

Joyce Vance:

Welcome to a special mini episode of #SistersInLaw. It's Wednesday evening this afternoon, and we have not yet had the chance to discuss this among ourselves. But this afternoon, I suspect my sisters were as surprised as I was to learn that Bill Cosby previously convicted in Pennsylvania in state court of sexual assault was suddenly released from prison where he was serving a sentence of three to 10 years. He had only served two of that sentence. Where you guys all surprised?

Jill Wine-Banks:

Yes, I'm sure we all were surprised because the district court and the appellate court had been very clear on facts that seem to now be decided differently by the Pennsylvania Supreme Court. And there was no thought in my mind that would be the outcome.

Kimberly Atkins Stohr:

I was very surprised. I mean, it seemed to come out of nowhere to the point that the initial tweets I saw about it, I wondered if they were real and it just seemed so hard to my gut, my viscera. It was so hard to imagine under what circumstance after that trial, after the allegations, he would be let free. But then obviously then I got the opinion and began frantically reading it and texting with y'all. I gave that away a little on Twitter to figure out exactly what was going on and just realize that it was just a very interesting set of facts in law that resulted in what happened today.

Joyce Vance:

Well, maybe we can get some terminology down to help. Pennsylvania state courts are a little bit different than other courts, they use different names. So their trial courts are called the Court of Common Pleas, that's where Cosby was convicted. Then you take an appeal to what they called the superior court. And this final decision that we saw today came out of the Supreme court. Barb, what did you think?

Barb McQuade:

Well, like all of you, my first reaction was "A sexual predator has been released. How can this grave miscarriage of justice occur?" But like Kim, once I read the opinion, I actually think they got it right. Even monsters are entitled to due process of law in the United States. And what the court said here is that when Bruce Castor, who was the prosecutor, you may remember that name from Donald Trump's impeachment trial volume two. He was one of the lawyers there. When he was the prosecutor back in 2005, he declined to prosecute the case. Now, I think in retrospect, that was a mistake. And then he issued a press release saying he wasn't going to prosecute Donald Trump. For in slips.

Joyce Vance:

Well done Barb.

Barb McQuade:

Saying that he was not going to prosecute Bill Cosby, second mistake. Because what the court said is that promise was binding. And so when his successor later brought the case, what they said is that that was a violation of the due process that people have to rely on the promises of prosecutors. And in the meantime, Bill Cosby had acted on that promise to his detriment by testifying in a deposition in a civil case where he made some admissions that were used against him in the later criminal case. So his rights

against self-incrimination were violated and his rights to due process, to have promises by prosecutors in Forrest was also violated. I think the takeaway here is due process matters even for monsters. But also to remember he's proclaiming his innocence, nothing changes what that jury found. And I hope that this will not be used as any sort of deterrent for women or others who are survivors of sexual assault from coming forward. This case is a procedural aberration, and it will have no bearing whatsoever on other allegations of sexual.

Joyce Vance:

Before we talk about whether the supreme court got it right here. Can we just take a step back and talk about Castor the district attorney and what he did because E. Jean Carroll, the woman who has alleged that Trump raped her and who has sued him for defamation in that regard, she had a tweet today that I thought was really great. It was very simple. She said, "This is why women don't come forward." And when I looked at that original decision that Castor made to not charge, my reaction was to think he's the poster child for why we need more women to be district attorneys. He investigated the case for a really long time you guys, for 30 days, for a month, and decided that he wouldn't charge because A, the victim hadn't gone immediately to the police. B, there was no forensic evidence. And C, without a confession from Cosby, he saw no way he could prosecute.

I think that that is such a bad decision. It smacks so much of privilege and the effort to protect men who were predators. So I think it's worth pointing that out. And then as you and Kim say, Barb, we shouldn't let our emotion cloud our legal judgment. Then we should look at the supreme court's opinion on legal terms, on due process terms. And I think I may actually disagree with y'all. So why don't you guys defend the opinion and then I'll tell you why I disagree.

Kimberly Atkins Stohr:

Okay. I just want... I want to be very clear with my terms here, and clear with what I say about take on these cases, because I want to start from the point of view of survivors. Both people who accused Bill Cosby of... And this horrific conduct that he was accused of and convicted of. Just really unthinkable stuff. I want to-

Joyce Vance:

Kim, can I interrupt you just for one second, just to say he was convicted of one instance of sexual assault. There were 19 or more women who had accused him by the end. I think it was actually a good bit more and this judge permitted five other women to testify. So although he was convicted for just the one, as you say, it was horrific.

