

Scott: The following is the second ever Grits for Breakfast Podcast here on September 8, 2011 with Jeff Blackburn.

Hi this is Scott Henson with Grits for Breakfast and I'm here with Jeff Blackburn, an Attorney for Amarillo who's also the Chief Legal Counsel for the Innocence Project of Texas. My employer and he's here today as a guest on Grits. And we're going to talk about a couple of subjects. First off, tickets and misdemeanors: What are the budget implications for counties of the new state budget and budget cuts and unfunded mandates at counties. Jeff how are you doing this morning?

Jeff: Well I'm doing great Scott. Thanks a lot for having me.

Scott: All right, so what are your thoughts this morning? You were pretty animated on the subject of counties, traffic tickets, and revenue generation. Let's hear where you're at.

Jeff: Well I think the first thing we need to remember is that, that, you know, a lot of us are inclined to think of Texas as a backward place, a place that's not really in line with the times. The truth is, economically and financially we're on the cutting edge of failed states everywhere. As we see the euros un-collapse as under a mountain of debt, the United States collapse under a mountain of debt, so are we. And the problem is, that we don't seem to know that here, you know, Perry's budget that he got done last time conveniently and pretty much secretly shoveled a lot of debt onto counties that have already been shoveling their own citizens into a pile of debt for a long time.

And, you know, and get very technical but people need to understand this, counties have been free to borrow money on their own and they've been able to do it. It's like teenagers with a credit card and no limit on it. They have borrowed and borrowed and borrowed, you've covered plenty of it in grits with these stupid jails that they've built, that they have no way to get anybody into.

Now, so here's what we've got, we've got a state budget that shrunk but made itself look okay mainly by virtue of just shoveling, you know, the problem onto counties. We've got counties who are already cashed strapped and some of which are basically functioning like Greece now okay, you just can't pay it back. And here's what's going to happen and I think already is and we've got listeners statewide and I invite you to look send a comment into Scott and report, we need to know.

Scott: Thanks for that.

Jeff: Anytime, well you're the one that wants to blog right? You know, I got to tell you, what we're going to see, what I'm already seeing in my own home county is a

great, great intensification of people being accused of penny ante crimes, misdemeanors like Class B's and A's. You know why? Because in those cases, unlike felonies, the county gets to keep the fine money. People don't know that, the county keeps the fine money.

The other big advantage they've got is that you don't necessarily have a right to a lawyer in those cases. You know, you do, but there are a lot of ways to trick people into thinking that if they plead guilty on their own everything will be fine. And I would say based on what we've learned over at the State Bar and that committee that I chair, probably about 60% to 70% of pleas to Class B and A, these are serious misdemeanors that wind up as you've noted on the blog many times, setting a person up for a much more serious crimes later on or accusations later on. Sixty to 70% of these cases are being handled without lawyers. That's a lot of cases, but it's also a lot of money for the counties.

So I'm going to make a prediction here, that is that by a year from now by next September we will see a huge up tick in misdemeanor prosecutions. We will see a huge up tick in the number of misdemeanor cases that are not being represented or handled by lawyers. Therefore, lots of convictions, lots of fines in a desperate effort for counties to raise money, they're going to try squeezing every stone they can.

Scott: And I suppose they'll also be going back and we're already seeing this to look for scofflaws and try and squeeze money out of their past cases. In Dallas they're diverting officers and deputies to that already and I'm sure it's going to happen elsewhere to.

Jeff: Well, you know, what's interesting is there comes a point where this just doesn't work. And I think you pointed this out on the blog before. I mean there.

Scott: You can't get blood from a stone.

Jeff: You really can't and the problem is that if you approach the bench and he goes okay, well we want \$1,000 fine or you're going to jail and what they say is, okay I'll just go to jail. Then the county has to go, oh wait a minute we didn't really mean that. Because they can't really put people in jail like that they don't have the room except in these counties that are so broke that they've built huge, giant jails like Lubbock and some of the rest of them.

Scott: Yes, so where no one lives they've got plenty of jail space.

Jeff: Yes.

Scott: Littlefield.

Jeff: Littlefield, but look, you know, we can joke about it, but I'm going to tell you it's not a joke for the thousands, tens of thousands I think hundreds of thousands of people that are going to get accused of BS crimes like evading arrest or failure to identify yourself to a police officer or all kinds of stuff that's really basically a ticket level crime that is going to be booted up so that the county can make money. The word is out they've got to raise the money and we're going to see a lot more of this.

