Sneak and Peek Warrants
Legal Issues Regarding Surreptitious Searches
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Searches and seizures conducted pursuant to validly authorized and executed search warrants are very common law enforcement practices. The canons regulating such searches and seizures at the federal level are found in the Fourth Amendment to the U.S. Constitution and Rule 41 of the Federal Rules of Criminal Procedure.

The Fourth Amendment provides the general requirements that all searches and seizures be reasonable and that all warrants be based on sworn probable cause, particularly describing the place to be searched and the items to be seized. Rule 41 imposes more specific regulations regarding the authorization and execution of search warrants, such as authority to issue, authority to serve, time restraints, and notice requirements.

The prescriptions contained in the Fourth Amendment and Rule 41 are well-established and routinely followed by law enforcement officers. There are occasions, however, when a legitimate law enforcement activity does not fit squarely within the realm of a traditional search, and the government's ability to comply with conventional constitutional and statutory warrant requirements is questionable. Specifically, the use of "sneak and peek" warrants by law enforcement officers has raised questions regarding compliance with the Fourth Amendment prohibition against unreasonable searches and the Rule 41 notice requirement.

This article examines the emergence of the sneak and peek warrant as a viable law enforcement technique and reviews cases that have addressed the legal issues involved in the execution of such warrants. Additionally, it offers suggestions...
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for meeting the demands of the Fourth Amendment and Rule 41 when employing a sneak and peek warrant.

A Viable Law Enforcement Technique

Sneak and peek warrants allow law enforcement officers to lawfully make surreptitious entries into areas where a reasonable expectation of privacy exists, search for items of evidence or contraband, and leave without making any seizures or giving concurrent notice of the search. The technique is particularly useful in controlled substance manufacturing cases.3

When conducting an investigation into the illegal manufacturing of controlled substances, law enforcement officers may want to enter premises to confirm the presence of precursor chemicals or to assess the stability of a clandestine lab without divulging the investigation or jeopardizing the potential for further investigation. Under such circumstances, employing a traditional search warrant, which requires notice at the time of execution, would be self-defeating. A sneak and peek warrant, however, would satisfy the legitimate law enforcement purpose by allowing the search to occur without concurrent notice.

The Notice Requirement

Because nothing is disturbed or physically seized4 during the execution of a sneak and peek warrant, surreptitious searches are arguably less intrusive than the traditional search pursuant to a warrant. However, the covert nature of sneak and peek searches has made reviewing courts wary5 and caused them to impose strict delayed-notice requirements.

The first reported case involving the review of a sneak and peek warrant was United States v. Freitas.6 In Freitas, DEA agents obtained eight warrants to search numerous sites used in a large-scale methamphetamine operation. Before those warrants were executed, agents applied for and obtained a sneak and peek warrant for one of those locations to “determine the status of the suspected clandestine methamphetamine laboratory.”7

When issuing the sneak and peek warrant, the magistrate used a traditional warrant form but crossed out the portions requiring a particular description of the items to be seized and an inventory. The sneak and peek warrant contained no notice requirement.

After executing the sneak and peek warrant, agents used information obtained during the surreptitious search to obtain extensions that would allow them to briefly delay the execution of the remaining eight warrants. When those warrants were finally executed, the agents seized numerous items of evidence and arrested the defendant.

In a subsequent motion to suppress, the defendant contested the validity of the sneak and peek warrant. After a hearing on the matter, the district court concluded that the failure of the warrant to provide notice of service breached the Fourth Amendment.8

On review, the Ninth Circuit Court of Appeals agreed that the agents violated the Fourth Amendment by their failure to provide notice.9 In doing so, the court recognized that not all surreptitious entries are unconstitutional.10 However, the court found that the “absence of any notice requirement in the warrant casts strong doubt on its constitutional adequacy.”11

To remove that doubt, the court held that a sneak and peek warrant must be based on a demonstrated need for coveryness and “provide explicitly for notice within a reasonable, but short, time
subsequent to the surreptitious entry. Such time should not exceed seven days except upon a strong showing of necessity."12

The need for covertness may be justified on numerous grounds. The more common justifications for delayed notice of surreptitious searches are the desire to locate unidentified co-conspirators and the flight risk of the subjects. However, probably the most compelling reason to delay notice of a search was demonstrated in United States v. Ludwig.13

In Ludwig, U.S. Customs agents were investigating the break-in of a Customs drug storage facility where 356 pounds of cocaine were stolen. During the course of the investigation, the agents obtained a sneak and peek warrant for the search of a storage locker where an undetermined amount of cocaine was reportedly observed by a confidential source. Among the reasons asserted to justify the delayed notice was the need to protect the confidential source’s safety until all the subjects could be located and arrested. Finding the reasons compelling, the court upheld the 7-day notice delay.

Although the 7-day notice requirement espoused in Freitas was a creation of the court and not mandated by the Constitution or Federal Rules, it has been adopted by the only other federal court of appeals to deal with the issue of sneak and peek warrants. In United States v. Villegas14 and United States v. Pangburn,15 the Second Circuit Court of Appeals relied on the decision in Freitas to impose the 7-day requirement.

