

# The Alabama Prosecutor



**Randy Hillman**  
Executive Director

**Executive Committee**

OFFICERS

**Jimmie Harp**  
President  
Gadsden

**Richard Minor**  
Vice President  
Pell City

**Rob Broussard**  
Secretary-Treasurer  
Huntsville

**Chris McCool**  
Immediate Past President  
Carrollton

**Steve Marshall**  
NDAA Board Rep.  
Guntersville

Members-At-Large

**Ken Davis**  
Phenix City

**Michael Jackson**  
Selma

**Randall Houston**  
Wetumpka

**Steve Giddens**  
Talladega

**Scott Anderson**  
Decatur

**E. Paul Jones**  
Alex City

What's Inside:

<b>The Phlebotomist as a (non)Necessary Witness</b>	<b>2</b>
<b>Gavel Glints</b>	<b>9</b>

Calendar of Events

2013

Support Staff Training	May 9	Prattville
Collections Training	May 17	Baldwin Co.
ADAA Summer Conference	June 25-28, 2013	Orange Beach

2014

ADAA Winter Conference	Jan. 22-24	Ross Bridge
ADAA Summer Conference	June 24-27	Orange Beach

# THE **CRASH** C O U R S E

## The Phlebotomist as a (non)Necessary Witness

Brandon Hughes

Traffic Safety Resource Prosecutor

[alabamaDUIprosecution.com](http://alabamaDUIprosecution.com)

Getting a blood draw in an impaired driving case used to be the rarest of treats. But now, with the escalation of drug-impaired drivers and an overall movement by law enforcement to seek evidence beyond a defendant's refusal to provide a breath sample, blood results in these cases are becoming more common. In the wake of *Crawford*<sup>1</sup>, *Melendez-Diaz*<sup>2</sup>, and even *Bullcoming*<sup>3</sup>, prosecutors are left with the question of which witnesses are required to testify in order to lay the predicate for the admission of the results of the blood test.

By far, the question I am asked most often with regards to this issue centers around the person who drew the blood. More to the point, the prosecutor wants to know: "Do I need to call the phlebotomist as a witness?" The answer is not necessarily; however, to most accurately answer that question, an examination of the specific facts



of your case is in order. For the purposes of this article, I am using the term “Phlebotomist” generically to refer to anyone who draws blood for testing purposes regardless of actual job title.

There are three primary issues to consider when determining if the phlebotomist in your case is a necessary and indispensable witness. First, establishing they are qualified to draw blood pursuant to §32-5A-194(a)(2) Ala. Code (1975). Secondly, establishing the chain of custody for the blood sample. Lastly, satisfying the defendant’s right to confront the witnesses against him or her as guaranteed by the Sixth Amendment to the United States Constitution.

### **§32-5A-194(a)(2)**

This is perhaps the easiest issue to overlook when preparing your case. You are going to need to establish that the person who drew the defendant’s blood was a “physician or a registered nurse (or other qualified person)” as required by the statute. If you are not going to call the phlebotomist to testify, one way to establish their qualifications is by calling someone from the hospital’s human resources department to testify that the person who drew the blood was employed by the hospital, what their job responsibilities were, and that those responsibilities included drawing blood. Also, did the person who drew the blood sign a form? If so, did that person also include their job title? Did the officer witness the signature? If the answer is yes to all three questions, the officer may be able to establish this fact for you. Yet another way is through the officer’s personal knowledge. For instance, the officer can testify that he or she knows that the person who drew the blood was a registered nurse.

Ultimately, how this fact is established is not important; only that it gets established. You don’t want this to be the issue that keeps your blood evidence from being admitted.

### **Chain of Custody**

This person drew the blood so they are in the chain, right? Yes, they are a link in the chain, but that still does not mean they need to testify. The Alabama Supreme Court addressed this issue in Ex Parte Holton, 590 So. 2d 918, 919-920 (Ala. 1991)(emphasis added):

We have held that the State must establish a chain of custody without breaks in order to lay a sufficient predicate for admission of evidence. Ex parte Williams, 548 So. 2d 518, 520 (Ala. 1989). Proof of this unbroken chain of custody is required in order to establish sufficient identification of the item and continuity of possession, so as to assure the authenticity of the item. *Id.* In order to establish a proper chain, the State must show to a "reasonable probability that the object is in the same condition as, and not substantially different from, its condition at the commencement of the chain." McCray v. State, 548 So. 2d 573, 576 (Ala. Crim. App. 1988). Because the proponent of the item of demonstrative evidence has the burden of showing this reasonable probability, *we require that the proof be shown on the record with regard to the various elements discussed below.*

