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Sheriff Edward J. McMahon
New Hanover County Sheriff's Office
3950 Juvenile Center Road
Castle Hayne, NC 24829

Re: North Carolina General Statute § 14-12.8

Dear Sheriff McMahon:

Thank you for your call yesterday evening. Since you sought my counsel, I have not only consulted with several senior prosecutors, but I have also consulted the experts in the field at the UNC School of Government regarding the statutes governing masking in public spaces.

North Carolina General Statute § 14-12.8, which prohibits the wearing on public property of any mask whereby the person is disguised so as to conceal the identity of the wearer, has never been repealed since its enactment in 1953 and is still in full effect. The Legislature in the spring of 2020 did codify an exception for when the person is wearing a mask for the purpose of physical health; however, as in every situation where the crime charged requires proof of a particular state of mind—and that would, of course, include nearly every crime that is currently the law in the State of North Carolina—the proof for that state of mind is the “totality of the circumstances.” It is not enough that the person may claim to be wearing a mask for physical health if the surrounding circumstances belie that claim and make clear that the purpose is—for example—to conceal identity or to intimidate others.

It is also of no legal significance if others who are present—even elected officials who may be in charge of a meeting where violations of § 14-12.8 occur—say that they are willing to have such masked individuals present. The Legislature—through this statute—has pre-empted any such ad hoc, local accommodations; moreover, applying the statute to some such individuals and not others would appear to be possible viewpoint discrimination, which would be impermissible. It is also important to remember that the public policy behind this statute is intended to vindicate the rights of citizens who would be present at a public meeting but for the intimidating presence of those in violation of § 14-12.8.

I would finally note that the Legislature’s codification, in North Carolina General Statute § 14-12.11, of a physical health exception also included a provision that should assist in the investigation of a criminal offense by a person who is wearing a mask. § 14-12.11(c) states that, “[a] person wearing a mask for the purpose of ensuring physical health... shall remove the mask, upon request by a law enforcement officer... when a law enforcement officer has reasonable suspicion... during a criminal investigation.” So if an officer has reasonable suspicion, based on the totality of the circumstances, that a person on public property is not wearing a mask for a physical health purpose, then that officer has a right to demand to see that person’s face, and can charge § 14-223(a), Resisting, Delaying, and Obstructing an Officer if that person refuses.

Sincerely,

Benjamin R. David
District Attorney