Extensions of the Notice Requirement

In Freitas, the court suggested that extensions of the 7-day notice requirement should not be granted except “on a strong showing of necessity.”16 Subsequently, the court in Villegas confronted a defense challenge to a surreptitious search where the notice of the search was delayed for more than 2 months.

In Villegas, DEA agents obtained a sneak and peek warrant to confirm the existence of a cocaine factory. The warrant contained a provision requiring notice of the search within 7 days. Two months after the execution of the sneak and peek warrant, agents executed a traditional search warrant and seized large quantities of cocaine in various stages of production and arrested 11 individuals.

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In the interim, agents obtained a series of additional 7-day extensions. The defendants ultimately moved to suppress the evidence on the grounds that notice of the surreptitious search, which did not occur until after the arrests were made, was not timely.

Addressing defendants’ motion, the court found two limitations on the issuance of covert entry searches to be appropriate. First, contemporaneous notice of a search should not be delayed unless the government has made a showing of reasonable necessity for the delay.17 Second, extensions of the delayed notice should not be granted “solely on the basis of the grounds presented for the first delay; rather, the applicant should be required to make a fresh showing of the need for further delay.”18

Applying these standards to the facts in Villegas, the court found that both criteria were met. First, the government presented ample grounds for the initial delay based on the remote setting of the clandestine lab, the lack of informants, and the large number of unidentified co-conspirators.

As to the numerous 7-day extensions, the court noted with approval that an affidavit supplying information on the progress of the investigation and a statement of the need for further delay were submitted with each request. These affidavits ranged in length from two to six pages and “were neither pro forma nor reflective of stale information.”19 While not suggesting that extensions could properly be granted indefinitely, the court concluded that “tolerable limits were not exceeded in this case.”20

The court in Villegas set a functional standard for the issuance of delayed-notice extensions. Requests for such extensions should keep the issuing authority apprised of the status of the investigation and clearly demonstrate that the need for covertness continues to exist.
Remedy for Violations of the Notice Requirement

If the government violates the 7-day notice requirement by failing to obtain the initial authorization for delayed notice or by failing to adequately support the need for extensions, the remedy for such violation is likely to be suppression of evidence subsequently obtained during the follow-up traditional search. The likelihood of such suppression, however, depends on whether the court views the government's failure as a violation of the Fourth Amendment or Rule 41.

Jurisdictions that view notice violations as contrary to the Fourth Amendment impose a higher standard than those that consider them violations of Rule 41. To overcome the finding of a Fourth Amendment violation, law enforcement officers must be able to establish that they executed a surreptitious warrant in a good faith belief in its validity. To surmount a claim of failure to comply with Rule 41, on the other hand, the government need only show that the defendant was not prejudiced by any intentional or deliberate disregard for the rule.

In Freitas, the Ninth Circuit Court of Appeals concluded that the failure to give contemporaneous notice of a search without adequate prior authorization violated the Fourth Amendment reasonableness requirement. Traditionally, constitutional violations are sanctioned by suppression of the evidence unless, in the case of searches, the law enforcement officer relied in good faith on a warrant.

In light of the fact that court decisions like those in Freitas, Villegas, and Pangburn have existed for a number of years, attempts to justify a good faith reliance on sneak and peek warrants that contain no notice requirements are likely to be ill-fated. However, if law enforcement officers make reasonable efforts to 1) support initial requests for surreptitious searches, 2) ensure that sneak and peek warrants contain 7-day, delayed-notification requirements, and 3) adequately justify delay extensions, then the prospects of a successful good faith defense on the part of the government increase.

Contrary to the court in Freitas, the Second Circuit Court of Appeals has rejected the notion that notice violations contravene Fourth Amendment protections. Rather, the court in Pangburn found the contemporaneous notice requirement to be merely an element of Rule 41. Because an infraction of Rule 41 does not amount to a constitutional violation, the court concluded that suppression of the evidence would be unnecessary unless shown to cause prejudice to the defendant or to be an “intentional and deliberate disregard of...the Rules.”

Because sneak and peek warrants are essentially an alternative to more intrusive traditional search warrant, it is unlikely that defendants will be successful in showing that they were prejudiced by the government’s use of the surreptitious search. Thus, to defeat defense challenges that the use of sneak and peek warrants violates Rule 41, law enforcement officers should concentrate their efforts on ensuring that there is no “intentional and deliberate” disregard for notice requirements. This can be accomplished by making reasonable attempts to comply with the rules by addressing the need for correctness in sneak and peek warrant applications and, when possible, having those applications reviewed for sufficiency by competent legal advisors prior to submission for authorization.

Suggestions for Ensuring the Admissibility of Evidence

Challenges to sneak and peek warrants usually take the form of motions to suppress evidence obtained during subsequent searches pursuant to traditional search warrants. Defendants inevitably claim that the previously executed “unlawful” surreptitious searches taint traditional warrants. Law enforcement can overcome these challenges in two ways.

