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# MEMORANDUM

TO: Kansas Prosecutors and Law Enforcement

FR: Attorney General Derek Schmidt

CC: Governor, Adjutant General, KHP Superintendent, KBI Director

DT: July 2, 2020

RE: Addendum 3 to March 24, 2020, state and local law enforcement duties and authorities memorandum regarding enforcement of orders issued pursuant to the Kansas Emergency Management Act after enactment of 2020 Special Session House Bill 2016 (HB 2016)

This Addendum assists state and local law enforcement and county and district attorneys in determining their duties and authorities related to enforcement of emergency orders of the Governor issued under authority of K.S.A. 48-924 and K.S.A. 48-925 (“emergency orders”).<sup>1</sup> It reflects changes in enforcement authorities and procedures established in statute by House Bill 2016, which was passed by the Legislature on June 4, 2020, signed into law by the Governor on June 8, 2020, and became effective on publication in the Kansas Register on June 9, 2020.<sup>2</sup> To the extent this Addendum conflicts with provisions of my March 24, 2020, memorandum on state and local law enforcement duties and authorities or Addendums to that Memorandum issued prior to this date, this Addendum replaces provisions of those prior documents.

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<sup>1</sup> The statutory changes discussed in this Addendum also apply to local emergency orders entered under authority of K.S.A. 48-932. Except as expressly noted herein, this Addendum does not discuss authorities arising under other statutes.

<sup>2</sup> HB 2016, § 43; 39 Kan. Reg. 755 (June 9, 2020).

## Background

Enactment of House Bill 2016 fundamentally changed numerous authorities related to the issuance and enforcement of emergency orders. On July 2, 2020, the Governor issued Executive Order 2020-52, which requires the wearing of facemasks in most indoor and many outdoor public places (“Mask Order”) to impede the spread of COVID-19. This is the first new emergency order potentially requiring enforcement that has been issued since the House Bill 2016 statutory amendments;<sup>3</sup> consequently, this Addendum explains the new procedures and authorities pertinent to law enforcement and county or district attorneys in the context of the Mask Order.<sup>4</sup>

### New County-by-County Opt-out Procedure

The initial question that must be asked is whether the Mask Order is in force and effect in a particular county. If it is not, it cannot be enforced in that county. Although the Mask Order itself, like previous COVID-19-related emergency orders, contains no terms limiting its geographical application, state law now establishes a mechanism by which individual counties may effectively opt out of some or all of its requirements. Section 33 of House Bill 2016 authorizes each county commission, pursuant to a statutorily established procedure, to “issue an order relating to public health that includes provisions that are less stringent” than the Mask Order if the commission, after consultation with local health officials, finds that “implementation of the full scope of the provisions in the governor’s executive order are not necessary to protect the public health and safety of the county.”<sup>5</sup> Thus, if a county commission has exercised this new statutory authority and issued a less-stringent order, then the more-stringent aspects of the Mask Order are not in force and effect in that county and may not be enforced. The new statute does not establish any time requirement or limitation for a county commission to exercise this opt-out authority.

### Violating the Mask Order is a Civil Wrong, Not a Crime

Section 36 of House Bill 2016 repealed the criminal penalties found in K.S.A. 48-939 that previously attached to violations of an emergency order and replaced them with civil penalties or injunctive relief that may be ordered by a court in a lawsuit filed by the county or district attorney.<sup>6</sup> Thus, violation of the Mask Order is now a civil violation and

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<sup>3</sup> Other emergency orders have been issued since the statutory change, but they either were extending previous orders or were of a nature that the role of law enforcement and county or district attorneys in their enforcement were not called into question.

<sup>4</sup> Although this Addendum focuses on the Mask Order just issued, the procedures and authorities it describes apply similarly to other emergency orders going forward.

<sup>5</sup> Codified at K.S.A. 48-925(h). The new law further requires that the board of county commissioners include in its order “all other relevant findings to support” its decision. This provision remains in effect through January 25, 2021, then reverts to prior law.

<sup>6</sup> Under the revised K.S.A. 48-939, the attorney general also may file a civil enforcement action. Because this Addendum provides assistance to law enforcement and to county and district attorneys, references to the attorney general are omitted in the Addendum’s text. In general, it is the intent of

not a crime;<sup>7</sup> consequently, the authorities and procedures ordinarily available to law enforcement officers to enforce criminal laws may not be used to enforce the Mask Order. For example, a law enforcement officer may not arrest a person for violating the Mask Order.<sup>8</sup> Nor may an officer conduct an investigative stop to enforce the Mask Order.<sup>9</sup> And no statute authorizes a law enforcement officer to issue a citation or to take any similar action for violation of the Mask Order.

