

House Committee on Criminal Jurisprudence HB 1325 – Interim Charge 1

Texas Department of Public Safety

Crime Lab Response

The passage of H.B. 1325 created a need for crime laboratories to distinguish legal hemp from illegal marihuana. Texas laboratories have been working diligently to develop a method that conforms with accreditation standards as well as international standards for the analysis of seized drugs in the context of criminal prosecutions.

INTERLABORATORY VALIDATION

Through a cooperative inter-laboratory initiative (Texas Department of Public Safety; Harris County Institute of Forensic Science; Houston Forensic Science Center) publicly funded labs are implementing analytical procedures to differentiate help from marihuana using an administrative threshold of 1% delta-9-tetrahydrocannabinol (THC) in plant material. Sam Houston State University facilitated the collaboration between operational laboratories, and the overall approach was based upon similar methods that were developed at the federal level by the Drug Enforcement Agency (DEA). The Texas Department of Public Safety is currently using this method to test felony plant cases submitted to the lab system. The Department is now working on validating a test to determine if the concentration of THC is above one percent.

Analytical challenges and the difference between agricultural industry testing and forensic testing: The cannabis plant is a **very** challenging material to analyze. Over one hundred related cannabinoids are contained within the plant. In an agricultural setting, the cannabinoids present in plant material are somewhat predictable and relatively easy to differentiate. This greatly facilitates regulatory testing using agricultural crops. In a forensic setting however, it is not uncommon for additional compounds (including synthetic cannabinoids or other substances) to have been added to the plant after it has been harvested. This greatly increases the complexity of the analysis because the scope of testing is not just limited to the natural cannabinoids that are present in cannabis. Many of these compounds have very similar chemical structures. Differentiation of these structurally similar drugs is complex, requiring highly sophisticated instrumentation with very specific detectors. The use of analytical techniques that lack high discriminating power increases the risk of misidentifying something that is **not** delta-9-THC as delta-9-THC (a false positive). We are already seeing indications of false positives from crime labs in other states that have incorporated technologies similar to those used in agricultural testing.

TERMINOLOGY ISSUES

- **Terms used in the legislation:** As one would expect, Texas based H.B. 1325 on the Federal Farm Act that legalized hemp nationally. However, that law creates interpretation challenges.
 - For example, terms such as “dry weight,” “delta-9-tetrahydrocannabinol” and “Cannabis Sativa L” do not translate well when chemists attempt to analyze suspected marijuana products and determine whether they are in fact controlled substances. For example, if a suspected THC oil arrives at a crime laboratory how does the chemist determine the “dry weight” of that liquid substance? And if testing shows a product

to be delta-8-THC, which also has hallucinogenic effects, is it a controlled substance? Several states have already shifted to a more general definition of Cannabis rather than simply “Cannabis sativa L” to avoid genetic determination of species.

REQUIRING DOCUMENTATION FOR POSSESSION OF CANNABIS PLANTS

The Agriculture Code implies legislative intent was that only licensed growers and manufactures should be permitted to possess the cannabis plant. This means the general public and unlicensed retailers should not have the plant. Other states (e.g., Kentucky) have clarified that a person or entity may not possess a cannabis plant without appropriately issued documentation. For example:

Sec. 481.120. OFFENSE: DELIVERY OF MARIHUANA. (a) Except as authorized by this chapter, a person commits an offense if the person knowingly or intentionally possesses or delivers ~~marihuana~~ a Cannabis plant; unless that person holds a license issued by the department, or is an agent of a licensee, to cultivate, handle, process, or market Cannabis plants or viable seeds, leaf materials, or floral materials.

CLARIFICATION RE: SMOKABLES

Assuming the legalization of hemp was not intended to include smokable materials like vape oils, it would be helpful to have some clear language to that effect in the law. This would alleviate the need for the labs to distinguish hemp from marihuana for vape cartridges, etc. because there would be no such thing as a legal hemp smoke-able item.

Open and closed systems are used in vaping and e-cigarette devices. Open systems are refillable by the user, while closed systems are not. However, techniques to “hack” closed systems are widespread and readily available on the Internet. Therefore, closed systems do not provide absolute safeguards regarding the contents of the e-liquid or provide assurance that the contents are those of the original manufacturer.

