

# Podcast: Elizabeth Holmes, Ghislaine Maxwell, and the Federal Sentencing Guidelines

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Headlines everywhere from *People Magazine* to the *Wall Street Journal* remind us that white collar crime is in the news. Both Ghislaine Maxwell and Elizabeth Holmes have been convicted and await sentencing. How are those federal sentences determined? What factors come into play, and what do the Holmes and Maxwell cases have in common?

In this episode, white collar attorney **Jim Sturdivant** joins the co-chair of our Investigations team, **Dan Plunkett**, to discuss the federal sentencing guidelines, statutory maximums, judicial discretion, and more.

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**Dan Plunkett:** Hello. I'm Dan Plunkett, Partner in the New Orleans office of McGlinchey Stafford and I co-chair our Government Investigations and White Collar practice team. Joining me today is Jim Sturdivant from Birmingham, a seasoned veteran in the White Collar space, who I hope has some answers to my questions. Hey Jim, how are you?

**Jim Sturdivant:** I'm doing great, Dan. Thanks for the chance to chat.

**Dan Plunkett:** You know, everything from the *Wall Street Journal* to *People Magazine* and *Vanity Fair* are talking to us these days about white collar crime. And I guess it's strange for our practice area to be so popular, but Elizabeth Holmes and Ghislaine Maxwell have certainly brought us onto the front page.

**Jim Sturdivant:** Absolutely, and these cases are both very high-profile cases. They're in some ways, very, very different cases, but there are areas of overlap. And I think one of the areas of overlap is that the sentencing in these cases is going to be fairly drawn out and fairly complicated.

**Dan Plunkett:** Well, that's exactly what I want to talk about, because they've both been convicted now. And what happens next?

**Jim Sturdivant:** Well, in general, what happens when a defendant is convicted of a federal offense, particularly these are very serious cases, both of them very different, but very serious. There's going to be a fairly prolonged period of time between the date the jury convicts the defendant and the date of sentencing. Often sentencing is

delayed until 120 or even 180 days later, or even longer than that. In both of these cases, sentencing, I believe in one case has not been set yet, but I would anticipate the sentencings are going to be significantly down the road.

**Dan Plunkett:** All right, Jim, so you're in federal court. You've been convicted or perhaps pled guilty. Where do we go to look for, how long am I going to go to prison for?

The starting point in a federal criminal case is going to be what are called the Federal Sentencing Guidelines. Within that manual... every conceivable federal offense is going to have a matrix that's going to be applied. And at the end of that process, you get a sentence. The purpose of the guidelines was to try to make federal sentencing uniform.

**Jim Sturdivant:** Well, the starting point in a federal criminal case is going to be what are called the Federal Sentencing Guidelines. And without getting into a whole lot of detail about these, they're basically a set of very complex, it's a very complex manual, really. And within that manual is a formula for coming up with — every conceivable federal offense is going to have a matrix that's going to be applied. And at the end of that process, you get a sentence that comes out of that. And the purpose of the guidelines was to try to make federal sentencing uniform so that no matter where in the country you were convicted of a like offense or series of offenses, you would receive roughly the same amount of punishment. And most of the time, "punishment" for purposes of our discussion today is going to be measured in terms of length of incarceration.

**Dan Plunkett:** So, Jim, are these guidelines mandatory? Do they bind federal judges?

**Jim Sturdivant:** They do not. And interestingly enough, they used to. When they were first enacted in 1987, they were mandatory and they were largely the way it went. You know, these were the rules, and your guidelines sentence really determined what sort of sentence you actually received. In 2005, the Supreme Court in a decision called *U.S. v. Booker* basically made the guidelines advisory, and now they are truly guidelines. However, they are really the starting point in federal sentencing and remain very influential in the sentencing process.

**Dan Plunkett:** Can a federal judge assign a sentence or impose a sentence that is greater than the guidelines?

**Jim Sturdivant:** Yes. And lower than the guidelines. They can go either way.

**Dan Plunkett:** So in summary, would it be fair to say that the guidelines are a policy statement on how seriously we take various crimes relative one to another?

**Jim Sturdivant:** I think that's accurate except I would take it a little further and say, instead of a policy statement, I would say that they are a very influential component of federal sentencing. I don't think it's inaccurate to say they're a policy statement, but I just think it's a lot more than that.

**Dan Plunkett:** And some of the factors that are taken into account, I can only imagine, let's see how I do on the quiz here, would be the amount of money at stake?

