Notes

Freitas after *Villegas*: Are "Sneak-and-Peek" Search Warrants Clandestine Fishing Expeditions?

INTRODUCTION

In 1984, Drug Enforcement Administration (DEA) agents obtained a search warrant to surreptitiously enter and search a house in Northern California to confirm the presence of an illegal methamphetamine laboratory.[1] At trial, in *United States v. Freitas*,[2] the defendants argued the covert search intruded into their constitutionally protected privacy interest.[3] The evidence was suppressed. The suppression was upheld on appeal because the search warrant used[4] failed to provide for reasonable postsearch notice.[5]

In 1987, DEA agents in New York obtained a similar warrant.[6] The warrant authorized surreptitious entry into private premises to confirm the presence of an alleged cocaine factory.[7] At trial, in *United States v. Villegas*,[8] the court acknowledged the standards

1. United States v. Freitas, 800 F.2d 1451, 1452-53 (9th Cir. 1986); *see also* text accompanying notes 32-50.

2. 610 F. Supp. 1560 (N.D. Cal. 1985), *rev'd and remanded*, United States v. Freitas, 800 F.2d 1451 (9th Cir. 1986).

3. *Freitas*, 610 F. Supp. at 1563-64.

4. Incriminating evidence was observed during the covert entry, and this provided probable cause for a second "regular" search warrant. The trial court suppressed the evidence gathered at the subsequent search because of the prior unconstitutional entry. *Id.* at 1573.

5. *Freitas*, 800 F.2d at 1456.

6. United States v. Villegas, 700 F. Supp. 94, 96 (N.D.N.Y. 1988); *see also* text accompanying notes 60-69.

7. *Villegas*, 700 F. Supp. at 96.

8. *Id.* at 94.

enunciated by the Ninth Circuit Court of Appeals in California, and distinguished *Villegas* because the warrant contained a provision mandating a return within seven days.[9] The court held that the warrant's notice provision removed any constitutional defect.[10]

This Note looks at the potential effects of the Second Circuit's decision on the area of covert warrants in the Ninth Circuit, and examines the constitutionality of these warrants. Part I places surreptitious search warrants within the development of the fourth amendment and explains why Title III of the Omnibus Crime Control and Safe Streets Act of 1968 should be relevant in determining their constitutionality. Part II summarizes the *Freitas* cases and their impact on the subsequent cases of *United States v. Johns* and *United States v. Villegas*. Part III analyzes the constitutionality of surreptitious searches. Specifically, Part III addresses the notice and necessity requirements of Title III and argues that both these requirements should be met to render the warrant constitutional. Part III also briefly discusses other constitutional problems related to covert warrants. Part IV discusses the likely effect of the *Freitas* and *Villegas* cases on future decisions of the Ninth Circuit. Finally, Part V discusses the utility of covert search warrants, taking note of some justifications advanced for their usage, and recommends, because of the dangers inherent in the nature of covert warrants, their issuance be strictly limited in order to comport with the fourth amendment.

I. SURREPTITIOUS SEARCHES AND THE FOURTH AMENDMENT

A surreptitious[11] search is a search of property or premises conducted without the knowledge or consent of the owners or residents. It is also known as a covert search,[12] a secret search, and, more recently, a sneak-and-peek search.[13] A surreptitious search generally

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9. *Id.* at 98.

10. "The warrant in this case is distinct from those in *Freitas*. . .in that it does provide for a return within seven days. . . . The Court in *Freitas I*, specifically noted that inclusion of such a provision would allow such warrants to pass constitutional muster." *Id.* (citing United States v. Freitas, 800 F.2d 1451, 1456 (9th Cir. 1986)).

11. "Surreptitious" is defined as: "Performed, made, or acquired by secret, clandestine, or stealthy means." THE AMERICAN HERITAGE DICTIONARY 1224 (2d college ed. 1976).

12. For an excellent overall discussion on the use of covert searches, see Note, *Covert Searches*, 39 STAN. L. REV. 545 (1987).

The author notes there has been a considerable increase in covert entries by FBI and DEA agents in a variety of criminal investigations. *Id.* at 546. Both agencies have distributed guidelines for covert searches to their agents. *Id.* at 546 n.7. However, the *Freitas* cases appear to be the first to squarely address the legality of a sneak-and-peek warrant.

13. In United States v. Johns, 851 F.2d 1131 (9th Cir. 1988), when a surreptitious search of a rented storage unit took place, a federal court, apparently for the first time, recognized the term "sneak-and-peek." The court used this term to describe the warrant which authorized the agents to enter the storage unit, to examine the unit, and to take

does not contemplate a seizure of evidence, but merely allows agents or officers to observe or verify a receptacle's or a premise's interior contents. A surreptitious search warrant may allow activity that the fourth amendment was designed to guard against, and thus these warrants should be limited in their issuance and application.

The fourth amendment was added to the Bill of Rights in 1791 to ensure the practice, prevalent in England, of issuing general warrants was not continued in the United States.[14] The amendment has two major clauses, the unreasonable searches and seizures clause, and the warrants clause.[15] The warrants clause states: "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."[16] The warrants clause requires a description of the place to be searched *and* the things to be seized. It is therefore arguable that a surreptitious entry violates the very letter of the fourth amendment because it does not contemplate the seizure of a person or a thing.

