

ALL MOTIONS, BRIEFS, & ORDERS at:

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Surviving the Courtroom

Ben Sessions
@Ben_Sessions
TheSessionsLawFirm.com

Lister & Holt's 12th Annual Criminal Law Seminar
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[The Sessions Law Firm, LLC](#)

3155 Roswell Rd., Ste. 220

Atlanta, GA 30305

Telephone: (470) 225-7710

The pursuit of motions can be a frustrating endeavor...



particularly if you only define success in terms having your motion granted.

We hardly ever hear “motion granted”...



Dirty Dozen Rules for Motions

1. We influence and/or control most issues that get litigated.
2. We should influence and/or control how most issues get litigated.
3. You do not have to win a motion to have it aid you in the case.
4. Not all issues must be litigated. What we do not litigate may be more important than what we do litigate.
5. Choose your battles. The goal is to win the war.
6. Do not ever underestimate the power of giving the other side the opportunity to muck up.
7. Know when and why to walk away from an issue. Plan on it.
8. Do not assume that the opposition knows anything about what you know.
9. *Gratuitously being obnoxious usually accomplishes nothing.* Planned obnoxiousness is different.
10. Be careful what you ask for, you may get it.
11. **A half-cocked effort will usually produce half-assed results.**
12. Do not make the other sides arguments for them: if they are not smart enough to make it themselves, you should be smart enough not to teach them their own argument.

Understanding Your Goals in a Motion Hearing

Five Basic Purposes of Motions:

- 1) Exclusion of unfavorable evidence;
- 2) Trial preparation;
- 3) Improving the plea offer;
- 4) Diversion; and,
- 5) Dismissal of the charges.

Exclusion of Unfavorable Evidence



A motion to suppress or motion in limine is your opportunity to change the facts of the case.

No. _____

STATE OF TEXAS

VS.

JOHN DOE

§
§
§
§

IN THE DISTRICT COURT

HARRIS COUNTY, TEXAS

___ JUDICIAL DISTRICT

MOTION TO CHANGE THE FACTS

To the Honorable Judge of Said Court:

Defendant, by and through his counsel of record, files this *Motion to Change the Facts*, and in support would show that, the facts being what they are, certain rights guaranteed to the accused by the United States Constitution are for naught. The facts should therefore be changed to give meaning to Defendant's Constitutional rights.

Generally, because of the facts in this case Defendant's right to the assistance of counsel under the Sixth Amendment is of no value to him. The legendary Earl Rogers could not, on his best day, have won this case. This Court should change the facts so that his counsel has a fighting chance of prevailing at trial.

**IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA**

State of Georgia,

v.

[REDACTED]

Defendant.

:
:
:
:
:
:
:

Case No.: [REDACTED]

**MOTION IN LIMINE TO EXCLUDE EVIDENCE AS IRRELEVANT
AND UNDULY PREJUDICIAL**

The Defendant anticipates that the State will attempt to introduce evidence that the Defendant urinated and defecated prior to being afforded the opportunity to reach a restroom. At the hearing upon the Defendant's motion to suppress, Officer Tarpley of the Union City Police Department testified that approximately 8-10 minutes after [REDACTED] was arrested, [REDACTED] urinated in the rear of his patrol car. (MT - 39-40) At the jail, approximately 30-35 minutes later, [REDACTED] defecated while she was in the staged holding area. (MT - 40-41) Both of these incidents occurred after Officer Tarpley had completed all field sobriety tests and after [REDACTED] was in custody.

IN THE STATE COURT FOR THE
COUNTY OF FULTON, STATE OF GEORGIA
CRIMINAL DIVISION

STATE OF GEORGIA,

v.

Defendant.

ACCUSATION NUMBER

CHARGE(S):

DUI Less Safe
Reckless Driving, FML, Speeding,
Altered License Plate, Unregistered
Vehicle

I hereby voluntarily, knowingly, and intelligently
WAIVE my right to trial by jury, and request a bench
trial on the above-styled case.

