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United States v. Crawford: Has the Ninth Circuit Unnecessarily Waived Supervision of Parolees

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***UNITED STATES V. CRAWFORD:*¹**

HAS THE NINTH CIRCUIT UNNECESSARILY “WAIVED” SUPERVISION OF PAROLEES?²

I. INTRODUCTION

For good reason, the Ninth Circuit granted en banc rehearing of the recent holding by a panel of judges in *United States v. Crawford*.³ In *Crawford*, the panel held that police may conduct parole searches only under individualized suspicion of continuing criminal activity,⁴ producing an unnecessary limitation on searches under Fourth Amendment⁵ jurisprudence. As a result, law enforcement has been hamstrung in its ability to supervise and investigate illegal activity by parolees. California’s previous rule that parole searches only be non-arbitrary, non-capricious, and non-harassing has fallen in favor of a higher standard—one that requires that officers demonstrate reasonable, individualized suspicion before conducting a search,

1. 323 F.3d 700 (9th Cir. 2003), *reh’g granted*.

2. The views expressed in this Comment are solely those of the author. They do not reflect the views of Judge Trott.

3. 323 F.3d 700 (9th Cir. 2003), *reh’g granted*.

4. *See id.* at 716; *see also* Robert Greene, *Court Limits ‘Fourth Waiver’ Home Searches of Parolees*, METROPOLITAN NEWS, Mar. 6, 2003, at 1, available at <http://www.metnews.com/articles/craw030603.htm>; Jason Hoppin, *Circuit Puts Limits on Parole Searches*, THE RECORDER, Mar. 6, 2003, at 6; Henry Weinstein, *Court Curbs Searches of Parolees’ Homes: Police Must Have Reasonable Suspicion Even Though Waivers Are a Condition of Release*, L.A. TIMES, Mar. 6, 2003, at B6.

5. The Fourth Amendment 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 persons or things to be seized.” U.S. CONST. amend. IV.

even when they suspect a parolee may have been involved in criminal activity.⁶

In *Crawford*, the dissent properly objected to the new, elevated standard. Noting the Supreme Court's "special needs" doctrine,⁷ the dissent argued that California's need to supervise its parolees outweighs whatever privacy expectation parolees who sign conditions of parole allowing for searches at any time may have.⁸ Accordingly, the dissent argued, the majority's holding that individualized suspicion of ongoing criminal activity is required for parole searches was not only unwise, but also wrong, given the Supreme Court's interpretation of special needs.⁹

The new rule announced by the majority is imprudent and unnecessary in light of current Supreme Court Fourth Amendment jurisprudence.¹⁰ This Comment argues that *Crawford* results in an unjustified limitation on law enforcement's ability to conduct legitimate investigations. To do so, it discusses why the *Crawford* decision was inconsistent with the Supreme Court's recent decision in *United States v. Knights*¹¹ or the Court's line of special needs

6. See *Crawford*, 323 F.3d at 711. The standard falls just short of the probable cause necessary for ordinary citizens.

7. See *Griffin v. Wisconsin*, 483 U.S. 868 (1987); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602 (1989); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989).

8. *Crawford*, 323 F.3d at 732-33 (Trott, J., dissenting).

9. See *id.* at 736-37 (Trott, J., dissenting).

10. See Laurie L. Levenson, *Recent Decisions End Trend of Limiting Parolee Privacy Rights*, L.A. DAILY JOURNAL, Aug. 25, 2003, at 7 (discussing the most recent trend in the Supreme Court to allow for greater leeway to law enforcement in parole searches).

11. 534 U.S. 112 (2001). The *Knights* Court considered whether a search conducted pursuant to a similar California "Fourth Waiver" and supported by reasonable suspicion of ongoing criminal activity complied with the requirements of the Fourth Amendment. *Id.* The Court concluded that a search conducted with reasonable suspicion that the probationer was engaging in criminal activity did not violate the Fourth Amendment and thus declined to answer whether searches conducted pursuant to blanket "Fourth Waivers" but not supported by reasonable suspicion are also supported by the Fourth Amendment. *Id.* at 122.

cases.¹² Additionally, it argues that California's alternative to the release and careful supervision of its parolees is to keep them in overcrowded prisons, now the only place where law enforcement officials may conduct adequate supervision, as California's parole conditions have now been effectively invalidated.¹³ The better approach, consistent with current Supreme Court jurisprudence, is to require only that the government provide a minimal showing that the search was conducted for legitimate law enforcement purposes and not merely to interfere with parolee privacy.

Part II of this Comment discusses the facts of *Crawford* and the standards the court applied. Part III discusses the jurisprudential lines under which *Crawford* was decided and argues that the *Crawford* court's analysis unnecessarily departed from those lines. It further discusses why the court's refusal to address California's special needs plainly contradicted the very case on which the majority relied. The concept of special needs discussed in this Comment does not necessarily mean that parole searches may be conducted with no cause. But certainly a lesser showing than that required by *Crawford* should be sufficient to protect privacy interests while still allowing law enforcement its legitimate authority.

