

## Easily Addressing the Problem of Particularization of Defense Motions to Suppress: Everything You Need Is On the Citation

For far too long, criminal defense attorneys have had to worry about the issue particularized motions. This is a simple problem with a simple answer. Filing particularized motions is not hard, and it need not cause you any further worry. We can fix this problem by implementing one (1) very simple step in your office. Let's first look at what the law requires of warrants attacking the admissibility of evidence obtained without a warrant, and then we'll talk about how you can make sure your motions are bulletproof.

### What is sufficient "particularization" of a motion to suppress?

If you regularly file motions to suppress, you will undoubtedly run into a prosecutor who will argue that your motion is not sufficiently particularized. Motions to suppress are authorized by O.C.G.A. § 17-5-30, which provides:

(a) A defendant aggrieved by an unlawful search and seizure may move the court for the return of property, the possession of which is not otherwise unlawful, and to suppress as evidence anything so obtained on the grounds that:

(1) The search and seizure without a warrant was illegal; or

(2) The search and seizure with a warrant was illegal because the warrant is insufficient on its face, there was not probable cause for the issuance of the warrant, or the warrant was illegally executed.

**(b) The motion shall be in writing and state facts showing that the search and seizure were unlawful. The judge shall receive evidence out of the presence of the jury on any issue of fact necessary to determine the motion; and the burden of proving that the search and seizure were lawful shall be on the state.** If the motion is granted the property shall be restored, unless otherwise subject to lawful detention, and it shall not be admissible in evidence against the movant in any trial.

(c) The motion shall be made only before a court with jurisdiction to try the offense. If a criminal accusation is filed or if an indictment or special presentment is returned by a grand jury, the motion shall be made only before the court in which the accusation, indictment, or special presentment is filed and pending.

*Dean v. State*, 246 Ga. App. 263, 540 S.E.2d 246 (2000), directly addresses the requirements of particularity of O.C.G.A. 17-5-30. In *Dean*, the defendants motion(s) to suppress included the following:

Each motion alleged that on or about the date set forth in the accusation, Dean was approached, questioned, unlawfully detained, and arrested by (unnamed) law enforcement officers; that these actions were taken without probable cause and without specific and articulable facts reasonably warranting an investigatory stop under *Terry v. Ohio*; that incident to each stop he was frisked and a small bag allegedly containing marijuana was taken from the front pocket of his jacket; and that each frisk was conducted without his consent or probable cause.

*Id.* at 263 (citations omitted).

The trial court in *Dean* relied upon *Rouse v. State*, 241 Ga. App. 167, 567 S.E.2d 360 (1999), in dismissing the defendant's motion(s) to suppress based upon a lack particularization. Reversing the trial court's dismissal of the motions, the Court of Appeals held:

In cases involving warrantless searches, the factual showing required by OCGA § 17-5-30 need not be made in great detail, because in such cases 'many of the necessary allegations are negative facts (e.g., the search was conducted without a warrant, the movant did not consent to

the search) and conclusions based upon mixed questions of law and negative fact (e.g., the officer lacked probable cause to arrest or search).’ [Cit.] In such cases, **motions to suppress are held sufficient if they ‘put the state on notice as to the type of search involved (without warrant vs. with warrant), which witness to bring to the hearing on the motion, and the legal issues to be resolved at that hearing.’**

Id., quoting, *Young v. State*, 225 Ga. App 208-209, 483 S.E.2d 636 (1997) (emphasis added).

Dean is also helpful in addressing the sufficiency of a motion where we cannot identify the names of all of the officers that participated in the stop and investigation of our clients. In *Dean*, the defendant’s motion did not identify the officers that participated in his arrest. Nonetheless, the Court held that the state was put on sufficient notice as to which officers were required to satisfy its burden of proof:

Did the suppression motions put the State on notice as to the witnesses whose testimony was required? For essentially two reasons, we conclude that they did. To begin with, the transcript of the hearing on the motions shows that the State did bring law enforcement officers to testify. **“Moreover, the State did not argue at the hearing that deficiencies in the motions left it unable to ascertain the identity of needed witnesses.”** Therefore, failure of the motions to identify the officers conducting the stops and frisks, and to more fully detail the attendant facts, was not fatal to the sufficiency of the motions.

Id., citing *Lavelle v. State*, 250 Ga. 224, 226, 297 S.E.2d 234 (1982); *State v. Barnett*, 233 Ga.App. 496(1), 504 S.E.2d 531

(1998); see also, *Hill v. State*, 222 Ga.App. 839, 476 S.E.2d 634 (1996).