You know, Scott these budget implosions that we're talking about are not just limited to counties every political subdivision of the state is going to start suffering these things because they're running out they don't have any money and they can't really effectively raise taxes anymore because people won't let them. Most of these places are run by red meat Republicans who have promised everybody they'd never raise taxes under any circumstance ever anyway. So we're going to start seeing this with cities, you're going to see a lot more parking tickets issued, you're going to see bigger fines, you're going to see a lot of classy misdemeanors being prosecuted. City courts are going to become really hopping places in the next couple of years because it's a huge revenue raiser for the government.

So I think we all need to, you know, fasten our seat belts not just to avoid getting a ticket for not doing so, but also as we watch government around as we know it all around us kind of gradually implode it's going to get taken out on us the little guy.

Scott: Well and that's part of what's driving the creation of all these new petty Class C offenses, it's why people think everything from texting to using your cell phone to everything else to be illegal. Yes, it's distracting - a lot of things are distracting - but they need to find more ways to make currently legal behavior illegal because that's more revenue, that's driving ticket [writing] and I really think that that's a lot of why that is such a go to move. There may be other ways to address those problems, to get people to not text while they drive, but the method they have chosen is this because it generates money. And that's what's going on and why they've chosen this tactic for seemingly every social problem under the sun.

Jeff: And it's so cynical I mean, you know, the people that are proposing this legislation show up with a straight face at every session of the legislature and solemnly tell everybody that if only we can have a ticket you have Class C misdemeanor or a Class B or a Class A that suddenly everybody's life is going to get better and no one will ever text while they're driving again and we know better than all of that. What they're up there to do is raise money for their respective constituencies whether it's city governments or county governments and we're going to see a lot of that. But, you know, it's look it's Texas we're use to that kind of cynical political ploy.

Scott: All right, well let's switch gears and talk about innocence issues since that's what you and I work together on. And we know the legislature passed quite a bit over form legislation in 2011 and 2009 we've seen eyewitness ID legislation pass. We saw the expansion of access to Chapter 64 testing, DNA testing. We've seen compensation expanded and then people like Anthony Graves being allowed to get compensation and so there's been a lot of work done on innocence issues. Let me ask you to talk about what still needs to be done? What are the big issues that we need to be focused on that legislature needs to be focused on going forward to keep as many people as we've seen from being falsely convicted and going to prison, in some cases for two or three decades at a time?

Jeff: Well look, the most important thing to understand in this discussion, when you try to figure out what the priorities are, what we ought to be doing next, and where the problems are, is that you have to understand that in Texas, we have a completely, utterly dysfunctional court system. And actually it's wrong to say it's dysfunctional. It's very functional. That's the problem. Its function is wrong. We have a court system that is not neutral or detached. That doesn't care about the law. The tone is set at the Court of Criminal Appeals. It's carried down through most of the appeals courts, and then down into most of the district court level judges. So what we've got is really, I mean, people, like, well, I don't know why you would focus so much on the legislature. It's like, well where else would we focus? Going to the Court of Criminal Appeals and trying to get them to do the right thing is a lot like going to a Klan rally and asking them to support the Civil Rights Act.

Scott: Now, now, now.

Jeff: No, no. I'm serious. Look. It's just a waste of time. And I'm frustrated with them because, of course, I'm a lawyer and I would like to believe that all the stuff I learned in law school about the courts being fair and above the fray and passing on the constitutionality of laws is right, but it's not. And I think that the hardest thing that we've got to come to grips with is, lawyers are the only people that can get innocent people out of prison. The truth is, we're also the most hamstrung in doing anything because the courts are not the place to do it. Now let me give you an example so I'm not just talking in vague generalities. The Court of Criminal Appeals decided a case about two months ago out of the Montgomery County that in the whole panoply of hideous decisions that they've made for years, decades, ranks as one of the worst. The case is called Ex Parte Robbins. Bottom line: This was a junk science case and a case involving a guy that got 99 years for suffocating a baby. Six, seven, eight years later, his lawyer, Brian Wice, an excellent lawyer out of Houston, manages to get the expert. Now, think about this. Follow me on this. The expert witness

pathologist who testified for the government to get the guy convicted says, "I was wrong."

Scott: Pretty rare.

Jeff: This is a writ lawyer's wet dream. This is what I want. Okay? You know what the Court of Criminal Appeals says about that? I'm cutting that, I could go on in detail, but the bottom line, so what. That's what the Court of Criminal Appeals says. That conviction was affirmed. They played a shell game with standards of law. It would take me 30 minutes to explain why this decision is wrong, but I can tell you, it might take 30 minutes to explain it from a lawyer's point of view, but it takes 30 seconds to understand why it's wrong. You had the expert say, "I testified falsely. It created a false impression." The jury, you had the Court of Criminal Appeals saying, "So what."

Scott: Right.