Kimberly Atkins Stohr:

And he admitted that he used drugs. I mean, I don't want to get into the specifics is I don't... We should probably have given a trigger warning at the beginning of this. I'm thinking of the victims, not only of the people who accused him, but other people who were probably traumatized by the events of today in many ways. And I'm thinking of them, because I can't imagine how difficult this would be. I've seen a lot of talk on Twitter and elsewhere bringing up the point that you talked about, about privilege and money, and about the fact that when you are rich and you're famous, you can buy your way out of justice. And I don't deny that that is true in many cases. But I just want to be really clear about what I'm saying. I agree with y'all that what happened with the district attorney.

I don't have proof of this, but I highly suspect that if it were a defendant, particularly a black man who was not named Bill Cosby, he would not have been given this non-prosecutorial agreement in this way. It would not have been so summarily decided that there is no way that a jury would have convicted on this allegation, and that it could not have been proven. I think the fact that it was Bill Cosby certainly played a big role in all of that.

I also think that it is true that Bill Cosby has at his disposal, the best lawyers money can buy. Both trial and appellate didn't help him in the trial because he was convicted, but certainly not everybody can appeal things, even if there are valid constitutional claims there in the same way that he was able. So he was afforded all of those things. But at the same time this particular decision followed constitutional and case law.

And I don't see how it could have come to a different outcome. This district attorney, Bruce Castor essentially tied the hands of future prosecutors in this case in a way that I think is wrong, that he should not have done. And I think that I want to ask you all the former prosecutors about ways that reforms can be made so that prosecutors can not summarily enter into these kinds of non-prosecutorial agreements in this way, in a way that really in opinion, denies justice.

But that's where the error was. Not in this final decision. So I don't want this to be taken away that I agree and think that this was all great. It was not, it is horrible, it's awful and the outcome is terrible. And in my opinion, a predator was let loose. But this is how we got here. And those are the law... That's how the law and facts led us here. So I would love to see reforms at the prosecutorial level. I think that what the former district attorney did was horrific and wrong. And I think in that sense, justice was not served. Not because of what the Pennsylvania Supreme Court did. But what happened before that?

Jill Wine-Banks:

I agree with you, Kim, but I want to just move to the concurring and dissenting opinions. And focus a little bit on whether what Castor said actually could be viewed as binding on all future prosecutors. And I think there is a very valid point to be made. And maybe it needs to be codified in some way to make it even clearer. But to me, it's pretty clear that a prosecutor can only say, "I'm not bringing charges." He can't say that no future incumbent, especially of an elective position will ever bring charges.

I think that the dissent has some very important points in saying the public announcement and what he was doing was really sort of to help him out as an elected official, who made a bad decision not to prosecute. And was trying to bind future prosecutors who disagreed with it. The other thing is we have to look at the fact that the trial court who's much better able to judge credibility and the appellate court, which I'm going to call it the appellate court, even though they use different names in Pennsylvania, looked at this and said, "No, we're going to let this go forward."

There is an issue about whether having said all this, it was okay to use the evidence that he gave against himself, supposedly in reliance, on Castor's promise of non-prosecution in a civil trial. And whether he could be retried without it. So there's another question, which is were they write, not only in releasing this monster. But were they right in saying he could never, ever be tried again, that it's over, it's done. The case of this particular victim is over and done with. Could he be tried without this additional evidence from that case? And that's something that they may have gone too far, but they are the supreme court. They're the final word in Pennsylvania.

Barb McQuade:

Yeah. And Jill in response to that with the majority said, because I was thinking that question to myself as I was reading it. Okay, so conviction reversed? Because they used statements that Cosby made in his civil deposition and he answered those questions because he no longer had any Fifth Amendment right against self-incrimination, because he had been told and he relied upon a statement that he would not be prosecuted criminally. So that all makes sense.

So why not say your conviction is reversed, you get a new trial and if there is a new trial the remedy is that the prosecution may not use those statements. Because there's still a pretty good body of evidence there with these other women and other things that his own statements about using Quaaludes to incapacitate women was a helpful evidence. But I don't know if it was essential evidence. But what the court said about that is that wasn't his only harm when he acted in reliance on the prosecutor's promise.

He also settled that civil case for \$3 million. And if he had not had to testify, if he instead could have invoked a Fifth Amendment privilege, maybe that would have been different. So what they say is, "we can't return him to a hole. We can't undo. We can't un-ring the bell that this prosecutor rang by promising not to prosecute him. And so that harm is done." And so I think I agree with that logic. I just think that it's a mistake for a prosecutor to make a promise that you're not going to prosecute somebody when he's never [crosstalk 00:13:24].