The chain of custody is composed of "links." A "link" is anyone who handled the item. The State must identify each link from the time the item was seized. In order to show a proper chain of custody, the record must show each link and also the following with regard to each link's possession of the item: "(1) [the] receipt of the item; (2) [the] ultimate disposition of the item, *i.e.*, transfer, destruction, or retention; and (3) [the] safeguarding and handling of the item between receipt and disposition." Imwinklereid, *The Identification of Original, Real Evidence*, 61 Mil. L. Rev. 145, 159 (1973).

If the State, or any other proponent of demonstrative evidence, fails to identify a link or fails to show for the record any one of the three criteria as to each link, the result is a "missing" link, and the item is inadmissible. If, however, the State has shown each link and has shown all three criteria as to each link, but has done so with circumstantial evidence, *as opposed to the direct testimony of the "link,"* as to one or more criteria or as to one or more links, the result is a "weak" link. *When the link is "weak," a question of credibility and weight is presented, not one of admissibility.*

The Alabama Supreme Court also had this to say: "While each link in the chain of custody must be identified, it is not necessary that each link testify in order to prove a complete chain of custody." Ex Parte Slaton, 680 So. 2d 909, 918 (Ala. 1996).

The Supreme Court of the United States also addressed this issue: "...we do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, *must appear in person* as part of the prosecution's case...this does not mean that everyone who laid hands on the evidence must be called" (emphasis added), Melendez-Diaz, 557 U.S. at 311, n. 1.

So long as the officer observed the blood draw and subsequently took possession of the vial(s) of blood and the evidence was never outside of the officer's presence, the appearance of the phlebotomist in court is not required for the purposes of chain of custody.

### **Confrontation Clause**

This is most likely where the biggest challenge from the defense will come. They will cite *Crawford*, *Melendez-Diaz*, and maybe even *Bullcoming* when making their argument.

The Sixth Amendment to the United States Constitution provides, in pertinent part, that “In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him.” It is important to note that the Supreme Court of the United States ruled in *Crawford*, that this right to confrontation applies *only* to witnesses who “bear testimony” or make testimonial statements against the defendant. Whether an act or statement is testimonial in nature can be viewed as an element v. non-element issue as stated by the North Dakota Supreme Court in *State v. Gietzen*, 786 N.W. 2d 1 (N.D. 2010). In *Gietzen*, the court interpreted *Melendez-Diaz* as clearly “distinguishing testimony entered to prove an element of a crime from a statement entered for other purposes.” This assertion that the elements evidence/non-elements evidence distinction is at the heart of the U. S. Supreme Court’s post-*Crawford* confrontation analysis is further supported by the following excerpt from the oral argument transcript in *Melendez-Diaz*, wherein counsel *for the eventual prevailing party* clearly argued for the elements/non-elements distinction<sup>4</sup>:

Justice Breyer: But if I assume -- I’m really uncertain as to whether it has covered “testimonial” or not.

And also, I’m not enamored particularly of seeing on a close question what happened in ancient history.

Mr. Fisher: --I understand.

Justice Breyer: All right. Now, is there anything else you want to add to me on those assumptions?

Mr. Fisher: Yes, that -- that, again, it is -- it is not for the court; it's for the defendant to decide.

We think the definition of "testimonial" generally speaking ought to be that when a document is prepared in contemplation of prosecution, or *more specifically in this case to prove a fact that is an element of a criminal case*, because that's what these reports say, then they should fall under the Confrontation Clause.

The simple takeaway is this: *the drawing of a person's blood is a non-testimonial act*; therefore, the confrontation clause does not apply. In an unpublished memorandum issued by the Alabama Court of Criminal Appeals in the case of Anthony Derrell Logan v. City of Florence (released March 15, 2013), the Court reached this same conclusion, citing State v. Nez, 148 N.M. 914, 920, 242 P. 3d 481, 487 (2010): "The absence of the blood drawer from trial and opportunity for defendant to cross-examine the blood drawer relating to chain of custody does not provide grounds for a confrontation objection to the admissibility of a blood-alcohol report."