Finally, this Comment discusses the balance between the government's needs and parolee expectations and concludes that the balance the majority achieved in *Crawford* was erroneous and resulted in an unsound rule. Part IV concludes that the decision in *Crawford* has deprived law enforcement of its legitimate authority to oversee those in state custody,¹⁴ and that a lesser standard for searches should have been adopted.

12. See *Griffin v. Wisconsin*, 483 U.S. 868 (1987); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602 (1989); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989).

13. See CAL. PENAL CODE § 3067 (Deering Supp. 2003) ("Any inmate who is eligible for release on parole pursuant to this chapter shall agree in writing to be subject to search or seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant and with or without cause); see also Joannathan Turley, *A See-No-Evil Parole System*, L.A. TIMES, May 12, 2003, at B11. By no means is supervision within the confines of prisons ideal, but with budget cuts in California, Turley argues, supervision outside the prison walls is done only through "divine intervention." *Id.*

14. CAL. PENAL CODE § 3056 (Deering 1992).

II. THE CRAWFORD DECISION

A. Facts

1. Crawford's Criminal History

In 1989, Raphyal Crawford became a ward of the California State Penal system.¹⁵ He had been convicted of selling cocaine base, was released, and then was arrested for a second time for firearm possession by a felon and for possession of marijuana for sale.¹⁶ Again, Crawford was released from prison on parole.¹⁷

Before his release, Crawford signed a document, frequently referred to as a "Fourth Waiver."¹⁸ In California, parolees must read and sign such a document prior to being released on parole.¹⁹ Among other things, the document states that the parolee understands that he or she is subject to search by law enforcement at any time, without a

15. See *Crawford*, 323 F.3d at 724 (Trott, J., dissenting).

16. *Id.*

17. *Id.*

18. *Id.* at 702. Although both law enforcement and the legal community frequently refer to the document as a "Fourth Waiver," the dissent in *Crawford* argued that this term inaccurately describes it. See *id.* at 724 (Trott, J., dissenting). In fact, all parolees are subject to the terms of the document. *Id.* at 724–25 (Trott, J., dissenting). Because it is unlikely that the term accurately describes the document, this Comment encloses the term in quotes. The "Fourth Waiver," in relevant part states:

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...

You agree to search or seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant and with or without cause...

You have read or have had read to you this notification and the following Conditions of Parole and understand them as they apply to you.

Id. at 702, 726; see also CAL. PENAL CODE § 3067 (Deering Supp. 2003).

19. See Hoppin, *supra* note 4, at 6.

warrant, and without cause.²⁰ Crawford was then released on parole, still a ward of the state penal system.²¹

2. The Parole Search

In 2000, while Crawford was on his second release from prison, an “unnamed source” identified Crawford as an accomplice to a robbery committed while Crawford was on his first release.²² After discovering that Crawford was on parole and subject to the “Fourth Waiver,” FBI agents obtained permission from Crawford’s parole agent to go to Crawford’s home and to search it.²³ Although the FBI hoped to find physical evidence of Crawford’s involvement in the robbery, they believed it unlikely that such evidence would be discovered and hoped primarily for a confession from Crawford.²⁴

For about an hour, the FBI searched Crawford’s home and questioned him about his involvement in the robbery, telling Crawford that he was under investigatory detention, but not under arrest.²⁵ After about an hour, no evidence had been uncovered, and the FBI asked Crawford if he would be more comfortable talking about the robbery at the FBI office.²⁶ Crawford agreed and was further questioned at the FBI.²⁷

A few hours later, Crawford admitted to his involvement in the bank robbery and was subsequently arrested.²⁸ At trial Crawford moved to suppress his confession, arguing that it was the product of a search that violated his Fourth Amendment rights.²⁹ The district

20. *See Crawford*, 323 F.3d at 725 (Trott, J., dissenting).

21. *Id.*; CAL. PENAL CODE § 3056 (Deering 1992) (“Prisoners on parole shall remain under the legal custody of the department and shall be subject at any time to be taken back within the inclosure of the prison.”); *see also* CAL. PENAL CODE § 3053 (Deering Supp. 2003) (“The Board of Prison Terms upon granting any parole to any prisoner may also impose on the parole any conditions that it may deem proper.”).

22. *Crawford*, 323 F.3d at 702.

23. *Id.* at 702–03.

24. *Id.* at 703.

25. *Id.*

26. *Id.* at 704.

27. *Id.*

28. *Id.* at 704–05.

29. *Id.* at 705.

court denied the motion, and Crawford appealed.³⁰ On appeal, the Ninth Circuit reversed the order and suppressed the confession, holding that it was the product of an unconstitutional search.³¹

B. *The Majority's Approach*

Reviewing *de novo*, the majority concluded that a search, to satisfy Fourth Amendment requirements, must be reasonable under the totality of the circumstances.³² In examining the totality of the circumstances, the majority first concluded that despite Crawford's status as a parolee and despite his having signed documents explaining his limited Fourth Amendment rights as a parolee, Crawford had a reasonable, albeit "reduced," expectation of privacy in his home.³³

After concluding that Crawford had a reasonable expectation of privacy in his home, the court balanced that expectation against the government's need for intrusion.³⁴ On balance, the court held that Crawford's interest outweighed the state's.³⁵ Relying heavily on *United States v. Knights*,³⁶ the court concluded that reasonable, individualized suspicion of ongoing criminal activity is *required* for parole searches despite any "Fourth Waiver" conditions.³⁷

Finally, the majority considered and discarded the argument that Crawford consented in advance to waive his Fourth Amendment rights, concluding that a person cannot voluntarily give consent when

30. *Id.*

31. *Id.* at 722–23. The resolution of *Crawford* remains to be seen, but the Ninth Circuit recently granted rehearing *en banc*.