Jill Wine-Banks:

So that raises the question of whether Castors should be looked at for some remedy. Whether it's some suspension of his license or something for doing something that I don't think any prosecutor should ever be allowed to do.

Kimberly Atkins Stohr:

And that was gets to my point that I think there should be reforms at the prosecutorial level as to how you enter into these non-prosecution agreements. The only other point, and I'm sorry for talking over you, Barb, that I want to make in response to that is this is what happened with a defendant, with all of the privileges, and fame, and riches, and everything else.

One reason why I also think that this decision is right, is imagine the defendant who doesn't have that, the defendant who talks to a prosecutor, prosecutor promises him, "All right, if you do X, Y, and Z, we're not going to prosecute you." And then a subsequent prosecutor comes later and puts them in jail. I mean, that's the kind of thing that shouldn't happen in the judicial system. And those are the folks that I'm worried about in the future, who believe a prosecutor, who rely on a prosecutor, who don't have all of the resources that Bill Cosby has. And they end up in prison for the rest of their lives, despite the promises that were made to them. So I think in this case that can work both ways.

Barb McQuade:

I think it's a really interesting take on privilege, Kim. I was talking to a friend recently who said... This is a white friend who's married to a black man and has a child of mixed race. And she said in her view, privilege is not so much that someone has perks and benefits. They just don't have the obstacles that other people face. And so when you think about Bill Cosby, yeah, he got justice. He got the justice everybody should have gotten, perhaps if you agree with this decision. But there are many people who do not, because they don't have the kind of legal representation that everyone deserves to have. They have an overworked and underpaid public defender, or they scraped together barely enough money for

a lawyer who's spread too thin who doesn't have the ability to make some of these arguments that we see other people like Bill Cosby and others who are well-funded able to make.

Joyce Vance:

So, can I go a step further back? Because I actually have a fundamental disagreement with the premise of the opinion. You know, it's a long opinion. It's 70 some pages. I read it pretty carefully this afternoon. I'm still thinking about it. So it's possible that my analysis isn't accurate and I'd love to hear what y'all say, but it seems to me that this entire decision to essentially let Cosby out of prison depends on the supreme court's decision. That when Castor made the decision that he would not prosecute Cosby, that meant that Cosby no longer had any Fifth Amendment privilege that he could assert against testifying. In fact, Castor offers that as a justification. I wanted him to have to go and testify in these civil suits. Castor said like 10 years later, because I thought that would be a measure of justice. So we removed his Fifth Amendment privilege.

And here is my problem. Let's just assume for the sake of argument, although I'm not even sure that I would agree with this, that castor can do that for himself and that he can bind his successors in office. And let's even assume that maybe he can some strange way that I don't think is accurate bind every other county prosecutor in Pennsylvania so that Cosby can never be prosecuted again in Pennsylvania. This guy was assaulting women all over the country. There's no reason to believe that there's not a case outside of Pennsylvania where he could have been theoretically prosecuted after this. No defense lawyer in their right mind thinks that Cosby his waived his Fifth Amendment privilege and let him go into those depositions and testifies, unless there's something really weird going on here, like there's almost a nudge, nudge, wink, wink deal. Instead of criminal prosecution, we're going to let your guy go pay this woman three and a half million dollars and all is forgiven. But you get my legal argument, right?

No matter what Castor did, he couldn't prevent Cosby from being prosecuted in other states or maybe even in the federal system if there was a case, which means he still had a Fifth Amendment right there to assert. And without that waiver of the Fifth Amendment right this court's entire opinion falls apart. And I think that that's the argument that was made at that first level of appeal. It's certainly the argument that the trial court... The Court of Common Pleas believed was accurate. So tell me why I'm wrong. I mean, I really am interested in this.

Barb McQuade:

Are you suggesting... I did detect that some of the language from the lower courts suggesting that maybe they didn't believe Castor. They say things like he's inconsistent in his reasons. The Supreme court comes back and has some explanations for why they did believe him. And that nonetheless, they wanted to enforce his promise. But I mean, what do you think was going on?

Joyce Vance:

Also, I'm actually sort of for purposes of my argument, taking all of that at face value and thinking that what Castor did was... Maybe it was legitimate. Maybe he did feel she was best served by going into a state prosecution. He still cannot say that no out of state prosecutor. There can never be another prosecution of Bill Cosby saying Alabama, where there's no statute of limitations on sexual assault. Which means-

Barb McQuade:

Well, would there be venue there Joyce for this rape?

