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TRIAL JUDGE SPEAKS PUBLICLY ABOUT MURDAUGH CASE

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The Hon. Clifton Newman, the Colleton County judge who presided over the highly publicized trial of Alex Murdaugh for the shootings of his wife and son, spoke recently about the case at his law school alma mater, Cleveland State University.

Newman, a well-respected and seemingly avuncular, down-to-earth jurist, was asked about his perceptions and decisions made during one of the more notorious trials in his nearly 40-year judicial career.

In particular, he was asked about his decision to admit evidence about the defendant's multi-year spree of financial crimes totaling nearly eight million dollars. Initially, the prosecution offered proof of thefts from clients, money laundering and embezzlement from his law firm to prove MOTIVE. Their theory was that the defendant committed the murders to provide a distraction from his other crimes by portraying himself as a grieving victim of a domestic tragedy involving unknown killers.

The judge denied the request but changed his mind after the defense called a character witness to show that the defendant was a loving husband and father who would not kill his own family. (It is still unclear how evidence of theft rebuts evidence of domestic tranquility).

The judge stated that the proof of the financial crimes (to support the defendant's drug addiction) provided necessary background and put the murders in context. However, during his interview at Cleveland State, when asked why he admitted the other crimes evidence, he said that whenever a defendant testifies at a trial, there is very little that cannot be used to attack his credibility as a witness.

So, while the ruling at trial appears to have been based on character rebuttal (or to provide background and context), the judge subsequently explained that it was a matter of impeachment. If that is true, then the "all bets are off" approach to cross examination of the defendant could provide fodder for the defense on appeal.

In New York, the credibility of a witness may be impeached on cross examination by prior instances of vicious, criminal, or immoral conduct provided such conduct or the circumstances of its engagement bear LOGICALLY and REASONABLY on credibility (NY Advisory Evidence Rule 6.17; *People v Smith*, 27 NY3d 662 [2016]).

When the witness is the defendant, the nature and scope of such inquiry on cross examination must be addressed by the trial judge who must balance the probative value of such evidence on credibility against its potential for undue prejudice (People v Sandoval, 34 NY2d 371 [1977]).

During the trial, the judge carefully considered the proffered evidence, but may have conflated proof that rebuts good character evidence with evidence of prior bad acts to prove motive (or provide background and context) (See NY Advisory Evidence Rule 4.21; People v Molineux, 168 NY 264 [1901]), and evidence of impeachment of the defendant. As noted above, the judge's explanation to law students suggests that, in his mind, once the defendant took the stand, the flood gates for evidence of prior bad acts were wide open.

WHY TALK AT ALL?

While basking in the warm glow of accolades flowing from the calm, cool handling of a high-profile trial near the end of one's judicial career is understandable, (one commentator described the judge as a "national treasure"), one can't help but wonder whether making any public comment about the case (which will undoubtedly be taken up on appeal) was ill-advised at this stage.

CANON 3(6) of the US CODE OF JUDICIAL ETHICS states that a judge SHOULD NOT MAKE PUBLIC COMMENT on the MERITS of a matter PENDING or IMPENDING in any court. This does not include comments in the course of official duties to explain court procedures or to scholarly presentations for legal education. (Article 100.80 of the NY Code of Judicial Conduct is essentially the same).

The North Carolina Code of Judicial of Judicial Conduct (CANON 3[A][6]) states that a judge should abstain from public comment about the merits of a pending proceeding in any state or federal court dealing with a case or controversy arising in Nort Carolina or addressing North Carolina Law. This subsection does not prohibit a judge from making public statements in the course of official duties; from explaining for public information the proceedings of the court; from addressing or discussing PREVIOUSLY ISSUED JUDICIAL DECISIONS when SERVING AS FACULTY or OTHERWISE PARTICIPATING IN EDUCATIONAL COURSES OR PROGRAMS; or from addressing…EDUCATIONAL…ORGANIZATIONS.

IT AIN'T OVER TIL IT'S OVER.

One could argue that the trial was completed, judgment was imposed (two consecutive life sentences) and therefore, the case was no longer pending. As noted above, while proceedings in the trial court were finished (at least for the time being), the prospect of an appeal still looms and however unlikely, the judgment could be reversed and returned for a new trial.

By letting the world to know the basis of his reasoning on a pivotal evidentiary issue that will surely be debated on appeal, the judge may have provided ammunition for the defense to argue that it was error to admit all the prior bad act evidence on the theory that a defendant who testifies is pretty much fair game for whatever salvos are launched in his direction.

Even if error was committed, the appellate court may conclude, like the trial judge did at sentencing three days after the verdict, that the evidence of guilt was overwhelming and therefore, it should not result in reversal of the convictions. Time will tell.