THERE IS NO EASY OR INEXPENSIVE ANSWER FOR EDIBLES

Crime laboratories will need new and different instrumentation to establish testing methods for non-plant materials, *especially for edibles*. Currently, most publicly funded laboratories do not have a validated and approved method for full quantitation which is what would be needed for edibles. Financial and human resource needs here (including instrumentation) are significant. Unlike e-liquids and cannabis plant material, edibles come in many different forms (fat or lipid rich chocolates, to cookies/brownies, gummies and hard candy). Test methods for edibles require extensive sample clean-up (extraction protocols) to separate cannabinoids and other drugs from the food matrix itself. Failure to properly isolate the compounds of interest from the food matrix can result in interferences that could negatively influence the reliability of the test and the concentration of drug. Extensive extraction and sophisticated instrumentation is required to quantify delta-9-THC in edibles and separate it from structurally similar compounds.

FIELD TESTING POSSIBILITIES

The DPS has met with vendors that serve the agriculture industry to discuss potentially viable field testing options that would assist law enforcement with screening. DPS has very recently completed validation work on field test kits offered by DetectaChem and NIKS. They are also in preliminary discussions with TAMU about field testing methods involving Raman technology. To be clear, these technologies may help state troopers and local partners make initial probable cause determinations (see e.g.,

<https://www.texastribune.org/2020/01/07/marijuana-texas-dps-arrest-hemp/>) but will still be insufficient for ultimate prosecution of marijuana cases. The field tests in question cost about \$4 each.

Texas Highway Patrol Response

The Texas Highway Patrol (THP), along with other Texas law enforcement agencies, have faced challenges resulting from unintended consequences arising from the passage of HB 1325.

The primary challenge with enforcement and prosecution of HB 1325 is the changed definition of marijuana that now excludes hemp. Specifically, the bill defines hemp as having a THC concentration of not more than 0.3 percent. A THC concentration of more than 0.3 percent is marijuana, the *Cannabis Sativa L* plant. Prior to this definition change, an officer testifying in court could articulate through their training and experience that the material smelled and looked like marijuana, thus permitting prosecution. However, with this law change, a trooper or other officer is unable to determine the difference between marijuana and hemp through appearance and smell. Consequently, only lab results specifying THC levels can distinguish between marijuana and hemp, leading to a patchwork of criminal prosecution statewide.

Due to Department of Public Safety (DPS) Crime Laboratory limitations when the law became effective, THP commissioned offers were unable to obtain laboratory results indicating the percentage of THC content. Recently, however, the crime lab established testing capabilities to determine whether a THC level is above 1 percent. Unfortunately, due to testing capacity limitations, DPS crime labs are only able to test THC content for the prosecution of felony marijuana cases. This leaves a significant gap for the prosecution of misdemeanor marijuana cases.

In addition to laboratory testing, the need for roadside field testing is critical for troopers to screen suspected substances to determine if they are marijuana or hemp. Field tests help troopers with the decision to arrest persons for marijuana offenses or release them because the substance is legal hemp. Only in the last several months have field tests that differentiate THC content become available, with varying results. The DPS Crime Lab completed testing of two field tests and the THP is in the process of procuring field test kits for the troopers. While these field tests are sufficient to establish reasonable suspicion and/or probable cause, they are inadequate as evidence for prosecution. Therefore, the gap in the ability to prosecute marijuana cases, especially misdemeanors, remains.

The THP wants to ensure the proper enforcement of statutes criminalizing marijuana, while also upholding the legalization of hemp as directed in HB 1325. To facilitate the ability to continue to prosecute marijuana cases, the THP believes the DPS Criminal Investigation Division's (CID) approach to return the definition of marijuana to the language prior to HB 1325 and create a separate exemption for hemp is balanced and logical. Providing an exemption for hemp instead of being another definition of marijuana eliminates the burden on prosecutors to disprove a substance is hemp, yet allows persons the ability to establish the substance was hemp. The CID's suggested amendments to applicable statutes will be provided separately.

