

No. \_\_\_\_\_

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**In The  
Supreme Court of the United States**

\_\_\_\_\_ ♦ \_\_\_\_\_

**KEVIN SEWELL,**  
*Petitioner,*

v.

**STATE OF MARYLAND,**  
*Respondent.*

\_\_\_\_\_ ♦ \_\_\_\_\_

**ON PETITION FOR WRIT OF CERTIORARI TO  
THE COURT OF APPEALS OF MARYLAND**

\_\_\_\_\_ ♦ \_\_\_\_\_

**PETITION FOR WRIT OF CERTIORARI**

\_\_\_\_\_ ♦ \_\_\_\_\_

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*Dated: June 28, 2019*

## QUESTIONS PRESENTED

1. Whether Maryland's law imposing a duty to report suspected child abuse or neglect on all persons in the State violates the First Amendment where it mandates speech.
2. Whether Maryland's law imposing a duty to report suspected child abuse or neglect on all persons in the State is overbroad in violation of the Due Process clause.
3. Whether Maryland's law imposing a duty to report suspected child abuse or neglect on all persons in the State is vague in violation of the Equal Protection clause.
4. Whether Maryland's law imposing a duty to report suspected child abuse or neglect on all persons in the State violates the Confrontation Clause of the Sixth Amendment where it permits anonymous reporting.

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## **CITATION OF STATE DECISION BELOW**

The Maryland Court of Appeals decision is reported at 205 A.3d 966 (2019), and is reprinted in the Appendix at 1a.

## **JURISDICTION**

1. The Maryland Court of Appeals entered its decision and final judgment in this case on April 2, 2019. 1a.
2. Petitioner believes this Court has jurisdiction to review the State's judgment pursuant to 28 U.S.C. § 1257(a).

## **CONSTITUTIONAL PROVISIONS INVOLVED**

U.S. CONST. amend. I; 68a.

U.S. CONST. amend. V; 69a.

U.S. CONST. amend. VI; 70a.

U.S. CONST. amend. XIV; 71a.

## **STATUTES INVOLVED**

28 U.S.C. § 1257. 73a.

34 U.S.C. § 20341. 74a.

Md. Code, Family Law, § 5-705. 82a.

## **STATEMENT OF THE CASE**

On September 23, 2016, Mr. Sewell was convicted of first-degree murder, first-degree child abuse, and neglect of a minor in the Circuit Court for Worcester County, Maryland. On December 2, 2016,

Mr. Sewell was sentenced to life without the possibility of parole. Mr. Sewell timely noted his appeal to the Court of Special Appeals of Maryland. On March 5, 2018, the Court of Special Appeals for Maryland reversed Mr. Sewell's convictions in a reported opinion. *See* 42a. The Court of Special Appeals correctly held that Maryland failed to meet its burden to offer "some facts and circumstances" to rebut the presumption of confidentiality and the trial court abused its discretion in admitting confidential marital communications. *Id.* The Court of Special Appeals also correctly held that the admission of the privileged marital communications between Mr. Sewell and his wife was not harmless error. *Id.* at 66a.

On April 19, 2018, the prosecution filed a Petition for Writ of Certiorari to the Court of Appeals of Maryland. On October 4, 2018, Maryland's mandatory reporting statute was raised, for the first time, by the Court of Appeals at oral arguments. The issue was never briefed by the parties. This appeal arises directly from the April 2, 2019 decision below holding that Maryland's mandatory reporting statute is a waiver of Mr. Sewell's marital communications privilege.

The Court of Appeals is Maryland's highest court, therefore, this Court has jurisdiction to review the State's decision. The constitutionality of the mandatory reporting statute is now timely and appropriately raised by Mr. Sewell.

## REASONS FOR GRANTING THE PETITION

In the present case, the answer is the Constitution. Maryland's mandatory reporting statute is repugnant to the Constitution. The Court of Appeals of Maryland erred by holding otherwise and reversing the well-reasoned decision of the Court of Special Appeals of Maryland. By allowing an unconstitutional statute to trample the marital communications privilege, the court has breached the integrity of a venerable and most sacred privilege. The Maryland decision desecrates the very sanctity of marriage, which is protected by the marital communications privilege that has historically served to preserve the public interest in maintaining marital harmony.

