Martin Harry
***for* District Attorney**

P.O. Box 92184, Austin, Texas 78709
maharry@martinharry.com

January 20, 2020

FOR IMMEDIATE RELEASE
Contact: Martin Harry, (512) 636-1428

Travis County District Attorney Candidate Criticizes Plan to End Enforcement of Certain Criminal Laws in Austin

Martin Harry, Republican candidate for Travis County District Attorney, has released the following statement concerning a proposed resolution[1] (Agenda Item 59), relating to the non-enforcement of certain marijuana offenses and prohibiting expenditure of city resources for testing of THC content. The proposed resolution, scheduled to be heard on January 23, 2020, by the Austin City Council, is premised on legal changes caused by enactment of House Bill 1325[2] which changed the definition of marijuana but did not decriminalize use or possession of marijuana.[3]

Greg Casar, one of the resolution's sponsors, openly admits its purpose is to "decrease personal marijuana arrests to the greatest extent possible under state law….We recognize that until the state government fully legalizes marijuana, we're still limited in some of our options, but we can get as close as we can to zero arrests."[4] Not only do the sponsors want to effectively decriminalize marijuana possession by executive fiat contrary to state law, they want to obstruct all efforts to determine whether crimes are committed.

According to the draft resolution, city funds and personnel will not be used to "[d]evelop THC concentration testing protocols or pursue accreditation for the purpose of testing any substance to determine whether the substance meets the legal definition of marijuana under state law" or "[a]ccess, by any means, THC concentration testing of cannabis-related substances for use in the investigation of possession cases without the intent to sell, distribute, or deliver the substance." Casar has been very explicit: "When APD understands that there's not going to be a test, then they'll understand that there's really no point to making an arrest."[5]

Although the purpose is to circumvent criminal laws Casar believes to be "counterproductive," the elimination of enforcement against certain marijuana crimes is pretextually based on two reasons: (1) costs associated with the lab analysis of substances to

---

[1] https://www.austintexas.gov/edims/document.cfm?id=333812.
[2] https://capitol.texas.gov/tlodocs/86R/billtext/pdf/HB01325F.pdf#navpanes=0.
[3] Significantly, House Bill 63, which would have reduced possession of marijuana of one ounce or less to a Class C misdemeanor (not punishable by confinement), failed to pass the legislature in the same legislative session. https://capitol.texas.gov/tlodocs/86R/billtext/html/HB00063E.htm.
[4] https://www.austinchronicle.com/daily/news/2020-01-14/will-austin-police-stop-making-marijuana-busts/.
[5] *Id.*

distinguish illegal marijuana from legal hemp and (2) the futility of prosecuting defendants without lab analysis.

The availability of testing and its cost, asserted to be unduly burdensome for the city, are neither stated nor a matter to be determined. The resolution first states that the city "*may* have to acquire new testing equipment" but then claims a "*necessity* to invest in new testing equipment" (emphasis added). In reality, the sponsors do not know what, if any, expenditures are required now or in the future.

Regarding prosecution, the sponsors assert that HB 1325 has made prosecuting cannabis-related substance possession charges so "time-consuming and expensive" that prosecutors are declining to prosecute them. In July 2019, District Attorney Moore announced she would not prosecute felony marijuana possession charges without lab testing. Remarkably, she dismissed 32 felony cases including a first degree delivery charge. The County Attorney adopted the same policy regarding misdemeanor charges.[6]

These decisions not to prosecute criminal charges are as much political as legal. Although the definition of marijuana has changed, possession of marijuana has not been decriminalized. Moore's decision, whatever its merit, is subjective and reversible. Moore's public position is that she will decide which cases are worth incurring additional expense of testing. In order to make that determination, however, there has to be a case to review.

The proposed resolution directs the *elimination* of "the use of arrest or other enforcement action for cannabis-related possession offenses, when the Chief of the Austin Police Department knows, or reasonably should know, that the prosecuting entity will *automatically* reject the charges or that a lab report will not be obtained to test the THC concentration of the substance" (emphasis added). Because the district attorney has *not* adopted a policy of automatic rejection of charges in Travis County, there should never be justification for the elimination of arrest or other enforcement action. Nevertheless, the resolution clearly is designed to deny discretion to prosecutors by discouraging police from arrests categorically, Casar's stated intention.

Furthermore, prosecution of marijuana possession charges does not depend on lab analysis. Although direct evidence of THC content might be the most compelling evidence, it is not required. Many prosecutors in other districts are continuing to prosecute drug offenses and obtaining convictions. The unequal application of any state law based on the predilections of local politicians undermines fundamental principles of the rule of law and equality under the law.

Moreover, it is not always necessary for prosecutors to prove possession of marijuana beyond a reasonable doubt for law enforcement objectives. If, for example, a criminal defendant awarded deferred adjudication is found in possession of marijuana in violation of terms of community supervision, guilt can be adjudicated if a violation is established by a preponderance of evidence. If a person in possession of marijuana can assist with the investigation or prosecution of a person suspected of a more serious drug offense, even a minor charge can motivate cooperation. Such cooperation will be lost by the proposed categorical non-enforcement

[6] If prosecuting attorneys require assistance in the prosecution of criminal cases, they have recourse to assistance from the Texas attorney general. TEX. GOV. CODE § 402.028.

policy. The sponsors' cost-benefit analysis fails to account adequately for public safety interests served by law enforcement.

The sponsors also fail to consider additional offenses established by HB 1350. A person possessing or transporting a substance with less than 0.3 percent THC, i.e., hemp, is still committing a misdemeanor if they have no legal authority to do so. A person transporting hemp without proper documentation is guilty of a crime and subject to a civil penalty. Even if the sponsors' claim that an arrest is a waste of resources in terms of prosecuting a drug offense, their argument is irrelevant for offenses related to possessing and transporting hemp, which the sponsors evidently presume will be the defense asserted by defendants to drug charges.

What is apparent is that the sponsors' real objective is to end criminalization of marijuana in Austin, a political objective that has nothing to do with costs or prosecutorial burdens. Rather than respect the exclusive legislative authority of state legislators, the sponsors arrogantly propose to usurp the power of Texans who legislators represent.

Whether possession of marijuana should be decriminalized or legalized is a proper public policy issue for debate. Reasonable persons can disagree. What should not be debatable, however, is the flagrant disregard of laws duly enacted by the only branch of government having such authority. In addition to undermining the rule of law and equality under the law, the proposed policy violates the separation of powers, a fundamental feature of our constitutional republic. For these reasons, it should be rejected.

###