Hits & Misses:
A Commentary on the 82nd Legislature

❖ No texting ban

H.B. 242 would have provided that an operator may not use a hand-held wireless communication device to read, write, or send a text-based communication (defined to include text messages, instant messages, and emails) while operating a motor vehicle unless the vehicle was stopped. The offense would have been punishable as a fine-only offense with a fine of not less than $1 or more than $200.

On June 17, 2011, Governor Perry vetoed the bill with the following statement:

> *Texting while driving is reckless and irresponsible. I support measures that make our roads safer for everyone, but H.B. 242 is a government effort to micromanage the behavior of adults. Current law already prohibits drivers under the age of 18 from texting or using a cell phone while driving. I believe there is a distinction between the overreach of H.B. 242 and the government's legitimate role in establishing laws for teenage drivers who are more easily distracted and law providing further protection to children in school zones.*
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> *The keys to dissuading drivers of all ages from texting while driving are information and education. I recommend additional education on this issue in driving safety and driver's education courses, public service ads, and announcements, and I encourage individuals and organizations that testified in favor of the anti-texting language included in this bill to work with state and local leaders to educate the public of these dangers.*

❖ Sexting

S.B. 407 creates a new offense in Section 43.261 of the Penal Code for what is commonly known as "sexting." Under this new law, it is an offense for a minor (defined as under 18 years of age) to intentionally or knowingly: (1) *promote* by electronic means to another minor visual material depicting a minor, including the actor, engaging in sexual conduct, if the actor produced the visual material or knew that another minor produced it, or (2) *possess* in electronic format visual material depicting another minor engaging in sexual conduct, if the actor produced the visual material or knew that another minor produced it. Sexual conduct means sexual contact, actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sadomasochistic abuse, or lewd exhibition of the genitals, the anus, or any portion of the female breast below the top of the areola.

The bill creates an affirmative defense for sexting between minor spouses or between minors within two years of age who were dating at the time of the offense. The law also provides a defense to prosecution to protect an innocent recipient of an unsolicited sext if the minor recipient destroyed the sext within a reasonable time of receiving it.

S.B. 407 amends Section 51.08 of the Family Code to *require* a court in which there is pending sexting complaint against a child (under 17 years of age) to waive its original jurisdiction and transfer the case to juvenile court. The bill also amends Section 51.03(b) to specify that a violation of this offense constitutes conduct indicating a need for supervision (CINS).

For 17-year-old minors, both the promotion and possession offense is a Class C misdemeanor (maximum fine of $500), but the penalties are enhanced for repeat offenses (and capped at a Class A misdemeanor).

Notably, the bill makes Article 45.0215 of the Code of Criminal Procedure requiring a child defendant to appear in open court with a parent, also apply to a 17-year-old defendant who has been charged with a sexting offense. The bill also makes the expunction provisions in Article 45.0216 apply to a 17-year-old who was convicted only once of the sexting offense.

❖ **New illegal substances (K2 and bath salts)**

H.B. 2118 and S.B. 331 both amend Chapter 481 of the Health and Safety Code (the Controlled Substances Act) to cover bath salts and K2, respectively. Bath salts are added to Penalty Group 2, while certain synthetic cannabinoids are added to new Penalty Group 2-A. The manufacture and sale of these drugs carry the same penalties, but possession of synthetic cannabinoids carries a lesser punishment. Possession of two ounces or less is a Class B misdemeanor.

❖ **New penalties for witness tampering**

H.B. 1856 attempts to provide a better level of protection to citizens who have witnessed and reported crimes by increasing the penalties associated with witness tampering. Under previous law, Section 36.05 of the Penal Code, the intimidation or coercion of a witness is a state jail felony, which does little to deter a defendants accused of capital, first, second or third degree felonies from intimidating witnesses. The new punishment for witness tampering corresponds to the most serious criminal offense that is charged in the case and is the basis of the intimidation. Witness tampering in non-criminal cases (i.e., divorce or probate proceedings) is now a third-degree felony. This now means that witness tampering in a Class C misdemeanor is only a Class C misdemeanor.

