

Boom! Lawyered: Mailbag Edition

- Imani Gandy: Hello, fellow law nerds! Welcome to another episode of Boom! Lawyered, a Rewire.News podcast hosted by the legal journalism team, half of which has been binge watching Survivor for about a month now. Please send help. I'm Imani Gandy.
- Jessica Pieklo: And I'm Jess Pieklo. Rewire.News is dedicated to bringing you the best reproductive rights and social justice news, commentary, and analysis on the Web. And the Team Legal podcast is part of that mission. So a big thank you to our subscribers, and a welcome to our new listeners.
- Imani Gandy: Today we thought we'd shake things up a little bit and do a Mailbag Episode. We asked you to post some question in our Facebook group, Boom! Lawyered ... which you should totally join, by the way ... and we're going to answer some of those questions. Let's get to it.
- Imani Gandy: First up, we have a question from Tracy. And they ask us, "Are we ever going to see our way out of this horror show we are in? Or is this the end? Is this it?"
- Imani Gandy: Well Jess, I'm going to let you take that. 'Cause my answer's gonna be like, "Oh, God."
- Jessica Pieklo: Oh, no, it's hard to see the end right now. I got to say this question, the first thing that popped into my mind, because I'm in full nihilism mode, is the scene in Armageddon when the two shuttles are like, and the one ends up crash landing on the asteroid, and the copilot is like, "This is it!" He's coming to terms with his death. I don't think we're there yet.
- Imani Gandy: So you're saying, "We're not astronauts hurtling towards an asteroid in outer space." Okay, good. That's it.
- Jessica Pieklo: No. It's bad, but it could be worse.
- Imani Gandy: Okay. Okay. So we're not going to have pull a Bruce Willis.
- Jessica Pieklo: I do. I think for example, but there's some tangible things. I am taking hope for example in the fact that reform to the Supreme Court and the federal judiciary is not just a throwaway talking point among Democratic candidates right now. That this is something that is serious in terms of addressing policy. That is one thing we're going to have to do.
- Jessica Pieklo: The idea that folks like Elizabeth Warren are out there saying, "Hey, you know what? We may have to restructure the Court," I think is a sign that there are folks with positions in power who do understand the gravity of the situation. It's going to be a while, but we do, and can, if we've got the will, to see our way out of it.

Imani Gandy: I'm going to agree with Jessica, but just say that it is going to be tough.

Jessica Pieklo: Yeah.

Imani Gandy: The road ahead is fraught with peril. We don't want to sugarcoat it, but at the same time-

Jessica Pieklo: No.

Imani Gandy: You gotta remain a little bit optimistic. Otherwise, it's like, "Why not just defenestrate yourself?"

Jessica Pieklo: Seriously. I think Imani and I have both said that we think 2019, especially, is going to be a rough year. So everybody be real good to yourselves.

Imani Gandy: Yes. Please.

Jessica Pieklo: But there are pathways out, and we're starting to find them, I think.

Imani Gandy: Next up, we have a question from Rosita, who asks us, "How can we get around recent FDA restrictions on Mifepristone and other abortion pills mailed from abroad, and for more liberal states to southern states with more restrictions?"

Jessica Pieklo: Wow, this is a great question.

Imani Gandy: It's an excellent question. First, we have to say, we cannot advise you to break the law.

Jessica Pieklo: Don't.

Imani Gandy: We're not going to advise you to break the law. That said, there are groups out there that do deal with this sort of thing. There's an organization called Women Help Women. You can go to their Web site, www.abortionpillinfo.com.

Imani Gandy: What they're going to do, they're going to let you know that there are many states in which the law requires that abortion pills be provided to you by licensed healthcare clinicians. Even though it doesn't seem like that's necessary, because it's a pretty easy ... you take a pill, and the next day, take another pill. It's not that fucking hard.

Imani Gandy: But, you know how it is when it comes to restricting the ability of people of reproductive rights age to access these healthcare options. Women Help Women, they will guide you through what you need to do in order to get abortion pills; what you need to do to avoid breaking the law; and please, we must reiterate, don't break the law because women have been arrested-

Jessica Pieklo: Yeah.