Defendant

We, the Jury, find the defendant

☐ GUILTY ☒ NOT GUILTY DUI

☒ GUILTY ☐ NOT GUILTY RECKLESS DRIVING

☐ GUILTY ☒ NOT GUILTY FAILURE TO MAINTAIN LANE

☒ GUILTY ☐ NOT GUILTY SPEEDING

7/1/10
DATE

Stds Ch Depp
FOREPERSON

Motion to Suppress or Motion in Limine:

Yes, It Does Matter

AUTHORITY

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)

Motion in Limine: statutory, regulations, or common law

Motion to Suppress or Motion in Limine:

Yes, It Does Matter

Time Limitations on Filing

Motion to Suppress: within 10 days
after the date of arraignment

Motion in Limine: at any time

Motion to Suppress or Motion in Limine:

Yes, It Does Matter

Particularization

Motion to Suppress or Motion in Limine:

What is sufficient “particularization” of a motion to suppress?

O.C.G.A. § 17-5-30 (b) states, in relevant part:

The motion shall be in writing and state facts showing that the search and seizure were unlawful.

What is sufficient “particularization” of a motion to suppress?

- (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.

State v. Goodman, 220 Ga. App. 169, 469 S.E.2d 327 (1996).

Motion to Suppress or Motion in Limine:

Yes, It Does Matter

❖ 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), 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.

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

Motion to Suppress

Because the burden is on those officers who conduct a search without a warrant to show that the search was conducted pursuant to an exception to the Fourth Amendment warrant requirement, it can be said that **a search without a warrant is presumed to be invalid and the burden is on the state to show that the warrantless search was valid.** *Mincey v. Arizona*, 437 U.S. 385, 390-391, 98 S.Ct. 2408, 2412-2413, 57 L.Ed.2d 290 (1978); *McDonald v. United States*, 335 U.S. 451, 456, 69 S.Ct. 191, 193, 93 L.Ed. 153 (1948).

Motion to Suppress

Searches are conducted either with or without a search warrant. ‘The most basic constitutional rule in this area is that **‘searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment**-subject only to a few specifically established and well-delineated exceptions.’ The exceptions are ‘jealously and carefully drawn,’ and there must be ‘a showing by those who seek ... that the exigencies of the situation made that course imperative.’ ‘[T]he burden is on those seeking the exemption to show the need for it.’ *Coolidge v. New Hampshire*, 403 U.S. 443, 454-455, 91 S.Ct. 2022, 2032, 29 L.Ed.2d 564 (1971) (citations omitted).

❖ *State v. Slaughter*, 252 Ga. 435, 436, 315 S.E.2d 865 (1984):

Motion to Suppress

“Once a defendant files a **motion to suppress alleging an illegal search and seizure, the state bears the burden of proving that the search is lawful.”**

State v. Kuhnhausen, 289 Ga. App. 489, 657 S.E.2d 592 (2008), citing *State v. King*, 287 Ga. App. 680, 652 S.E.2d 574 (2007).

Motion in Limine

“‘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).

Motion in Limine

“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).

Preparing for Motions

If at all possible, go into motions with a developed theory of the case.

If you are doing motions immediately prior to trial, *you better have a theory.*

To Brief or Not to Brief?

That's not really a question.

See Rule No. 11

Effectively Attacking Probable Cause: Credibility is Key

Success in most probable cause hearings requires us to call into question the credibility of the evidence or the arresting officer.

Credibility of witnesses and the weight to be given their testimony is a decision-making power that lies solely with the trier of fact. **The trier of fact is not obligated to believe a witness even if the testimony is uncontradicted and may accept or reject any portion of the testimony.**

Tate v. State, 264 Ga. 53, 56, 440 S.E.2d 646 (1994).