The express requirement that the seized objects be particularly described was intended to make impossible the type of general searches abhorred by the colonists. An agent or officer executing the warrant should not have the discretion to choose which areas to search and which objects to seize. For example, in a surreptitious entry to confirm the presence of a drug laboratory, in which DEA agents are free to roam the premises of a person's residence without the owner's

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inventory of its contents, without notifying the owner.

14. Schroeder, *The Warrants Clause: The Key to the Castle*, FED. PROBATION, Mar. 1985, at 65.

General warrants were a source of discontent in Great Britain, and in 1765, in the case of Entick v. Carrington, 19 How. St. Trials 1030, 95 Eng. Rep. 807 (K.B. 1765), this practice was held invalid. The court, in *Entick*, held that issuing general warrants constituted a trespass, that a specific grant of power was required, and a general warrant was not such a grant. Schroeder, *supra*, at 65. The fourth amendment took effect in 1791 but was not interpreted for almost a century. The Supreme Court first interpreted the amendment's protections in the 1886 case of Boyd v. United States, 116 U.S. 616 (1886), but not until the 1961 case of Mapp v. Ohio, 367 U.S. 643 (1961), was the framework of the amendment given enough substance to ensure the protections afforded would have some practical effect.

15. The fourth amendment states:

> 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.

U.S. CONST. amend IV.

16. *Id.*

knowledge, the need for a particularized description of the places to be searched and the objects to be seized is critical. In such an instance, there is a greater danger of impermissible invasion than in a "regular" search, which gives the owner or resident notice of the search and thus the ability to protest if his or her constitutional rights are invaded.

The fourth amendment protects not only property rights but the right to privacy as well.[17] In *Sequra v. United States*,[18] the Supreme Court noted a search constitutes an even greater invasion of privacy than a seizure of evidence.[19] A search warrant authorizing an agent to secretly enter the private residence of a citizen during the night to look for evidence and then depart without leaving notice of the visit is an intrusion into the privacy right. These sneak-and-peek warrants appear to be analogous to the general warrants that the fourth amendment was designed to protect against.

As technology advanced, police surveillance techniques became increasingly sophisticated and facilitated intrusions into aspects of people's lives that were once considered private. Wiretapping and electronic eavesdropping became common investigative tools. In *Katz v. United States*,[20] the Supreme Court rejected the notion that there must be a physical trespass to trigger the protection of the fourth amendment, and held that recording a defendant's telephone conversation constituted a search and seizure because it violated the privacy Katz justifiably relied on when entering an enclosed phone booth.[21]

Congress reacted to the new technological developments by ensuring this intrusive practice be a highly regulated activity. It enacted Title III of the Omnibus Crime Control and Safe Streets Act of 1968.[22] Under the Act, various officials may authorize an application to a federal judge for an order allowing wiretapping or electronic eavesdropping to discover evidence of specific federal crimes.[23] Evidence obtained though the lawful execution of the order may be ad-

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17. Prior to the 1960s, the fourth amendment appeared to protect only property rights. The Supreme Court defined private rights in terms of property rights. However, in Warden v. Hayden, 387 U.S. 294 (1967), the Court acknowledged that property interests alone do not trigger the protection of the fourth amendment. In Mapp v. Ohio, 367 U.S. 643 (1961), the Court explicitly recognized the right to privacy created by the fourth amendment.

18. 468 U.S. 796 (1984).

19. *Id.* at 806.

20. 389 U.S. 347 (1967).

21. *Id.* at 353.

22. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 212 (codified as amended at 18 U.S.C. §§ 2510-2521 (1988)).

23. 18 U.S.C. § 2516 (1988) (authorization for interception of wire, oral, or electronic communications only for specified federal offenses).

missible in court.[24]

Under section 2518 of the Act, before an interception order is granted, the judge must determine whether the applicants attempted to use normal investigative procedures.[25] If normal procedures were attempted but failed, or if they had to be abandoned because of the danger inherent in the particular situation, the judge can take these factors into account and still grant the warrant.[26] Section 2518 also provides that notice must be served on the intercepted party within a reasonable time.[27] These requirements of "necessity" and "notice" are important limitations placed on wiretapping and electronic surveillance to ensure this activity remains within the mandates of the fourth amendment.

Surreptitious entries to verify evidence of criminality have been

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24. *Id.* § 2515 (prohibition of use of intercepted wire or oral communications as evidence).

25. *Id.* § 2518 (procedure for interception of wire or oral communications). Section 2518 states:

> (1) Each application for an order authorizing or approving the interception of a wire, oral, or electronic communication under this chapter shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:
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> . . .
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> (c). a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

Id. at (1)(c).