Imani Gandy: ... for using these pills. And they have been jailed for using these pills. It's a very treacherous area to be in. It's unfortunate we don't live in Poland, where they're dropping abortion pills from drones, because that would be amazing if we could have that sort of infrastructure here.

Imani Gandy: But we don't. So if you're overseas, you probably have more options. If you're listening to us in America, in North America, which I mean the United States, I would suggest you go to abortionpillinfo.com.

Jessica Pieklo: Also, I would just add to that that it's possible to have multiple doses of Plan B on hand. And that's still, for now, over the counter. Obviously, a much shorter window of efficacy in when you can use it. But, it is something that is just maybe not a bad idea these days.

Imani Gandy: Absolutely. Thanks for the question, Rosita.

Jessica Pieklo: Yeah. Excellent.

Imani Gandy: Next up, we have a question from Mike, who asks, "Do you foresee any action being taken against Spuds McKavanaugh?"

Jessica Pieklo: That's a good one.

Imani Gandy: Do you foresee any action being taken against Spuds McKavanaugh for the allegations of perjury and inappropriate action that came up during his confirmation hearing? Jessica.

Jessica Pieklo: Oh. No. So we're in a bad spot here with this. First of all, we don't have any ethical rules that apply directly to sitting Supreme Court justices. With no ethical canon to fine them, we don't have that kind of enforcement mechanism.

Jessica Pieklo: Now, and nothing that happened in terms of the professional responsibility complaints that got kicked over to the 10th Circuit, those have all gone away once Spuds McKavanaugh was confirmed.

Jessica Pieklo: That said, we do have political options. Again, elections have consequences; Democrats are in charge of the House, and there was a lot of unanswered questions from Kavanaugh's confirmation hearings. Who paid off all those debts, for example? If we have investigatory power, and if we learn things through that process, we may have political will to get him off the bench.

Jessica Pieklo: But those are a lot of things that have to line up. Frankly, there's got to be a big stomach for that fight. Democrats have a bunch of fights that they're going to have; I don't know where that falls in their priority. I don't know, Imani; what do you think?

Imani Gandy: Yeah, no. I just, no. I don't think so. I think it's really interesting ... Well, first of all, there are some ethical rules that I think that Roberts is considering.

Jessica Pieklo: Yeah.

Imani Gandy: There are some rules that may be put in place. Whether those rules will be retroactive or not, is a question. It could be that Spuds is just grandfathered in, and whatever shit that he did during his confirmation hearing is off the table.

Imani Gandy: But yeah, as Jess said, the Democrats, I don't think they have the stomach for this particular fight, because they have so many other fights. And I think that, I'm not sure if this is happening, but it seems to me that either Roberts is keeping Spuds quiet, or Spuds has decided to keep himself quiet for a while, in order to let all of the bad juju from the confirmation hearing pass over.

Imani Gandy: I think, and I'm not sure. Jess, you may disagree. I haven't actually floated this with you. But I think it's interesting that the court hasn't taken any of those Title VII cases this term.

Imani Gandy: Because I feel like they're trying to give Kavanaugh ... they haven't yet, anyway. It seems like they're trying to give Kavanaugh a year to just get comfortable before he comes in on his second term and starts just decimating rights. Which I honestly think is on the horizon. I think we're stuck with Spuds.

Jessica Pieklo: We are stuck with Spuds. I think, though, I do think, Imani, you're right, that with all of the drama around the confirmation fight, and just the court in general. We've got an administration that is like, "Aw, fuck it, I'm just gonna go straight to the Supreme Court. Who cares about proper appellate procedure?"

Jessica Pieklo: With all of that kind of stuff happening, I do really think that Chief Justice John Roberts has tried to pump the brakes a little bit this term. I think, frankly though, that's going to be next to impossible for him to do next term. Even if they don't take a bunch of high-profile cases, or if they only take one or two.

Jessica Pieklo: I just think that we saw Kavanaugh's personality in that confirmation hearing. We saw that rageful, angry man and you just can't contain that. We'll see. Unfortunately, yeah, we're stuck with him.

Imani Gandy: Yeah.

Jessica Pieklo: Hooray.

Imani Gandy: That ragefulness that was aimed directly at Democrats.