❖ **Age limits for certain child offenses**

H.B. 359 creates exceptions to the application of the offenses of Disruption of Class and Disruption of Transportation under Sections 37.124 and 37.126 of the Education Code if the student is in the sixth grade or lower at the time. The same exception applies to the Disorderly Conduct offense in Section 42.01 of the Penal Code (involving language, gestures, odors, noise, and fights) if the person engaged in the conduct was in the sixth grade or lower and the conduct occurred at a public school during school hours. Disorderly conduct involving abuse, threats, or the discharge of a firearm does not contain this exception.

S.B. 1489 adds an age requirement to the elements of the offense of Failure to Attend School under Section 25.094 of the Education Code. The defendant must be between the ages of 12 and

17 (inclusive) at the time of the offense. Students that are 10 or 11 years old may only be dealt with in juvenile court, and students age 18 or older may not be criminally prosecuted.

❖ Uncertain state of license plate laws

H.B. 2357 reorganized Chapters 501 (titling of vehicles), 502 (registration of vehicles), 504 (license plates), and 520 (miscellaneous provisions) of the Transportation Code. In removing all license plates offenses from Chapter 502 and placing them in Chapter 504, the offense of not having two license plates on your vehicle was moved to Chapter 504, without a penalty. For more on this, read the accompanying article "The State of License Plate Laws in Texas."

❖ Driver license bills

Three bills affected the Driver Responsibility Program. H.B. 2730 (passed by the 81st Legislature but not effective until September 1, 2011) made numerous changes, among them: mandating that DPS send no less than three notices to a surcharge holder and prohibiting DPS from suspending a license for at least 105 days; mandating that DPS not enter into any payment plan agreements with surcharge holders requiring them to pay surcharges of $500 or more in less than 36 months, of $250-$499 in less than 24 months, and of $249 or less in less than 12 months; requiring DPS to create a "good driver" program where for every year a surcharge holder goes without accruing more points, a point will be deducted; and requiring DPS to create an indigency program where courts can notify DPS of a surcharge holder's indigency status and DPS will then waive the surcharges.

H.B. 588, passed this session, speaks to the payment plans addressed above. Once DPS assesses a surcharge, holders must pay that surcharge over the course of one to three years. Until now, holders had no option to pay the money up front and get out from under the surcharge program. Now DPS shall notify the holder of the advance payment option when assessing a surcharge.

H.B. 2851 allows for a deferral of the surcharges by tolling the 36 month length for active military personnel who are deployed. This only applies to the automatic surcharges assessed for driving without a valid license, driving while license invalid, or failure to maintain financial responsibility.

H.B. 1514 allows for veterans to apply to DPS to have a designation on their driver's license. S.B. 1292 allows for peace officers to apply to DPS to have an alternate address shown on their license that is within the municipality or county of their employment.

❖ Traffic safety bills

H.B. 1199 creates an "aggravated DWI" offense by adding an enhancement to the DWI statute in the Penal Code. If it is shown on the trial of the offense that the defendant's blood, breath, or urine analysis showed an alcohol concentration of 0.15 or higher, the offense is a Class A misdemeanor (up from a Class B misdemeanor). Intoxication assault, generally a third degree felony, can be enhanced to a second degree felony if it is shown at trial that the defendant caused a traumatic brain injury to another that results in a permanent vegetative state.

S.B. 1608 adds an enhancement to Section 521.025 (License to be Carried and Exhibited on Demand) of the Transportation Code. If it is shown at trial that at the time of the offense the driver was also in violation of the requirement to maintain financial responsibility and caused a crash resulting in serious bodily injury or death to another, the offense in a Class A misdemeanor (up from two separate Class C misdemeanors). Note that this enhancement does not apply to Section 521.021 (License Required).

H.B. 378 amends the law on passing an authorized emergency vehicle to be applicable to a stationary tow truck using authorized equipment. A vehicle operator approaching a stationary tow truck that is stopped alongside a road must vacate the lane nearest the truck or reduce speed by 20 miles per hour (or to 20 mph if not other lane exists).