32. *Id.* at 705; *see also* *United States v. Knights*, 534 U.S. 112, 118–19 (2001) (determining reasonableness by comparing privacy intrusion to government interest in the intrusion); *Ohio v. Robinette*, 519 U.S. 33, 39 (1996) (concluding that "reasonableness," under the Fourth Amendment, is determined by "examining the totality of the circumstances."); *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (stating that well-established principles require reasonableness to satisfy Fourth Amendment requirements).

33. *Crawford*, 323 F.3d at 710.

34. *Id.*

35. *Id.* at 715–16.

36. 534 U.S. 112 (2001).

37. *Crawford*, 323 F.3d at 715–16.

the alternative to such blanket consent is imprisonment.³⁸ Acknowledging that an individual can ordinarily consent to a search, the majority rejected, out of hand, the notion that a “Fourth Waiver” can constitute valid advance consent to such a search.³⁹

III. ANALYSIS: THE *CRAWFORD* RESULT UNDER CURRENT FOURTH AMENDMENT JURISPRUDENCE

The critical question in *Crawford*, as in any case where the Fourth Amendment is invoked, is whether, given the totality of the circumstances, the defendant had a reasonable and legitimate expectation of privacy that outweighed the government’s interest in the intrusion.⁴⁰ The majority determined that Crawford’s expectation of privacy was both legitimate and reasonable and that the government’s interest was not sufficiently strong to outweigh that privacy interest.⁴¹ The dissent, in contrast, concluded that the government’s special need for supervision outweighed whatever expectation Crawford may have had.⁴² Unfortunately for California, the majority’s conclusion was not simply a determination of Crawford’s rights, but also announced a new Fourth Amendment rule that is now the law in the Ninth Circuit.⁴³

38. *See id.* at 718. The court did not state that *any* consent given in lieu of prison is invalid. *Id.* Rather, it stated that the parole conditions cannot constitute consent as presented when the alternative is to remain in prison custody. *Id.* The majority followed the above analysis with a lengthy discussion of whether Crawford’s confession to law enforcement was sufficiently attenuated from the wrongful search to cure the wrongfulness of the search. *Id.* at 719. Neither the dissent nor this Comment finds that part of the majority’s opinion relevant. *Id.* at 725 (Trott, J., dissenting). Although the discussion was necessary to wholly address the motion at issue in the case, it is not necessary to discuss it here, as the relevant issues in the case arise long before attenuation even hits the radar screen.

39. *See id.* at 718–19. The majority cited no U.S. Supreme Court decision in which such consent has been rejected, instead relying on prior Ninth Circuit disapproval of blanket waivers. *Id.*

40. *See id.* at 710; *Ohio v. Robinette*, 519 U.S. 33, 39 (1996).

41. *See Crawford*, 323 F.3d at 715–17.

42. *See id.* at 737–38 (Trott, J., dissenting).

43. Furthermore, it has effectively invalidated California’s current parole conditions.

A. Critique: Parolees' Reasonable
Expectations of Privacy

Defendants may invoke the Fourth Amendment only if they had a subjective expectation of privacy that "society is prepared to recognize as 'reasonable.'"⁴⁴ Thus, determining a defendant's expectation of privacy involves two considerations. First, the expectation must be reasonable to society. Second, the defendant must have had a subjective, actual expectation of privacy.

The majority erred in three respects in concluding that Crawford had a reasonable and actual expectation of privacy in his home. First, the majority granted Crawford a greater expectation of privacy than the Supreme Court defined as reasonable for parolees in *United States v. Knights*.⁴⁵ Second, the majority's analysis of privacy in the home for ordinary citizens does not compel an equally high expectation of privacy for parolees. Finally, the majority in effect ignored Crawford's outright admission that he had no subjective expectation of privacy as a parolee and wrongly deferred to the trial court in this respect.⁴⁶

1. Limited Expectations of Privacy Under
United States v. Knights

The *Knights* Court addressed to some extent the question of whether society is prepared to accept that parolees have a reasonable expectation of privacy. The Supreme Court held in *Knights* that probationers who sign conditions of release nearly identical to that signed by Crawford have a "significantly diminished . . . expectation of privacy."⁴⁷

Despite *Knights*'s holding that probationers have a "significantly diminished . . . expectation of privacy," the *Crawford* majority characterized parolees' reasonable expectations of privacy as merely "reduced."⁴⁸ As a result, upon balance against the state's interest in conducting the search, the court concluded that Crawford's

44. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); see also *United States v. Nerber*, 222 F.3d 597, 599 (9th Cir. 2000).