Another challenge relates to the transportation of legal hemp products, most notably bulk quantities, but also smaller quantities. There is a need to ensure substances being transported can be directly matched to the transport manifest issued by the Texas Department of Agriculture (TDA). Such identification and verification is crucial to make certain criminals are apprehended,

while legal hemp transporters are unencumbered. The DPS has been working closely with the TDA throughout the implementation process of HB 1325 to clarify, strengthen, and modify internal procedures and, where necessary, administrative rules. The DPS continues to make suggestions for manifest improvements as they are identified.

The ongoing collaboration has resulted in the DPS being able to provide the TDA with temporary solutions so law enforcement officers can confirm the validity of paper transport manifests at roadside any time after TDA's regular business hours. This provides THP and local law enforcement access to vital information while a nationwide system continues to be under development.

Lastly, there have been limited instances of legal hemp fields being reported to local law enforcement as growing marijuana. As previously described, hemp is visually indistinguishable from marijuana, which makes citizens reporting fields as growing marijuana instead of hemp inevitable. To avoid unnecessary law enforcement responses, it is critical for DPS and local agency officers to be able to readily and accurately identify sites approved by the TDA to grow hemp in compliance with the statutory requirements of HB 1325. To this end, the DPS is coordinating with the TDA to incorporate grow site data into the DPS TXMAP geospatial platform so all law enforcement agencies have the ability to access to the information at any time, but especially outside of TDA business hours.

The Texas Highway Patrol continues to evaluate applicable aspects of HB 1325 to identify further improvements for the successful implementation of the legislation.

Texas DPS Criminal Investigations Division (CID) Response **Growing Marijuana**

Current Texas Department of Agriculture (TDA) rules state that if a licensed hemp grower is growing hemp at a licensed hemp location and **negligently** grows marijuana, or a "hot crop," they will be held to administrative sanctions. Such unintentional marijuana growth can easily occur, as heat and lack of water can cause hemp plant THC content to rise above .3%. However, there is a concern that large marijuana-growing operations, usually associated with Mexican cartels and transnational drug organizations who are intentionally growing marijuana could attempt to grow under the guise of being legitimate hemp operations, with the aim of utilizing TDA rules to escape criminal penalties.

Proposal: Create a growing/raising marijuana law on the books to prevent someone who is intentionally growing marijuana from only facing administrative penalties in accordance with TDA rules. Language has been proposed that any new marijuana law be simple enough for a street cop to interpret. For example:

"It is a violation of this (sub) chapter for a person to knowingly or intentionally raise or grow marijuana, even if the person is a TDA-licensed hemp grower at a TDA-licensed hemp production location. It is an affirmative defense if a person is a TDA-licensed hemp grower at a TDA-licensed hemp production and negligently grows marijuana as defined by TDA law."

Such wording would put the burden of proof on the suspect.

Punishment: It is proposed that the level of penalty be based on number of plants, not weight. For example, 99 or fewer plants would be a state jail felony, while 100 or more plants would be a felony of

the 3rd degree. Tying the penalty level to number of plants is much easier than tying it to weight, which requires the plants to be stripped, dried, and submitted to the lab for processing. Complications associated with weight-based penalties include:

- Storing large marijuana plants (sometimes 30,000 plants on large outdoor grows) takes up a significant amount of storage space that most agencies don't have;
- The storage of marijuana is dangerous because of the mold created when drying;
- The lab typically wants a sample, not all the plants; and
- After the marijuana is stripped and dried, the total weight does not accurately represent the significance of the crop.

Travel Manifest

It is important to be able to match the exact load of hemp being transported with the specific travel manifest the driver is carrying. As we have discussed more than once, having a lot number on a manifest does not identify the exact plants or bundles being transported. Requiring that each bundle or plant be marked (in any sequential manner), and that those markings be detailed on the manifest, will help the roadside law enforcement officer easily determine that what is being transported is correctly described on the manifest. Currently, however, the manifest simply identifies a lot number from which the reported hemp came.

24-Hour Accessible Database for Licensed Grow Locations / Manifest Legitimacy

Legitimate hemp producers and criminal suspects do not just transport hemp during regular business hours. As a result, officers need to be able to call or access a database to check the legitimacy of a travel manifest or grow location at any time. This will minimize the liabilities that arise from seizing a load until the legitimacy can be proven.