**Jim Sturdivant:** Correct.

**Dan Plunkett:** Whether children are involved in the crime?

**Jim Sturdivant:** Yes. Children or other vulnerable victims are often going to result in an enhanced offense level.

**Dan Plunkett:** Such as the elderly.

**Jim Sturdivant:** Correct.

**Dan Plunkett:** The number of victims involved plays a role, yes?

**Jim Sturdivant:** Yes.

**Dan Plunkett:** And then, maybe if we're talking about drugs, the quantity involved could play a role.

**Jim Sturdivant:** That's correct.

**Dan Plunkett:** Okay. So let's look at these two particular instances. Elizabeth Holmes has been convicted of four counts of defrauding investors into Theranos, her blood-testing company, right?

**Jim Sturdivant:** That's correct.

**Dan Plunkett:** What's the maximum sentence that she could receive?

**Jim Sturdivant:** Well, the maximum sentence that she could get is the statutory maximum, which is 80 years, because she was convicted of four counts. Each of those wire fraud counts carries a 20-year maximum. They've recently been amended to increase the upward maximum penalty. So she could theoretically get 80 years. And she's not going to get that, but she could get 80. That's the max.

**Dan Plunkett:** Okay. And under the guidelines, what "should" she get?

**Jim Sturdivant:** Well, under the guidelines, and this is going to sound extremely harsh, but under the guidelines, I have calculated her sentence to be at an offense level which is the highest possible offense level there is, which is a life sentence. She is at offense level 43 under the sentencing table. And there are only 43 levels. So if you're at 43 or above, you have a life sentence under the guidelines. So if she were to receive a pure guideline sentence, she would receive in effect an 80-year sentence. That's not going to happen, but that's my calculation is that she's at an offense level of 43.

I have calculated [Holmes'] sentence to be at... offense level 43 under the sentencing table, and there are only 43 levels. So if you're at 43 or above, you have a life sentence under the guidelines.

**Dan Plunkett:** Okay. And to put this in perspective, Jim, her crimes were that she defrauded investors who wanted to get rich in her Silicon Valley company.

**Jim Sturdivant:** That's right. And under the guidelines, because the amount of money in a fraud case, under a certain section of the guideline which would apply here — under that section, there is a series of categories of what's called the "loss amount." And in her case, her loss amount is either going to be more than \$65 million, more than \$150 million, or more than \$550 million, I believe. But the point is, there are these various

benchmarks and her loss amount is going to be between \$65 and \$150 million. And that's going to place her with an enhancement of 26 levels, which is going to result in a base offense level of 33, because it's  $7+26=33$ . I know that's a lot of math, but that's where you start in her case is an offense level of 33, which is extremely high.

**Dan Plunkett:** I want to compare this to the Ghislaine Maxwell situation. Ms. Maxwell was convicted of five counts of child sex trafficking. Correct?

**Jim Sturdivant:** She was actually convicted of both the substantive counts of child sex trafficking and conspiracy to commit child sex trafficking. But yes, she was convicted of five counts.

**Dan Plunkett:** Alright, Jim, now you're sounding like a lawyer. She was engaged in the trafficking of young girls to rich men who wanted to prey upon them. That's what it came down to, right?

**Jim Sturdivant:** Yes.

**Dan Plunkett:** And what is her statutory maximum possible sentence?

**Jim Sturdivant:** Sixty-five years is the statutory maximum in her case.

**Dan Plunkett:** And what about the guidelines?

**Jim Sturdivant:** In her case, the guidelines are not perhaps as high one might expect, partly because I believe the appropriate guideline manual to use is going to be a 2004 guideline manual, because the conduct for the most part took place in the 2001 through 2004 timeframe, according to the indictment.

**Dan Plunkett:** And what's the number, Jim, how many months are we looking at?

**Jim Sturdivant:** Okay. The number is going to be between either, she's going to be at a range of either between 78 and 97 months, or possibly between 87 and 108 months. So if she's at an offense level 29, which is very possible, then her guideline offense sentencing range would be between 87 on the low end and 108 months on the high end, which is nine years.

**Dan Plunkett:** Jim, I didn't excel in math, but I think what you just told me is that the woman preying on young girls could go to jail for 6, 8, 10 years. And the woman who defrauded some investors in a "get rich quick" scheme might be facing 80 years. Is that right?

**Jim Sturdivant:** That's not quite right, because for one thing, you're comparing apples to oranges there, because you either need to use the statutory maximum or the guidelines sentence. So like in the case of, for a statutory max purpose, 80 years versus 65 years, in the Maxwell case, it's 65 years. If you're looking at guidelines, then there's a huge discrepancy between really a life sentence versus a sentence of possibly as high as nine years under the guidelines.