H.B. 2981 creates a new offense to operate on a highway or street a motor vehicle that is drawing a boat or personal watercraft in or on which a child younger than 18 years of age is riding. A defense to prosecution exists if the person operates the motor vehicle that is towing the watercraft on a beach, in a parade, or in case of emergency. The offense is a Rules of the Road offense with a $1-$200 fine range.

H.B. 1116 creates a new offense to (1) use, attempt to use, install, operate, or attempt to operate a radar interference device in a motor vehicle operated by a person or (2) purchase, sell, or offer for sale a radar interference device to be used in a motor vehicle operated by a person. A radar interference device is defined as a device, mechanism, instrument, or piece of equipment that is designed, manufactured, used, or intended to be used to interfere with, scramble, disrupt, or otherwise cause to malfunction a radar or laser device used to measure the speed of a motor vehicle. The offense is a Class C misdemeanor. This does not, however, criminalize the mere possession of such a device.

H.B. 1201 and H.B. 1353 both raise the maximum speed limits allowed under law. The Texas Transportation Commission can raise the speed limit up to 85 mph on state highways, if the portion of the road is designed to accommodate that high of a speed, and after an engineering and traffic investigation, the commission determines the higher speed is reasonable and safe. The maximum speed limit on state highways or U.S. highways outside an urban district is raised to 75, and cities not have the authority to establish a speed limit of up to 75 mph (instead of a max of 60) provided it does not violate maximum speed limits under state law and the city conducts the appropriate traffic study. All nighttime and truck speed limits have been removed and cities cannot enact two different speed limits for nighttime or truck driving.

❖ Confidentiality of juvenile records

H.B. 961 adds two new provisions to the Code of Criminal Procedure. Article 45.0217 provides that all records and files, including those held by law enforcement and all electronically stored information, relating to a child who is convicted of and has satisfied the judgment for a fine-only misdemeanor offense other than a traffic offense are confidential and may not be disclosed to the public. The language in Article 45.0217 parallels the language in Title 3 of the Family Code, which protects records relating to juvenile conduct when adjudicated through the juvenile courts.

H.B. 961 also adds Article 44.2811 to the Code of Criminal Procedure, and addresses the confidentiality of records on appeal from a municipal or justice court. On appeal from a municipal court of non-record or justice court, confidentiality will apply under Chapter 44 only if the child is again convicted and satisfies the judgment. If the case is dismissed upon appeal or the child is acquitted, there will be no confidentiality. Likewise, confidentiality will only apply to records relating to a case appealed from a municipal court of record if the judgment is affirmed; if the judgment is reversed, there will be no confidentiality. In either case–appeal from a record or non-record court–confidentiality is only triggered upon satisfaction of the judgment.

The bill adds a similar provision to Chapter 58 of the Family Code, which previously exempted records in a municipal or justice court from the traditional juvenile confidentiality.

❖ **New laws for discharging fines**

Juvenile cases:

Both H.B. 1964 and H.B. 350 create a new Article 45.0492, Code of Criminal Procedure.

H.B. 350 - Under the new law, in addition to allowing children convicted of Class C misdemeanors to discharge any fines and costs through community service, a judge may also allow a child to discharge the fines or costs through tutoring. This can only occur if a defendant younger than 17 years of age is assessed a fine or costs for a Class C misdemeanor that occurred in a building or on the grounds of the primary or secondary school at which the defendant was enrolled at the time of the offense. The rate at which a child will discharge the fines or costs is not less than $50 for each 8 hours of tutoring or community service.

H.B. 1964 - Under this new law, a judge may allow a child convicted of a Class C misdemeanor to discharge fines or costs through community service without considering the child's resources and without waiting for a failure to pay. Notably missing from this new article is the clause providing a minimum discharge of $50 for every eight hours worked as is included in two other articles dealing with community service in Chapter 45.

