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July 21, 2020

FOR IMMEDIATE RELEASE
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Travis County District Attorney Candidate Challenges Lawfulness of Automatic Release of Accused Felons from Jail

Martin Harry, Republican candidate for Travis County District Attorney, challenges the automatic release of inmates from Travis County jail by district court judges in Travis County. On March 23, 2020, Presiding Judge Brenda P. Kennedy adopted a Standing Order ("Order") that provides that people accused of certain felonies otherwise not excepted by terms in the Order "shall be released on personal bond." Harry believes the Order is unlawful and, if elected, will rescind the current DA's acquiescence.

Harry believes the Order is unlawful for reasons comparable to those for which the ACLU attacked Gov. Greg Abbott's Executive Order GA-13 ("GA-13") (GA-13 prohibits the release of persons previously convicted or currently charged with violent crimes on personal bonds.)

On March 29, 2020, Governor Greg Abbott issued GA-13 pursuant to his disaster declaration in response to the coronavirus pandemic. That order suspends specific provisions of the Texas Code of Criminal Procedure pertaining to personal bonds. The ACLU has argued, in part, that Gov. Abbott's action is unlawful because it usurps the exclusive legislative authority of the legislative branch and infringes on the powers of the Texas judiciary.

The right to bail only arises when the state incarcerates a person before trial. With few exceptions, prisoners in Texas are bailable. Judges have discretion for setting bail requirements but the state legislature prescribes factors they must consider. The ACLU essentially challenged GA-13 on the grounds that it broadly and indiscriminately denies release of prisoners on personal bonds and precludes judges from exercising their discretion.

On April 10, 2020, Travis County District Court Judge Lora Livingston approved the ACLU's application for a temporary restraining order, finding sufficient evidence that GA-13's provisions are unconstitutional. (Less than three weeks earlier, Judge Livingston and her fellow district court judges had adopted their Order.) On April 23, 2020, the Texas Supreme Court overturned the restraining order but the case continued in the district court.

The Travis County District Judges' Order is subject to a legal argument comparable to that presented by the ACLU against GA-13 because it generally and indiscriminately permits the release of felons on personal bond "automatically" for specific, enumerated, offenses without consideration of the factors required by law. When release is "automatic" there is no discretion.

Prisoners qualifying for automatic release include those who already had been magistrated with bail requirements set. Implicitly, the magistrate judges determined the prisoners were a risk for flight, a risk for harm to the community or both and denied bail in the form of personal bond. The Order essentially overrides the magistrate judges' determinations not based on individualized findings of fact by trial judges after evidentiary hearings but categorically based on offenses charged.

The Order allows magistrate judges to ignore the requirements the law mandates be considered when setting bail.[1] *Granting* release on personal bond without consideration of statutorily prescribed factors usurps the authority of the legislative branch no less than *denying* personal bond without consideration of the same prescribed factors. For example, Texas law authorizes district court judges to release a defendant on personal bond without sureties or other security but,

> on reasonable belief by the investigating or arresting law enforcement agent or magistrate of the presence of a controlled substance in the defendant's body or on the finding of drug or alcohol abuse related to the offense for which the defendant is charged, the court or a magistrate *shall require* as a condition of personal bond that the defendant submit to testing for alcohol or a controlled substance in the defendant's body and participate in an alcohol or drug abuse treatment or education program if such a condition will serve to reasonably assure the appearance of the defendant for trial.

Tex. Code Crim. Proc., § 17.03(c) (emphasis added).

Magistrate judges, however, may not release on personal bond a defendant who refuses to submit to testing or who submits to testing and the test shows evidence of the presence of a controlled substance. Tex. Code Crim. Proc., § 17.03(a). A district court judge before whom the case is pending may authorize the release of the defendant notwithstanding a refusal to test or a positive test result except in those cases where it would serve to reasonably assure the appearance of the defendant for trial. Thus, drug abuse is a circumstance the legislature has expressly made a factor to be considered in assessing a defendant's risk for failure to appear for trial.

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[1] The amount of bail to be required in any case is to be regulated by the court, judge, magistrate or officer taking the bail; they are to be governed in the exercise of this discretion by the Constitution and by the following rules:

> 1. The bail shall be sufficiently high to give reasonable assurance that the undertaking will be complied with.
> 2. The power to require bail is not to be so used as to make it an instrument of oppression.
> 3. The nature of the offense and the circumstances under which it was committed are to be considered.
> 4. The ability to make bail is to be regarded, and proof may be taken upon this point.
> 5. The future safety of a victim of the alleged offense and the community shall be considered.

Tex. Code Crim. Proc., § 17.15.

The Order, which includes several drug offenses for which automatic personal bond is available, does not exclude from automatic release defendants who refuse testing or drug abuse treatment or education. This failure is contrary to statutory rules which require that the nature of the offense and the *circumstances* under which it was committed are to be considered and to give reasonable assurance that the undertaking (i.e., appearance at trial as ordered) will be complied with when courts set bail.

The Order resembles an order issued by the Travis County Court judges on February 6, 2020. That order is even more egregious, however. It provides for *pre-approval* for personal bonds for all persons charged with Class A and Class B misdemeanors except for some listed offenses. Pretrial Services may recommend additional conditions at any time *after* the arrested person is released. If a person is considered an imminent danger to the community Pretrial Services is to be notified. An imminent danger presumably is one that exists at the time of release but, incredibly, it likely will not be considered until after release. On its face, the order does not make risk of flight a factor for consideration ever.

Aside from the legal objection, these orders are bad policy. The fundamental flaw in these orders (and the philosophy of politicians promoting them) is the shift in focus from the offender to the offense. Any offender, regardless of offense, can pose a risk of harm, of flight or both. This is precisely why Travis County Pretrial Services engages in a multifactorial inquiry before making a bail recommendation.

The case of Dylan Woodburn illustrates the danger of basing bail decisions on offenses charged versus the offender. Woodburn, a homeless man, had a history of drug offenses and violations of bail conditions when he was arrested for burglary in Travis County in 2019. At the time of his arrest, it was evident that he was under the influence of some substance. Pretrial Services recommended against release on personal bond and he was jailed pending trial.

Upon negotiation of a plea bargain, however, Woodburn's appointed attorney requested that Woodburn be released on personal bond before sentencing. Without any apparent objection by the prosecutor, the judge granted the request. The judge did not require Woodburn to submit to drug testing. After gaining his freedom, Woodburn randomly and wantonly attacked several people and stabbed a man to death. Evading arrest, he jumped from the roof of a building and died from his injuries. Although drug offenses are frequently claimed to be "victimless" crimes, evidence shows Woodburn's crimes of burglary and murder each occurred during a drug-induced psychosis. Based on his criminal history and the circumstances surrounding the pending charge, further drug abuse upon his release was entirely predictable. The risk of harm was great but the system tragically failed to keep the public and Woodburn safe.

Because the Order allows for automatic release of some felony offenders based on offenses charged without judicial discretion, dangerous offenders may be released into the community. Politicians attempting to satiate demands of extreme ideologues for an end to "mass incarceration" are putting politics ahead of public safety. As District Attorney, Martin Harry will end the politicization of prosecution decisions which makes Austin less safe.

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