Joyce Vance:

So gain, not for this rape. We know that there are other women [crosstalk 00:19:08].

Barb McQuade:

But then it's not a rape it's a- [crosstalk 00:19:09] .

Joyce Vance:

There could be other possible crimes and so when he goes into these depositions and testifies, for instance about the Quaaludes, he could certainly be giving inculpatory testimony around other cases [crosstalk 00:19:21].

Barb McQuade:

Not for this case, but for some other case.

Jill Wine-Banks:

Joyce has a point. Someone who has been also a defense lawyer, I think you're making a very good point. And as a defense lawyer, I would have advised my defendant that he still had a Fifth Amendment privilege and that he should not waive it because there were pending possibilities elsewhere. I believe there are like up to 50 women who have charged him with some sort of assault. I think you're right. It was like 18 or 19 back then, but since then more have come forward. But I think we should also look at number one, this opinion does nothing about his guilt. A jury of his peers found him guilty. He is guilty.

Kimberly Atkins Stohr:

Right. It's not an exoneration.

Jill Wine-Banks:

This is not an exoneration. It is a technical glitch. And technical glitches when they involve due process are legitimate reasons for overturning a conviction. I'm not saying no.

Kimberly Atkins Stohr:

Yeah, I wouldn't call it a technical glitch. I mean, a technical glitch is paperwork wasn't filed. I mean, this is a constitutional [crosstalk 00:20:24].

Jill Wine-Banks:

It's still process [crosstalk 00:20:25]. It has nothing to do with the evidence of his guilt. He is guilty, and we should never forget that that's important. But I think we also need to address what does this mean for the Me Too movement and for the rights of women who are coming forward, that this could happen in this way?

Kimberly Atkins Stohr:

Before we get there, can I just make a point about something that Joy said and not sure that this is right. The appellate lawyer in me takes what you said, but at this level this is not a fact-finding level, just for

our listeners. Once something goes to appeal, there is a set of facts. There is a record that is agreed upon. And the issues as to fact, as to what his intent was and didn't do that. That seems like those are things that were for lower courts to decide. I just want to differentiate between that and the legal question.

Joyce Vance:

The legal question of whether he still had Fifth Amendment privilege is something that the appellate court would look at De novo with fresh eyes. Yeah.

Kimberly Atkins Stohr:

Certainly, but it wouldn't be fair. I mean, I just felt like that was a little bit [crosstalk 00:21:27].

Joyce Vance:

But that is such a good thing to say. Right? Because people, I think may not know that there's actually a record of all the evidence that's compiled in the trial court. It moves with the case to the appellate court, except with rare exceptions by leave of court. You can't expand that record once the case is on appeal. That's why fact-finding and trial courts is so important.

Kimberly Atkins Stohr:

Right. I just wanted to make that-

Jill Wine-Banks:

It's not that these issues weren't raised at that level. They were and they were rejected. And to your point the fact-finding by the lower courts that actually saw it and lived, it is much more compelling than any re-interpretation by the supreme court.

Joyce Vance:

Well, Jill, to your point, here we are. We need to think about what this means for Me Too. I think Kim has raised a great point. We've seen this here, we've seen this down in Florida when Castor was the DA in the Epstein case, and there's this sort of sweetheart deal. Is there a necessary reform here for prosecutors? And is there something that could work given the fact that so many cases are declined early on. Barb, do you have a thought about that?

Barb McQuade:

I am wondering we think about... Remember the plea agreement said something like in addition to not prosecuting Jeffrey Epstein, federally in exchange for his guilty plea to a single count of prostitution, Castor further agreed not to prosecute. I think the language, something like any potential co-conspirators. So if I'm the lawyer for Ghislaine Maxwell, I think I am looking at this case and I'm looking at her deposition testimony. And I'm wondering whether she can make similar arguments that she relied on that promise when she went ahead and testified at depositions. And so this is the kind of case that I think does not have a whole lot of precedential value. But I think that's one place where it could help her defense and perhaps preclude this federal prosecution that's going forward. Now we've got a defendant's attorney's office involved.

Joyce Vance:

It seems like there's this state court in Pennsylvania, right? I mean, this is Pennsylvania-

Jill Wine-Banks:

Right. It's not directly controlling.