A rational trier of fact can choose to reject even “undisputed” testimony if that fact finder believes that witness's testimony to be unreliable. Factors such as demeanor, contradictory or inconsistent statements and evidence that an officer had “ulterior motives” can all lead a finder of fact to disregard testimony by an officer that an accused was violating the law.

Tate v. State, 264 Ga. 53, 56 (fn. 5), 440 S.E.2d 646 (1994).

Learn Your Favorite Probable Cause Cases:

Pick out your favorite PC cases, learn them, and get really good at arguing that your facts fit within those cases.

	State v. Handley 294 Ga. App. 236 (2008)	State v. Gray 267 Ga. App. 753 (2004)	State v. Batty 259 Ga. App. 431 (2003)	State v. Ellison 271 Ga. App. 898 (2005)	Case at Bar
Basis for Stop	Tag Violation	Traffic Accident	Red light violation and following too closely	Roadblock	Speeding
Odor of Alcohol	Odor of Alcohol (Noted on Test Printout as “Very Strong” but no testimony)	Odor of Alcohol	Odor of Alcohol	Strong Odor of Alcohol	Odor of Alcohol
Admission of Drinking	Initial Denial of Drinking but Later Admission	Admission of Drinking	Admission of Drinking	Initial Denial of Drinking but Later Admission	Admission of Drinking
Appearance of Eyes	Noted on Test Printout as Bloodshot Eyes but no testimony	Bloodshot Eyes	None	Red, Bloodshot, and Watery Eysers	Red and Bloodshot Eyes

	State v. Handley 294 Ga. App. 236 (2008)	State v. Gray 267 Ga. App. 753 (2004)	State v. Batty 259 Ga. App. 431 (2003)	State v. Ellison 271 Ga. App. 898 (2005)	Case at Bar
Ability to Stand and Walk Normally	No indication	Unsteady Gait	Slight unsteadiness but walked to rear of car fine	No stumbling or loss of balance when exiting vehicle	No trouble exiting vehicle, standing, and walking
Alco-Sensor Result	Positive Alco- Sensor Result	Positive Alco- Sensor Result	Positive Alco- Sensor Result	None	Positive Alco-Sensor Result
Dazed	No indication	Dazed Manner	No indication	No indication	No indication
Speech	No indication	Slurred Speech	No indication	No indication	No Slurred Speech
HGN	None	Failed HGN Test	None	Refused and Stated “I’ve been arrested for DUI before, and I do not think I can do them”	Not Administered
Walk and Turn	No Walk and Turn	No Walk and Turn	Passed	Refused and Stated “I’ve been arrested for DUI before, and I do not think I can do them”	Not Administered
One Leg Stand	No One Leg Stand	No One Leg Stand	Passed	Refused and Stated “I’ve been arrested for DUI before, and I do not think I can do them”	Not Administered

	State v. Handley 294 Ga. App. 236 (2008)	State v. Gray 267 Ga. App. 753 (2004)	State v. Batty 259 Ga. App. 431 (2003)	State v. Ellison 271 Ga. App. 898 (2005)	Case at Bar
Ability to Produce License	Failed to Produce License	No indication	No indication	No indication	Produced license
Summary of Holding	No credibility determination or disputed Facts. Held insufficient to establish probable cause	Affirmed trial court's decision granting motion to suppress.	Affirmed trial court's decision granting motion to suppress	Affirmed trial court's decision granting motion to suppress	

Implied Consent: The Advisement

- Timing of the Implied Consent Warning: After Arrest
- Delay in the Advisement of Implied Consent Warning
- Misstatement Regarding the Legal Limit
- Coercion to Submit to the Breath Test: “Blow Below and You Go Home”
- Rescission of the Refusal
- Statements Regarding Out-of-State License Being Suspended

Implied Consent: Independent Test

- Independent Test Requests
- Timing of the Request for an Independent Test
- Limitations on Facilities for the Administration of Independent Test

Statutory Speedy Trial Demands

You've got to know
When to hold 'em,
Know when to fold 'em
Know when to walk
away,
Know when to run.

