U.S. v. Crawford
(9th Cir. en banc, June 21, 2004) ___ F.3d ___

INTRODUCTION

Last year in *U.S.* v. *Crawford*[1] [hereinafter *Crawford I*], a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit ruled that officers may not conduct a parole search of a parolee's home unless they have reasonable suspicion that the parolee was again involved in criminal activity. This ruling prompted a number of California law enforcement agencies to order their officers to stop conducting suspicionless parole searches. They did so mainly because they were concerned that a violation of *Crawford I* might result in civil litigation.

On September 2, 2003 the Ninth Circuit granted *en banc* review of *Crawford I*. In doing so it invalidated *Crawford I*. On June 21, 2004, the *en banc* panel filed its opinion. Unfortunately, a majority of the court did not rule on whether reasonable suspicion is required to conduct parole searches. It did, however, affirm Crawford's conviction on grounds that his confession was admissible on other grounds.

In doing so, five of the 11 judges on the panel filed a concurring opinion in which they explained why they believe that officers may conduct parole searches without reasonable suspicion or any other level of suspicion. This concurring opinion, written by Judge Stephen Trott, is so logical, so well written, and based on such sound legal authority, that it will certainly be cited with approval in published cases throughout the country in years to come. For prosecutors and judges who confront this issue in the future, Judge Trott's opinion will prove to be a valuable resource.

So, where do we stand now on this important issue? The answer is clear: *Crawford I* is a nullity. The California Supreme Court's decision in *People* v. *Reyes* and Penal Code § PC 3067 continue to be the law of this state. And both state that officers are not required to have reasonable suspicion before they may conduct a parole search of a parolee's home.

FACTS

FBI agents received reliable information 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 condition they notified his parole officer who authorized a search of Crawford's home. Although the agents "hoped" they would find incriminating evidence, their real reason for conducting the search was to question Crawford about the bank robbery. They thought the parole search would give them an opportunity to do so but, as one of the agents testified, they would have attempted to interview him even if he was not on parole.

The agents and San Diego police arrived at Crawford's home at about 8:20 A.M. Crawford's sister admitted them and said Crawford was asleep in the bedroom. They entered the bedroom "with weapons drawn," told Crawford they were conducting a parole search, and "escorted" him to the living room where he was detained for 30-50 minutes until the search was completed.

Having discovered no evidence, an agent asked Crawford if he would accompany him to the FBI office to talk about the bank robbery. Crawford said okay. At the beginning of the interview, the agent told Crawford "that he was not in custody and could leave at any time." The agent then started to advise Crawford of his *Miranda* rights but he interrupted him, saying the warnings "were making him nervous," and that he thought he was present "merely to discuss an old case." The agent then reaffirmed that Crawford was not under arrest and was free to leave. The agent did not seek a *Miranda* waiver.

About 90 minutes into the interview Crawford confessed to the robbery. He was permitted to leave but was later indicted for armed bank robbery. After the trial court denied his motion to suppress the confession, he pled guilty.

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[1] *U.S.* v. *Crawford* (9th Cir. 2003) 323 F.3d 700.

DISCUSSION

Crawford contended his confession should have been suppressed because, (1) it was the "fruit" of an unlawful parole search, and (2) it was obtained in violation of *Miranda*.

In *Crawford I*, the court addressed only the lawfulness of the parole search. As noted, it ruled that parole searches are unlawful unless officers had reasonable suspicion that the parolee was engaging in criminal activity. It then determined that reasonable suspicion did not exist and, therefore, the confession should have been suppressed.

In the *en banc* decision [hereinafter *Crawford II*], the court determined that the information linking Crawford to the bank robbery constituted probable cause.[2] Thus, even under *Crawford I*'s "reasonable suspicion" requirement, the search was lawful. The court did not, however, decide the case on that basis. Instead, it ruled that even if the parole search was unlawful, the confession could not be suppressed because it was not the "fruit" of the search.

"Fruit of the poisonous tree"

Under the so-called "fruit of the poisonous tree" doctrine, evidence obtained during an illegal search may nevertheless be admissible if the link between the search and the evidence has been sufficiently weakened.[3] Because the court was assuming for the sake of argument that there was, in fact, an illegal detention and search (a "poisonous tree"), the issue was whether the confession was its "fruit."

THE DETENTION: As noted, Crawford was detained for 30-50 minutes before he agreed to accompany the agent to the FBI office for questioning. Crawford argued the detention was unlawful because the entry into his home was unlawful. The court responded that even if the detention was unlawful, it ended when Crawford voluntarily agreed to accompany the agents to the FBI office. Thus, the link between the confession and the detention was effectively broken. Said the court, "[A]fter the search ended, [Crawford] agreed to accompany [the officers] to the FBI office. At that point, the involuntary detention ended."

THE SEARCH: Crawford's argument that his confession was the "fruit" of an unlawful parole search was also rejected—and for the same reason: Even if the search was unlawful, it had ended well before Crawford confessed. The court noted the confession might have been deemed the "fruit" of the search if officers had discovered evidence during the search, and if that discovery prompted Crawford to confess. But, as the court pointed out, no evidence was found:

> Because the search failed to produce any physical evidence, and because Defendant made no incriminating statement during the search, we fail to see how the search caused Defendant's statement in the FBI office.[4]

The court acknowledged there was an indirect connection between the search and the confession in that the officers used the search as a means of encouraging Crawford to talk to them about the bank robbery. But because it was apparent that the officers would have attempted to question him even if he was not on parole, the court ruled the connection was sufficiently attenuated. Said the court, the FBI agent "testified

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[2] NOTE: The court in *Crawford II* said, "[H]ere the officers had probable cause to arrest Defendant. Although there may have been some confusion on this point below, defense counsel clearly and expressly conceded on appeal, both in briefing and at oral argument, that when [the FBI agent] and the state officers arrived to perform the parole search, they had probable cause to arrest Defendant for the Ulrich Street bank robbery." Having probable cause to arrest, however, did not necessarily mean the search was lawful under *Crawford I* because probable cause to arrest is not the same as probable cause to search.