Relying upon *Dean* for the proposition that motions to suppress need not identify the officers involved in the case can be harrowing experience. Look to *State v. Goodman*, 220 Ga. App. 169, 469 S.E.2d 327 (1996), for a clear statement as to what is a sufficiently particularized motion to suppress. Motions to suppress which include the following information garnered express approval from the Court of Appeals:

- (1) the date of the stop,
- (2) the identity of the person stopped,
- (3) the identity of the officer who made the stop,
- (4) the law enforcement organization with which he was affiliated,
- (5) the nature of the stop (e.g., traffic stop),
- (6) the offenses with which Goodman was charged, and
- (7) the conclusion that no such violations occurred which would justify the stop.

*Id.*

A sample motion to suppress is attached hereto as Exhibit A.

Motion to Suppress or Motion in Limine: Yes, It Does Matter

There is a great deal of confusion among lawyers, judges, and even our case law as to what evidence is subject to a motion to suppress. This debate is not an academic one that is inconsequential to our clients.

## **Motion to Suppress**

O.C.G.A. § 17-5-30, which is also referred to in older case law as Section 13 of an Act of 1966 (Ga.L.1966, pp. 567, 571; Code Ann. 27-313),

makes no provision for pre-trial suppression of evidence deemed illegal for reasons other than unlawful search and seizure. *Norrell v. State*, 116 Ga.App. 479(3), 157 S.E.2d 784. By its clear terms, Section 13 furnishes a procedural device for the protection of constitutional guaranties against unreasonable search and seizure only. The protection of other rights which might have been violated by a transaction is merely coincidental. A single transaction may amount to a concurrent violation of constitutional guaranties against unreasonable search and seizure and constitutional guaranties against compulsory self-incrimination. See *Hammock v. State*, 1 Ga.App. 126, 127, 58 S.E. 66. Thus evidence obtained by compulsory self-incrimination might be subject to suppression pursuant to a pre-trial motion under the 1966 Act. However, the basis for suppression is that the evidence was obtained by unlawful search and seizure, not that it was obtained by compulsory self-incrimination.

*Hawkins v. State*, 117 Ga. App. 70, 71, 159 S.E.2d 440 (1967) (emphasis added).

A great deal of the confusion between the issues that may be litigated by a motion to suppress arises out of those cases which make reference to a motion made pursuant to O.C.G.A. § 17-5-30 only applying to tangible evidence. “A motion to suppress is to be aimed at tangible evidence, not confessions or identification testimony.” *Robinson v. State*, 208 Ga. App. 528, 430 S.E.2d 830 (1993), citing *Martin v. State*, 201 Ga. App. 643, 644, 411 S.E.2d 788 (1991). It should be noted that Robinson and

Martin specifically address the applicability of a motion to suppress to identification evidence, and our appellate courts have repeatedly held that identification evidence is not subject to a suppression motion.

### Filing **motions in limine** is not a “catch all” solution

“‘In limine’ means ‘at the threshold’ or before the trial begins. *State v. Johnston*, 249 Ga. 413, 414 (fn. 3), 291 S.E.2d 543 (1982), quoting, *Stevens v. State*, 265 Ind. 411, 354 N.E.2d 727, 733 (1976).

A motion in limine is a pretrial motion which may be used two ways: 1) The movant seeks, not a final ruling on the admissibility of evidence, but only **to prevent the mention by anyone, during the trial, of a certain item of evidence** or area of inquiry until its admissibility can be determined during the course of the trial outside the presence of the jury[; and] 2) **The movant seeks a ruling on the admissibility of evidence prior to the trial.** The trial court has an absolute right to refuse to decide the admissibility of evidence, allegedly violative of some ordinary rule of evidence, prior to trial. If, however, the trial court decides to rule on the admissibility of evidence prior to trial, the court's determination of admissibility is similar to a preliminary ruling on evidence at a pretrial conference, and it controls the subsequent course of action, unless modified at trial to prevent manifest injustice.

*Gaston v. State*, 227 Ga. App. 666, 669, 490 S.E.2d 198 (1997) (citations and punctuation omitted), quoting *State v. Johnston*, 249 Ga. 413, 415, 291 S.E.2d 543 (1982) (emphasis added).

“A motion in limine is the proper vehicle by which to interpose an objection to the admissibility of chemical test results on the basis urged by appellant herein, non-compliance with the

provisions of OCGA § 40-6-392(a)(1)(A).” *Gaston v. State*, 227 Ga. App. 666, 669, 490 S.E.2d 198 (1997).