26. *Id.*

27. *Id.* § 2518(8)(d). Section (8)(d) states:

> Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7)(b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—
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> (1) the fact of the entry of the order or application;
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> (2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and
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> (3) the fact that during the period wire, oral, or electronic communications were or were not intercepted.
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> The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

Id.

analogized to electronic surveillance.[28] Each is an extraordinary search calling into question all of the basic protections afforded by the fourth amendment. The government itself has analogized the surreptitious search in such a way.[29] Although Title III is not directly applicable, one court has held that its limitations show the minimum standards required in order for surreptitious entries to comport with the fourth amendment.[30]

An official covert entry into the private residence of a citizen, at night, to determine the status of evidence sought to be seized later, is an extraordinary procedure. The entry impacts the right of privacy guaranteed by the fourth amendment and could "constitute. . .a dangerous and radical threat to civil rights and to the security of all our homes and persons."[31]

Assuming surreptitious entries can be constitutional under certain conditions and Title III regulations are applicable, those regulations should be stringently enforced. In particular, the notice and necessity requirements should be required in order for sneak-and-peek searches and entries to be constitutional.

II. THE CASES

A. Freitas I *and* II

In the summer of 1984, DEA agents received an anonymous telephone tip indicating Raymond Freitas was running a methamphetamine laboratory at his home in Clearlake, California.[32] In October, Clearlake Deputy Sheriffs notified the DEA that a hose connected the Freitas house to the nearby lake and that neighbors reported strong odors around the house.[33]

In December, the still anonymous informant told the DEA Freitas was assembling equipment to begin manufacturing methamphetamine.[34] DEA agents conducted an independent investigation at Clearlake and ascertained Freitas was loading equipment, members of his party were purchasing large blocks of ice commonly used in the manufacture of methamphetamine, a hose connected the Freitas house to the lake (perhaps facilitating disposal of waste prod-

28. United States v. Freitas, 610 F. Supp. 1560, 1570 (N.D. Cal. 1985), *rev'd and remanded*, United States v. Freitas, 800 F.2d 1451 (9th Cir. 1986).

29. *Freitas*, 610 F. Supp. at 1570. The government relied on rulings in several wiretapping and electronic surveillance cases to bolster its position that a surreptitious intrusion for the purpose of establishing information about suspected criminal activity does not violate constitutional constraints.

30. *Id.* at 1571.

31. *Freitas*, 800 F.2d at 1458 (Poole, J., dissenting).

32. *Id.* at 1452.

33. *Id.*

34. *Id.* at 1453.

ucts from the suspected laboratory), and windows on the ground floor of the house were covered.[35]

Based on the above sequence of events plus his knowledge of Freitas's prior arrests in connection with cocaine and methamphetamine,[36] DEA special agent Stephen Woods procured eight search warrants on December 12, 1984. These warrants allowed agents to search Freitas's homes and storage lockers. The warrants expired on December 16th.[37] However, on December 13th, special agent Laura Hayes was granted a "surreptitious entry" warrant for the Clearlake house on the grounds it would assist the DEA in "determin[ing] the status of the suspected clandestine methamphetamine laboratory."[38] The magistrate granted the warrant, using a conventional warrant form he modified by striking out a description of the property to be seized and the requirement that copies of the warrant and an inventory of the property seized be left at the house.[39] The warrant did not require notice be given to the owners nor did the affidavit accompanying the warrant request assert a need for the warrant based on a claim of necessity. The surreptitious entry took place on December 13th.[40]

On December 17, a day after Agent Woods' warrants expired, an extension was granted on those warrants based on the probable cause obtained from the December 13th surreptitious entry into Freitas's house.[41] On December 20, DEA agents arrested Freitas, the owner of the property, along with other defendants and seized property as evidence.[42]

At trial, the defendants argued the initial covert search was an unconstitutional intrusion which tainted the evidence obtained from the second search.[43] The trial court agreed and suppressed the evi-

35. *Id.*
36. In May 1980, Freitas was arrested for importing seven pounds of cocaine and in January 1982, he was arrested for attempting to involve his brother-in-law in a methamphetamine-making scheme. *See id.* at 1452.
37. *Id.* at 1453.
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Freitas*, 610 F. Supp. at 1563-73.
Freitas moved to suppress the evidence obtained from the second search. He first challenged the validity of the original search warrants, issued on December 12, claiming there was not probable cause or facts were intentionally or recklessly omitted from the affidavit, rendering it substantially misleading. The court concluded "the informant's tips were sufficiently reliable under the 'totality of the circumstances' to affirm the magis-

dence.[44] In reaching its conclusion, the court analogized a surreptitious entry to electronic surveillance regulated by Title III, and concluded the lack of notice and necessity, as required by Title III, violated the fourth amendment.[45]

On appeal, *Freitas I*, the Ninth Circuit agreed Title III applied to clarify the probable constitutional importance of both the necessity for the surreptitious search and the need for subsequent notice.[46] The court held that a failure to expressly provide for notice within a short time of the entry was a constitutional defect but refused to hold that a showing of necessity was constitutionally required.[47] The case was remanded to determine whether the good-faith exception could be invoked.[48]

On remand, the district court again concluded evidence derived from the covert entry was tainted and ordered suppression.[49] The

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trate's finding of probable cause," and Freitas failed to meet the burden necessary for a hearing as to the validity of these warrants. *Id.* at 1566, 1568.

Freitas also objected to the surreptitious entry and argued for exclusion of evidence derived from the original warrants. The court determined the "surreptitious entry was invalidly authorized," and the warrant was constitutionally infirm. *Id.* at 1570-71.