Jessica Pieklo: Yeah.

Imani Gandy: Do you remember where he was yelling about Democrats and Hillary Clinton is behind all of this? I have not forgotten that.

Jessica Pieklo: Oh. Yeah. Yeah.

Imani Gandy: But I suspect a lot of Americans will have forgotten that, by the time he starts being like, "Sure, it's okay for employers to fire you if you're gay," and that sort of thing.

Jessica Pieklo: Unless we think ... I'll just go into the weeds real quick on, because I can't help myself lest we think that was a one-off Kavanaugh thing, being pissed at the Clintons. This week in the court, we got a big immigrant rights decision that said effectively, immigrants can be held indefinitely, and then grabbed by ICE. We haven't covered that extensively at all.

Jessica Pieklo: We've got a little bit of coverage of it over at Rewire.News on the site. But in his opinion, Kavanaugh blames Clinton for the statute! We will see this kind of weird ugly partisanship from him next term, and I don't know.

Jessica Pieklo: Maybe, to get back to the question of whether we're stuck with him, maybe enough partisanship and some stuff, if there is some subpoenas and investigations that happen, I don't know. It's been a wild couple of years already. I didn't think we'd be this far. Who the hell knows, right, Imani?

Imani Gandy: Yeah. Seriously. Who the hell knows. Thank you for that question, Mike. Our next question comes from Erin, who asks us, "Are there any laws we're stuck with forever and ever amen, that once declared, cannot be undeclared?" They go on to say, "I guess I need reassurance that this current shitshow can be fixed." Jessica ...

Jessica Pieklo: It can be fixed. Statutes can be written, they can be amended ...

Imani Gandy: Thank you ...

Jessica Pieklo: Hell, even the Constitution can be amended-

Imani Gandy: Yep.

Jessica Pieklo: ,, if we get really into it. Things can be fixed. Yes. But, what does fixing look like? That's a process, there's a political process, and there's a reality that there's time in that, and we're stuck with the mess, while the fixing is happening.

Jessica Pieklo: The mess, like Brad McBeer on the court for however long. The mess of what happened now that we have largely told school districts that they can go their own way in implementing Title IX protections for trans students. What does that look like in local school jurisdictions?

Jessica Pieklo: That's what we're stuck with right now. And waiting that out from a policy perspective is going to take some time. But our federal agencies can do it, and Congress can do it.

Imani Gandy: Also, another thing that I think is important to know is that there are Democratic candidates who have been talking seriously about expanding the Supreme Court. Kirsten Gillibrand, Elizabeth Warren, Kamala Harris, Beto O'Rourke, and Pete ... God, I can't say your last name. I'm so sorry, Mayor Pete.

Jessica Pieklo: Mayor Pete.

Imani Gandy: I'm sorry, Mayor Pete. But they are just a few of the Democratic candidates who have actually entertained the prospect of expanding the court. And actually, just this morning, our favorite orange menace said that he wasn't considering expanding the court. That he wasn't going to expand the Supreme Court.

Imani Gandy: Now, that said, that man changes his opinion as fast as he changes his underwear. Tomorrow, if Fox and Friends is like, "Yeah, Donald Trump should expand the Supreme Court," he'll probably get on Twitter and be like, "I'm expanding the Supreme Court today! 35 judges and they'll all be Republicans!" Then we can all just throw ourselves out windows.

Imani Gandy: But, there are some possibilities there. But again, as Jess said, it's a long road. There's a lot of process that goes involved. And you can bet your sweet ass that Republicans are not going to expand the court without a lot of pushback. Because right now, they've got a 5-4 majority.

Jessica Pieklo: Right.

Imani Gandy: Why would they want to mess with that?

Jessica Pieklo: One of the things that should the election go well in 2020, though, the Democrats could do that would help kick start that, while the fight over legislation is happening and while the fight over the court is happening, is the federal agencies under Democratic guidance could reverse course on some of the most terrible decisions that we've seen in terms of rule-making. I'm just going to ask that if you are curious about that, you go back and listen to our episode on administrative law, because-

Imani Gandy: Jess loves it, and it's sexy.

