



LEGISLATIVE UPDATE

Criminal Law

BY KRISTIN ETTER, DAVID GONZALEZ, AND ALLEN D. PLACE, JR.



The 82nd Texas Legislature faced a number of critical issues when they gavelled into session in January 2011. Criminal justice was not considered a critical area needing reform or revision. Despite that fact, lawmakers passed a number of important and timely bills on this subject. If one takes a closer look at some of these bills, it is clear that the “budget crisis” in Texas precipitated several of these new laws. All in all, the criminal justice system was spared major budgetary reductions, especially when compared with other state agencies and services.

Legislation that Improves the Texas Criminal Justice System

- **House Bill 351** and **Senate Bill 462** make it easier for Texans to expunge a criminal record. Prior to this legislation, a person who had a criminal case dismissed was required to wait the statute of limitations period before becoming eligible to expunge the criminal record associated with the dismissed case. This was extremely problematic for felony offenses with long statutes of limitations and certain offenses with no statutes of limitations. Together, H.B. 351 and S.B. 462 eliminate the statute of limitations waiting period for dismissed cases and provides certain waiting periods on uncharged cases (six months for Class C misdemeanors; one year for Class A and B misdemeanors; three years for felony offenses; no waiting period if prosecutor certifies arrest records and files not needed for use in any criminal investigation or prosecution).



- **H.B. 215** requires all Texas law enforcement agencies to adopt and implement a written policy on photographic and live lineup identification procedures. This reform legislation was designed to address the multitude of exonerations that have been made due to eyewitness misidentification. Under the new law, the Bill Blackwood Law Enforcement Management Institute at Sam Houston State University will develop the model policy and best practices for the law enforcement agencies to adopt.
 - **S.B. 122** makes it easier for a defendant to request and receive post-conviction DNA testing of evidence. Under this legislation, a motion for post-conviction DNA testing will be granted if the biological evidence was not previously tested; or the biological evidence was previously tested, but can be subjected to newer testing techniques that provide a reasonable likelihood that the results will be more accurate and probative than the previous test results.
 - **S.B. 1616** establishes statewide uniform guidelines to require that biological evidence be retained and preserved for not less than 40 years, or until the statute of limitations has expired, if there is an unapprehended actor associated with the offense. Because most of the exonerations in Texas have been based on the testing or retesting of biological evidence, this legislation was designed to make such testing more readily available and to address the lack of statewide guidelines for biological evidence retention.
 - **H.B. 2649** authorizes a judge to award “diligent participation credits” for participation in an educational, vocational, treatment or work program for defendants confined in state jail facilities in an amount not to exceed 20 percent of the original sentence. Prior to the passage of H.B. 2649, defendants sentenced to a state jail facility had no option for early release or “parole.” This legislation aims both to ease jail overcrowding as well as to promote rehabilitation.
 - **H.B. 1205** allows qualifying a defendant to receive any combination of time credits toward completion of community supervision by earning a certificate, diploma, or degree; making full payment of court costs, fines, attorney’s fees, and restitution; or completing treatment or rehabilitation programs.
 - **S.B. 198** provides a framework for a hearing on an exemption for sex offender registration for certain young adult sex offenders. *Relating to exempting persons who are convicted of certain sexual offenses from registering as a sex offender in this state.* Previous law required that a defendant who engages in “consensual” statutory rape register as a sex offender for life. Under this legislation, if at the time of the offense the defendant was not more than four years older than the victim and the victim was at least 15 years of age, a court may issue an order exempting the person from registration.
 - **H.B. 3474** and **S.B. 1331** were designed to address one of the tragedies of underage drinking — fatal alcohol poisoning. In conjunction, these bills provide immunity to minors from alcohol-related charges when seeking emergency medical help. Under this legislation, immunity is granted to the first person who requested emergency medical assistance in response to the possible alcohol overdose of the minor or another person if the minor remained on the scene and cooperated with medical assistance and law enforcement.
- ### Human Smuggling and Trafficking Legislation
- **H.B. 260** creates a new state offense of human smuggling under the current unlawful transport statute. This legislation was directed at human smugglers that transport undocumented immigrants throughout Texas. Under the new law, it is either a state jail felony, or third degree felony if committed for pecuniary benefit or if transport was dangerous, for a person to use a motor vehicle, aircraft, or watercraft to transport an individual with the intent to conceal the individual from a peace officer or special investigator or to flee from law enforcement attempting to lawfully arrest or detain the person.
 - **H.B. 3000** creates a new first-degree felony offense, “Continuous Trafficking of Persons.” The new legislation provides that a person commits an offense if, during a period that is 30 or more days in duration, the person engages two or more times in conduct that constitutes Trafficking of Persons offense.
 - **H.B. 2329** provides for issuance of a protective order for victims of trafficking. Under the bill, the duration of a protective order for a victim of trafficking may be lifetime if the court finds reasonable cause to believe that the victim is the subject of a threat that reasonably places the victim in fear of further harm from the alleged offender. If a time is not specified, the duration of a protective order for a victim of trafficking is two years.
- ### New Offenses
- **H.B. 1215** makes it easier to prosecute those who are using modern technology such as credit/debit card skimming machines or telephoto lenses to obtain financial information. This change was necessary because previous law required an intent to harm or defraud another and under this legislation, the act of obtaining the financial information is punishable as a Class B misdemeanor. The punishment is enhanced to a Class A misdemeanor if the information is transferred to a third party.
 - **H.B. 2118** makes the possession of bath salts, or the chemicals contained therein, a felony offense. Prior to the enactment of H.B. 2118, bath salts, perceived as mimics of cocaine, LSD, MDMA, and methamphetamine, were



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marketed as “legal” alternatives to these drugs. Now, possession of bath salts will be punishable from a state jail felony up to a first-degree felony depending on the weight of the substance possessed.