45. 534 U.S. 112 (2001).

46. See *Crawford*, 323 F.3d at 707 n.13.

47. *Knights*, 534 U.S. at 120.

48. *Crawford*, 323 F.3d at 710.

expectation of privacy outweighed the government's interest in intrusion.⁴⁹ Had the majority correctly identified the level of a parolee's reasonable expectation, the balance would have plainly given way to the government's special interest in parolee supervision.

In *Knights*, the Supreme Court considered whether a "waiver"⁵⁰ of Fourth Amendment rights by a probationer⁵¹ in California affected a probationer's reasonable expectation of privacy.⁵² Because *Knights*, like *Crawford*, was "unambiguously informed" of the search condition, the Court concluded that his expectation of privacy was "significantly diminished."⁵³ Consequently, the government did not bear a substantial burden in proving that its need to intrude outweighed that "significantly diminished" expectation of privacy.⁵⁴ While at first blush this may appear to be an issue of pure semantics, *Crawford's* subtle softening of the holding in *Knights* allowed the court to increase parolees' reasonable expectations of privacy, thus creating the need for a higher showing of cause by the government and distorting the balance that should have been achieved.⁵⁵

The *Crawford* court, while acknowledging this characterization in *Knights*, in fact applied a lesser variation of the expectation and discussed *Crawford's* expectation as "reduced."⁵⁶ The Ninth Circuit's reference to a "reduced" expectation of privacy simply cannot mean the same thing as the message the Supreme Court delivered in

49. *See id.* at 715–16.

50. "Waiver" is contained in quotes because although the Supreme Court referred to the conditions in California as a "waiver," there is still some controversy concerning whether these types of conditions are really waivers at all. *See infra* Part III.B.

51. The Ninth Circuit has held that for purposes of the Fourth Amendment, there is no relevant difference between "probation" and "parole." *United States v. Harper*, 928 F.2d 894, 896 n.1 (9th Cir. 1991). This Comment accepts that holding without question.

52. *Knights*, 534 U.S. at 117–20.

53. *Id.*

54. *See id.* at 120–22 (discussing the important need of the state to supervise and control its probationers as opposed to ordinary citizens).

55. Indeed, the *Crawford* majority engaged in distinguishing "reduced" from "extinguished," a necessary and appropriate exercise to show the different levels of reduction of an expectation that could be recognized by society as reasonable. *See Crawford*, 323 F.3d at 710.

56. *Id.*

Knights that probationers and parolees only enjoy a bare minimum expectation of privacy. *Knights* plainly outlined what level of reasonable expectation parolees/probationers who have signed conditions of release have, yet the *Crawford* court's analysis was inconsistent with that level.⁵⁷

2. The *Crawford* Result Under General Principles Regarding Expectations of Privacy in the Home

The *Crawford* court also justified its decision by giving great weight to the fact that Crawford was in his home at the time of the search.⁵⁸ It is true that the Supreme Court has identified the home as an area in which privacy expectations for the ordinary citizen are great.⁵⁹ But the Supreme Court has also stated that while the place in which a person has an expectation of privacy does play a part in the consideration of that person's reasonable expectation, "the Fourth Amendment protects people, not places."⁶⁰ Moreover, the fact that a person is more likely to have an expectation of privacy in the home does not necessarily imply that an individual *has* that subjective expectation. Indeed, a parolee who is engaging in criminal activity is most likely to expect to be searched *in* his or her home, imagining that this would be the first place law enforcement would discover criminal activity.⁶¹

Aside from these doctrinal flaws in the analysis of privacy in the home, the majority's discussion was merely an attempt to dismiss a multitude of cases cited by the dissent in which far worse intrusions than the one at issue in *Crawford* have been upheld despite Fourth Amendment considerations, when the government's special needs

57. *Knights*, 534 U.S. at 119–20 (a probationer who was "unambiguously informed" of the conditions of his parole had a "significantly diminished...reasonable expectation of privacy."). In fact, *Knights*'s expectation may have been *completely extinguished*, but the Court declined to address that possibility. *Id.* at 120 n.6.

58. *See Crawford*, 323 F.3d at 706–08, 710.

59. *See Kyllo v. United States*, 533 U.S. 27, 33 (2001).

60. *Katz v. United States*, 389 U.S. 347, 351 (1967); *see also Crawford*, 323 F.3d at 735–36 (Trott, J., dissenting) (arguing that Crawford's presence in his home at the time of the parole search did not justify the majority's analysis of the special needs doctrine).