Jessica Pieklo: It's so sexy. But it's so important, like the agency stuff that's happened under this administration is so important, And, when we're talking about how the fuck do we get out of all of this, the agencies are going to be on the front lines of doing that. All right, there's your agency law plug.

Imani Gandy: She's gonna plug agency law in every episode, if possible. Our next question comes from Caitlin, who asks, "How soon are we going to see the effects of all the conservative lower court judges that Turtle McEvil ..."

Jessica Pieklo: These are the best names.

Imani Gandy: Okay, "how soon are we going to see the effects of all the conservative lower court judges that Turtle McEvil has pushed through in the last two years? Is it something that's already happening, and just flying under the radar, because it's not SCOTUS? Or are things going to slowly build up?" Jessica?

Jessica Pieklo: Oh, this is a great question. It is already happening. Let's talk about this, because this is, aside from agency law, my other big moment or area. One in six circuit judges now, Imani, are Trump appointees. One in six.

Imani Gandy: Aggh ... No ... Okay. I had a little mini-tantrum. One in six, y'all. I mean, I feel like that's one of the areas that really has flown under the radar, that people aren't talking enough about, which is the wave after wave after wave of judicial nominees that are just being shoved into the court. People who really have no business being there. We're talking ABA-unqualified people.

Imani Gandy: The ABA has come out and said, "You know what? These people are not qualified to be judges."

Jessica Pieklo: Yeah.

Imani Gandy: But yet, there they are. There they sit, making rules for multiple states, depending on what circuit they sit in. Or the federal government, if they sit in the DC circuit. It is really frightening, how many Trump appointees are sitting on courts.

Jessica Pieklo: And so we have, we can give you a very specific example, even. The Sixth Circuit recently, the entire Sixth Circuit Court of Appeals came out and said that Ohio could just go gangbusters and defund Planned Parenthood. It released a terrible decision that is radical in its reach.

Imani Gandy: It is radical.

Jessica Pieklo: And without going-

Imani Gandy: You should explain why it's radical.

Jessica Pieklo: Yeah. Without going too far into the weeds on the case, here's the TLDR on the Ohio Planned Parenthood fight in the Sixth Circuit. You remember those terrible CMP, the Center for Medical Progress videos, right? Those came out and John Kasich and the Ohio legislators said, "That's terrible, Planned Parenthood is a

criminal enterprise, and we're going to defund them." Then Planned Parenthood said, "That's unconstitutional, you can't do that; we have certain rights."

Jessica Pieklo: The lower court said, "Hey, Ohio, that's unconstitutional, you can't do that; Planned Parenthood, as an abortion provider, has certain rights." The state of Ohio didn't like that, and they appealed it to the Sixth Circuit. Three judges on the Sixth Circuit, or two of three judges on the Sixth Circuit panel, said, "Hey Ohio, you can't do that."

Jessica Pieklo: In between that decision and the time when the full Sixth Circuit decided to take it up, Trump got a whole bunch of new appointees to the Sixth Circuit. Four of them, as a matter of fact, and lo and behold, what happens when the full Sixth Circuit hears it? They say, "Hey, you know what Ohio, go gangbusters. You actually can do that."

Jessica Pieklo: "And, abortion providers, you don't have the kind of constitutional rights to provide abortions that you think you do. And that the law has historically recognized."

Imani Gandy: Which is absurd.

Jessica Pieklo: It is absurd.

Imani Gandy: I read the opinion; what they said is like, "Well abortion providers don't have a due process right to perform abortions." Well, I mean, what are you talking about? First of all, there is a long line of cases that say, "Abortion providers' rights are derivative of their patients." Right?

Jessica Pieklo: Right.

Imani Gandy: They sue to uphold the constitutional right to choose, on behalf of their patients. It's not a matter of whether or not the providers have a due process right to perform abortion. The issue is whether or not patients have a due process right to be able to obtain abortions. In order to vindicate that due process right, they have to be able to go to someone who will perform the abortion.

Imani Gandy: Having the right to get an abortion doesn't make a difference if there's no one who can perform it. So that's been the rule for a long time.