44. *Id.* at 1573. The court held the lack of a notice provision in the warrant violated the fourth amendment of the Constitution and since the extension warrants had been issued based in part on the knowledge gained from the surreptitious entry, all subsequent evidence arising out of these searches was to be suppressed.

45. *Freitas*, 800 F.2d at 1454.

46. *Id.* at 1456. The court noted that although Title III has thus far been held to apply only to aural interception of communication and not to visual observations, Title III nevertheless appears to clarify the "probable constitutional importance" of both the necessity of conducting a covert search and the subsequent notice that must be given.

47. *Id.* The court believed that the absence of a notice requirement in the warrant presented a more difficult issue than the necessity requirement. *See id.* at 1456. The court expressly concluded that "we do not hold that a showing of necessity is constitutionally required in a case such as is before us." *Id.* This Note suggests that the *Freitas I* court should have found that such a showing is vital to upholding the constitutionality of a sneak-and-peek warrant because to hold otherwise is to erode the protection of the fourth amendment.

48. According to United States v. Leon, 468 U.S. 897 (1984), evidence may not be suppressed when agents have acted in "objectively reasonable reliance" on a warrant later found to be defective, unless the affidavit supporting the warrant is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable" (quoting Brown v. Illinois, 422 U.S. 590, 610-611 (1974) (Powell, J., concurring in part)), or the warrant is "so facially deficient. . .that the executing officers cannot reasonably presume it to be valid." *Leon*, 468 U.S. at 922-23.

49. The district court found the warrant to be so facially flawed that "objective reasonable reliance" could not be established. The court determined that although the DEA agents had sought the advice and approval of an Assistant U.S. Attorney, and had advised the magistrate of the surreptitious nature of the warrant, that the agents were unaware of any similar covert warrants being issued in other districts and that there had, in fact, been no similar issuance of warrants. *Freitas*, 856 F.2d 1425, 1427 (9th Cir. 1988) (*Freitas II*).

The court thus concluded that "the flaw on the face of the warrant was so basic that no reasonably well-trained law enforcement officer could have acted in objectively reasonable reliance on the warrant" and that approval by a federal prosecutor and authorization by the magistrate were insufficient to establish objectively reasonable reliance so as to invoke the good-faith exception. *Id.*

case was again appealed. In *Freitas II*, the Ninth Circuit conducted a de novo review and concluded there was sufficient evidence to establish that the agent's behavior was objectively reasonable, and therefore fell within the good-faith exception.[50] The court reiterated its holding in *Freitas I*, that the original warrant was constitutionally defective because it failed to provide for postsearch notice. The court did not address the necessity requirement.

B. United States v. Johns[51]

FBI agent John White allegedly detected unusual odors associated with the manufacture of methamphetamine coming from defendant Johns's storage unit.[52] White procured a search warrant to surreptitiously enter and examine the storage unit without removing any evidence. Certain chemicals and equipment commonly utilized in the production of methamphetamine were found.[53] At trial, Johns moved to suppress the evidence because of allegedly willful or reckless false statements in the affidavit.[54] The motion was denied, and Johns entered a conditional guilty plea.[55] The *Freitas* case then came to trial, and Johns moved for reconsideration of his earlier motion to suppress the evidence based on the district court's decision. He contended the covert nature of the warrant violated the fourth amendment.[56]

The court characterized the surreptitious entry as a "sneak-and-peek" warrant[57] and held that because the warrant to enter the storage unit was indistinguishable from the warrant in *Freitas*, it too violated the fourth amendment for the reasons given in *Freitas*.[58]

The *Johns* court appeared to accept the *Freitas* court's analysis of the constitutionality of the sneak-and-peek warrant. The court acknowledged the notice requirement had not been met, but did not raise any questions as to necessity. The case was remanded for an evidentiary hearing on the agent's good faith, to decide whether the evidence should still be admitted under the good-faith exception to

50. *Id.* at 1428.
51. 851 F.2d 1131 (9th Cir. 1988).
52. *Id.* at 1132.
53. *Id.*
54. *Id.*
55. *Id.* at 1133.
56. *Id.*
57. *Id.* at 1134.
58. *Id.* at 1135.

the exclusionary rule.[59]

C. United States v. Villegas[60]

In May of 1987, DEA agents surreptitiously entered and searched Villegas's farm in New York, pursuant to a search warrant issued to allow confirmation of the existence of illegal activity.[61] The supporting affidavit stated a confidential source informed the government of a cocaine factory in the general vicinity of Villegas's farm and subsequent independent government investigations corroborated the information.[62] On July 14, 1987, pursuant to a regular search warrant, agents seized quantities of cocaine in various stages of manufacture and arrested Villegas and other defendants.[63]

Defendants contended a search without a seizure is a "fishing expedition" that by its very nature violates the fourth amendment.[64] The trial court noted covert warrants constituted an issue of first impression in the Second Circuit and only the Ninth Circuit had addressed their propriety.[65]

The *Villegas* court acknowledged the Ninth Circuit found sneak-and-peek warrants without appropriate limitations violated the fourth amendment. The *Villegas* court then distinguished the warrant before it from those in *Freitas* and *Johns*. Unlike those warrants, it provided for a return within seven days[66] and, under *Freitas I*, the "inclusion of such a provision would allow such warrants to pass constitutional muster."[67]

The *Villegas* court found the inclusion of an affidavit supporting the necessity of the surreptitious warrant, together with the provision for a return, sufficient to prevent the warrant from violating constitutional restrictions.[68] The court noted *Freitas I* acknowledged a necessity requirement would strengthen the claim of constitutionality.[69]

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59. *Id.* The defendants alleged that the information leading to the discovery of the equipment came from an informant and not an inadvertent discovery. They contended the agents could not have inadvertently detected what they claimed to have smelled. The court acknowledged sufficient doubt as to the agents' good faith did exist and thus remanded the case.

