

U.S. v. Crawford
(9th Cir. March 21, 2003) ___ F.3d ___

Important Case Update

On September 2, 2003 the U.S. Court of Appeals for the Ninth Circuit announced it will review its decision in *U.S. v. Crawford*. *Crawford* was a controversial decision in which the court ruled that officers may not conduct parole searches unless they have reasonable suspicion that the parolee is continuing to engage in criminal activity. As the result of *Crawford*, some departments ordered their officers to stop conducting parole searches. Pending *en banc* review, *Crawford* is no longer citable authority.

ISSUE

Must officers have reliable evidence that a parolee has committed new crimes before they may conduct a parole search of his home?

FACTS

FBI agents received a tip from an “unnamed source” that Crawford had robbed a certain bank in San Diego two years earlier. When agents learned that Crawford was on California parole with a standard search condition¹ they notified his parole officer who authorized a search of Crawford’s home. The agents reportedly did not expect to find any evidence inside the house although they “hoped” they would. They also hoped to talk to Crawford about the bank robbery.

While the search was underway, agents asked Crawford if he would accompany them to the FBI office to talk there. He agreed. About 90 minutes into the interview Crawford confessed to the robbery. He subsequently pled guilty.

DISCUSSION

Crawford contended the parole search was unlawful and, therefore, his confession should have been suppressed because it resulted from the search. It was unlawful, he argued, because the FBI agents did not have reliable information that he had committed the robbery. In other words, Crawford urged the court to rule that officers may conduct parole searches only if they have reasonable suspicion that the parolee has committed one or more new crimes.

Although the United States Supreme Court has not ruled on this issue,² the California Supreme Court did so in *People v. Reyes*.³ In *Reyes*, the court ruled that in order to both protect the public and encourage parolees to go straight, officers may conduct suspicionless parole searches. The court also ruled, however, that the privacy rights of parolees are diminished but not extinguished. Consequently, it reasoned that the interests of the public and those of parolees could both be respected if a limitation was placed on suspicionless parole searches. Specifically, the court ruled that a suspicionless parole search is unlawful if it was arbitrary, capricious, or conducted for the purpose of harassment.

¹ **NOTE:** The standard search condition reads: *You and your residence and any property under your control may be searched without a warrant by an agent of the Department of Corrections or any law enforcement officer . . . with or without cause.*

² See *United States v. Knights* (2001) 534 US ___ [151 L.Ed.2d 497, 504-5][“We need not decide whether Knights’s acceptance of the search condition constituted consent in the *Schneekloth* sense of a complete waiver of his Fourth Amendment rights . . .”].

³ (1998) 19 Cal.4th 743.

In *Crawford*, however, Judges Reinhardt and Tashima declared this approach unconstitutional, announcing a per se rule that “a search of a parolee’s home pursuant to a parole condition is reasonable only if it is supported by reasonable suspicion.” Thus, because a tip from an unnamed source cannot, in and of itself, furnish reasonable suspicion, the court ruled the parole search was unlawful and Crawford’s confession was inadmissible.

DA’s COMMENT

The ruling of the *Crawford* majority is troubling for several reasons. Not only does it seek to elevate the privacy rights of parolees to a new level, its ruling—if it stands—will make it much more difficult for officers to monitor the activities of California’s parolees. In other words, it weakens the parole system and consequently increases the threat that parolees present to society.⁴

The *Crawford* majority accomplished this by making the parole system reactive instead of proactive. It effectively replaces the goals of rehabilitation and reducing recidivism through intense supervision with the goal of catching parolees who aren’t smart enough to keep their criminal activities a secret. By permitting officers to conduct parole searches only if they have reliable information that the parolee is engaging in criminal activity, the *Crawford* majority provides a safe haven for parolees who associate only with hardcore criminals who would never “snitch.” As the U.S. Supreme Court observed when it considered—and rejected—a similar argument that probable cause should be required to search probationers, “The probationer would be assured that so long as his illegal (and perhaps socially dangerous) activities were sufficiently concealed as to give rise to no more than reasonable suspicion, they would go undetected and uncorrected.”⁵

Even more troubling is the *Crawford* majority’s complete disregard of the public policy reasons upon which California’s parole system is based. Both the California Supreme Court and the California Legislature have made a determination that it is in the best interests of the people of California that parole searches be conducted randomly and without requiring officers to justify the decision to search.⁶ As the California Supreme Court stated in *In re Tyrell J*, “[A] probationer must thus assume every law enforcement officer might stop and search him at any moment. It is this thought that provides a strong deterrent effect upon the [probationer] tempted to return to his antisocial ways.”⁷

One would think that if a panel of the Ninth Circuit was going to invalidate the reasoned judgment of California’s highest court and its Legislature, it would have a compelling legal basis for doing so. But the legal foundation upon which *Crawford* was built was so flimsy as to be ludicrous. The only case it could find that even remotely supported its position was *Board of Education v. Earls*⁸ in which the United States Supreme Court upheld suspicionless drug testing of students who participated in

⁴ See *United States v. Knights* (2001) 534 US 112, 120 [Court notes that a 1991 Justice Department study showed that 43% of 79,000 felons on probation in 17 states were rearrested for a felony within three years while still on probation].

⁵ *Griffin v. Wisconsin* (1987) 483 US 868, 878.