Determining whether an act or statement is testimonial in nature or not is critical when deciding if a witness's appearance in court, during trial, and on the witness stand is required for the admission of your evidence.

### **Conclusion**

A prosecutor is tasked with making a number of decisions in every case he or she takes to trial; chief among them involves determining which witnesses to call in order to lay the proper foundation for the admission of evidence. In impaired driving cases involving a blood draw and a subsequent analysis of the blood, it is important to remember that, first and foremost, you must establish that a qualified person drew the blood. Beyond that, the officer's testimony should be sufficient to establish the chain of custody of the blood evidence from the moment of the blood draw to the point where the officer places it in the evidence locker at the police station or delivers

---

it to the Alabama Department of Forensic Sciences via U.S. mail or hand delivery. As for the confrontation issue, the phlebotomist is not, per se, a necessary and indispensable witness and failure to call them is not a violation of the Sixth Amendment's Confrontation Clause.



### Endnotes

<sup>1</sup> Crawford v. Washington, 541 U.S. 36 (2004)

<sup>2</sup> Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009)

<sup>3</sup> Bullcoming v. New Mexico, 131 S.Ct. 2705 (2011)

<sup>4</sup> [http://www.oyez.org/cases/2000-2009/2008/2008\\_07\\_591](http://www.oyez.org/cases/2000-2009/2008/2008_07_591) (last accessed August 29, 2012)

---

Please visit [alabamaDUIprosecution.com/Resources](http://alabamaDUIprosecution.com/Resources) for DUI related Predicate Questions and Search Warrants.

A screenshot of the website [alabamaDUIprosecution.com](http://alabamaDUIprosecution.com). The navigation menu at the top includes: Home, The Crash Course, Resources (highlighted), New DUI Laws, DRE, Links, and Contact. The main content area is titled "Predicate Questions" and lists several links: [DUI Predicate](#), [Draeger Predicate](#), and [Checkpoint Predicate](#). Below these is a section titled "DUI Search Warrants for Obtaining Biological Specimens" with the subtext "(Each PDF document is a fill-in-the-blank affidavit, search warrant, and court order)". It contains two links: [Search Warrant for a District or Circuit Court Judge](#) and [Search Warrant for a Municipal Court Judge](#). At the bottom of the page, there is a copyright notice: "© 2011 Brandon Hughes, Traffic Safety Resource Prosecutor [Contact Me](#)".

# Gavel Glinns



**Tom Sorrells**  
**Supernumerary District Attorney**

**SANDERS V. STATE (CR-10-1091), 12/14/12, Jefferson County, Evidence, Reversed and Rendered, Joiner, Judge**

**HOLDING:** The defendant pleaded guilty to Burglary third degree, see section 13A-7-7(a), Ala. Code (1975). He was sentenced to two years imprisonment, which was suspended, and the defendant was placed on probation.

The facts show that on the morning of April 1, 2010 law enforcement officers saw Sanders carrying metal and a screwdriver in an unoccupied house located at 8413 5<sup>th</sup> Avenue North in Birmingham where he was arrested. Sanders filed a motion to dismiss the indictment in which he asserted he could not be guilty of third degree burglary because, he argued, the structure he had entered was not a “building” as that term is used in Section 13A-7-7(a), Ala. Code (1975). At a hearing on the motion the State stipulated to the admission of evidence submitted by Sanders.

That evidence showed that the house had been purchased by the Birmingham Airport Authority (The Authority) under a federal grant that provided that the buildings purchased would be demolished and the property used as a buffer for noise abatement. An employee of The Authority testified that once a contract had been let to demolish a structure, under the terms of the grant the property could not be used for any other purpose than noise abatement. He stated that on April 1, 2010 a demolition contract had been let and the contractor was cleared to demolish the structure. Since the definition of a building found in 13A-7-1(2), Ala. Code (1975), specifically excludes “an abandoned building awaiting demolition,” the structure Sanders entered was not a “building” as defined in the Criminal Code. Therefore, the Appeals Court reversed and rendered the judgment of the trial court.

**Naquin V State (CR-11-0513), 12/14/12, Mobile County, Confrontation, Reversed and Remanded, Welch, Judge**

**HOLDING:** Naquin appealed from his conviction for Rape first degree, see section 13A-6-61(a)(2), Ala. Code (1975), and Rape second degree, 13A-6-62(a)(1) Ala. Code (1975). He was sentenced to

---

two ten-year sentences to be served concurrently.