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**Dan Plunkett:** Ok, you're right, Jim, intellectual speaking, I was comparing apples and oranges. But you know, an American citizen, it seems to me that what the sentencing guidelines, the policy statement that I asked you about, is that we value money more than we value young women. And you don't have to answer that, Jim, but isn't that the contrast here?

**Jim Sturdivant:** Yes, it is. However, I would point out that the current guidelines, if we were to use guidelines from say 2018 or 2019, the current guidelines would result in a higher sentence of around 151 to 188 months, which is going to be 12 to 15 years. So the current guidelines do operate in such a way that the guidelines, the "guidelines sentence" would be greater. One other point that is important to make is that the guidelines are not binding on the judge and they are not mandatory. And therefore, in the case of Ms. Maxwell, I believe that the judge is probably going to look at not imposing a guideline sentence, but rather imposing a more harsh sentence. In Ms. Holmes's case, I think the judge is probably almost certain — well, is going to certainly not impose a life sentence or anything close to that, and is going to be looking at a sentence lower than what would be called for by the guidelines. And both of those outcomes are permitted. Both outcomes are entirely plausible in both of these cases. One where the judge will go up from the guidelines and one where the judge will go down from the guidelines.

**Dan Plunkett:** So to capture that thought, Jim, the U.S. sentencing guidelines have somewhat caught up with the shock that I'm expressing regarding Maxwell's crimes, in that she would be treated harsher under the current guidelines than the ones likely to apply.

**Jim Sturdivant:** That's correct.

**Dan Plunkett:** Okay. Last topic for you, Jim. One of these women is in her early sixties and a sentence of 10 or 15 years could, in effect, be a life sentence. The other was convicted by a jury where one of the jurors actually expressed concern about a woman so young being sent to prison for so long. Is age a factor under the guidelines?

Age is not a factor under the guidelines. However, everything about the defendant is allowed to be a valid consideration when imposing sentence.

**Jim Sturdivant:** Age is not a factor under the guidelines. However, the judge is allowed to consider all of the defendant's, everything about the defendant is allowed to be a valid consideration when imposing a sentence. And certainly in this case, the age of Ms. Maxwell is going to be considered by the judge, I think just because of the practicality of a long sentence, you know, on her life. As far as, you know, frankly, how much longer is she going to be, you know, a functioning member of society in terms of being able to have any kind of life after she were to get out of prison. In the case of Ms. Holmes, I'm not so sure that her age is really going to — I believe she's 37. And I think she, I don't know that her age is really going to play that much of a part in her sentence. I think what may make more of an impact is the fact that she does have a young child.

**Dan Plunkett:** Interesting, she's also rumored to be in a relationship with a very wealthy individual. Is it too late for her to "get out of jail" for, not free, but for cash?

**Jim Sturdivant:** I think it is. She's so far down the road now, after going through a jury trial and the type of case it was, and the length of the trial, and the complexity of the trial, and the whole twisting and turning path of the investigation. I think that window has closed for her.

**Dan Plunkett:** The time for that would've been during a plea agreement.

**Jim Sturdivant:** Correct.

**Dan Plunkett:** Interesting, Jim. I appreciate all this knowledge that you've dropped on us. For those who really want to dig into the sentencing guidelines, where would they go to look?

**Jim Sturdivant:** Well, first of all, the sentencing guidelines are available online. But also I'm perfectly happy to have email exchanges or telephone conversations with anyone who might want to discuss this further and in more depth. There are many twists and turns to the Holmes sentencing in particular, and that is something that I have written about recently. And there's a much more detailed analysis of her situation in that article.

**Dan Plunkett:** Excellent. Thanks, Jim. And for our audience who might be thinking about some of these issues for the first time, I note that while Ghislaine Maxwell is sitting in jail awaiting sentencing, even though she might only do six or eight years, total. Elizabeth Holmes is out on a \$500,000 bail, in contrast to her maybe a quarter-billion-dollar crime. Interesting twists and turns there, huh?

**Jim Sturdivant:** Yes. Now I do think that the judge in Ms. Maxwell's case did specifically find that she was a flight risk. And so that is the reason that has been articulated by the judge. I believe on more than one occasion, they've repeatedly tried to have a bail or bond set in Ms. Maxwell's case pretrial, and she has been in jail since July of 2020. So in her case, she was deemed to be a flight risk.

**Dan Plunkett:** Thanks, Jim. That's a lot of great information about the federal sentencing guidelines. I hope I never need your expertise. Thanks.

**Jim Sturdivant:** You're welcome.

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