61. *See Knights*, 534 U.S. at 120 ("probationers have even more of an incentive to conceal their criminal activities").

take precedence.⁶² Surely if schools can constitutionally take bodily fluids from high school students in an effort to discover drug use of which no suspicion exists, then law enforcement may search the home of a convicted parolee who no longer “enjoy[s] a presumption of innocence”⁶³ when reliable information reveals that he may have been involved in additional, undiscovered crimes.⁶⁴

To conclude that because the searches cited by the *Crawford* dissent did not occur in the home they have no bearing on Crawford’s search of his home is entirely misplaced. The body is the single most expected area of privacy, equal to, if not above and beyond that of the home.⁶⁵ Indeed, the Fourth Amendment enumerates not only the home, but also the person, yet the Supreme Court has consistently held that the body, like the home, may be searched without a warrant without offending the Fourth Amendment when the need for the intrusion sufficiently outweighs the privacy expectation.⁶⁶ Nevertheless, the majority insisted that these bodily searches were distinguishable because they did not occur in the home, while parole searches conducted to discover past criminal activity, with the permission of parole officers, after the signing of a “Fourth Waiver” are not permissible⁶⁷ because they *do* occur in the home.⁶⁸ There is no palpable logic to this distinction—it merely attempts to deflect the real issue of the governmental need for intrusion into the private lives of individuals.⁶⁹

The location of the search is one of many germane circumstances to be considered, yet the *Crawford* majority treated it

62. See *Crawford*, 323 F.3d at 735 (Trott, J., dissenting).

63. See *id.* at 732 (Trott, J., dissenting); see also *Latta v. Fitzharris*, 521 F.2d 246 (9th Cir. 1975).

64. See *Bd. of Educ. v. Earls*, 536 U.S. 822, 835 (2002).

65. See *Crawford*, 323 F.3d at 735–36 (Trott, J., dissenting).

66. See *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602 (1989); *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989); *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002).

67. (without reasonable, individual suspicion of ongoing criminal activity).

68. *Crawford*, 323 F.3d at 706–08, 710.

69. Moreover, the people searched in these types of cases still enjoyed the presumption of innocence no longer a luxury to parolees and probationers. See *id.* at 732 (Trott, J., dissenting).

as nearly dispositive.⁷⁰ No one disputes that Crawford could have some level of expectation in his home, but the majority's focus on this fact was far too narrow. It necessarily implied that a parolee's expectation of privacy in the home was the same as that of the ordinary citizen. This proposition is contrary to the nature of a parolee's status as an individual who is under constant supervision of the California Department of Corrections.⁷¹

3. Review of Crawford's Actual Expectation of Privacy

Factually, Crawford could not have had more than a minimal subjective expectation of privacy. Because Crawford's subjective expectation of privacy was a factual determination to be made by the trial court, the majority concluded that they should grant great deference to the trial court's conclusion that Crawford did have an expectation of privacy.⁷²

While the majority had the standard of review right, the application of it was lacking. Even under this highly deferential standard of review, one need only look at Crawford's own admission to see that Crawford had almost no, if absolutely no expectation of privacy: "I mean, I just, you know, took for granted that, you know, I'm on parole, that I don't have no rights at all."⁷³ While society may to some degree regret this mistaken belief of an absolute lack of rights, clearly Crawford held an unequivocal belief that he had no Fourth Amendment rights at all.⁷⁴ Crawford's *mistaken* belief makes it no less a belief. Combine this statement with Crawford's initials by the conditions of his parole in his "Fourth Waiver," and what other conclusions may be drawn? Rather than confront these two

70. *See id.* at 706–08.

71. *See* CAL. PENAL CODE § 3056 (Deering 1992).

72. *See id.* at 707 n.13.

73. *Id.*

74. It bears mention that Crawford, of course, was wrong. Never will the Supreme Court allow a parolee to lose all of his or her constitutional rights. *See* Daniel P. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatist's Guide to Loss, Abandonment and Alienation*, 68 *FORDHAM L. REV.* 2011, 2011 (2000) ("defendant may waive most, though not all, of his fundamental constitutional and statutory rights."). The issue here is not the existence of Crawford's rights under the Fourth Amendment, but the extent of those rights. *See Crawford*, 323 F.3d at 707 n.13.

glaring facts, the majority simply brushed them aside as insignificant—citing Crawford's statement of surprise when FBI agents entered his home as grounds for the trial court's determination.⁷⁵

However, an examination of the facts determined in the trial court demonstrates that the facts did not support the court's conclusion. There were essentially three facts established in the trial court: (1) Crawford's statement that he believed he had no rights;⁷⁶ (2) his signature by the conditions of parole allowing search at any time for no reason at all;⁷⁷ and (3) his shock when agents entered his home one night.⁷⁸ The first two factors work clearly against Crawford. Even the third factor does not support his argument because Crawford may have been shocked that law enforcement officers tracked him down; however, that does not necessarily mean that he was shocked that his home could be searched while he was on parole. Accordingly, as the *Crawford* dissent argued, Crawford had virtually no actual, subjective expectation of privacy.⁷⁹

B. Fourth Waivers as Valid Consent

It is unclear whether conditions such as those at issue in *Crawford* should be viewed as valid consent.⁸⁰ Consequently, there was serious dispute between the *Crawford* majority and the dissent as to whether the "Fourth Waiver" is really a waiver and as to whether it can constitute consent to searches otherwise in violation of the Fourth Amendment.⁸¹ This difficult issue did not need to be decided in *Crawford*.

75. *Crawford*, 323 F.3d at 707 n.13.

76. *Id.*

77. *Id.*; *id.* at 725–26 (Trott, J., dissenting).

78. *Id.* at 707 n.13.

