

Defense Lessons From A 'Varsity Blues' Acquittal

By **Thomas Murphy** (July 29, 2022)

When the federal investigation code-named "Operation Varsity Blues" first made headlines, it seemed as if it was a scandal created in a lab to maximize feelings of schadenfreude and working-class rage.

Wealthy celebrities and corporate executives had been accused of conspiring with insiders at elite universities in an elaborate pay-for-play scheme to gain admission for their children.

Many in the media opined that it would be legal suicide for any of the parents to go to trial and face the wrath of a jury comprised of ordinary citizens of presumably more modest means. Unsurprisingly, most of the individuals charged in the investigation ultimately chose to plead guilty.



Thomas Murphy

One of the handful of defendants that elected to take his chances at trial was Amin Khoury, the son of the billionaire founder of B/E Aerospace Inc. Khoury had been accused of paying \$200,000 to secure his daughter Katherine's place on Georgetown University's tennis team and, with it of course, admission at the prestigious school.

In what many perceived to be a shocking result, Khoury was **acquitted** on all charges on June 16. A deeper look at the facts of the case, and how each side chose to present it, reveals that the result should not have been terribly surprising at all.

Notably, the facts of Khoury's case were different from those of many of the other parents caught up in the "Varsity Blues" sting. Nonetheless, the task facing Khoury's defense team was daunting.

Khoury admitted that he gave \$180,000 to the Georgetown tennis coach, and another \$20,000 to a tennis tutor, Tim Donovan, who allegedly acted as a middleman. Katherine Khoury was admitted to Georgetown but ultimately never played tennis there. Perhaps worst of all, Donovan struck a plea deal and agreed to testify against Khoury.

Facts ultimately decide cases. The way attorneys choose to frame those facts, however, can greatly influence whether the client wins or loses at trial. Khoury's trial illustrated two related concepts attorneys should be mindful of whenever considering how to tell their client's story at trial.

Own the Factual Hand You Have Been Dealt

Jurors bring a lifetime of knowledge and experience with them into the jury room. For all the talk of populist rage when the "Varsity Blues" scandal broke, it has never been a secret that the extraordinarily wealthy are different.

The general public understands that the admissions process at elite universities is an unfair game where the field is tilted in favor of the wealthy and well-connected.

For example, the practice of providing legacy applicants an admissions advantage simply because a parent attended the school keeps diplomas from elite universities in the hands of the same elite families.[1]

To put it mildly, admissions favors to major donors further shrinks the pool of coveted spots available to hardworking kids who have nothing to offer but their academic merit.

What the Khoury defense recognized was that jurors would not punish Khoury for playing what all recognize is an unfair game, so long as he played that game within the bounds of the unfair rules we grudgingly accept is a fact of life.

Khoury's defense owned the unfairness of the college admission process rather than run away from it. Defense attorney Roy Black **told the jurors** in his opening statement that there was "a part of this case you're not going to like" and noted that they would "never see a building named after the student who had the highest SAT score."

However, rather than attempting to minimize Khoury's wealth, or the role wealth far too often plays in the college admissions process, the defense made it a focal point of their case.

For example, Khoury's defense asserted that Georgetown's evaluation of athletic recruits often factored in the recruit's parent's ability to make large financial contributions to the school. When internal Georgetown e-mails **were introduced** showing the university's interest in the wealth of potential athletic recruits' families, Black astutely asked: "What does that have to do with their ability to play soccer?"

When opposing the government's motion in limine to exclude evidence regarding Georgetown's fundraising efforts, Khoury's defense noted that the government would argue that only "exceptional athletes or those who are gifted academically are admitted to Georgetown."

The defense argued that, in reality, "Georgetown considers not only academics and athletic ability, but also whether the applicant is the child of a wealthy or prominent family that has the potential to donate to the school."

While the Khoury defense essentially conceded that family wealth is what gave Katherine Khoury a chance of getting into Georgetown, it also took dead aim at Georgetown's recruitment process, asserting that it had a history of giving preferential treatment to applicants that offered the prospect of large future donations to the school.

Khoury's defense could take this approach because there were key facts that distinguished his case from those of the other "Varsity Blues" parents that made headlines:

- Katherine Khoury was actually on her high school tennis team.
- No athletic records were fudged or forged.
- There were no photoshopped action shots that needed to be awkwardly explained away.
- By all accounts, Katherine Khoury was a hardworking — though not outstanding — student.
- There was no accusation that anyone had taken entrance exams on her behalf.
- Lastly, Khoury had a personal connection precisely where he needed it most: He played tennis at Brown University with Gordon Ernst, the Georgetown University tennis coach.

When Ernst sent Katherine's transcripts and scores to Georgetown's admissions officer, he remarked, "This is the daughter of my best bud from Brown."