As the Court of Special Appeals for Maryland held below, Mr. Sewell is entitled to a new trial where the trial court's error in admitting privileged text messages exchanged between spouses was not harmless. As noted by the dissenting judge below, there is an absence of precedence for Maryland's holding and the Majority's decision erodes the marital privilege. It is undisputed that Mr. Sewell's communications to his wife are privileged under Maryland law. Furthermore, both the Majority and the dissent below fail to acknowledge the unconstitutionality of the mandatory reporting statute employed to uphold Mr. Sewell's conviction and life sentence without the possibility of parole. *See* 1a.

## **I. Mandatory Child Abuse Reporting Statutes are Bad Laws Born of Hard Cases.**

Generally, there is no duty to rescue. RESTATEMENT (SECOND) OF TORTS § 314 (1965). Historically, the duty to report suspected child abuse was limited to health practitioners, police officers, educators, or human service workers acting in a professional capacity. *See e.g.*, 34 U.S.C. § 20341; *see also* MD. CODE, FAM. LAW § 5-704; JESSICA R. GIVELBER, *Imposing Duties on Witnesses to Child Sexual Abuse: A Futile Response to Bystander Indifference*, 67 FORDHAM L. REV. 3169, 3181-84 (1999). The constitutionality of these laws is questionable. *See e.g.*, *Missouri v. Brown*, 140 S.W.3d 51, 56 (2004) (White, J., dissenting). Nevertheless, the duty to report has expanded across the country in an effort to protect children.

In 1997, a 7-year old girl, Sherrice Iverson, was brutally attacked and murdered. *See* ALISON M. ARCURI, *Sherrice Iverson Act: Duty to Report Child Abuse and Neglect*, 20 PACE L. REV. 471 (2000). While Sherrice was sexually assaulted and murdered in a bathroom stall by Jeremy Strohmeyer, David Cash, a friend of Strohmeyer's looked on, but never alerted police and never intervened to help Sherrice. *Id.* Strohmeyer, facing the death penalty, pleaded guilty to first-degree murder, first-degree kidnapping, sexual assault on a minor with substantial bodily harm and sexual assault on a minor. *Id.* He is currently serving four consecutive life terms without possibility of parole. Cash was not prosecuted because his failure to act did not violate any state law. *Id.*



In response, Nevada enacted the Sherrice Iverson Bill rebuking the traditional no duty to rescue rule and requiring affirmative action of innocent bystanders. *Id.* In response to public outcry, the 105th Congress proposed, but failed to enact, H.R. 4531, the Sherrice Iverson Act. *Id.* The Act would have amended the Child Abuse Prevention and Treatment Act to require that states receiving funds under the Act enact laws providing a criminal penalty for an individual who fails to report witnessing another engaging in sexual abuse of a child. *See* H.R. 4531, 105th Cong. (1997-1998). Following Sherrice's death, nineteen states<sup>1</sup> and Puerto Rico extended the duty to report suspected child abuse to everyone. *See* LexisNexis50-State Surveys, Statutes & Regulations. The result is a circuit split where federal courts must apply the law of the states in which they sit. *See* Danny R. Veilleux, *Validity, Construction, and Application of State Statute Requiring Doctor or Other Person to Report Child Abuse*, 73 A.L.R. 4th 782 (1989).

In 1987, Maryland enacted Md. Code, Family Law, § 5-705 expanding the duty to report to "all persons." Md. Code, Family Law, § 5-705 mandates that all persons in the State of Maryland "who have reason to believe" that a child has been subjected to abuse or neglect shall notify the local department or the appropriate law enforcement agency. The report shall include certain information, not including the name of the reporter, as determined by Md. Code,

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<sup>1</sup> Arizona, Delaware, Florida, Idaho, Indiana, Kentucky, Maryland, Mississippi, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, Oklahoma, Rhode Island, Tennessee, Texas, Utah and Wyoming.

Family Law, § 5-704(c). In Maryland, all persons are mandated to report all suspected child abuse—even abuse believed to have occurred outside the State and even where the reporter has never met or observed the child. MD. CODE, FAM. LAW, § 5-705.1; *see also* MD. CODE, FAM. LAW, § 5-703.

