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## Recent Developments: Howell v. State

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## RECENT DEVELOPMENT

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### ***HOWELL V. STATE: DURESS CANNOT BE RAISED AS A DEFENSE TO A CONTEMPT CHARGE FOR REFUSING TO TESTIFY IN COURT, UNLESS THE DEFENDANT CAN OFFER EVIDENCE OF “PRESENT, IMMEDIATE, AND IMPENDING” SERIOUS BODILY HARM OR DEATH.***

**By: Justin Ellis**

The Court of Appeals of Maryland held that a defendant must offer “some evidence” of immediate harm in order to raise the defense of duress to a contempt charge. *Howell v. State*, 465 Md. 548, 565, 214 A.3d 1128, 1139 (2019). The defendant was held in contempt for refusing to testify out of fear but could only offer evidence of potential future harm. *Id.* at 556, 214 A.3d at 1139. Additionally, the court declined to decide whether the ability to raise a duress defense to a contempt charge from refusing to testify is available. *Id.*

In March 2012, Travis Howell (“Howell”) pled guilty to federal drug charges in accordance with a plea agreement, requiring him to testify in future cases if called as a witness for both state and federal proceedings. Pursuant to that agreement, Howell testified to a Baltimore City grand jury in 2012. During his testimony, Howell stated that Freddie Curry (“Curry”) admitted to murdering Raynard Benjamin. Curry was later charged for this murder, with the trial set to begin in March 2016.

Prior to the beginning of the Curry trial, Howell was subpoenaed to appear before the court for a pretrial hearing. He refused to comply with the court order, resulting in a material witness warrant being issued. After being arrested and brought to the motions hearing on March 7, Howell took the stand and refused to answer any questions by invoking his right against self-incrimination. The State then granted Howell use and derivative use immunity, allowing Howell to testify at trial without repercussions from his testimony or information learned from it. Howell was then brought back to the circuit court to testify on March 10 but again refused to do so. On this occasion, he stated, “I respectfully refuse to testify” in response to each question from the prosecutor.

After this occurrence of refusing to testify, Howell was held in direct contempt by the circuit court, but disposition was delayed until after the Curry trial. This provided Howell the opportunity to honor his agreement and testify. The very next day, March 11, Howell was brought back to court to testify and again refused. Howell’s reason for refusing this time was that after the previous day’s session, he was involved in an altercation outside of

the courthouse. Howell claimed that he was assaulted and called a “snitch” by unidentified individuals. Therefore, he was frightened to testify out of fear of future physical harm.

Further, counsel for Howell argued that the prosecutor at his testimony before the grand jury in 2012 promised to give notice when his cooperation with the State would be made public. Howell claimed he did not receive any notice before an article published in the Baltimore Sun online edition covering the Curry trial listed him as a witness for the State. Throughout the trial, Howell continued his refusal to testify, and Curry was acquitted. Soon after, Howell was indicted on two counts of criminal contempt.

Before Howell’s trial for contempt, his counsel subpoenaed the prosecutor from the Curry trial. To establish Howell was in fear of retaliation for testifying, his lawyer planned to elicit testimony regarding the witness protection offerings by the State during the trial. The intent was to argue then how these offerings were inadequate. The State responded with a motion to quash, stating that a duress defense was inapplicable in this context. The court agreed, and the motion was quashed. Prior to the trial, the State also filed a motion in limine to exclude any evidence that could be used to raise a duress defense, which was also granted.

The trial for contempt commenced in April 2017, and Howell entered a plea of “not guilty” with an agreed statement of facts. Howell was ultimately found guilty of contempt for refusing to testify by the Circuit Court of Baltimore City, to which he filed a timely appeal. The Court of Special Appeals of Maryland did not discuss whether duress is a valid defense to a contempt charge. Instead, the court focused on whether Howell offered enough evidence to generate a duress defense. They held he failed to do so, prompting Howell to file a *writ of certiorari*, which was granted by the Court of Appeals of Maryland.

The Court of Appeals followed the same approach as the lower court and declined to answer whether duress was an available defense to a contempt charge for refusing to testify. *Howell* at 566, 241 A.3d at 1139. Instead, the court focused on whether Howell met the required legal elements to raise duress as a defense during a criminal trial. *Id.* at 565, 241 A.3d at 1138. The standard for raising duress is that there must be a “present, immediate, and impending” threat that creates a fear of death or serious bodily harm with no opportunity for a victim to escape. *Id.* at 563, 241 A.3d at 1136 (citing *McMillan v. State*, 428 Md. 333 at 348, 51 A.3d 623 (2012)). Therefore, the immediacy of the threat is essential to raising the defense to a criminal charge. *Id.* at 565, 241 A.3d at 1138.

In order to fulfill the immediacy requirement for duress, Howell was required to offer “some evidence” of immediate harm. *Howell* at 565, 241 A.3d at 1138. There is no legal burden of proof attached to the “some

evidence” standard, which instead is understood by its common meaning. *Id.* If this requirement is fulfilled in a criminal trial, then the court will include an instruction of duress for the jury. *Id.* The Court of Appeals held that Howell failed to meet this burden because all evidence of harm offered related to potential future retaliation for testifying. *Id.* For Howell’s duress defense to prevail, the immediate threat needed to be in the courtroom at the time he was testifying without the ability to escape. *Id.* at 564, 241 A.3d at 1138.

In reaching its conclusion, the Court of Appeals also considered the duty for witnesses to testify and the potential societal impact of permitting a duress defense for refusal. *Howell* at 562, 241 A.3d at 1136. Witness testimony is considered essential to the operation of law and the state may compel such testimony if necessary. *Id.* However, this must be balanced against the state’s obligation to protect citizens. *Id.*, 241 A.3d at 1137. Maryland has addressed this by passing MD. CODE ANN. CRIM LAW § 9-303, permitting punishment of witness intimidators up to ten years in jail. *Id.* at 563, 241 A.3d 1137. Although witness intimidation is still a problem, the court held that a duress defense was a “poor fit” to combat the issue due to its immediacy requirement. *Id.* at 565, 241 A.3d at 1138. Additionally, the court noted that a fear of retaliation offers a valid legal basis, which is better suited for mitigating against a contempt conviction for failing to testify. *Id.*

In *Howell*, the Court of Appeals of Maryland held that a witness refusing to testify must proffer an immediate threat of harm in the courtroom at their testimony to be able to raise a duress defense. Threats to and retaliation against testifying witnesses is an ever-present reality in Maryland and Baltimore City especially. The Court of Appeals has made it clear that the criminal justice system must prevail over these criminal acts in order to preserve our fundamental legal foundation. Giving in to victim intimidation could be the beginning of the end of credibility for our system of justice. Overall, cooperation between the State and the public is required to achieve a solution. Witnesses need to testify at trial in order to obtain guilty verdicts and incarcerate violent offenders. Simultaneously, the abilities of the State to protect witnesses and their ability to arrest perpetrators of witness intimidation needs to be known.