Jeff: Now, what does that mean? Well, it means that you can forget about bringing junk science cases in the Court of Criminal Appeals from now on out. Forget it. Just forget it. All the lawyers, and I'll address this to all of my fellow lawyers out there, you're wasting your time. It's not going to work. Not. What does that mean for us? Well, there's only one place left to go, and that's the legislature. And I think that the legislatures been the go to place for anything good in the Texas criminal justice system for the last 10 years.

Scott: Which is a strange comment, but there it is.

Jeff: Well, it tells you a lot about the courts, okay. It tells you that – I mean, when the Texas legislature, which has proudly always fully represented the fools and idiots that make up our fine state by being a body of fools and idiots, and I was Carl - yeah, it was Carl Parker that said that, I think. Not just me.

Scott: Try not to pander your audience.

Jeff: All right. But still, look, when you've got to look to the Texas legislature to save the system, you know that things have gone seriously, totally wrong somewhere. But that's the way it is, and that's the best we can do, and you know what, so far it's kind of working. It's working a lot better than taking cases to the Court of Criminal Appeals. So, boiled down, what does it mean? We have got to make a case, and we are going to make a strong push for anti-junk science legislation in the legislature. The good news is the Court of Criminal Appeals every year manages to make itself

so it looks so bad, that the Legislature feels like it's got to do something about it, and I think this is going to be another one of those circumstances.

Scott: Now, they haven't been completely out to lunch on the junk science cases. I'm thinking about the dog scent case that Barbara Hervey authored. What are the distinctions between Robbins and that case as far as getting junk science cases through the court criminal appeals?

Jeff: When you have a problem with those dog scent cases, the way it stands right now legally, you couldn't get somebody out on a writ - in other words, somebody whose appeals are already gone. The difference in that case was they took a very narrow approach. The objections had been made correctly, which they usually aren't in criminal cases.

Scott: Right. It was all done on direct appeal.

Jeff: They made sure it didn't apply to anybody. The court system doesn't even want people convicted on dog scent cases to get out. That's really horrifying. Because I can't think of anything junkier in the world of - and it's not even right to call that junk science. That's just junk.

Scott: Well, like I said, to give credit, that opinion is being interpreted to basically scuttle that evidence by the lower appellate courts.

Jeff: In current cases, but let me tell you, you're not going to be anybody out of prison on that, and you know what? Following the rules of this new case, Ex Parte Robbins, if I had a dog scent case, I would - even if we got Keith Picou on the stand to say, "Okay, I made it up."

Scott: Right.

Jeff: That's the dog scent guy incidentally listeners.

Scott: So it's a function of the different standard for habeas cases. The dog scent case was on direct appeal and in habeas cases the higher standard applies.

Jeff: That's right. It's because the Court of Criminal Appeals is petrified of letting people out of prison. And it's really true, they are. They have a belief, I think, that every exoneration discredits the system, which, of course, it does. But they can't stand that idea, and these people are propping up this falling house of glass cards all the time, and the only way they know to do it is, stop these cases from being brought.

Scott: Now, now, Rick Perry says that every exoneration proves that the system works. We've got to believe, Jeff, we've got to believe.

Jeff: It does prove that the system works. Unfortunately, it proves that the system works very poorly.

Scott: And rarely.

Jeff: And rarely.

Scott: All right. So we've talked about writ reform and junk science. What else needs to be done? What other issues are out there that Texas needs to address?

Jeff: Well, of course there are some fires that we need to put out, but, that's okay because thank God climate change is a hoax, right? Because otherwise it would be really hot and the fires would be really, really bad.

Scott: Right. Right.

Jeff: But, seriously, look, the criminal justice system, and I've said this those few times I was allowed to say things in writing on your blog, but the criminal justice system is a barometer of everything else. And I think that as the money runs out, which it is, and I think as times get harder, which they are, we're going to see people get uglier about the criminal justice system. And here's the part where I get everybody excited about the future. Getting reforms accomplished are going to get harder and harder. Times are going to get uglier. And feelings are going to get nastier. And I think we're in for a period of increased verdicts, punishment verdicts, and increasingly closed courts, even at the district court level, to not just claims of innocence, but to defenses being advanced by people accused of crime.

Scott: All right. Well on that happy, optimistic note, thanks Jeff for visiting with me this morning

Jeff: Yeah, and I hope everybody has a good fall too, okay?

Scott: Thanks for listening to the second-ever Grits for Breakfast podcast on September 28, 2011, and thanks to Jeff Blackburn for joining me. If you liked this share it with your friends and colleges, and until next time, thanks for listening.

Transcribed by: www.idictate.com; edited by Scott Henson.