Jessica Pieklo: Yeah, when we talk about the right being derivative, Imani, that's exactly what we're talking about. The right to an abortion means nothing if there's no right to access it. In the way in which the rights play together, provider rights and patient rights, are in some ways inextricably woven to that.

Jessica Pieklo: And the law has recognized, forever, and so ... without even getting into the concept of constitutional weeds on it, you can see how radical it is, just by

carrying the logic out. What effectively the Sixth Circuit said is, "Yes, a right to abortion exists. No, abortion providers, you don't have a separate constitutional due process guarantee in doing your work."

Jessica Pieklo: What that means is, the state can do whatever it needs to do to make it impossible for you, effectively, up until the point when that becomes an undue burden on patient rights. That framework requires the patients to enforce it. Not the providers. That is the kind of intellectual fuckery that the Trump appointees are enacting on the federal courts right now.

Jessica Pieklo: That was just this month. We have cases in the pipeline in the Fifth Circuit, in the Eighth Circuit, where they've gotten a bunch of judges; in the First Circuit, which is in the northeast. We are going to see this ripple effect. And now, they're gunning for the Ninth Circuit.

Imani Gandy: Yeah. I was literally just about to say, "And they're coming for the Ninth." Because a lot of the big cases that have shut down some of Trump's policy initiatives ... the travel ban, the Muslim ban ...

Jessica Pieklo: Yep.

Imani Gandy: ... the attorneys generals of states like Washington and California, filed those suits so they will be in the Ninth Circuit, because the Ninth Circuit is notorious for being very liberal circuit. Well, not anymore. It's moving to the middle. If Trump, he was saying he wanted to split up the Ninth Circuit.

Jessica Pieklo: Yep.

Imani Gandy: If he can get more conservative judges on the Ninth Circuit, well, that's what he's going to do.

Imani Gandy: We're already seeing it. But yeah, in terms of a national discussion, I think that a lot of this stuff is flying under the radar. Which is why we have podcasts like Boom! Lawyered.

Jessica Pieklo: Yes.

Imani Gandy: For you lovely people to come and get the information that you need to have before the shit completely hits the fan. So you can at least maybe ... I don't know ... get some plastic covering and shield yourself from all the flying shit. [crosstalk 00:19:34] That's a gross analogy, but you know...

Jessica Pieklo: I remember during the halcyon days of the Obama administration, when I was covering the federal judiciary. I would get so excited about the idea of covering judicial nominations and the fights, because yes, it's totally nerdy and that is all my jam. But also because it was something that didn't happen a whole lot.

Jessica Pieklo: Now, I've lost track, sincerely, I do not know what wave of judicial nominations we have gone through. I know we are at least through 15 waves. That's Trump, but that's Republicans working absolutely hand in hand with him. Imani, you and I will not see a change, I think, in the federal courts going back in a good direction in our lifetime, unfortunately.

Imani Gandy: No we won't. Sorry if you're 40 and above.

Jessica Pieklo: Yeah, thanks for that question.

Imani Gandy: Yeah. Was that Caitlin's question? Yeah, that was Caitlin's question. The next question comes from Christie. Who asks, "What's the best way for residents of blue states to make sure their state laws related to reproductive healthcare are strong as possible in the wake of all these terrible laws being passed across the country?"

Jessica Pieklo: Oh, yeah, that's a great question too. I think yes, absolutely, if you are in blue states, blue-state legislatures should be doing everything they can to shore up reproductive rights and access.

Jessica Pieklo: That means that making sure, not just there's a codification of Roe v Wade on the books. That's a state statute that says, "We recognize at the state level that there's a fundamental right to abortion." States are doing that.

Jessica Pieklo: But it's also making sure that your states aren't doing things with regard to conscientious refusals and expansions. Because we're seeing attacks on anti-discrimination laws and reproductive rights protections through this weaponization of the First Amendment and religious objections. Imani and I talk about it a lot. So that's another area.

Jessica Pieklo: Then also, drill down to the local. What's your school board doing about how it's teaching sex ed and consent and things like that? I've got a 14-year-old boy, and this is a wild time.

Imani Gandy: Wait, he's 14 now?

Jessica Pieklo: He's 14.

Imani Gandy: My God.

Jessica Pieklo: He's going to be a freshman in high school. It's wild.