“Any challenge to the procedures used in reading [the defendant] his statutory implied consent warning, OCGA § 40-5-67.1(b)(2), and the proper working of the Intoxilyzer 5000 machine would have been appropriately raised by a motion in limine, which was not done here.” *Goddard v. State*, 244 Ga. App. 730, 731, 536 S.E.2d 160 (2000).

“Those portions of [the defendant’s] motion to suppress alleging non-compliance with Code Ann. § 68A-902.1 or regulations of the Department of Public Safety do not involve ‘constitutional guarantees against unreasonable search and seizure.’ Thus, a motion to suppress is not a proper procedural device to deal with such allegations. That does not mean, however, that such allegations may not be considered prior to trial.” *State v. Johnston*, 249 Ga. 413, 414, 291 S.E.2d 543 (1982), quoting, *Hawkins v. State*, 117 Ga. App. 70, 159 S.E.2d 440 (1967).

Why did *Gonzalez* cause so much concern?

It seems to me that *Gonzalez* caused a substantial amount of concern because lawyers suffered under the misunderstanding that empty motions to suppress could be amended at any time. *Gonzalez* clarified for us that motions to suppress cannot be amended at any time.

On August 27, 2010, Gonzalez’s counsel filed a motion to suppress, which stated in its entirety:

**MOTION TO SUPPRESS**

**COMES NOW** the Defendant in the above-styled case, by and through the undersigned counsel, and moves this Honorable Court to suppress the following:

1. Any and all evidence illegally obtained and/or seized by the State.
2. Any and all evidence of pre-trial and in-court identification of the Defendant.
3. Any and all statements made by the Defendant.

In support of said Motion, the Defendant asserts that the above-referenced evidence was obtained in violation of the laws of the United States and the State of Georgia.

Defendant expressly reserves the right to amend and supplement this motion as new facts and information become available through the State's responses to the Defendant's discovery requests, or otherwise.

**WHEREFORE**, the Defendant respectfully requests that this Honorable Court conduct a full and complete hearing regarding this Motion to Suppress and order the suppression of any evidence seized, obtained, or acquired in violation of the laws of the United States and the State of Georgia.

Gonzalez v. State, 334 Ga. App. 706, 707, 780 S.E.2d 383, 385 (2015)

And where, as here, the defendant waives arraignment, “the ten-day period in which [the defendant] must file pretrial motions begins on the date that the waiver of arraignment is filed.” *Bighams v. State*, 296 Ga. 267, 270(2), n. 4, 765 S.E.2d 917 (2014)

Gonzalez v. State, 334 Ga. App. 706, 708, 780 S.E.2d 383, 386 (2015)

OCGA § 17–5–30(b) outlines the requirements for a motion to suppress. “The statutory provision mandates that a motion to suppress ‘be in writing and *state facts* showing that the search and seizure were unlawful.’ ... Compliance with OCGA § 17–5–30(b) is required because evidence exclusion is an extreme sanction and one not favored in the law.” (Citations and punctuation omitted; emphasis supplied.) *Young v. State*, 282 Ga. 735, 735–36, 653 S.E.2d 725 (2007). Thus, “[a]ll motions to suppress, whether based on statutory or non-statutory grounds must state facts and not merely conclusions.” (Citation and punctuation omitted.) *Davis v. State*, 203 Ga.App. 315, 316(2), 416 S.E.2d 789 (1992).

Gonzalez v. State, 334 Ga. App. 706, 709, 780 S.E.2d 383, 386 (2015)

Gonzalez's proffered amendment of the motion to suppress, which was tendered more than one month after he waived arraignment, was untimely. “When a defendant files an untimely pre-trial motion, the trial court may dismiss the motion or entertain a request by the defendant to accept the late filing.” \*\*387 *Taylor v. State*, 326 Ga.App. 27, 30(2), 755 S.E.2d 839 (2014). Therefore, the trial court had the discretion to determine whether Gonzalez was to be afforded an opportunity to file an untimely amendment to his legally defective preliminary motion, and we will not disturb the trial court's ruling on appeal in the absence of an abuse of that discretion. *State v. Mojica*, 316 Ga.App. 619, 622–23(2), 730 S.E.2d 94 (2012); *Davis*, 203 Ga.App. at 316–17(3), 416 S.E.2d 789.

Gonzalez v. State, 334 Ga. App. 706, 709, 780 S.E.2d 383, 386-87 (2015)