79. *Id.* at 727 (Trott, J., dissenting). Perhaps Crawford had a minimal expectation of privacy, but whatever the minimal level he may have had, the bottom line is that the government should not have had to prove more than a minimal showing of need for intrusion.

80. The doctrine of criminal waiver is controversial. Thus, it is no surprise that the majority and dissent disagreed on the subject. See *Crawford*, 323 F.3d at 717–19, 725.

81. Compare *Crawford*, 323 F.3d at 717–19 (majority's discussion of whether "Fourth Waivers" can constitute valid consent), with *id.* at 725 (Trott, J., dissenting) (concluding that consent/waiver is irrelevant).

It is axiomatic that people may consent to searches that would otherwise violate their Fourth Amendment rights.⁸² Application of this basic principle to “Fourth Waivers” is controversial.⁸³ The dissent argued that “Fourth Waivers” are not waivers at all; rather, they are conditions of parole to which all parolees are subject, and accordingly the dissent did not address the issue of consent at all.⁸⁴ In contrast, the majority discussed for pages whether Crawford’s signature on the “Fourth Waiver” constituted valid, voluntary consent.⁸⁵ As a practical matter, whether one takes the view of the majority—that the “waiver” was not valid because it was not made voluntarily,⁸⁶ or the position of the dissent—arguing that the “waiver” is no waiver at all, but a condition not subject to consent, the search in *Crawford* should have been permitted. Either way, Crawford had a substantially diminished, if not extinguished expectation of privacy that could not outweigh law enforcement’s legitimate interests. Accordingly, the government should have been required only to show a minimal need for intrusion and minimal cause for doing so. In Crawford’s case, there were adequate circumstances for allowing the search, but the court’s analysis of consent, special needs, and expectations of privacy went beyond that was necessary.

C. California’s Special Need for Supervision of Parolees

The majority’s insistence that the Supreme Court’s holding in *Knights* only slightly reduced a parolee/probationer privacy expectation allowed the majority to quickly dismiss California’s need for the supervision of its parolees. As such, the *Crawford* court

82. See *Zap v. United States*, 328 U.S. 624, 628 (1946) (holding that Fourth Amendment rights may be waived voluntarily by consent); *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973); see also *United States v. Mezzanatto*, 513 U.S. 196, 201 (1995) (criminal defendants “may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution”).

83. See generally William J. Stuntz, *Waiving Rights in Criminal Procedure*, 75 VA. L. REV. 761 (1989) (discussing the doctrine of criminal waiver and its ambiguities).

84. *Crawford*, 323 F.3d at 725.

85. See *id.* at 717–19.

86. *Id.*

repeatedly cited the supremacy of the U.S. Constitution as the reason for ignoring California's special needs. But the Constitution, as interpreted by the U.S. Supreme Court, does not conflict with the California law at issue.⁸⁷

The Supreme Court developed the special needs doctrine in order to recognize that in certain cases, the ordinary requirements of the Fourth Amendment are impractical and inadvisable.⁸⁸ In some limited circumstances, individualized suspicion is *not required*.⁸⁹ In the context of searches, if the expectation of privacy is not great enough to overcome the government's special need, then the search is constitutional.⁹⁰

California's need to supervise its parolees is abundantly clear when one looks at a few simple statistics. California currently has approximately 161,000 incarcerated individuals.⁹¹ Of these inmates, most serve determinate sentences, making them eligible for parole after serving, on average, between fifty and sixty percent of their sentences, with no input from a parole board.⁹² In the last decade, due in part to this non-discretionary system of release, California has seen a more than seventy percent increase in the number of prisoners released on parole.⁹³ In fact, almost *ninety-eight* percent of California's prisoners are placed on parole.⁹⁴ Of those released on

87. See *Knights*, 534 U.S. at 121–22.

88. See *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002) (upholding the constitutionality of a high school's suspicionless drug testing policy); *Nat'l Treas. Employees Union v. Von Raab*, 489 U.S. 656, 668 (1989) (upholding the constitutionality of the U.S. Custom Service's suspicionless drug testing of its employees).

89. See *Earls*, 536 U.S. at 829.

90. See *Nat'l Treas. Employees Union*, 489 U.S. at 668.

91. Paige M. Harrison & Jennifer C. Karberg, Bureau of Justice Statistics, *Prison and Jail Inmates at Midyear 2002* 3, <http://www.ojp.usdoj.gov/bjs/pu.PDF> (Apr. 2003).

92. Timothy A. Hughes et al., Bureau of Justice Statistics, *Trends in State Parole, 1990-2000*, <http://www.ojp.usdoj.gov/bjs/pu.PDF> (Oct. 2001); see also Joan Petersilia, *Parole in California: Is This a Version of the Future in Queensland?*, at http://www.angelfire.com/space/pls/Docs/Inside_Out_2/California_parole_article.htm (Sept. 2000) (discussing the mandatory, non-discretionary system of parole in California).