Barb McQuade:

Yeah, of course it's not binding, but it's an interesting argument that they could consider raising. And of course, they've also got the instance of the US attorney in Miami can't bind the US in Manhattan. But I think there's an argument to be made that, "Hey, I relied on that promise. And that promise needs to be enforced when I did not assert my Fifth Amendment rights it's because I believed that I could not be prosecuted because of this promise that Alex's accustoming"

Kimberly Atkins Stohr:

Oh, that's depressing. I mean, the one thing that I will say about the Me Too movement is that I think we really need to, as a legal industry and as prosecutors move beyond this idea of... In particular, well, this, she waited so long to come forward. It is difficult to come forward and confront anyone who is an abuser. Particularly if they are rich, famous, powerful. We saw in this case, what happened. There was power in numbers. There was security in numbers. And it took one, and then two, and then five, before all 50 came forward. So the idea that all of this began in part, because the decision was made in part on the fact that this was just one woman and how are they going to believe her with no forensic evidence. There's something about that needs to change.

Joyce Vance:

Yeah, this was America's diary. I mean, it has to have been so hard to be the first woman to come forward and make these claims about Bill Cosby of all people. So I think we should say all honor to the women who are willing to come forward. It's brave. And so few of these cases are prosecuted and convicted. And so we do need to be really intentional about making the legal system work for these women, not against them.

Jill Wine-Banks:

And so that goes to Kim's point of what can and should be done in the legal system to make it easier for women. And Joyce, you raised this in the very beginning when you said that Castor said, "Well, I didn't do it because," and he listed three really awful reasons. One was, "Well, she waited a year." If you look at the statistics on reporting rape a year may be long, but most victims do not come forward in the early days. It takes them a long time before they do. And in many cases it is... And I'm old enough to remember in my day rapes required a witness other than the victim, that a victim wasn't deemed credible enough on her own. And thank heavens we're past that. And you don't... But forensic evidence often doesn't exist.

So those two reasons alone are things that need to be codified as these aren't necessary. You don't have to have forensic evidence and you don't have to worry about the fact that the victim waited months to come forward. I think we could do something about those. I'm not sure I know all the answers, but I think it's something we should all think about and think about what kind of laws could be proposed that would protect women who have a valid complaint going forward.

Joyce Vance:

Well, I think you make a great point, Jill. It's not that long ago in this country that as a defense to rape men could bring forward the victim's sexual past, and then we adopted rape shield laws, I guess in the seventies. I'm not sure about when, but you can no longer go into the victim sexual background-

Jill Wine-Banks:

What she was wearing on the day. That she was dressed provocatively. So of course it's her fault. That was definitely part of it back then.

Joyce Vance:

And we now take those laws for granted. So I have to believe that there are new laws. But some of the answer to Kim's questions go to how prosecutors handle declarations on cases which is usually left to that office? How pleas work? And at least in the federal system, over the 25 years I was at DOJ, there was a deliberate move out of Washington from being pretty sloppy about some of that paperwork to require informal declaration forms. That stated the reason to only using written plea agreements. So maybe part of the answer here is a process answer.

Jill Wine-Banks:

And I don't want to be glib about this, but public pressure does matter. I can tell you that in looking at the sexual assault in the military, public pressure resulted in many more cases being approved for prosecution than ever had been approved. And that was because generals at the time commanders were in charge and as of today they still are, but there's a possibility they'll be removed from that position. They were making decisions that were based on, "I don't want it to look bad by having somebody in my command being charged." To, "Oh my gosh, I look bad if I don't let the case go forward." So let's not under value what that means to have the American public and the Me Too movement behind saying these cases need to be prosecuted.

Barb McQuade:

Yeah, I just want to agree with Jill there, I want to make sure that the message that people receive is not, "Oh, look, every time you accuse a powerful man of sexual assault, you're going to lose." This was a very unique case based on some very unique facts. The jury found him guilty as we have already stated. And so the mistake here was the promise not to charge him with a crime in the first instance, I think. And so I hope that this will not sit back the Me Too movement. I think that we've made a lot of progress in the last couple of years and we need to continue to advance the ball.

Joyce Vance:

I think that's a great way of putting it. And I know we only meant to discuss this case for 10 minutes or so, but it's a really interesting case. And beyond the interesting legal issues, it is critically important for women going forward. And I think the point that we've all made here, the fact that this is in no way an exoneration of Bill Cosby. If anything the jury's verdict believing the women still stands. And the important thing is to go forward and make sure that women can report this sort of crime. Whether it's sexual assault or rape or something that's related. And that they are taken seriously by district attorneys and by law enforcement. That's something that we can all do to support women.

So that's all the time that we have for tonight, but we will be back with a new episode of #SistersInLaw on Saturday. I expect that we'll be discussing an awful lot about the news we expect

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tomorrow morning on the indictment of the Trump organization and its CFO Allen Weisselberg. Until Saturday morning, #SistersInLaw.