In a broad sense, the House Bill 2016 amendments fundamentally shifted from the state's more than 8,000 law enforcement officers to the 105 county and district attorneys the discretion to *determine in the first instance* whether to commence enforcement of the Mask Order. In that sense, the Mask Order now is to be civilly enforced in a manner much more similar to civil abatement of a common nuisance<sup>10</sup> or to the Kansas Consumer Protection Act<sup>11</sup> and not as crimes. In general, citizens who violate the Mask Order may be subject to civil penalty or injunction related to their behavior only *after* a judge has entered an order to that effect in an enforcement lawsuit filed by the county or district attorney. The county or district attorney, not a law enforcement officer on the street, is the first authority to determine whether any enforcement action should be commenced in any individual circumstance. Enforcement policies, procedures and priorities lie with the county or district attorney, not with law enforcement agencies.<sup>12</sup> Therefore, law enforcement agencies are strongly encouraged to determine what assistance the county or district attorney may request from them in preparing and bringing any civil enforcement actions. Because authority to “enforce[]”<sup>13</sup> violations of the Mask Order now rests with the county or district attorney, each county or district attorney is advised to determine the manner in which he or she intends to receive complaints of violations of the Mask Order; how enforcement discretion will be exercised;<sup>14</sup> the propriety of bringing

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the attorney general to defer enforcement decisions to the local county or district attorney absent any extraordinary circumstance.

<sup>7</sup> Violating the Mask Order is not a crime. Of course, being maskless may be a relevant *fact* that tends to establish an element of *other* crimes that prohibit conduct beyond merely not wearing a mask. For example, if a private business requires people who enter its premises to wear a mask and a maskless person refuses to leave after being properly asked, the refusal to leave may constitute criminal trespass. See K.S.A. 21-5808(a)(1)(A). There are other conceivable circumstances in which being maskless may be a relevant *fact* in proving a criminal threat, see K.S.A. 21-5415(a)(2), endangering the food supply, see K.S.A. 21-6317, or some other crime. Similarly, violation of lawful orders issued under authority of other statutes, such as orders of a local health officer, still may be crimes under provisions of those statutes.

<sup>8</sup> See K.S.A. 22-2202(d) (defining “arrest” as related to “the commission of a crime”); see also K.S.A. 22-2401 (authorizing arrest only in relation to crimes).

<sup>9</sup> See K.S.A. 22-2402 (authorizing investigative stop only in relation a crime).

<sup>10</sup> See K.S.A. 22-3902.

<sup>11</sup> See K.S.A. 50-623 *et seq.*

<sup>12</sup> County and district attorneys are not required to wait for a violation to occur but may seek court-ordered injunctive relief “against a person who has violated, is violating or is otherwise likely to violate” the Mask Order. See K.S.A. 48-939(c) as amended by Section 36 of House Bill 2016.

<sup>13</sup> K.S.A. 48-939(b) as amended by Section 36 of House Bill 2016.

<sup>14</sup> It is possible that a county or district attorney will exercise discretion to adopt different approaches to different types of violations. For example, a restaurant that refuses to require its food-

an enforcement action in any individual case;<sup>15</sup> the manner in which investigation of potential violations should be conducted; and similar types of enforcement issues.

Because of this changed enforcement structure, individual law enforcement agencies and officers (as appropriate in each jurisdiction) are strongly encouraged to consult with their local county or district attorney to determine how he or she intends to exercise the new civil enforcement authority granted by Section 36 of House Bill 2016. Although enforcement of the Mask Order is now the responsibility of the county or district attorney, law enforcement agencies should consider adopting procedures or otherwise giving guidance to their officers who encounter violations of the Mask Order to help ensure a consistent approach for citizens throughout each county. While enforcement may be initiated only by the county or district attorney, law enforcement officers continue to have the same abilities as any citizen to report potential violations to the county or district attorney, and officers also remain free to courteously and professionally encourage citizens to comply with the Mask Order (without effecting a stop for that purpose). Thus, officers should be given guidance from law enforcement agency leadership, in consultation with the county or district attorney, on these sorts of matters.

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service workers to wear masks while serving food to the public in violation of the Mask Order may be a priority for enforcement while a private citizen walking through an office hallway in a business not open to members of the public may not.

<sup>15</sup> For a more thorough discussion of the county or district attorney's duty to assess the lawfulness of an emergency order before undertaking enforcement, see Attorney General Opinion 2020-6. Be mindful, however, that the assessment in that Opinion arose in the context of potential criminal prosecution, and the bar for a lawfulness assessment may be somewhat lower in the civil enforcement actions now authorized by House Bill 2016. In addition, a county or district attorney should consider potential constitutional or other legal concerns that may arise from applying the Mask Order in particular situations; for example, for the government to threaten a civil penalty of up to \$2,500 or otherwise to compel a person to purchase and wear a mask as a precondition for entering a polling place to cast a vote may present concerns about unlawful voter suppression.