Basics of the constitutional speedy analysis

The analysis has two stages. First, the court must determine whether the interval from the accused's arrest, indictment, or other formal accusation to the trial is sufficiently long to be considered “presumptively prejudicial.” If not, the speedy trial claim fails at the threshold. If, however, the delay has passed the point of presumptive prejudice, the court must proceed to the second step of the [Barker-Doggett](#) analysis, which requires the application of a delicate, context-sensitive, four-factor balancing test to determine whether the accused has been deprived of the right to a speedy trial.

Ruffin v. State, 284 Ga. 52, 55, 663 S.E.2d 189, 195 (2008) (citations omitted).

Where do we lose?

[W]ith respect to the [Barker v. Wingo](#) analysis, it should be recognized that delayed assertion of the right to a speedy trial and lack of prejudice are the two factors that most often weigh heavily against defendants and which then support the overall conclusion that speedy trial rights have not been violated.

Phan v. State, 287 Ga. 697, 700, 699 S.E.2d 9, 12 (2010) adopted, (Ga. Super. June 17, 2011)

Assertion of the right: how do we do it?

It would also allow a court to weigh the frequency and force of the objections as opposed to attaching significant weight to a purely pro forma objection.

Barker v. Wingo, 407 U.S. 514, 528-29, 92 S. Ct. 2182, 2191, 33 L. Ed. 2d 101 (1972) (citations omitted).

Comes Now, the Defendant in the above-styled case, by and through the undersigned counsel of record, and waives formal arraignment upon the charges in this case. The Defendant hereby enters a plea of not guilty to the charges herein. The Defendant further asserts her right to a speedy trial under the Sixth Amendment to the Constitution of the United States and Art. I, Sec. I, Par. XI (a) of the 1983 Georgia Constitution.

* YELL AT ME IF I DON'T DISCUSS IMPORTANT STRATEGIC CONSIDERATIONS FOR CASES BEING BOUND OVER TO A STATE/SUPERIOR COURT.

Establishing prejudice in the constitutional speedy context

Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown.

Barker v. Wingo, 407 U.S. 514, 532, 92 S. Ct. 2182, 2193, 33 L. Ed. 2d 101 (1972) (citation omitted).

Specific issues relating to prejudice: late amendment



Specific issues relating to prejudice: destruction of samples

Prejudice – At no point in time prior to the filing of the accusation in the Franklin County Superior Court was the Accused ever put on notice that she was being charged with driving while under the combined influence of drugs and alcohol. The State's filing of an accusation on August 21, 2013, charging the Accused with driving under the combined influence of benzoglyecogonine, methadone, and alcohol to the extent it was less safe for her to drive triggered her request for an independent test. The delay in filing an accusation putting the Accused on notice that she was being charged with these charges, while the GBI destroys the blood samples that are the basis for these charges, cause irreparable harm to the development of possible defenses for her.

Specific issues relating to prejudice: pre-trial incarceration

However, we disagree with the trial court's determination that there was no evidence of prejudice for the period of time that Leopold subsequently served in jail after his release. The record shows that Leopold was later arrested for an unrelated probation violation, and as a result, was held in the DeKalb County jail from December 18, 2008 until the start of his trial. Leopold argues that the delay in this case caused him to lose the possibility of serving this sentence concurrently with the nine months he served on his sentence for the probation violation. This Court has previously recognized that with respect to a defendant incarcerated on other charges, a delay in bringing such a person to trial may be prejudicial because the defendant may forego the opportunity to receive a sentence that is at least partially concurrent with the one he is serving. [Johnson](#), 313 Ga.App. at 904(2)(d), 723 S.E.2d 100 (citing [Smith v. Hooey](#), 393 U.S. 374, 378, 89 S.Ct. 575, 21 L.Ed.2d 607 (1969)). Thus, the trial court erred in failing to consider this factor. However, our Supreme Court has consistently held that “when a defendant is already incarcerated for unrelated offenses, there is minimal possibility of oppressive pretrial incarceration.” See [Williams](#), 279 Ga. at 109(1)(d), 610 S.E.2d 32 (citing cases).