At the time of the offense, Naquin was 29 years old. On the night in question he camped out in the woods with six children. The allegation that formed the basis of the charges was that he had sexual intercourse on that occasion with J.R., a 15-year-old girl. Testimony was given that all present had been drinking and taking pills. Although in conflict, there was testimony that Naquin provided some of these substances. A witness stated he woke up and saw the victim's clothes all over the place and Naquin lying on top of the victim, who was naked, with his pants down having sex with her and although he could not quite tell where the defendant's penis was, his penis was inside the victim. The defendant denied having sex with the victim and testified he woke up with her on top of him.

The State called Dr. Jessica Kirk, a professor of Pediatrics at the University of South Alabama, who was also a specialist in Child Abuse Pediatrics. She was the custodian of the records at the "Sexual Child Abuse and Neglect" (SCAN) clinic. She reviewed the records of the victim's examination at the University of South Alabama emergency room. This examination disclosed a bruise or abrasion on the victim's labia externally. After that examination the victim was referred to SCAN. The examination was conducted by a Dr. Shriner, who because he was 87 years old, retired, and in poor health, could not attend the trial. Dr. Kirk said she reviewed the file, which included Dr. Shriner's personal notes. These notes reflected that Dr. Shriner, by the use of a sophisticated instrument, detected further evidence. She was asked to identify a SCAN summary, which was State's exhibit 1. She stated the SCAN summary was a report kept in the files of the clinic, as part of the victim's permanent file there. She stated the summary was kept in the regular course of business and may be relied on in the regular course of her medical practice and upon which she would rely to make decisions. The State moved to admit the report and, over objections that included the contention that the summary violated the Confrontation Clause, the SCAN summary was admitted into evidence. Dr. Kirk testified in detail about the contents of the file and its conclusions.

The United States Supreme Court in Crawford v Washington, 541 U.S. 36 (2004), held that a non testifying witness' "testimonial" statements are not admissible against a Confrontation Clause challenge unless the witness is unavailable and the defendant has had a prior opportunity to cross-examine the absent witness. The Court ruled that the SCAN summary was testimonial in nature and reversed and remanded.

**Luong v. State (CR-08-1219), 2/15/13, Mobile County, Change of Venue, Reversed and Remanded, PER CURIAM**

HOLDING: This is a decision that has received much notice. The defendant was indicted in February 2008 charging him with five counts of capital murder in connection with the deaths of his children: four-month-old Danny Luong, one-year-old Lindsey Luong, two-year-old Hannah Luong, and three-year-old Ryan Phan. Following a jury trial, Luong was convicted of all five counts of capital murder as charged in the indictment. The jury recommended by a vote of 12-0 that Luong be sentenced to death. The Circuit Court accepted the jury's recommendation and sentenced Luong to death for the five capital murder convictions.

The State's evidence tended to show that on January 7, 2008 Luong drove his four children to the

---

top of the Dauphin Island Bridge and threw each child off the bridge to the water 100 feet below. Danny's body was found on January 12 in a marshy area approximately 12 miles from the bridge; Lindsey's body was discovered in Mississippi on January 15 approximately 18 miles from the bridge; Hannah's body was discovered in Louisiana on January 20 approximately 144 miles from the bridge; and Ryan's body was found on January 13 approximately 16 miles from the bridge. The medical examiner testified that all four children were alive when they were thrown from the bridge; that Danny, Ryan, and Lindsey died as a result of blunt force trauma and asphyxia due to drowning; and the cause of Hannah's death was drowning.

The defendant's common law wife testified that on the day in question he came to where she worked and she gave him money for gas. After Luong left she tried to contact him repeatedly but was unsuccessful. She finally spoke to him around 7:00 p.m. and he told her he had left the children with "somebody else," a woman named "Kim." Later that night they reported to the police the children were missing. The next morning as police were questioning the couple separately, the wife asked to talk to the defendant. He then admitted to his wife that the children were all dead, that he had thrown them off a bridge, and that he would take the police to the bridge