[3] See *Wong Sun* v. *United States* (1963) 371 US 471, 488; *United States* v. *Leon* (1984) 468 US 897, 911.

[4] Quote edited.

unequivocally that he would have contacted Defendant to discuss the old bank robbery whether or not the parole search had taken place. . . . That a search was conducted does not in itself make a later-given confession the fruit of the search."

Consequently, the court ruled there was an insufficient connection between the parole search and Crawford's confession to warrant its suppression on grounds that the search was unlawful.

Miranda

Crawford also claimed his confession should have been suppressed because he did not waive his *Miranda* rights. As noted, before the interview began the agent told Crawford he was not in custody and could leave at any time. The agent then started to advise him of his *Miranda* rights but Crawford interrupted him, saying the warnings "were making him nervous" and that he thought he was present "merely to discuss an old case." At that point, the agent decided not to seek a waiver. Instead, he confirmed that Crawford was not under arrest, and that he was free to leave.

It is settled that officers must obtain a *Miranda* waiver before interrogating a suspect who is "in custody."[5] In the context of *Miranda*, a suspect is "in custody" if a reasonable person in the suspect's position would have believed he was under arrest, or that his freedom had been restricted to the degree associated with an actual arrest.[6]

One circumstance that strongly indicates the suspect was in custody was that he was questioned in a police station, especially, "the inherently coercive environment of the police interview room."[7] Nevertheless, the courts have ruled that questioning that occurs in a police station may be deemed noncustodial if, (1) the suspect voluntarily accompanied officers to the station, and (2) the suspect was told he was "free to go."[8] It was apparent that the FBI agent was aware of these requirements because he complied with both of them. As the court observed:

> Perhaps most significant for resolving the question of custody, Defendant was expressly told that he was not under arrest after interrupting [the FBI agent's] attempt to recite the *Miranda* warnings. [The agent] testified that he read the *Miranda* warnings in order to make the questioning of Defendant "as clean as possible." Defendant stopped him and said, "Oh, I'm under arrest?" [The agent] answered in the negative and later repeated that Defendant was not under arrest and was free to leave.

Consequently, the court ruled that Crawford's confession was admissible. His conviction was affirmed.

DA's COMMENT

As noted in the introduction, a concurring opinion was written by Judge Trott in which five of the 11 judges addressed the issue upon which *Crawford I* was decided: Must officers have reasonable suspicion that a parolee has committed a new crime before they may conduct a parole search of his home? Although a concurring opinion is not binding authority, Judge Trott's opinion was so well-reasoned that it will certainly have a great deal of influence on other courts that consider this issue. Here are some of the points he made:

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[5] See *Berkemer* v. *McCarty* (1984) 468 US 420, 428; *California* v. *Beheler* (1983) 463 US 1121, 1124.

[6] See *Yarborough* v. *Alvarado* (2004) __ US __; *Berkemer* v. *McCarty* (1984) 468 US 420, 442; *Stansbury* v. *California* (1994) 511 US 318, 322-3; *California* v. *Beheler* (1983) 463 US 1121, 1125; *Oregon* v. *Mathiason* (1977) 429 US 492, 495.

[7] See *People* v. *Celaya* (1987) 191 Cal.App.3d 665, 672.

[8] See *People* v. *Stansbury* (1995) 9 Cal.4th 824, 831-2; *Oregon* v. *Mathiason* (1977) 429 US 492, 495; *California* v. *Beheler* (1983) 463 US 1121.

- California's interest in the management of its parole system is "overwhelming." According to a 2001 report by the California Criminal Justice Statistics Center, 68% of adult parolees are returned to prison: 55% for a parole violation, and 13% for committing a new felony. According to the California Policy Research Center, 70% of California's parolees committed a new offense within 18 months of their release. *This is the highest recidivism rate in the nation*. According to the *California Journal*, California had 158,177 inmates in its prisons in August of 2000. 90,000 of them were returned to prison following a conviction of a new crime or for violating parole.
- According to another study, most parolees committed many crimes for which they were not arrested. In one case, a man committed approximately 300 rapes before he was ever arrested. Another parolee snatched about 500 purses in one year. He was never arrested for any of them. Another parolee said he molested about 1,000 children per year when he was between 17 and 22 years old. He was arrested for only one of them.
- It was reasonable for the California Supreme Court in *People* v. *Reyes*[9] to "harden its stance against habitual criminals" by permitting suspicionless parole searches. In doing so, however, it did not declare "unfettered open-season on parolees." Instead, it wisely ruled that suspicionless parole searches are permitted only if they are not arbitrary, capricious, or harassing.
- Parolees such as Crawford do not have a reasonable expectation of privacy as to "non-arbitrary, non-capricious, and non-harassing searches of their persons and abodes."

In conclusion, Judge Trott said:

> Parolees, like drunk drivers on our highways, are a discrete group that are a demonstrable menace to the safety of the communities into which they are discharged. Parolees have demonstrated by their adjudicated criminal conduct a capacity and willingness to commit crimes serious enough to deprive them of liberty. ¶ Parole is first and foremost about supervising and controlling people who have demonstrated a propensity to break the law and for whom the State still has a responsibility to constrain and to mentor in connection with public safety.

[9] (1998) 19 Cal.4th 743. ALSO SEE Penal Code § 3067 in which the Legislature authorized suspicionless searches of parolees.