Leopold v. State, No. A15A0783, 2015 WL 5238136, at *5 (Ga. Ct. App. Sept. 8, 2015) (emphasis added).

Specific issues relating to prejudice: inability to produce witnesses - THINK STRATEGICALLY ABOUT THIS ISSUE

And with respect to the impairment of his defense, Leopold argues that had Blackford not testified at trial, the testimony of two defense witnesses as to allegedly exculpatory statements made by Blackford would have been uncontroverted. However, Leopold provides no citation to authority to support his argument that the State's inability to locate and present testimony from Blackford in order to make its case is the type of prejudice the Barker factors are designed to address, and we find none. The record confirms that Leopold was able to present evidence in support of his defense, he does not argue that the delay prevented him from obtaining any evidence or testimony, and his only contention is that the delay strengthened the State's case, to his detriment. See [Robinson v. State](#), 287 Ga. 265, 269(1)(d), 695 S.E.2d 201 (2010) (prejudice factor does not weigh in the defendants' favor where “no witnesses have died or disappeared; there is no evidence that witnesses have lost their memories; and the defense strategy remained unchanged”). Cf. Johnson, 313 Ga.App. at 905(2)(d)(iii), 723 S.E.2d 100 (if a witness that could supply material evidence for the defense dies or disappears during the delay, prejudice may be established). Moreover, the State's need to locate a missing witness whose testimony is required for trial is one of the specific reasons recognized by the United States Supreme Court that may justify a delayed trial. See Barker, 407 U.S. at 531, 92 S.Ct. 2182 (“[A] valid reason, such as a missing witness, should serve to justify appropriate delay.”).

Leopold v. State, No. A15A0783, 2015 WL 5238136, at *5 (Ga. Ct. App. Sept. 8, 2015) (citation omitted).

Specific issues relating to prejudice: anxiety and concern suffered by the Defendant

Regarding anxiety and concern, the trial court found that Takyi suffered unusual and extreme anxiety and emotional pain due to her uncertain immigration status, such that she was “frightened that at any time her unresolved immigration status could force her to leave the U.S.” The trial court heard testimony from Takyi and her attorneys about the actions they took regarding her pending citizenship application and the emotional impact the attorneys understood the situation to have on Takyi.

[Takyi](#), 314 Ga.App. at 448(1), 724 S.E.2d 459. On remand, the trial court, explicitly disregarding hearsay and relying exclusively on the uncontradicted testimony of Takyi and her attorneys, found that Takyi suffered an unusual amount of stress and anxiety due to the delayed resolution of her case. Because it ignored the hearsay identified in the prior appeal to reach its decision, the trial court properly exercised its discretion in weighing the final factor slightly in Takyi's favor.

State v. Takyi, 322 Ga. App. 832, 838-39, 747 S.E.2d 24, 30 (2013)

What are the issues that are coming?

1. Refusal to submit to field sobriety tests (I messed up in *Mitchell*)
2. Constitutional Challenges to Voluntariness (AND MISLEADING INFORMATION) of Breath Testing –*Elliott*
3. Constitutional Challenges to Voluntariness (AND MISLEADING INFORMATION) of Blood Testing –*Nightingale, et al.*
3. *Harper* challenges – HGN for drugs, DRE tests (almost all), toxicologist opinions of impairment

Refusal to Submit to Field Sobriety Tests

Whatever the specific basis for Price's holding, it is at odds with our conclusion that neither Georgia statutory nor constitutional law requires a Miranda warning or something like it in this context. Although Price's holding about field sobriety tests — which encompass a variety of tests with different characteristics, but not a breath test of the sort at issue here and in Olevik and Elliott — does not directly control the issue of whether the giving of Miranda warnings or something similar is a condition of admissibility of the results of a breath test performed by a suspect in custody, there is no principled basis for distinguishing Price's holding from the issue before us today.