60. 700 F. Supp. 94 (N.D.N.Y. 1988).

61. *Id.* at 96.

62. *Id.* at 99.

63. *Id.* at 96.

64. *Id.* at 97.

65. *Id.*

66. *Id.* at 98.

67. *Id.* (citing United States v. Freitas, 800 F.2d 1451, 1456 (9th Cir. 1986)).

68. *Id.*

69. *Id.* This author believes the necessity requirement should not be used merely to strengthen the claim of constitutionality, but should be an absolute requirement in order to meet the threshold of constitutionality.

III. THE CONSTITUTIONALITY OF SNEAK-AND-PEEK SEARCHES

In *Freitas I*, the court cited *Dalia v. United States*[70] as standing for the proposition that the fourth amendment does not prohibit all surreptitious entries.[71] In *Dalia*, petitioner's (defendant's) business office was electronically monitored pursuant to a warrant.[72] While the warrant approved the surveillance, it did not explicitly authorize a covert entry to install the device. FBI agents had secretly entered the office and spent three hours installing the bug, and petitioner based his motion to suppress all evidence derived from the bug on that unauthorized physical intrusion into his business premises.[73]

Arguably, the *Dalia* holding should be strictly limited to its facts. The *Dalia* court was addressing electronic surveillance, a practice that had already been subjected to legislative scrutiny. Secret entry into a private residence to ascertain the status of evidence is a different, more intrusive, practice than a secret entry which seeks to "seize" incriminating conversations that there is probable cause to believe will take place.

Assuming, arguendo, that the *Dalia* holding can be extended to sneak-and-peek entries (as the *Freitas* court apparently assumed without explaining the basis for doing so), the holding should still be read restrictively. *Dalia* does not assert that all surreptitious entries are constitutional, but merely that the fourth amendment does not prohibit all such entries. There are still stringent requirements that should be met.

A. The Notice Requirement

Citing *Irvine v. California*[74] and *Silverman v. United States*,[75] the *Dalia* court held that covert entries are constitutional in some instances, at least if made pursuant to a warrant, and that the lack of prior notice does not render the warrant unconstitutional if such an announcement would provoke escape of the suspect or the destruction of critical evidence.[76] The *Dalia* court concluded petitioner's argument, that lack of notice rendered the entry unconstitutional, was

70. 441 U.S. 238 (1979).
71. *Freitas*, 800 F.2d at 1456.
72. *Dalia*, 441 U.S. at 241-242.
73. *Id.* at 245.
74. 347 U.S. 128 (1954).
75. 365 U.S. 505 (1961).
76. *Dalia*, 441 U.S. at 247 (citing Katz v. United States, 389 U.S. 347, 355 n.16 (1967)).

frivolous.[77] However, the court qualified its statement by citing *United States v. Donovan*,[78] which held that substituting postsearch notice to those subjected to surveillance renders the initial lack of notice constitutional.[79] In *Freitas II*, the court said if the warrant had provided for notice within seven days after the search it would not have crossed the constitutional line, thus implicitly accepting the conclusion in *Donovan*.[80]

Assuming *Dalia*'s result, upholding the constitutionality of covert entries in order to install electronic surveillance devices, is validly extended to surreptitious entries and searches such as those in *Freitas*, *Johns*, and *Villegas*, it appears the inclusion of a provision for postsearch notice will cure the constitutional defect of lack of prior notice. However, curing the notice defect, by itself, should not render the warrant constitutional.

B. The Necessity Requirement

In *Dalia*, the Court limited the term "covert entry" to "the physical entry by a law enforcement officer into premises without the Owner's permission or knowledge *in order to install bugging equipment.*"[81] The trial court noted, generally, the most successful way to install the device is through breaking and entering.[82] Thus *Dalia* implicitly comports with the necessity requirement set forth in Title III, as the device probably could not be installed without a covert entry.

In *Freitas*, however, the surreptitious entry was made to "determine the status of the suspected clandestine methamphetamine laboratory."[83] The agents desired to secretly enter the defendant's property in order to establish probable cause for a subsequent warrant. There was no showing of necessity in the affidavit for the covert warrant.[84] The *Freitas I* court stated that if necessity had been an im-

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77. *Id.* at 248.

78. 429 U.S. 413 (1977).

79. *Id.* at 429 n.19 ("In addition to these provisions for mandatory and discretionary inventory notice, the Government is required to supply the issuing judge with recordings of the intercepted conversations, which are to be sealed according to his directions. 18 U.S.C. Section 2518(8)(d). These notice and return provisions satisfy constitutional requirements.").