All other cases:

H.B. 27 amends Articles 42.15 and 45.041 of the Code of Criminal Procedure by ensuring that defendants unable to immediately pay a fine and costs are allowed to make payments in specified portions at designated intervals. This bill is not intended to impede or prohibit a court from allowing a defendant to discharge fines and costs by performing community service. Rather, it is intended to guarantee that once a judge makes the determination that a person is unable to immediately pay, the defendant is guaranteed a payment plan.
New procedures for the recusal/disqualification of judges

S.B. 480 repeals Section 29.012 and replaces it with a comprehensive series of procedures located in Subchapter A-1 of Chapter 29 of the Government Code. These rules are adapted from

Texas Rule of Civil Procedure 18A and can be used in any kind of criminal or civil case in which a municipal court has jurisdiction. See the following chart for more on this process.

❖ New procedures for the recusal and disqualification of municipal judges

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❖ Combining municipal courts

H.B. 984 amends Section 29.003 of the Government Code and the Article 4.14 of the Code of Criminal Procedure to authorize two contiguous municipalities, or two municipalities with boundaries that are within one-half mile of each other, to enter into an agreement establishing concurrent jurisdiction for the municipal courts of either municipality in all cases in which the courts have original, concurrent, or appellate jurisdiction and in cases arising from offenses related to the seizure of cruelly treated animals or the failure to attend school. The bill specifies that a municipal court in either municipality has original jurisdiction in such a case.

❖ Administrative issues

H.B. 1658 amends Article 17.02 of the Code of Criminal Procedure to require that any cash funds deposited as bail be receipted by the officer receiving the funds and, on order of the court, be refunded, after the defendants complies with the conditions of bond, to (1) any person in the name of whom a receipt was issued, in the amount reflected on the face of the receipt, including the defendant if a receipt was issued to the defendant; or (2) to the defendant, if no other person is able to produce a receipt for the funds. This bill attempts to protect the financial interests of people who post bonds on behalf of defendants by providing that the money if refunded to the person who posted the bond.

H.B. 1573 amends Article 17.085 of the Code of Criminal Procedure, titled "NOTICE OF APPEARANCE DATE." Now, the clerk of a court that does not provide online Internet access to that court's criminal case records shall post in a designated public place in the courthouse notice of a *prospective* criminal court docket setting *as soon as the court notifies the clerk of the setting* rather than the existing language of "not less than 48 hours before the docket setting."

❖ Increasing the authority of jailers

H.B. 1070 creates Article 17.025 and amends Article 17.20 of the Code of Criminal Procedure to allow a jailer to take a defendant's bond in a misdemeanor case. The jailer must be licensed under Chapter 1701 of the Occupations Code (by TCLEOSE).

S.B. 604 adds Article 2.31 to the Code of Criminal Procedure and authorizes a jailer, licensed under Chapter 1701 of the Occupations Code and who successfully completes a training program

provided by the sheriff, to execute lawful process issued to the jailer by any magistrate or court on a person confined in the jail at which the jailer is employed. Process includes: a warrant under Chapter 15, 17, or 18; a capias under Chapter 17 or 23; a subpoena under Chapter 20 or 24; or an attachment under Chapter 20or 24.

❖ Keeping up with the Joneses

H.B. 976 amends Article 15.03 of the Code of Criminal Procedure, authorizing the use of technology to more quickly obtain an arrest warrant or summons by enabling a person to appear before and communicate with a magistrate through an electronic broadcast system. The bill requires that a recording of the appearance be preserved until the defendant is either acquitted of the offense or all appeals relating to the offense have been exhausted.

S.B. 1331 and H.B. 3474 provide an exception from the application of minor in consumption or minor in possession offenses in Chapter 106 of the Alcoholic Beverage Code by creating a "safe harbor" that only applies to the *first* minor to request emergency medical assistance in response to the possible alcohol overdoes of the minor or another person if they remain on the scene until the medical assistance arrives and cooperate with medical assistance and law enforcement.

❖ Expanded uses for the court security fee

H.B. 2847 adds a new Subsection 102.017(d-1)(6) to the list of authorized items that the funds can be expended on to include video teleconferencing systems. This renumbers the remaining items in the list, without regard to the next amendment. The rest of this bill pertains to witness testimony in grand jury proceedings, the taking of a nolo contendere or guilty plea in a criminal proceeding, or inmate witness testimony.

S.B. 1521 adds Subsection 102.017(d-1)(12) to the list of authorized items that the funds can be expended on to include warrant officers and related equipment.