****State v. Turnquest, 305 Ga. 758, 773, 827 S.E.2d 865, 877 (2019) – DON'T LET ME GO FORWARD WITHOUT DISCUSSING THIS CASE. MIRANDA DOESN'T APPLY TO PAR. 16.**

Refusal to Submit to Field Sobriety Tests

Elliott v. State, No. S18A1204, 2019 WL 654178, at *26 (Ga. Feb. 18, 2019):

Having considered the text of Paragraph XVI and the context in which it was enacted, as well as all of the arguments made by the parties and the amici, we conclude that Paragraph XVI precludes admission of evidence that a suspect refused to consent to a breath test.³¹ Consequently, we conclude that OCGA §§ 40-5-67.1 (b) and 40-6-392 (d) are unconstitutional to the extent that they allow a defendant's refusal to submit to a breath test to be admitted into evidence at a criminal trial.

Submission to Breath (and URINE) Test After Elliott

- Old implied consent or new?
- Old implied consent? Challenge voluntariness and misleading information.
- He/she was told refusal could be introduced. That's false, and it is the type of information that would lead to submission to the test. *Sauls, Kitchens, etc.*
- New implied consent? Voluntariness analysis.

Submission to a Blood Test

- Old implied consent or new?
- Old implied consent? Challenge voluntariness and misleading information.
- He/she was told refusal could be introduced. That's false, and it is the type of information that would lead to submission to the test. *Sauls, Kitchens, etc.*
- *Rely upon Miley, Mackey, Gardiner, etc.* for proposition that refusal of search cannot be used against a defendant.
- New implied consent? Voluntariness analysis.

Refusal of field sobriety tests

The issue of refusal of fields constituting a violation of *Miranda* is relatively well settled, but the whether the refusal of field sobriety tests constitutes an impermissible comment upon a search remains ~~open~~.

TO ALL COUNSEL:

RE: S1610310. QUINTON MITCHELL v. THE STATE.

The Supreme Court today granted the above referenced application for Interlocutory Appeal. All the Justices concur.

(3) Did the trial court err in declining to exclude evidence of Applicant Mitchell's initial refusal to submit to field sobriety tests? See Long v. State, 271 Ga. App. 565 (2) (610 SE2d 74) (2004).

Harper Challenges

The *Harper* rule requires that the Court in a criminal case determine “whether a given scientific principle or technique is a phenomenon that may be verified with such certainty that it is competent evidence in a court of law....” *Id.* at 525. Otherwise stated, the Court must determine whether the scientific principle or technique “has reached a scientific stage of verifiable certainty” or “rests upon the laws of nature.” *Id.* (citations omitted). “[E]vidence based on a scientific principle or technique is admissible only if the science underlying the evidence is a phenomenon that may be verified with such certainty that it is competent evidence in a court of law.” *Parker v. State*, 307 Ga.App. 61, 704 S.E.2d 438 (2010).



Harper Challenges – Scientific Reliability (Generally and As Administered In Case)

- ❖ Opinion of toxicologist as to impairment by drugs
- ❖ Lack of convergence & DRE Protocol Generally
- ❖ Rhomberg / Romberg Test (*Mitchell v. State*)
- ❖ HGN for drugs



ALL MATERIALS AT:

<https://tinyurl.com/y3oanma9>

Thank you!

Ben Sessions
@Ben_Sessions
TheSessionsLawFirm.com

Got a question?
Follow me @Ben_Sessions and send
me tweet

[The Sessions Law Firm, LLC](#)

3155 Roswell Rd., Ste. 220

Atlanta, GA 30305

Telephone: (470) 225-7710