Search Warrants

Submitted by electronic means, sworn to and signature attested telephonically per Art. 18.01(b-1), Tex. Code Crim. Proc.

Date: _____ at Time: _____

Signature: _____

Printed Name: _____

Magistrate Title: _____

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Art. 18.04(5) **All Search Warrants**


Now added to the requisite “Contents of Warrant” Article:

“(5) that the magistrate’s name appear in clearly legible handwriting or in typewritten form with the magistrate’s signature.”

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Art. 18.04(5) **All Search Warrants**

SWORN AND SUBSCRIBED TO ME ON THIS THE _____ day of _____, 20____, at _____ o'clock _____ .M.

(Signature) _____
 (Printed name)
MAGISTRATE / JUDGE
_____ County, Texas

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Protocol Options for Magistrate

Magistrate may . . .

- Refuse to use process – permissive, not mandatory
- Adopt “local rule” consistent with personal professional procedures and technical capabilities
- Refuse to amend affidavits and insist that changes discussed be incorporated in re-submitted affidavit
- Refuse to “modify” search warrants and instruct applicant to re-submit search warrant as per discussed modifications

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Chapter 18 Amendments

- ❑ Art. 18.01(b-1)(6): Evidence obtained under 18.01(b-1) is not subject to suppression for being unreasonable absent a finding of bad faith
- ❑ 18.01(b-1) is probably not available for Art. 18.0215 searches of cellular telephone or other wireless communications devices
- ❑ Art. 18.24 requires search warrant for body cavity searches during traffic stops

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Last thoughts . . . So,

- ☀ Is the availability to issue E-Warrants a good or bad thing?
- ☀ Will they be convenient or more trouble?
- ☀ Will the process increase the chances for fatal defects in documentation?
- ☀ Will they enable no-delay DWI blood warrants?

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***Honor the profession,
be of good cheer,
and stay in touch.***

Tom Bridges
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361-643-2581 (office)
361-877-3592 (cell)
tytomb@aol.com

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Art. 2.10 Duties of Magistrates

It is the duty of every magistrate to preserve the peace within his jurisdiction by the use of all lawful means; *to issue all process intended to aid in preventing and suppressing crime*; to cause the arrest of offenders by the use of lawful means in order that they may be brought to punishment.

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