



## GEORGIA SUPREME COURT DISCUSSES REQUIREMENTS OF ANTI-MASK STATUTE: Part Two

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Law Enforcement Risk Management Group, 700 N. Carr Rd. #595, Plainfield, IN 46168

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In light of the frequent protests and public demonstrations, law enforcement must be mindful of the constitutional requirements regarding laws that are typically enforced at such demonstrations. Part One of this article discussed the constitutional requirements of Georgia's anti-mask statute as stated by the Supreme Court of Georgia. Part Two of this article will discuss the remaining challenges made by the defendant in the case discussed below, specifically Issues 2, 3 and 4 as listed below.

In 1990, the Supreme Court of Georgia decided the *State v. Miller*<sup>i</sup>, in which the court upheld the Georgia anti-mask statute, holding that there are elements not contained in the statute, but were provided in the statement of public policy when the statute was enacted, that enable the statute to pass a Constitutional challenge.

In *Miller*, the defendant was arrested for violating OCGA § 16-11-38, the Georgia anti-mask statute, when he appeared in public wearing the traditional regalia of the Ku Klux Klan, which included a mask that covered his face. Miller admitted that he wore the mask, but argued that the statute was unconstitutional because it was vague, overbroad, and violated his freedom of speech and association under the First Amendment and the Georgia Constitution. Ultimately, the Supreme Court of Georgia granted certiorari.

The issues before the Court were as follows:

- (1) Whether the statute, as applied to his case, was unconstitutional because he engaged in protected symbolic speech under the First Amendment and the Georgia Constitution;
- (2) Whether the statute is unconstitutionally vague and overbroad;
- (3) Whether the statute violated his freedom of association under the First Amendment because it prevented him from anonymously proclaiming his message in order to avoid persecution; and

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- (4) Whether the statute violated the Equal Protection Clause of the Fourteenth Amendment because it allowed the wearing of masks for holidays, balls, and theatrical productions, and therefore discriminated against the wearing of a mask for political purposes.

*Issue Two: Whether the statute is unconstitutionally vague and overbroad?*

A statute is considered unconstitutionally “overbroad” when it prohibits a substantial amount of constitutionally protected conduct, in addition to the conduct that is not constitutionally protected. Regarding this, the Court stated

**[A] ... statute should not be deemed facially invalid unless it is not readily subject to a narrowing construction ...**, see *Dombrowski v. Pfister*, 380 U.S. 479, 497, 85 S.Ct. 1116, 1126, 14 L.Ed.2d 22 (1965), **and its deterrent effect on legitimate expression is both real and substantial.**” *Erznoznik v. [260 Ga. 674] City of Jacksonville*, 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975). [emphasis added]

The Court then noted that the Georgia statute is subject to narrowing construction which is contained in the “Statement of Public Policy.” This statement, when applied to the elements contained in the statute, limit the prohibited conduct to “**mask-wearing conduct when the mask-wearer knows or reasonably should know that the conduct provokes a reasonable apprehension of intimidation, threats or violence.**”<sup>ii</sup> [emphasis added]

Miller also argued that requiring law enforcement to apply the narrowing construction language from the “Statement of Public Policy,” requires “law enforcement to cater to individuals’ irrational and idiosyncratic fears.”<sup>iii</sup> To this argument, the court stated

Persons of common intelligence may readily appreciate mask-wearing conduct that provokes a reasonable apprehension of intimidation, threats or impending violence in a given context. For example, a person wearing a ski-mask in mid-winter would not ordinarily warrant alarm, but a person wearing a ski-mask on a warm day and while entering a bank certainly would.<sup>iv</sup>

Thus, the court held that the statute was not unconstitutionally vague or overbroad.

*Issue Three: Whether the statute violated Miller’s freedom of association under the First Amendment because it prevented him from anonymously proclaiming his message in order to avoid persecution?*

Miller argued that by not allowing him to anonymously proclaim his message, it made him fearful of persecution; therefore, it prevented him from exercising his rights under the First Amendment.