93. See Hughes et al., *supra* note 92, at 3.

94. Jeremy Travis & Sarah Lawrence, Urban Institute, *Beyond the Prison Gates: The State of Parole in America* 14 (Nov. 2002), at <http://>

parole in California, *less than twenty-five* percent successfully complete their supervision period—almost twenty percent less than the national average.⁹⁵ In fact, when California is excluded from the national rates, the national parole success rates increase on average about ten to fifteen percent.⁹⁶ What is most alarming (and most relevant to the discussion of California's critical need for parolee supervision) is that recent statistics show that California has the highest recidivism rate of any state.⁹⁷

Recognizing California's crisis in recidivism, supervision, and crime,⁹⁸ the Supreme Court stated in *Knights* that in ignoring the need for adequate supervision in California, "the Court of Appeals . . . would require the State to shut its eyes to the [special need] and concentrate only on [reintegration]. But we hold *that the Fourth Amendment does not put the State to such a choice.*"⁹⁹ The *Knights* court further pointed out:

[P]robationers have even more of an incentive to conceal their criminal activities and quickly dispose of incriminating evidence than the ordinary criminal because probationers are aware that they may be *subject to supervision* and face revocation of probation, and possible incarceration. . . in which the trial rights of a jury and proof beyond a reasonable doubt, among other things, do not apply.¹⁰⁰

Consequently, the *Knights* court held that probationers¹⁰¹ do not enjoy the same level of Fourth Amendment privilege as ordinary

www.urban.org/UploadedPDF/310583_Beyond_prison_gates.pdf; *see also* Petersilia, *supra* note 92.

95. *See* Travis & Lawrence, *supra* note 94, at 11.

96. *Id.* at 19; Hughes et al., *supra* note 94, at 12.

97. Turley, *supra* note 13, at B11.

98. Obviously, the above statistics may be interpreted in various ways. But the irrefutable conclusion is that California's many criminals, after release, commit more crimes and thus require more supervision.

99. *United States v. Knights*, 534 U.S. 112, 121 (2001) (emphasis added). The *Knights* court did not explicitly refer to supervision as a "special need," instead evaluating it as the government's side of the balance in examining the totality of the circumstances. *Id.* at 120.

100. *Id.* at 120.

101. And thus parolees.

citizens.¹⁰² Indeed, the above statistics clearly illustrate the state's critical need for supervision. The *Crawford* court failed to come to grips with this special need, holding it to be less significant than Crawford's possible expectation that he would not be searched. The prudent approach, given this clear balance in favor of the government's need, would have been to require only the most minimal showing that the parole search was being conducted for legitimate law enforcement purposes.

Given this approach, the concept of special needs discussed in this Comment would not allow law enforcement to search with no cause, but rather would allow for investigation with minimal showing of cause. In a case such as *Crawford*, where there was a signed waiver, valid parole conditions allowing for searches, an admission that the parolee had a minimal to no subjective expectation of privacy, and a legitimate robbery investigation for which the parolee was a suspect, no further showing of government need should be required.

*D. Balancing Need with Expectation: What Level of Suspicion
Should Be Required*

After concluding that Crawford had an objectively reasonable, subjectively legitimate expectation of privacy in his home, the *Crawford* majority concluded that this expectation outweighed California's need to supervise its hundreds of thousands of parolees, many of whom, like Crawford, are repeat offenders.¹⁰³ The balance should have gone in the other direction.

Ninth Circuit law now requires law enforcement personnel to have a reasonable, individualized suspicion that the parolee is engaging in ongoing criminal activity to search a parolee, regardless of the conditions of parole. Amazingly, it relies on *Knights* for this conclusion.¹⁰⁴ But the *Knights* court never held that law enforcement could not constitutionally search a parolee subject to parole conditions allowing a search at any time, without reasonable

102. *Id.* at 121.

103. *Crawford*, 323 F.3d at 716; see also Travis & Lawrence, *supra* note 94, at 22.

104. See *Crawford*, 323 F.3d at 705–06.

suspicion of ongoing criminal activity.¹⁰⁵ The *Knights* court only went so far as to hold that when individualized suspicion exists, the balance weighs in favor of the search.¹⁰⁶ The *Knights* court *did not* hold that individualized suspicion of continuing criminal activity is *required*. Thus, the Court has yet to draw any lines as to how far a state's special needs must extend before the balance tips in favor of an individual's expectation of privacy. The *Crawford* court, while acknowledging this holding, extended it to the assumption that such suspicion *is* required.¹⁰⁷ In fact, the *Knights* court rejected such extensions, stating that "dubious logic. . . [is required to assert] that an opinion upholding the constitutionality of a particular search implicitly holds unconstitutional any search that is not like it."¹⁰⁸ Furthermore, the *Crawford* rule is a step in the wrong direction and draws Fourth Amendment lines that leave law enforcement without adequate means of supervising state wards.