The defense filed several pretrial motions, including motions for change of venue, individual voir dire of the venire, funds for the lawyers and an expert to go to Vietnam to gather evidence for the penalty phase. The trial court denied the motion for change of venue, and funds to travel to Vietnam. The Court indicated that it would grant the motion for individual voir dire. Shortly before the trial the defendant decided to change his plea to guilty and a hearing was set to hear his plea. When he was informed that in a capital case the law required that a jury be impaneled and find him guilty of capital murder, even if he entered a plea of guilty, he decided to withdraw his guilty plea. Since the trial was near the defense moved again for change of venue alleging the news of his attempted guilty plea would further prejudice him in Mobile County. Extensive juror questionnaires showed the overwhelming majority of the venire had heard of the case and the possible guilty plea. The trial court, in trying to narrow the number of potential jurors that would be subjected to individual voir dire, asked who had heard or read about the case. It appeared there were only a few who had not. The court then informed the defense that it considered the lengthy juror questionnaires to be sufficient to show their individual views and did not conduct any individual voir dire.

The Court of Appeals rested their decision on whether the amount of pretrial publicity was so great as to constitute presumptive prejudice, a very rare situation. The Court related a mass of articles, editorials, Internet blogs and stories, most with very negative implications toward the defendant, which included information about his attempted plea of guilty. The Court ruled that this was a case involving presumptive prejudice and reversed and remand. Though not required, they took up the issue of individual voir dire and the denial of funds to travel to Vietnam and stated those motions should have been granted.

**State of Alabama v. Edwin M. Moore (CR-11-1079), 12/14/12, Montgomery County, Motion To Suppress , Reversed and Remanded, Windham, Presiding Judge**

**HOLDING:** The State filed this pretrial appeal from the Circuit Court's decision to suppress evidence of crack cocaine discovered during a search of Edwin M. Moore's vehicle after Moore was stopped for a traffic violation. A Montgomery County grand jury indicted Moore for Unlawful Possession of a

Controlled Substance, see section 13A-12-212(a)(1), Ala. Code (1975). Moore filed a motion to suppress the crack cocaine seized arguing that it was the product of an illegal search of his vehicle. At a hearing on the motion, Corporal Mark Wells, an officer with the Montgomery Police Department, testified that while on patrol on July 23, 2011 he saw a vehicle run a stop sign and stopped the vehicle to give the driver a ticket. Corporal Wells approached the driver's side window and saw there were three people in the vehicle. At that point, Corporal Wells asked the driver (Moore) for his information. While speaking with Moore, Wells detected a strong odor of alcohol emanating from the vehicle. Wells then went back to his patrol car to run Moore's information through the law enforcement database to see if Moore had any outstanding warrants. After finding Moore had no outstanding warrants in the database he returned to the vehicle and asked Moore to get out so that he could observe the defendant more closely to determine if he was under the influence of alcohol. When Moore opened the door Wells saw a clear bag containing a white substance. Wells explained that, based on his experience, including the fact that the white substance was packaged in the corner of the bag which was a common means of packaging crack cocaine, he believed the substance in the bag was crack cocaine. After seeing the bag, Wells asked all occupants of the car to get out so he could safely seize the drugs. Once all the passengers were out of the car he seized the bag of crack cocaine that formed the basis of Moore's charge. The defendant's wife testified but other than stating that while they had just been to the liquor store and bought vodka and no one was drinking, her story was consistent with Corporal Wells' testimony. The Circuit Court asked Corporal Wells if he gave the defendant a field-sobriety test and Wells said he did not. The Circuit Court then questioned Corporal Wells in detail regarding why he did not give Moore a field-sobriety test. Wells explained that because he saw the defendant in possession of the crack cocaine before he gave such a test and because Moore did not appear to be so impaired he could not drive the vehicle he saw no need to give the test. The Circuit Court then granted the motion to suppress.

The appeals court noted that where evidence is presented ore tenus to the trial court, that court's findings of fact based on that evidence are presumed to be correct, absent a finding that the trial court abused its discretion. The appeals court stated that a trial court abuses its discretion when his decision is based on an erroneous conclusion of law or where the record contains no evidence on which he rationally could have based his decision. It is well settled law that exceptions to the warrant requirement include Plain View and The Automobile Exception. It is also well settled law that once an officer has legally stopped a vehicle, he may, consistent with the Fourth Amendment, order a driver out of the car for any reason or for no reason at all. After a driver has been ordered out of the car the officer may seize any contraband, including weapons, in plain view. The Court reversed and remanded the case to the trial court.