The court first noted

**This Court and the U.S. Supreme Court have long recognized that, under certain circumstances, anonymity may be essential to the exercise of constitutional rights.** *Fortson v. Weeks*, 232 Ga. 472, 208 S.E.2d 68 (1974); *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 78 S.Ct. 1163, 2 [260 Ga. 675] L.Ed.2d 1488 (1958). **In *Talley v. California*, 362 U.S. 60, 80 S.Ct. 536, 4 L.Ed.2d 559 (1960), in which the Supreme Court held**

**unconstitutional a statute that required all hand-bills to bear the true name and address of the person sponsoring them, the Supreme Court stated: Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all.**<sup>v</sup> [emphasis added]

However, the court also noted that a statute that places a burden on constitutional rights must be balanced by governmental interest at stake. The court stated

**Anonymity is neither an absolute social good, nor an absolute constitutional right. Consequently, statutes that affect an individual's right to associate or to advocate anonymously are analyzed in light of the nature of the governmental interests furthered by the statute and the extent of the burden that they place on individual rights.** Buckley v. Valeo, 424 U.S. 1, 68, 96 S.Ct. 612, 658, 46 L.Ed.2d 659 (1975).<sup>vi</sup> [emphasis added]

The court then sought to examine the burden the statute placed on Miller's constitutional rights. They noted that Miller and Klan member can wear masks on their private property, anonymous purchase billboard space, signs, radio and television commercials or from joining the Klan anonymously. Rather, the court stated

[The statute] only prevents masked appearance in public under circumstances that give rise to a reasonable apprehension of intimidation, threats or impending violence. We therefore conclude that the statute's effect on the Klan's ability to advocate or proselytize anonymously is negligible.<sup>vii</sup>

Thus, regarding the third issue, **the court held that the states interest in regulating mask wearing exceeds individual rights to anonymity when the mask wearers are engaging *in intimidating or threatening behavior*.**

*Issue Three: Whether the statute violated the Equal Protection Clause of the Fourteenth Amendment because it allowed the wearing of masks for holidays, balls, and theatrical productions, and therefore discriminated against the wearing of a mask for political purposes?*

The court quickly disposed of this issue by stating that the statute specifically allows mask wearing for non-threatening or intimidating reasons by stating that the code section does not apply to wearing a mask for employment, sport activity, theatrical productions, holidays, and emergencies (such as gas masks). This is very different from wearing a mask for intimidation, threats or violence. Thus, it did not violate the Equal Protection Clause of Fourteenth Amendment.

The court then held

In conclusion, **we hold that the Anti-Mask Act proscribes mask-wearing conduct that is intended to conceal the wearer's identity and that the wearer knows, or reasonably should know, gives rise to a reasonable apprehension of intimidation,**

threats or impending violence. So construed, the Act passes constitutional muster.<sup>viii</sup>

**Key points for Georgia law enforcement:**

For mask wearing to violate the anti-mask statute (OCGA 16-11-38), the officer must show the following:

**The person must be wearing:**

- (1) A mask, hood, or device to cover any portion of the face;**
- (2) Such that the person's identity is concealed;**
- (3) The person is on a public way or private property without permission of owner or occupier of the property; and**
- (4) The person is concealing their identity under circumstances that the person knows or should know that mask, hood or cover, causes reasonable apprehension of intimidation, threats or impending violence**

Further the mask is not a violation if its for employment, sport activity, theatrical production, holidays, and emergencies (such as gas masks).

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<sup>i</sup> 260 Ga. 669 (398 S.E.2d 547)(1990)

<sup>ii</sup> Id. at 552

<sup>iii</sup> Id.

<sup>iv</sup> Id.

<sup>v</sup> Id.

<sup>vi</sup> Id.

<sup>vii</sup> Id. at 553

<sup>viii</sup> Id.