80. United States v. Freitas, 856 F.2d 1425, 1456 (9th Cir. 1988).

81. *Dalia*, 441 U.S. at 241 n.2 (emphasis added).

82. *Id.* at 248 n.8.

83. *Freitas*, 800 F.2d 1451, 1453 n.1 (9th Cir. 1986).

84. In Note, *supra* note 12, at 550 n.24, the author notes that the *Freitas* litigation involved a showing of the government's interests in surreptitious entries. A declaration of D. Largent, a DEA special agent, was submitted with the government's motion for the court to reconsider the suppression order. The declaration itemized some of these interests. The government wished to conduct a surreptitious search because of safety concerns relating to the agents' subsequent raid, and relating to the carcinogenic effects of flammable chemicals and the disposal of toxic by-products from the methamphetamine pro-

portant reason for issuing the warrant, the argument the warrant did not violate the fourth amendment would be stronger. However, the court refused to hold that necessity was a constitutional prerequisite in a case such as *Freitas*.[85]

The *Villegas* court, in analyzing the constitutionality of the sneak-and-peek warrant, construed *Freitas* as holding that had there been provision for notice, the surreptitious entry would have been constitutional, and did not address the necessity issue in much depth. The court noted the inclusion of an affidavit supporting the necessity of the covert nature of the warrant strengthened the claim of constitutionality, but did not mandate a necessity requirement in all issuances of sneak-and-peek warrants.[86]

A necessity requirement should be vital to preserve the constitutionality of a covert entry. If the "necessity" does not rise to the level required by the Constitution, the mere showing that it will be more convenient or safer to covertly entry prior to a regular search and seizure should not suffice for the warrant to pass constitutional muster. In many complex operations, especially those relating to the illegal manufacture of drugs, agents want to secretly "case" the premises to determine the status of the laboratory, its exact location in the premises, the presence of weapons, and other relevant information that facilitates a more efficient and less dangerous subsequent regular search. While it is understandable that the covert search is a desirable weapon in the agents' eyes, the search is nevertheless a severe intrusion into the alleged criminals' privacy. Agents may be mistaken in their identification of the suspects, or in the identification of a personal residence as a drug laboratory. The level of necessity required before a regular search warrant is forsaken should therefore be one of strict or absolute necessity. The fourth amendment protects all citizens' homes, including those of suspected felons, from arbitrary invasion by government agents.

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duction. However, even though these may be legitimate safety reasons supporting the agents' preference for a covert warrant over a regular warrant, the affidavit did not show a specific necessity justifying the covert warrant in this particular case. *See also* text accompanying notes 96-100.

85. *Freitas*, 800 F.2d at 1456.

86. The *Villegas* court stated that "[t]he recognized problem with. . .clandestine searches is the lack of notice to the party whose privacy had been invaded. . . ." United States v. Villegas, 700 F. Supp. 94, 97 (N.D.N.Y. 1988). The court did not address the level of necessity claimed by the affidavit.

C. *Analysis of an Absolute Necessity Requirement*

An application for a surreptitious warrant could be required to attain a higher level of justification than the probable cause needed for a regular warrant, to compensate for the lack of prior notice to citizens affected by the search.[87] If there is a sufficient showing to meet this higher level of justification, the official issuing the warrant should ascertain why the agents are not seizing the incriminating evidence at that time instead of using the extraordinary clandestine search. Arguably, only once there is a showing of absolute necessity for a surreptitious entry, rather than a regular entry, should a covert warrant be granted.

If a surreptitious entry is erroneously conducted, mere subsequent notice to the affected party should not serve to render constitutional what otherwise is most likely unconstitutional. If absolute necessity must be shown at the outset, a subsequent erroneous entry has at least met a higher initial standard; absolute necessity serves as a protection against arbitrary surreptitious intrusions.

D. *Invasion of Privacy and Other Potential Dangers*

The right of privacy has developed both in the Court's interpretation and application of the two fourth amendment clauses and in the more general penumbra of privacy permeating the Constitution.[88] As earlier contended, covert warrants resemble the abhorred general warrants the drafters of the fourth amendment intended to abolish.[89] A sneak-and-peek warrant has the potential to bestow on law enforcement agents unlimited license to rifle through a person's private residence without the owner's knowledge or consent. There is no check on agents' actions to ensure they comply with the action described in the affidavit. If a search is covert, the owner is not present to observe the actions of the agents and thus has no means to question or contest the search.

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87. The fourth amendment has been interpreted as allowing some flexibility in what constitutes justification for an intrusion. An entry pursuant to a building inspection, or searches pursuant to a stop-and-frisk, require lesser degrees of justification than probable cause to remain within constitutional limits because these are arguably less intrusive practices. However, a sneak-and-peek warrant is an unusually severe intrusion and should require a higher level of justification than regular probable cause. Justice Stewart noted in his concurrence in Berger v. New York, 388 U.S. 41 (1967), in which a New York eavesdropping law was held unconstitutional, that the circumstances in the affidavit would have been adequate to meet the probable cause necessary for a conventional search or arrest but that it did not rise to the level of probable cause needed for the intrusive practice of eavesdropping. *Id.* at 69-70. This argument has not prevailed in the lower courts, however, but the Supreme Court has not yet addressed this issue.

88. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Loving v. Virginia, 388 U.S. 1 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965).

89. *See supra* note 14.

There is also the possibility agents may come across incriminating evidence they had not expected to find. In *Coolidge v. New Hampshire*,[90] the Court allowed the seizure of unnamed items if, in the course of a lawful search, the police inadvertently came across other articles of an incriminating nature in "plain view." This doctrine renders otherwise inadmissible evidence admissible, notwithstanding that police had no probable cause to believe the incriminating evidence was present in the residence when the search warrant was obtained. There are limits to this doctrine. The article must be of incriminating character[91] and this should be evident without examining it.[92]

The requirement of inadvertency is robbed of its meaning if agents have unlimited secret access to residences and their contents without the knowledge or presence of the owners. There is no such thing as "in plain view" if all drawers and files can be opened. Even if the warrant narrowly circumscribes the scope of the search, a defendant has no way of knowing whether the agent remained within the boundaries of the warrant.

Undoubtedly, many agents and law enforcement personnel would feel compelled to comply with the letter of the warrant. However, the risk of abuse and the subsequent intrusion into the privacy of citizens is so severe that a covert warrant should issue unless there is a clear showing of absolute necessity, a provision for postsearch notice, and full compliance with all other provisions mandated by legislation consistent with the fourth amendment.

IV. THE EFFECT OF *FREITAS* and *VILLEGAS* UPON THE ISSUANCE OF COVERT WARRANTS

In both *Freitas I* and *Freitas II*, the courts focused on the notice requirement needed to render the covert warrant constitutional.[93] The court refused to find a showing of necessity constitutionally re-

90. 403 U.S. 443 (1971).

91. *See* Commonwealth v. Wojcik, 358 Mass. 623, 266 N.E. 2d 645 (1971) (unnamed stolen property was suppressed because the police had no probable cause to believe the articles were stolen at the time of seizure).

92. *See* Stanley v. Georgia, 394 U.S. 557, 569-72 (1969) (Stewart, J., concurring) (screening of an obscene film found during a search of an alleged bookmaker's bedroom resulted in its suppression because the screening violated constitutional protections); *see also* Commonwealth v. Hawkins, 361 Mass. 384, 280 N.E. 2d 665 (1972) (bonds suppressed because the officer who seized them had no probable cause to believe the bonds were stolen because he had to make a phone call to verify the ownership status of the bonds).

93. *See supra* text accompanying notes 46-50.

quired.[94] Because of these decisions, the threshold requirements for covert warrants were lowered to the point where a judge could theoretically authorize such a warrant at any time as long as there was an adequate provision for postsearch notice.

The court in *Villegas* used only the low threshold of notice, as stated by the *Freitas* court, to find a covert warrant constitutional.[95] It is likely that if the next case in the Ninth Circuit dealing with covert warrants includes a notice provision but no finding of necessity, it too will pass constitutional scrutiny. Both courts found "necessity" a factor that merely strengthened the claim of constitutionality, but that it was not required.[96]

Today, there is considerable attention being focused on drugs and the various persons involved in their manufacture, transportation, sale, and use. The desire by all branches of government to rid the United States of the drug problem is certainly a laudable and legal goal. However, when the executive and legislative branches of government implement their policies, the judiciary should not allow the desirability of the end to justify zealous practices which deprive citizens of their basic constitutional rights under the fourth amendment. "The right of the people to be secure in their persons, houses, papers and effects. . ."[97] is an important right and should only be disturbed after a showing of necessity.

V. Justifications for Sneak-and-Peek Warrants

A covert entry is conceivably justifiable for the following reasons: 1) to prevent the destruction of evidence; 2) to ensure the safety of the agents involved in the operation; 3) to ensure the safety of members of the public in the vicinity of a dangerous situation; and 4) to allow the agents to calculate the most effective time and manner to execute a later raid.[98] While the reasons listed are by no means exhaustive, they are representative of possible justifications for official authorization of a sneak-and-peek warrant. However, each of the advantages enumerated above can be present in many situations not rising to the level of strict or absolute necessity.

In the context of drug investigations, although the rationale can

94. *See supra* text accompanying notes 46-50.
95. *See supra* text accompanying notes 64-67.
96. *See supra* text accompanying notes 46-50 & 64-67.
97. U.S. Const. amend. IV.
98. In Note, *supra* note 12, at 552, the author recognizes covert warrants may often be justified and cites some reasons why, including those enumerated in this Note. The author recognizes, as does this Note, that "[b]efore issuing a warrant for a covert search, a magistrate should also require proof of a substantial risk of destruction of evidence or of danger to agents or the public, and a more-than-conclusory statement in the application that no alternative measures will satisfy the need." *Id.* This Note has implicitly included these circumstances under the "necessity" umbrella.