The Attorney General for Maryland has issued opinions relating to Maryland’s mandatory reporting statute on several occasions. In 1993, the Attorney General opined on several issues stating that reporting is required even when it is believed that the abuse or neglect occurred in the past, even if the victim is an adult when the incident comes to light. 78 Op. Att’y Gen. 189 (Md. 1993). Further, a report shall be made whenever there is reason to believe that child abuse or neglect occurred in the past, even if the abuser is believed to be deceased. *Id.*

In 1995, the Attorney General for Maryland opined on several more issues. First, the Attorney General opined that “suspected” should be construed as synonymous with Maryland’s ‘reason to believe’ standard. 80 Op. Att’y Gen. 130 (Md. 1995). Second, the Attorney General opined that a person has an affirmative and unqualified obligation to report suspected child abuse. *Id.* The 1995 opinion is unhelpful because the word “suspected” no longer appears in the code.

The Maryland legislature seeks to criminalize failure to comply with its mandatory reporting statute. *See* H.B. 1069, 439th Gen. Assemb., Reg. Sess. (Md. 2019). The proposed legislation and the existing statute do little to help children. Out of the 4.1 million reports received nationally by Child

Protective Services, 16% of them are substantiated. See U.S. Dep't of Health and Hum. Serv., Admin. for Children and Families, Youth and Families, Children's Bureau, *Child Maltreatment Report 2017* 33 (<https://www.acf.hhs.gov/sites/default/files/cb/cm2017.pdf>). Mandatory reporting overloads child welfare services and depletes limited resources. Well-intended reporting statutes are burdensome and are of little social value.

## **II. Maryland's Mandatory Reporting Statute Violates the Compelled Speech Doctrine of the First Amendment by Mandating Speech of Innocent Bystanders.**

The First Amendment is made applicable to the states through the Due Process Clause of the Fourteenth Amendment. See *Stromberg v. California*, 283 U.S. 359, 368 (1931) (incorporating the guarantee of freedom of speech against the states). Freedom of speech, embodied by the first amendment, includes the right not to speak. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). The compelled speech doctrine protects individuals from mandatory speech and guards against forced disclosure of an opinion or belief. See *id.* (holding that the State cannot force student to stand or recite the Pledge of Allegiance). Freedom of speech prohibits the government from telling people what they must say. *Rumsfeld v. Forum for Acad. & Institutional Rights*, 547 U.S. 47, 61 (2006). The right to speak and the right to refrain from speaking are complementary components of the broader concept of individual freedom of mind. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). Compelled speech violates the

First Amendment. *See Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018).

Refusal to provide information to the government is a right protected by the First Amendment. *See Burns v. Martuscello*, 890 F.3d 77, 83 (2d. Cir. 2018). In *Burns*, a prison inmate was confined to involuntary protective custody for over six months for his refusal to act as an informant for the government. *Id.* at 93. The Second Circuit held that the correctional facility violated Burns' First Amendment right to silence. *Id.* at 81. Further, the court held that refusal to provide information to the government, even by inmates with limited rights, is protected by the First Amendment. *See id.*

Maryland's mandatory reporting statute is subject to review under the First Amendment because it compels speech. *See John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010). Where the State seeks to promote a compelling interest, it must use the least restrictive means necessary to further the State interest when the freedom of speech is involved. *See Sable Comm. of California v. FCC*, 492 U.S. 115, 122 (1989). Where the State seeks to further a significant, important or substantial interest, restrictions on non-speech activity must be narrowly tailored. *Id.* at 126. Further, the restriction must alleviate harms in a direct and material way. *See Turner Broad. v. FCC*, 512 U.S. 622, 633 (1994). This Court applies intermediate scrutiny when determining the constitutionality of statutes aimed toward combating crime. *See City of Erie v. Pap's A.M.*, 529 U.S. 277, 279 (2000). Intermediate scrutiny, not rational basis standard, is applied where the State's purpose is unrelated to speech suppression. *Id.* at 280. More

exacting scrutiny, applicable here, should be applied to regulations that compel speech. *See Sable Commc'n of California v. FCC*, 492 U.S. 115, 126 (1989); *Citizens United v. F.E.C.*, 558 U.S. 310, 366 (2010).