Imani Gandy: Oh my God, I guess I saw him when he was still like 11 or 12?

Jessica Pieklo: Yeah. I know. Time marches on ... time marches on. And I'm just going to say, as a parent, it is fraught. I live in a blue state, in a very blue city, in a very blue district. And I was floored by some of what was going on in the sex ed curricula.

So much so that I reached out to local providers here to say, "Excuse me?" My poor son was like, "Oh Mom, stop." Anyway, that's a different story.

Jessica Pieklo: But that is something that on the local level, make sure that if you happen to live in a place that has abortion providers and clinics in your city, in your town, make sure that there are not attempts to roll back buffer laws and zones, if they exist.

Jessica Pieklo: Go to the directors and see what they need, in terms of support. Those are things that I think folks can do to immediately protect access in their areas. What do you think? What are some other ideas? What'd I forget?

Imani Gandy: I would say that it's important, especially for journalists, to support the pro-choice legislators in a particular state. We get so many articles written about how Joe Q. Republican is doing this shitty thing when it comes to reproductive rights. We don't see a lot of articles about how Joe Q. Democrat is doing a lot of amazing things with reproductive rights.

Imani Gandy: I feel like people who are the pro-choice legislators get pushed aside because they're doing the right thing, in my opinion. In favor of these stories about how these other legislators are fucking everything up.

Imani Gandy: So I think it's important to support ... if you're on Twitter, shoot out a tweet to whomever, and be like, "Hey, man, thanks for this law. It's really great, and we really appreciate it."

Imani Gandy: Another thing I think that's important, and that we saw come up with the New York Reproductive Health Act, is the pushback on the lies-

Jessica Pieklo: Oh yeah.

Imani Gandy: ... we had an episode about this, on the lies that these laws are intended to approve and fantasize. Passing laws that shore up reproductive health tend to be looked not favorably upon by Republicans. So what they'll do is they will make shit up about what's in the law to try and fire people up.

Imani Gandy: Apparently in New York, Democrats are just murdering babies. They're just post-birth abortions, they're all the range in New York. If you hear stuff like that, push back on that in whatever way you can. If you're talking to your neighbor. Write a letter to the editor. Write a letter to the publisher. Whatever. To the politician. Just make sure that you're pushing back on the lies, because the lies are going to come fast and furious. And they won't stop.

Jessica Pieklo: That's an excellent point. Excellent point.

Imani Gandy: All righty! Our next question, and our last question comes from Victoria, who asks us, "Just for fun, when Don Jr., Jared K., and Ivanka get indicted, what are

you drinking to celebrate?" And they say that they're thinking positive by saying they're going to get indicted. Then they also add, "Will you guys talk about the Flowers case, since it's going before SCOTUS Wednesday?," which was yesterday.

Imani Gandy: In answer to the first question, "What are you going to drink?," all of the things.

Jessica Pieklo: All of the-

Imani Gandy: Just anything within reach. I don't care what it is. If it's within my grasp, I'm putting it down my gullet. What are you going to drink?

Jessica Pieklo: Despite being a very logical human being, I have certain superstitions, and one superstition I have is that I always keep a bottle of Prosecco in the house, because it feels very optimistic, and that's my celebratory drink of choice. If I have Prosecco on hand, I'm always prepared for good shit happening. Something to celebrate.

Imani Gandy: That's a good idea; I might start doing that. That's a really good quality idea.

Jessica Pieklo: My Italian grandpa drilled that into my head as a very young child, and it stuck with me. It was formative. Plus, you always have Prosecco on hand, which is fantastic. So, I keep a bottle of Prosecco on hand for just these occasions. And I would go there. From there, who knows?

Imani Gandy: Who knows.

Jessica Pieklo: The sky's the limit-

Imani Gandy: Exactly.

Jessica Pieklo: ... but that's where I start, with my backup bottle of celebratory Prosecco.

Imani Gandy: The world is your oyster shot.

Jessica Pieklo: Basically.

Imani Gandy: As for the Flowers case. Yeah, I can talk a little bit about the Flowers case.