easily be expanded to other hazardous situations, each of the above justifications should be stringently limited. In the manufacture of methamphetamine, for example, the presence of the equipment involved generally will preclude immediate destruction of evidence. While the size and output of illegal drug manufacturing laboratories will vary in each situation, the equipment and chemicals are more easily detected and less destructible than evidence of drug usage alone. Unless the government is highly certain destruction of evidence will result without a covert entry, this reason does not rise to the level of necessity. A normal search warrant with no announcement of initial entry may serve equally well to prevent the destruction of evidence and is a less severe intrusion than a covert entry.[99]

The safety of government agents is an important objective, but threats to safety are potentially present in all searches and arrests. This objective could be used as a means to justify a covert search in any potentially dangerous situation. Therefore, this argument should rise to the level of necessity only if specific hazards are shown very likely to be involved in the particular situation, such as booby traps and explosive chemicals, which pose a significant and probable danger to the agents if not identified and neutralized through a prior covert search.[100]

Another justification the government may use for sneak-and-peek warrants is the possibility of harm to the public. For example, volatile chemicals used in the manufacture of drugs may explode. However, if probable cause exists to believe volatile chemicals are on the premises, these chemicals should be seized in a regular search and seizure operation. If there is no probable cause to believe the chemicals are dangerous, then there is almost certainly no probable cause for a covert entry.

The government may rely on another potential source of harm to the public as a justification for sneak-and-peek warrants. It is the potential for violence from armed suspects. It has been suggested that a covert search warrant "seems appropriate where the potential danger is either uncertain or depends upon how far the criminal ac-

99. In Ker v. California, 374 U.S. 23 (1963), the police entered the defendant's house without giving notice of their authority and purpose. The Court excused the notice requirements because of the need to prevent the destruction of contraband. The use of a regular warrant with the possibility of having the notice requirement excused is arguably a less intrusive procedure than an overall surreptitious entry. However, further development of this idea is beyond the scope of this Note.

100. For a more detailed discussion, see Note, *supra* note 12 at 551.

tivity. . .has advanced."[101] However, this standard is overbroad because it can be stretched to include myriad circumstances. In many situations danger is a potential and agents rarely will have knowledge of the specific threats involved. This rationale could be used to justify covert entries in situations in which law enforcement personnel should anticipate danger will be present, and conduct the search and arrest in a careful but regular manner, instead of resorting to secret entries into private residences which are severe intrusions on privacy. As before, only if the threat to public safety and the futility of regular procedures is indeed ascertained does this justification rise to the level of necessity required by the fourth amendment.

The final rationale, calculating the most efficient time and manner to conduct a later search or arrest, must bow to the restrictions discussed above. These administrative justifications are not strong enough to overcome the protections of the fourth amendment.[102]

CONCLUSION

Arguably, because the fourth amendment's warrants clause requires the description of things to be seized, surreptitious entries that do not envision a seizure of evidence are proscribed by the very letter of the fourth amendment. Assuming that surreptitious entries are constitutional under limited circumstances, as the *Dalia* court appeared to hold, the *Freitas* court's adoption of the *Dalia* holding is questionable. The covert entries authorized by *Dalia*, unlike those in *Freitas*, were limited to those necessary to install electronic surveillance devices authorized pursuant to the strict limitations of Title III.

The *Dalia* court did not address the new breed of sneak-and-peek warrants at all. *Dalia* should not be read as giving carte blanche to surreptitious nocturnal entries into private residences, but should be read restrictively as permitting limited covert entries under certain express conditions. Assuming that the *Dalia* holding should be extended to cover surreptitious entries, the implicit requirements of necessity as well as postsearch notice should be strictly followed in the authorization of covert warrants.

The necessity requirement should be more stringent than that required by Title III, as the legislature has examined the practice of electronic surveillance but has not yet examined covert warrants which result in an even greater intrusion into the privacy of United States citizens. A higher level of justification than the probable

101. *Id.* at 552.

102. Mincey v. Arizona, 437 U.S. 385, 393 (1978). The Court states that "the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment." *Id.*

cause for a regular warrant should be shown before a covert warrant can issue within the constitutional limitations of the fourth amendment.

A covert search invites violations of the fourth amendment's protection of privacy, and even if the scope of the search is narrowly drawn, there is no check on agent conduct. Because the plain view doctrine has no practical meaning in the context of a covert search, any incriminating evidence found in the house, whether or not it is named in the warrant, is potentially admissible in court. This is so similar to the general warrants abolished by the fourth amendment that covert warrants should not be issued unless they meet the standards articulated, including the provision for notice and a showing of absolute necessity.

As a result of the Second Circuit's interpretation of *Freitas* in *Villegas*, it appears that as long as there is an adequate provision for postsearch notice, a judge may theoretically authorize a covert warrant without a showing of circumstances necessitating this extraordinary measure. Although arguments against covert warrants may be expounded by persons involved in drug manufacturing, the protections of the fourth amendment extend to all citizens. There is a potential for abuse of the search warrant process in any situation.

While there are many rationales justifying sneak-and-peek warrants, they are generally unpersuasive unless the circumstances in each particular case point to a showing of absolute necessity. There should be a virtual certainty that evidence will be destroyed or that lives are in danger before a regular search and seizure with attendant protective measures will be considered insufficient and a covert warrant issued.

GAIL ARMIST