The genius of the Khoury defense was that it didn't run away from the fact that Khoury's wealth and connections undeniably played a role in his daughter being admitted to Georgetown. They owned it.

To that end, they also showed how Georgetown was an eager participant in perpetuating this fundamentally unfair aspect of college admissions. Indeed, internal documents showed that Georgetown showed flexibility in its admissions "standards" based on just how wealthy or important the applicant's family was.

The Khoury defense recognized that there was a difference between a university giving the wealthy the types of breaks they have received for generations and the subterfuge, forgeries and audacious misrepresentations that characterized the other "Varsity Blues" cases. Perhaps most importantly, they recognized they didn't have any other choice.

In its **closing argument**, the government tried to attack the defense's approach, arguing that Khoury "admits what he can't deny, and he denies the one thing he can't admit." The government failed to see the approach for what it was — shrewd and effective.

Never Overpromise and Then Underdeliver

In stark contrast, the government lost credibility with the jury by breaking a cardinal rule of trial. It failed to deliver on the promises it made at the trial's inception.

As an advocate, it is the attorney's job to paint facts in the light most favorable to the client. This, however, can lead to a temptation to oversell and attempt to paint the facts as different, or better, than they really are. Succumbing to this temptation can be detrimental.

Examples of the government overselling the facts — both big and small — occurred throughout the trial.

The government claimed that Khoury's agreement to pay a \$200,000 bribe to Ernst was reached during a reunion dinner for the Brown tennis team. Under cross-examination, the government's star witness, Donovan, admitted that there had been no discussion of a bribe or anyone committing a crime at that dinner.

Even worse, numerous documents showed that Katherine Khoury's admission to Georgetown was far from a sure thing even months after that dinner occurred.

When one top tennis recruit elected to turn down Georgetown in favor of Boston College, opening a slot for Katherine Khoury, Donovan remarked in a text message to Khoury that they had "dodged a bullet."

If Katherine Khoury's admission had been sealed with a bribery agreement made months before, it wouldn't have mattered what Georgetown's other tennis recruits decided to do. In fact, when Katherine Khoury was finally admitted to Georgetown, Donovan sent a text message to Khoury that Katherine's admission was "proof that miracles still happen."

The government claimed that Khoury and Ernst had concocted a scheme to have Katherine Khoury fake a shoulder injury as an excuse to avoid playing tennis at Georgetown. That story unraveled when there was no reliable evidence that anything of the sort had actually happened.

Katherine Khoury convincingly testified that she was unaware of the efforts her father had made on her behalf. Consequently, she never claimed to have an injured shoulder.

Rather, a series of agonizing text messages were admitted at trial that showed that her parents' ugly divorce left the family in therapy and Katherine Khoury contemplating suicide just as she was beginning her freshman year at Georgetown. That was the real reason why Katherine Khoury stopped playing tennis.

The government put former Georgetown admissions officer Meg Lysy on the stand to testify that wealth of applicants' families was neither investigated nor considered during the admissions process. Black argued that internal Georgetown documents undeniably proved that was not true.

The government put on evidence of the scores of the first two SAT tests Katherine Khoury had taken. The defense countered by showing that Katherine had taken the test two more times and that her scores had improved each time.

If Katherine Khoury's admission to Georgetown had been secured months earlier by a bribe, she would not have needed to keep taking the SAT.

Perhaps most damaging, the government was left in the position of trying to argue that money and influence do not play a role in the admissions process at Georgetown. To no real surprise, the evidence showed that it did.

The jurors, of course, likely knew that was the case with college admissions everywhere long before they were even selected for jury duty.

It is often said that people are entitled to their own opinions but not their own facts. A critical part of preparing a narrative for trial is being objective about what the facts are and where those facts can — and cannot — take you.

The Khoury defense recognized that there were certain facts it could not spin. Khoury was both wealthy and connected. Katherine Khoury was neither a top tennis recruit nor the type of student that could gain admittance to Georgetown on merit alone. Khoury caused Ernst and Donovan to be paid a total of \$200,000.

To paraphrase the government's closing argument, Khoury admitted all of those things because there was no credible way to deny them. The government, on the other hand, took those same facts and tried to make them seem even stronger than they were.

Worse, the government tried to deny the one thing that was undeniable — that Georgetown gave admissions preferences to the children of wealthy or well-connected applicants.

Given how each side chose to present the facts, the jury's decision to reject the government's theory of the case was not nearly as remarkable as it may have first seemed.

Thomas F. Murphy is a partner at Friedlander Mislner PLLC.

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[1] Moreno, Carlos "How Ending Legacy Admissions Can Help Achieve Greater Education Equity," April 12, 2022, <https://www.aclu.org/news/racial-justice/how-ending-legacy-admissions-can-help-achieve-greater-education-equity>.