The concern over continuing limitation of parolee rights cannot, as a matter of common sense, extend to investigation of crime such as that in *Crawford*. A few simple hypotheticals illustrate the proper application of the Fourth Amendment in searches of parolees and their residences. When it comes to parolees, there are a range of intrusions that law enforcement could seek to justify. For example, could the state install video cameras in parolees' homes, without a warrant, to conduct twenty-four hour surveillance with no cause whatsoever? Clearly, this type of activity would not be justified under *Knights*. Likewise, it would be an unjustified intrusion for law enforcement to enter a parolees' place of work regularly to search her pockets for drugs in front of her coworkers with no suspicion that she possessed any, especially if she had not been previously convicted of any drug offense. In other words, *Knights* and proper application of

105. Because the Court found that the search in *Knights* was supported by reasonable suspicion, the Court expressly declined to address whether a suspicionless search could be conducted pursuant to a Fourth Waiver. *Knights*, 534 U.S. at 120 n.6.

106. *Id.* at 121.

107. *Crawford*, 323 F.3d at 715–16.

108. *Knights*, 534 U.S. at 117.

the special needs doctrine would prohibit law enforcement from arbitrarily harassing a parolee for no reason at all.¹⁰⁹

However, nothing in *Knights* prohibits law enforcement from searching a parolee's vehicle without a warrant after receiving reliable evidence that weapons are inside. In fact, *Knights* would seem to expressly authorize such action.¹¹⁰ Recognizing the need to balance enforcement with legitimate Fourth Amendment rights, the *Knights* Court held that law enforcement does not need a warrant to search a person on parole or probation.¹¹¹ But *Knights* did not go so far as to say what *is* required. Again, *Knights* simply extended the Fourth Amendment line to allow Fourth Amendment searches supported by reasonable suspicion of criminal activity; it declined to answer how far that line would extend.¹¹²

The circumstances of *Crawford* lie between the twenty-four hour surveillance extreme and the reliable information of possession of weapons extreme. While there was no concrete evidence that Crawford was *still* engaging in criminal activity, the FBI had reliable information that Crawford had been involved in the prior robbery and the search was for legitimate law enforcement purposes.¹¹³ The Supreme Court has *never* ruled that this is insufficient to support a reasonable search under the state's special needs doctrine, and it is unnecessary to do so. To say that Crawford's "expectation of privacy" in his home,¹¹⁴ after being told unequivocally that he could be searched at any time, somehow outweighs the State's need to supervise those people who have been convicted of crimes and are still serving their sentences¹¹⁵ is a gross departure from the lessons of

109. To this end, California adopted the standard that a parole search may not be "arbitrary, capricious, or harassing." *People v. Reyes*, 19 Cal. 4th 743, 752 (1998); 968 P.2d 445, 450; 80 Cal. Rptr. 2d 734, 739. As illustrated by this Comment, nothing in the Constitution forbids this standard. See *Griffin v. Wisconsin*, 483 U.S. 868 (1987).

110. See *Knights*, 534 U.S. at 121–22.

111. *Id.* at 121.

112. *Id.* at 121–22.

113. See *Crawford*, 323 F.3d at 724 (Trott, J., dissenting).

114. For a discussion of Crawford's subjective expectation of privacy, see *supra* at Part III.A and accompanying footnotes.

115. See CAL. PENAL CODE § 3056 (Deering 1992) ("Prisoners on parole shall remain under the legal custody of the department and shall be subject at

Knights. True, at some point on the continuum, Fourth Amendment considerations must win out.¹¹⁶ But the *Crawford* court has drawn the wrong line on the continuum and has unnecessarily left California's law enforcement with far less ability to adequately supervise its parolees.¹¹⁷

IV. CONCLUSION

The practical result of *United States v. Crawford* has yet to be seen.¹¹⁸ If allowed to stand on rehearing, it will certainly force California to seriously rethink how and when to release prisoners under the sole supervision of parole agents.

The most prudent approach, and the approach most consistent with current Supreme Court doctrine, is to permit law enforcement to conduct searches of a parolee's home if they can make a minimal showing that the search is for legitimate law enforcement purposes¹¹⁹ and not a mere ruse for interfering with a parolee's privacy.¹²⁰ This approach could be adopted under the special needs doctrine. It would also avoid the difficult and undecided issue of whether the parolee's advance agreement to be searched can constitute a valid waiver of Fourth Amendment rights. Finally, it is an approach that does not give a green light to law enforcement to harass parolees or interfere with their reintegration into society but does give law

any time to be taken back within the inclosure of the prison." This is somewhat different from other state systems.

116. California perhaps drew the correct line on the continuum, now ruled unconstitutional by the Ninth Circuit—Fourth Amendment considerations prevail over searches that are arbitrary, capricious, or harassing. *People v. Reyes*, 19 Cal. 4th 743 (1998).

117. See *Crawford*, 323 F.3d at 736–37 (Trott, J., dissenting).

118. Although the California Supreme Court recently expressed its disagreement with the holding of *Crawford*. See *People v. Sanders*, No. S094088, 2003 Cal. LEXIS 5371, at *9 (Cal. July 31, 2003) (noting the *Reyes* holding and expressing disagreement with the holding in *Crawford* as contrary to *Reyes*); see also Levenson, *supra* note 10, at 7.

119. Whether for *past* or *presently occurring* criminal activity.

120. See Levenson, *supra* note 10 (stating that Supreme Court jurisprudence before *Crawford* allowed greater latitude to law enforcement searches of parolees).

enforcement sufficient authority to ensure that parolees remain in compliance with the law.

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