Jessica Pieklo: Yeah. Go into the-

Imani Gandy: 'Cause that's sort of my wheelhouse. There was a case a couple of years ago called Foster v Chatman, where Timothy Foster actually got a new trial because of the really ridiculous racist shit that went on during his trial.

Imani Gandy: We're talking about prosecutors keeping notes, talking about how they were striking all of the black jurors ... They were basically coming up with reasons to strike black jurors, reasons that would pass Supreme Court muster.

Imani Gandy: Now what do I mean by pass Supreme Court muster? In a case called Batson v Kentucky ... I think it was back in 1986 ... the court came up with a framework by which judges could evaluate the peremptory strikes that prosecutors use to strike jurors from jury pools.

Imani Gandy: Peremptory challenges are something that lawyers use; they're also called peremptory strikes; they use them to remove potential jurors. And they can remove potential jurors for no reason at all; they don't have to say the reason.

Imani Gandy: But, under Batson v Kentucky, a defendant can claim that the reason that particular juror was stricken was due to race. It was racial discrimination. You get these cases where black guys are on Death Row, having been sent there by all-white juries.

Imani Gandy: You're supposed to be judged by a jury of your peers. And if you're a black defendant in Mississippi, for example, and you've gone through six trials, which is what Flowers went through. Six trials for the same crime. And the prosecutor is just being racist as fuck. Just really asking something like 45 questions per black juror, and two questions per white juror.

Jessica Pieklo: Right.

Imani Gandy: Asking a juror, "Hey, do you live in the neighborhood of this Flowers person?" The black juror says, "No, I don't live in the neighborhood. I'm six streets away, but in a town that small, he's not my neighbor."

Imani Gandy: "Are you sure he's not your neighbor? Look, I'm gonna call in an extra witness to testify that you're lying about whether the fact this person is your neighbor."

Jessica Pieklo: This is so wild ... this is bananas.

Imani Gandy: It's the way that this prosecutor was treating black jurors. He was cross examining black jurors in order to find reason to strike them from the jury. He did this six times.

Imani Gandy: So what can happen is the defendant can say to the court, "Hey, look. This prosecutor is being racially discriminatory, and I can make the case. Here's the facts and the evidence that show that this prosecutor has been racially discriminatory, and there needs to be some action on that."

Imani Gandy: Now then, the burden flips to the prosecutor. And the prosecutor can say, "Oh no, yeah, I struck all of these black jurors, but here are these race-neutral reasons that I did so."

Imani Gandy: Race-neutral reasons end up being not really race-neutral at all. They end up being stuff like, "The demeanor of the juror. The black person seemed a little bit too surly, or seemed to have an attitude," which is just stereotypes about black people anyway.

Imani Gandy: Then the prosecutor will say, "Well, his demeanor, I didn't like his demeanor and his attitude was bad," and blah-blah-blah. That can be the quote-unquote race neutral reason.

Jessica Pieklo: Yep.

Imani Gandy: But, you have to realize that a lot of prosecutors will go to conferences where they are taught how to survive Batson v Kentucky challenges. The Flowers case, and cases like it, are good for Flowers. They're good for Timothy Foster. They're good for Johnny Lee Gates, who's another black defendant who was raising Batson challenges.

Imani Gandy: But they're not good for criminal defendants writ large, because they're on a case by case basis. A Batson challenge necessarily involves looking at the facts of the particular strike, of the particular prosecutor.

Imani Gandy: And even if that prosecutor has a long history of being racist as hell, as the prosecutor's name was Something Evans, in this Flowers case was, they can still skate by because sometimes you get a bunch of judges on the Mississippi Supreme Court, for example, who will look at the behavior of these prosecutors and just be like, "Ehhh. Yeah, it's kind of racist, but I mean, ehh. What are we going to do?"

Imani Gandy: And that's essentially what happened.

Jessica Pieklo: Yeah.

Imani Gandy: I think the fact that Thomas asked a question during the-

Jessica Pieklo: Yeah, let's talk about the-

Imani Gandy: ... the oral arguments yesterday, is huge. I think it's his first question in three years or something? He seemed to be siding with the defendant. So there's a very good chance that Flowers is going to get his new trial.

Jessica Pieklo: Yeah.