One approach is for officers to ensure the lawfulness of the surreptitious search. In that regard, the following suggestions are offered:

1. Sneak and peek warrants should only be used when there is a legitimate need for
the government to covertly uncover information that could not be obtained through other, more traditional means of investigation. Because courts are wary of surreptitious searches, they should not be used as a routine matter of course.

2) When sneak and peek warrants are obtained, the warrant forms should contain a statement requiring notification of execution within 7 days.

3) Every effort should be made to comply with the 7-day notice requirement. Delays, when necessary, should be the result of circumstances beyond the control of the government and authorized in 7-day increments.

4) Delays, when justified, should be supported by affidavits summarizing the investigation to date and clearly demonstrating the need for continued covertness.

5) When feasible, a competent legal advisor should review both the surreptitious warrant application and any requests for extensions of the delayed notice prior to submission to the court for authorization.

6) If the conditions justifying the need for covertness are dispelled, notice of the surreptitious search should be given as soon as possible.

The second course of action to overcome a defense motion to suppress evidence seized pursuant to a traditional warrant executed subsequent to a surreptitious search is to protect the independent nature of the traditional search warrant. If the courts view the traditional warrant as an outgrowth of an unlawful surreptitious search, anything seized pursuant to the traditional warrant would be considered “fruit of the poisonous tree” and suppressed.

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If, however, the courts deem the traditional warrant autonomous, the seized evidence may be admissible, despite the unlawfulness of a previous sneak and peek.\(^\text{21}\) To protect the independent nature of the traditional warrant, law enforcement officers should be careful to omit from the probable cause statement any information obtained during the execution of the sneak and peek.

Conclusion

The covert nature of sneak and peek warrants makes them attractive to law enforcement officers but menacing to the courts. To preserve the continued use of surreptitious searches as a legitimate practice, law enforcement officers should carefully follow the dictates of the few courts that have reviewed the technique. Furthermore, the government should demonstrate good faith by using sneak and peek warrants only when necessary and by giving notice of the search as soon as feasible.\(^\text{22}\)

Endnotes

1 U.S. Const. amend. IV reads: “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 person or things to be seized.”

2 Statutes regulating the issuance and execution of search warrants at the state level differ greatly from state to state. Thus, state and local law enforcement officers are encouraged to consult with their department’s legal counsel prior to engaging in activities discussed in this article.

3 Sneak and peek warrants may be used effectively in other types of investigations. For example, the sneak and peek may be used to locate stolen items without revealing the government’s investigation to the subjects so that further investigation can identify additional co-conspirators or fences.

4 Although nothing is physically seized during the execution of a sneak and peek warrant, photographs of observed evidence or contraband are often taken and those images are considered seized.

5 In United States v. Freitas, 800 F.2d 1451 (9th Cir. 1986), the court made the following statement:

Surreptitious searches and seizures of intangibles strike at the very heart of the interests protected by the Fourth Amendment. The mere thought of strangers walking through and visually examining the center of our privacy interest, our home, arouses our passion for freedom as does nothing else. That passion, the true source of the Fourth Amendment, demands that surreptitious entries be closely circumscribed. ld. at 1456.

6 800 F.2d 1451 (9th Cir. 1986).

7 Id. at 1453.

8 The district court also concluded that the sneak and peek warrant impermissibly allowed agents to observe, but not seize, tangible property. However, on appeal, the court cited United States v. New York Telephone Co., 434 U.S. 159 (1977) for the proposition that the seizure of intangibles does not violate the Fourth Amendment or Rule 41. Id. at 1455.

9 Both the district court and the court of appeals concluded that the failure to give notice also violated Rule 41. However, because
failures to comply with the Federal Rules of Criminal Procedure do not automatically require suppression of evidence, it is more significant that these courts found a violation of the Fourth Amendment.


800 F.2d 1341, 1456.

Id. at 1456. The court in Freitas did not order the evidence seized pursuant to the warrants suppressed. Rather, the court believed there was a strong possibility that the agents relied on the warrants in good faith and that the evidence would be admissible under the Supreme Court's ruling in United States v. Leon, 468 U.S. 897 (1984). Accordingly, the court ordered a remand. The second time on review, in Freitas II, the court concluded that the good faith reliance on the warrant exception to the exclusionary rule did, in fact, apply in this case. 856 F.2d 1425 (9th Cir. 1988).


999 F.2d 1324 (2d Cir. 1990).

983 F.2d 449 (2d Cir. 1993).

800 F.2d 1451, 1456 (1990).

The court did not suggest that the government must meet the Title III standard of establishing that “normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous.” 18 U.S.C. § 2518(3)(c).

999 S.2d 1324, 1338.

Id. at 1338.

Id. at 1338.


983 F.2d 449, 455 (citing United States v. Burke, 517 F.2d 377 (2d Cir. 1975)).

In Pugh, the court noted with approval that the agent submitted the sneak and peek warrant application to an assistant district attorney for review prior to presentment to the court. Id. at 455.

See, e.g., United States v. Sirotn, 968 F.2d 947 (9th Cir. 1992).

Law enforcement officers of other than federal jurisdiction who are interested in this article should consult their legal advisors. Some police procedures ruled permissible under federal constitutional law are of questionable legality under state law or are not permitted at all.