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# Former DOJ Prosecutor: Holmes' Verdict Anything But Routine

By Kevin O'Brien

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Elizabeth Holmes' jury verdict was anything but routine, says former assistant U.S. attorney Kevin J. O'Brien, now partner at Ford O'Brien. For one thing, he notes, it ran counter to widespread pessimism about the government's ability to hold powerful business figures to account.

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The jury's verdict in the Elizabeth Holmes trial had something for everyone: conviction on four counts, a hung jury on three counts, and acquittal on four counts. Casual observers might consider this verdict to be anticlimactic. Since the government is expected to win convictions in white collar cases—it does so about 85% of the time—its victories tend not to stand out. Only Holmes' acquittal across the board would have been shocking from that perspective.

But, as a former assistant U.S. attorney for the Department of Justice who specializes in white collar crime, however, the Holmes verdict struck me as far from routine.

## Powerful Business Figure Held to Account

For one thing, the prosecution's success in convicting Holmes on four counts of the 11-count indictment—all springing from fraud on investors, the heart of the case—ran counter to widespread pessimism about the government's ability to hold powerful business figures to account.

Fresh in people's minds was the aftermath of the 2008 financial crisis, when not a single high-level executive was successfully prosecuted for the disastrous performance of their companies. This despite promises by the DOJ, state attorneys general, and elected officials that heads would roll. The fate of Holmes (who was indicted in 2018, during the Trump administration) showed that such prosecutions could be brought off after all.

## Prosecution Cut Through Gender Issues

Also notable was how the prosecution cut through the much-anticipated gender issues surrounding the case. Holmes attempted to exploit these issues, undergoing a makeover for the trial. Changing her appearance, presentation, and even her speaking voice, she sought to become, in the words of one commentator, “the feminine yin to her formerly masculine yang” when she had been CEO of Theranos.

Her new persona seemed to set the stage for her defense that psychological and sexual abuse by her former boyfriend, Ramesh “Sunny” Balwani, the company’s former COO, explained her misdeeds.

In her nearly seven days on the witness stand, however, Holmes never made such a claim; in fact, on direct examination she denied that Balwani ever forced her to tell investors or journalists anything. The most she would say was that Balwani “impacted everything about who I was,” as if the “masculine yang” of her Theranos days—the hands-on competence, air of command, and severe black attire—had not been real.

Under cross-examination, Holmes tended to make vague admissions that downplayed her own agency; thus, when asked about her attempts to quash the *Wall Street Journal* exposés in late 2015 that spelled the beginning of the end, Holmes allowed: “We really messed up.”

The prosecution did not have to rehabilitate Balwani in order to prove its case and, for the most part, it did not attempt to do so. Instead, it seeded its case in chief with reminders that Holmes was a commanding and independent CEO.

### **Compelling Government Witness**

One compelling government witness was Steven Burd, the former CEO of Safeway. He testified that in 2010 his team negotiated Safeway’s \$55 million deal for blood-testing devices “almost exclusively with Holmes,” who did not have counsel present, and that she appeared to be in charge even when Balwani was in the room.

“She never looked over at Sunny to see what he might be thinking,” Burd explained.

By 2012, though, Burd realized that Theranos’ device, despite Holmes’ claims, was “nowhere near” as accurate as laboratory testing, and that Theranos was not close to rolling it out in Safeway stores. A year later, when Burd retired, the deal was dead.

The jury, given the testimony of Burd and other investors, could well have found Holmes guilty of investor fraud without even considering the circumstances of her relationship with Balwani. On the other hand, it is also possible the jury considered the circumstances and decided that Holmes, in blaming Balwani, was trying too hard to change her spots.

### **Sentencing to Come**

The remaining open question is Holmes' sentence, a date for which has not yet been set. The federal sentencing guidelines for white collar crimes are often honored in the breach; in 2021, most of the sentences imposed for economic crimes were below the relevant guidelines range (which is determined largely on the basis of the victims' economic loss).

A recent analysis prepared for the Wall Street Journal found that the medium prison term for defendants whose cases were similar to Holmes' was 16 years. This number is lower than the likely guidelines range in her case, which exceeds 20 years, let alone the maximum sentences for the statutes she violated (wire fraud and conspiracy to commit wire fraud).

Further, a sizable percentage of comparable defendants received prison terms of five years or less, including two who were sentenced to just one year in prison.

Holmes is well positioned to benefit from this tendency toward leniency. She is only 37 years old, has a seven-month-old child, and might credibly argue that she has much to contribute in the future. In addition, she is represented by a leave-no-stone-unturned legal team.

However, a heavily discounted term of imprisonment, one of five years or less, would be truly a surprise in a case that has largely gone the government's way. When a defendant manages to obtain an acquittal or a hung jury on one or more counts, the impact is frequently negated when she receives a sizable sentence on the remaining counts.

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