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Possible Holmes Testimony Hangs Over Sunny Balwani's Trial

By **Dorothy Atkins**

Law360 (March 8, 2022, 6:05 PM EST) -- With former Theranos executive Ramesh "Sunny" Balwani's monthslong criminal fraud trial slated to begin jury selection Wednesday, legal experts are keeping a close eye on whether convicted ex-Theranos CEO Elizabeth Holmes will take the stand against her former romantic partner.

The 56-year-old former Theranos chief operating officer faces criminal **fraud and conspiracy charges** alleging that he and Holmes defrauded patients and investors with blood-testing technology they knew didn't work. His trial is expected to last roughly 13 weeks and opening statements are set to begin March 15.

Balwani's trial follows Holmes' four-month criminal trial over the same charges, which **ended Jan. 3** when a unanimous jury convicted Holmes on one conspiracy count and multiple fraud counts related to some investors, but cleared her of claims that she defrauded patients.

Legal experts say Balwani likely has an advantage, because his attorneys at Orrick Herrington & Sutcliffe LLP sat through Holmes' trial and **now have a road map** for what to expect from witness testimony and trial evidence.

However, Ford O'Brien LLP partner Kevin O'Brien, a former federal prosecutor turned white collar defense attorney, noted that prosecutors also have benefited from trying their case once already. They've seen what works and what doesn't, he said.

"Their case has been road-tested too, and they may be stronger for it," he said.

Holmes as a Game-Changing Witness

Prosecutors have indicated that their case-in-chief against Balwani **will largely follow the path** of their case against the former CEO. But legal experts say the biggest unknown heading into Balwani's trial is whether Holmes, who is on the government's witness list along with more than 100 other possible witnesses, will take the stand.

During her trial, Holmes testified that Balwani **sexually and physically abused her** while she was Theranos' CEO and that her love for him clouded her judgment, allowing him to take over the business' lab operations despite repeated complaints from Theranos employees. The pair had a purportedly volatile 10-year romantic relationship, which began in 2005 when Holmes was an 18-year-old college student and Balwani was 38, according to Holmes.

Balwani has denied Holmes' abuse allegations in pretrial filings, and he refused to testify in her trial, pleading the Fifth. His attorneys have **fought vigorously** to keep any mention of the abuse claims out of his trial, arguing that the testimony is too prejudicial, and successfully convinced the judge to sever their trials due to conflicting defenses. However, U.S. District Judge Edward Davila, who presides over both cases, has so far not barred the topic.

Former federal prosecutor Michael G. Freedman of The Freedman Firm pointed out that when criminal cases are severed, prosecutors typically try lower-level conspirators before the top ringleaders.

"It's sort of like a bellwether trial," Freedman said. "The top people are in no rush to go to trial, but the lower-level people do want to."

Although many perceive Holmes to be the leader of the alleged Theranos conspiracy, she went to trial first. In doing so, she made her allegations against Balwani public, and also cleared a path for her to now cooperate with the government if she so chooses.

O'Brien noted that it's common in criminal conspiracy cases for convicted criminals to cut deals with prosecutors after their trials and to testify against their alleged co-conspirators in exchange for the possibility of a lighter sentence.

"If I was [Holmes' defense counsel] Williams & Connolly LLP, I would seriously consider that opportunity," he said. "In fact, I would raise that proactively with the government."

O'Brien said federal prosecutors may think they have a strong enough case against Balwani without Holmes' cooperation, and there's also a risk that putting Holmes on the stand could make it sound like she's denying her own guilt.

Freedman told Law360 that the only way Holmes' abuse claims against Balwani could come into the record during Balwani's trial is if Holmes testifies.

"If she's not testifying, I can't imagine any universe in which that happens," Freedman said. "I don't think it comes in."

But her testimony could be game-changing and devastating for Balwani's defense, particularly since she said during her trial that Balwani was responsible for creating Theranos' skewed financial projections provided to investors, O'Brien said.

There's also a question of whether Balwani plans to testify in his own defense, which legal experts say is unlikely since he refused to take the stand during Holmes' trial. Even if he does testify, he may not do as well as Holmes, O'Brien said.

"I don't think he's as telegenic as she is," he said. "I don't think he has her appeal."

How Holmes' Delayed Sentencing Plays Into Balwani's Trial

Although Holmes was convicted three days into the new year, Judge Davila scheduled her **sentencing for late September** in a move that legal experts say may have been intended to leave open the possibility for Holmes to reach an agreement with prosecutors.

"That's a long way out there," O'Brien said. "That tells me that they're hoping to enlist her as a cooperating witness in [Balwani's] trial, and they're creating that as a possibility."

Freedman said it's not unusual for sentencing hearings to be delayed and for parties to ask for continuances to give time for the probation officer to file a presentencing report and for the parties to respond.

"Logistically, the government and the judge are also quickly pivoting to the new trial," he said. "They're just busy."

Freedman and O'Brien both said that Judge Davila may also have pushed back Holmes' sentencing to avoid any problems that may arise if Holmes were sentenced before Balwani's trial, and to ensure that the court has a clean record in both cases.

Although the deadline for Balwani to accept the government's plea offer has long since passed, legal experts noted that Balwani could cut a plea deal with prosecutors at any time before the jury's verdict. Once trial starts, however, Freedman says a plea deal is less likely.

"Once this train gets going, it's going to be hard to stop," Freedman said.

Representatives for the government didn't immediately respond Tuesday to Law360's request for comment on whether prosecutors plan to call Holmes in Balwani's trial.

Balwani's counsel declined to comment Tuesday and Holmes' counsel didn't immediately respond to a request for comment.

The government is represented by Jeff Schenk, John C. Bostic, Robert S. Leach, Kelly I. Volkar and Amani Solange Floyd of the U.S. Attorney's Office for the Northern District of California.

Balwani is represented by Jeffrey Bruce Coopersmith, Stephen A. Cazares, Aaron Paul Brecher and Amy Walsh of Orrick Herrington & Sutcliffe LLP.

The case is U.S. v. Elizabeth Holmes et al., case number 5:18-cr-00258, in the U.S. District Court for the Northern District of California.

--Editing by Kelly Duncan and Alanna Weissman.

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