⁶ See *People v. Reyes* (1998) 19 Cal.4th 743; Penal Code §3067.

⁷ (1994) 8 Cal.4th 68, 87. ALSO SEE *People v. Mason* (1971) 5 Cal.3d 759, 763; *People v. Reyes* (1998) 19 Cal.4th 743, 753; *People v. Turner* (1976) 54 Cal.App.3d 500, 507 [“Unexpected, unprovoked [probation] searches are permitted, since they are reasonably calculated to monitor the probationer’s compliance with the law.”]; *In re Anthony S*, (1992) 4 Cal.App.4th 1000, 1002, fn.1 [“Being on probation with a consent search term is akin to sitting under the Sword of Damocles.”]; *Griffin v. Wisconsin* (1987) 483 US 868, 876 [the possibility of “expeditious searches” has a “deterrent affect”].

⁸ (2002) 536 US 822.

competitive extracurricular activities. The *Crawford* majority reasoned that because the Court in *Earls* noted that the drug test results of students were not turned over to any law enforcement authority it was essentially ruling that any suspicionless search that did so was unconstitutional.

Ironically, a panel of the Ninth Circuit in *United States v. Knights* was soundly criticized just two years ago by the U.S. Supreme Court for employing exactly this type of reasoning. The circuit's panel in *Knights* said that because the U.S. Supreme Court in *Griffin v. Wisconsin*⁹ had approved of a certain type of probation search, it had implicitly ruled that any probation search that was not just like it was per se unconstitutional. The Supreme Court in *Knights* characterized this as "dubious logic," saying it is error to conclude "that an opinion upholding the constitutionality of a particular search implicitly holds unconstitutional any search that is not like it."¹⁰

The other case upon which *Crawford* was based was *Ferguson v. City of Charleston*¹¹ in which, according to the *Crawford* majority, the U.S. Supreme Court "struck down a program collecting and screening urine from pregnant mothers without individualized suspicion of drug use." Thus, as the *Crawford* majority sees it, the privacy rights of pregnant mothers are substantially the same as those of convicted felons. That the *Crawford* majority was forced to resort to such specious reasoning supports Judge Trott's observation that *Crawford* was a "result oriented" decision.

Not only does *Crawford* conflict with California law, its holding has been rejected by the 11th Circuit which stated, "It is clear that a requirement that searches only be conducted when officers have 'reasonable suspicion' or probable cause that a crime has been committed or that a condition of probation has been violated could completely undermine the purpose of the search condition."¹² Furthermore, *Crawford* represents a split within its own circuit. As the Ninth Circuit stated in *Latta v. Fitzharris*:

[A parole officer is] in a better position than anyone else to decide whether a search is necessary." His decision may be based upon specific facts, though they be less than sufficient a finding of probable cause. *It may even be based on a "hunch" about the behavior and attitude of the parolee.*¹³

In addition, the Ninth Circuit has ruled that a probation search is lawful under the Fourth Amendment if it was lawful under state law.¹⁴ And, as noted, California state law permits suspicionless parole searches.¹⁵

Finally, it appears that *Crawford* is at odds with *Griffin* itself.¹⁶ In *Griffin*, a parole officer received a tip from a police officer that "there were or might be guns in Griffin's apartment." Although such a tip clearly does not constitute reasonable suspicion,¹⁷ the Court ruled that, for purposes of justifying a probation search, it was sufficient. Said the Court, "[W]e think it reasonable to permit information provided by a police officer, whether or not on the basis of first-hand knowledge, to support a probationer search."¹⁸

⁹ (1987) 483 US 868.

¹⁰ *United States v. Knights* (2001) 534 US 112, 117.

¹¹ (2001) 532 US 67.

¹² *U.S. v. Kelley* (11th Cir. 1982) 681 F.2d 1362, 1368.

¹³ (9th Cir. 1975) 521 F.2d 246, 250. Emphasis added.

¹⁴ See *U.S. v. Wryn* (9th Cir. 1991) 952 F.2d 1122, 1124 ["In line with the foregoing cases, had the warrantless search of the probationer Wryn's home been authorized by either Montana state law or by Wryn's probation agreement we would consider the search 'reasonable' under the Fourth Amendment."]; *U.S. v. Garcia-Cruz* (9th Cir. 1992) 978 F.2d 537, 541 ["A parole search is proper if conducted in a manner consistent with state law."].

¹⁵ See *People v. Reyes* (1998) 19 Cal.4th 743.

¹⁶ (1987) 483 US 868.

¹⁷ See *Alabama v. White* (1990) 496 US 325.

¹⁸ At pp. 879-80.

Judge Stephen Trott wrote a vigorous dissenting opinion in *Crawford* pointing out it essentially constitutes an attack by the *Crawford* majority on California's legal system:

What the majority opinion in this case does is far more serious than simply freeing a dangerous bank robber from federal prison. The opinion effectively holds unconstitutional a fundamental aspect of California's statutory parole system and laws. . . . [*Crawford*] blows an ill wind for California. We may have just thrown open the habeas gates to a flood of petitions, disabled electronic monitoring, crippled DNA banks, and who knows what else. Only the Richard Allen Davises [parolee who murdered Polly Klass] of the underworld will herald this unsettling result.

In his dissenting opinion, Judge Trott said, "I file this dissent with the hope that this is not the end, but the beginning of the proper resolution of this appeal." We sincerely hope he is right.