Imani Gandy: But the problem is, that doesn't really carry over to any of the other many black defendants who are facing racist prosecutors, who are facing racist trials. It's like a good thing for the particular defendant, but not a great thing writ large.

Jessica Pieklo: Yeah.

Imani Gandy: I hate to be a buzzkill, but I wouldn't get your hopes up too much, even if this Flowers case goes Flowers's way. Because that doesn't really say a whole lot about the next black defendant.

Jessica Pieklo: Yeah, and I'm just always nervous whenever this court weighs in on anything having to do with race and the criminal justice system in particular. Race generally, right?

Jessica Pieklo: This is the court that gave us Shelby County.

Imani Gandy: Yeah.

Jessica Pieklo: There's no reason to think that there's any sort of racial consciousness beyond in the conservative wing of the court beyond the reinforcing white supremacy as it exists in the law. So that makes me nervous. But I do think this might be an example of one of those cases that's so egregious.

Imani Gandy: So egregious.

Jessica Pieklo: We might get some good out of it. I'm trying to be hopeful. This is like, it's spring.

Imani Gandy: It is spring.

Jessica Pieklo: I'm happy. Equinox. I'm like, working on something towards that. Finding those moments.

Imani Gandy: Also, I think however way this Curtis Flowers case goes, I think we can expect a really banging decision from Sonia Sotomayor. This is her-

Jessica Pieklo: Yeah, she's going to have something great to say.

Imani Gandy: ... wheelhouse. Whenever this ruling comes out, I'm reading her opinion first.

Jessica Pieklo: Yeah.

Imani Gandy: I'm fairly certain she's going to write one, and I'm fairly certain she's going to drop the hammer. We love you, Sonia. Call us. Come be on our show.

Jessica Pieklo: Call us.

Imani Gandy: That's going to wrap it up for our Mailbag Episode. Thank you to everyone who posed questions. We're sorry if we didn't get to yours.

Jessica Pieklo: There were so many good ones, too. And some of them were really hard.

Imani Gandy: Some of them were like, "Hey man ..." We don't know. But we'll pop into the Facebook group and I'll certainly go through the questions and try and answer them as best as I can. You could always track us down on Twitter and pepper us with questions; we're always happy to answer them. Use the hashtag #teamlegal because that's the best-

Jessica Pieklo: That helps.

Imani Gandy: ... way to get in touch with us. Because my mentions are just bananas. If you ask me a specific question without using the hashtag, there's a chance I may not see it. It doesn't mean I'm ignoring you; it just means my mentions are out of control. Anything else to add, Jess?

Jessica Pieklo: I'm really enjoying the new Maren Morris album. But that has nothing to do with it. It's real good; go listen to it.

Imani Gandy: And if I may plug Lizzo, go listen to Lizzo.

Jessica Pieklo: Oh, my God yes-

Imani Gandy: Lizzo just dropped a song with Mitzi Elliott and it is the shit.

Jessica Pieklo: There's so much great music and arts happening right now, and things are up. Go enjoy some of that. It feels good.

Imani Gandy: Absolutely. Oh, and if you really want to have some really good music, it's Thursday. You know what happens on Thursday on Twitter?

Jessica Pieklo: Oh-

Imani Gandy: For Imani Gandy? #SelfCareWhitePeopleMusicThursday. If you want to go check out that hashtag, I have a Spotify playlist. I've had many white people say that I have better taste in white people music than some white people.

Jessica Pieklo: She really does.

Imani Gandy: I really do take that as like a badge of honor.

Imani Gandy: That's going to wrap up this episode for us. You can follow me on Twitter @AngryBlackLady. You can follow Jess @hegemommy; H-E-G-E-M-O-M-M-Y. You can follow Rewire.News @Rewire_News; and join our Facebook group, Boom! Lawyered.

Jessica Pieklo: Do it.

Imani Gandy: It's all the rage. And we'll see you on the tubes.

Jessica Pieklo: We'll see you on the tubes.

Jessica Pieklo: Boom! Lawyered is created and hosted by Jessica Mason Pieklo and Imani Gandy. This episode was produced by Marc Faletti, who is also our executive producer. And the Rewire.News editor in chief is Jodi Jacobson.