- **S.B. 331** makes the possession of synthetic marijuana, also called “K2” or “spice” a crime. Prior to S.B. 331, “K2” was marketed as a legal alternative to marijuana. Under the new law, possession of “K2” will be pushed from a Class B misdemeanor up to a first-degree felony depending on the weight of the substance possessed.
- **S.B. 407** creates a new offense of “sexting” for minors. Prior to the passage of S.B. 407, Texas teenagers who possessed and sent naked photos were treated the same as child pornographers. In recognition of the absurdity of this, S.B. 407 now provides a reduced crime and penalties for the practice of teen “sexting” — sending or receiving sexually explicit images via mobile telephones. The offense of “sexting” by minors will now be punishable as a Class C misdemeanor unless the minor has prior offenses, which may enhance it to a Class A or Class B misdemeanor. In addition, the new offense will not require that minors register as sex offenders in the state.
- **H.B. 1043** sought to close the loophole in previous cockfighting laws in Texas. While previous law provided prosecution of cockfighting under the general cruelty to animals statute, H.B. 1043 creates a separate criminal offense of cockfighting and expands prosecution of such conduct to include engaging in cockfighting; participating in the earnings of a cockfight; using or permitting another to use property for cockfighting; owning or training a cock with the intent it be used for cockfighting; manufacturing, possessing, or selling implements with intent that they be used for cockfighting; or attending as a spectator an exhibition of cockfighting. The conduct is punishable from a Class C Misdemeanor to a state jail felony.

Penalty Enhancement Legislation

- **H.B. 1199** allows for a first-time DWI conviction to be enhanced from a Class B Misdemeanor to a Class A Misdemeanor if the person’s blood alcohol content is 0.15 or more. This bill also enhances the offense of intoxication assault from a third-degree felony to a second-degree felony if a victim suffered a traumatic brain injury that resulted in a persistent vegetative state.
- **H.B. 1806** provides that a person commits a criminal offense if, with intent to affect the outcome of a fishing tournament, the person alters the length or weight of a fish or the person enters a fish in the tournament that was taken in violation of any provision of this code or a proclamation or regulation of the commission. Under this legislation, an offense is a Class A misdemeanor, except that if the offense occurred during a tournament in which

any prize or combination of prizes to be awarded for any one category, whether prize or prizes are to an individual or a team, is worth \$10,000 or more in money or goods, the offense is a third-degree felony.

- **H.B.3** requires the punishment of life-without-parole for persons convicted of aggravated sexual assault and sexual assault who were previously convicted of sexual assault, aggravated sexual assault, or continuous sexual abuse of a young child or children. Previous law provided the punishment for this conduct was a life sentence, which meant that offenders would eventually become eligible for parole.

Other Highlights

H.B. 25 extends the right to carry a weapon — including a firearm — on a boat or personal watercraft. Under H.B. 25, it remains an offense if the weapon is not hidden from plain view, the person in possession is engaged in criminal activity or a member of a criminal street gang, or the person is prohibited by law from possessing a firearm. This legislation also clarifies that it is legal to carry weapons while hunting, fishing, or engaging in other sporting activities while on or traveling to the immediate premises of activity.

- **S.B. 377** increases the victim age threshold that makes a murder of a young child a capital murder from under 6 years old to under 10 years old.

Conclusion

In the next legislative session, we will undoubtedly face similar budgetary and fiscal crises. However, the silver lining to such budgetary woes may be that our criminal justice system will be forced to continue to reform and more attention can be paid to rehabilitation efforts and policies aimed at lowering recidivism.

KRISTIN ETTER

is a partner in Sumpter & Gonzalez, L.L.P. in Austin. She is certified in criminal law by the Texas Board of Legal Specialization. Etter has represented the Texas Criminal Defense Lawyers Association at the Texas Capitol for the past three sessions.

DAVID GONZALEZ

is a founding partner in Sumpter & Gonzalez, L.L.P. in Austin. He is certified in criminal law by the Texas Board of Legal Specialization. Gonzalez has represented the Texas Criminal Defense Lawyers Association at the Texas Capitol for the past three sessions.

ALLEN D. PLACE, JR.

has been practicing law for 32 years. He is a former member of the Texas Legislature and was House author of the Texas Penal Code. For the past six sessions, he has represented the Texas Criminal Defense Lawyers Association at the Texas Capitol.