### **III. Maryland's Mandatory Reporting Statute is Overbroad in Violation of Equal Protection because it Infringes on the First Amendment and is Not Narrowly Tailored.**

Laws that infringe upon First Amendment rights are subject to strict scrutiny. *NIFLA v. Becerra*, 138 S. Ct. 2361 (2018) (holding that law requiring certain notifications was unconstitutional). Laws, like the statute employed below, that are not narrowly tailored to meet a compelling government interest are invalid. *See Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 879 (1997). Here, Maryland fails to use the least restrictive means by which to protect children from suspected child abuse where it compels innocent bystanders to speak.

The overbreadth doctrine calls for precision when drafting a statute that may affect First Amendment rights. *See NAACP v. Button*, 371 U.S. 415, 432-33 (1963). Overbreadth of a statute must be real and substantial judged in relation to the statute's plainly legitimate sweep. *See Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). Maryland's restriction on the First Amendment freedom is direct, not merely incidental, and it is greater than what is essential to further the State's interest in investigating suspected child abuse.

The overbreadth doctrine is used to determine if a statute violates Constitutional rights. *See Broadrick* at 613. The doctrine is used primarily to strike down laws that offend fundamental First Amendment rights, and it has been used to strike down laws aimed to protect children at the expense of law abiding citizens' first amendment rights. *See Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 240 (2002). Maryland's mandatory reporting statute is so far reaching that it seeks to regulate conduct that occurs in other states. *See* MD. CODE, FAM. LAW, § 5-705.1. Maryland is not entitled to regulate activity in another state. *See* U.S. CONST. amend. I, § 8.

The overbreadth of Maryland's reporting statute begs for false and/or unsubstantiated complaints and investigations where ordinary citizens are not capable of understanding their obligations to report. The Attorney General Opinions discussed *infra* and Md. Code, Family Law § 5-705.1, fail to provide guidance or clarification. Rather, those sources expand upon an already vague and overbroad reporting statute by applying the law to suspected abuse in the past, suspected abuse by deceased alleged abusers and acts committed outside the State of Maryland. The statute mandates reporting even where there is no special relationship and the reporter and the alleged victim are strangers. Maryland's effort to criminalize the failure to speak further evidences the State's disregard for the First Amendment.

**IV. Maryland's Mandatory Reporting Statute is Vague in Violation of Mr. Sewell's Substantive Due Process Rights and the Decision Below Arbitrarily Deprives Mr. Sewell of Life, Liberty and Property.**

The Fifth Amendment guarantees the fundamental right to due process. U.S. CONST. amend. V. The vagueness doctrine seeks to ensure fair and non-discriminatory application of the law. *See Kreimer v. Police of Morristown*, 958 F.2d 1242, 1266 (3d Cir. 1992). A law is vague in violation of due process where the legislature fails to establish minimum guidelines to govern law enforcement. *Smith v. Goguen*, 415 U.S. 566, 574 (1974). Due process requires that judges are provided standards by which to apply the law. *See Columbia Nat. Res., Inc. v. Tatum*, 58 F.3d 1101, 1105 (1995); *cert denied*, 516 U.S. 1158 (1996).

If a law infringes on free speech rights, “a more stringent vagueness test should apply.” John F. Decker, *Overbreadth outside the First Amendment*, 34 N.M. L. REV. 53 (2004) (quoting *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-499 (1982)). A statute which requires the doing of an act in terms so vague that “men of common intelligence must necessarily guess at its meaning” and differ as to its application certainly violates the due process of law. *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). The statute at issue is so vague that legal professionals have requested the opinion of the Attorney General on at least four occasions.<sup>2</sup> Vague statutes, like the one employed below, are facially

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<sup>2</sup> See discussion of Attorney General Opinions *infra*.

invalid. *See Coates v. Cincinnati*, 402 U.S. 611, 615 (1971).

Strict scrutiny applies where the Statute burdens fundamental rights. *See Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). Statutes addressing substantial state interests must be narrowly tailored and they must alleviate harms in a direct and material way. *See Turner Broad.*, at 633. Maryland's mandatory reporting statute fails to alleviate harms in a direct and material way and it fails to pass strict scrutiny. Further, the statute is not necessary to protect children where citizens are free to make anonymous reports absent the statute. Mandatory reporting does not make children safer. Rather, mandatory reporting offends the Constitution and its arbitrary use violates Mr. Sewell's fundamental rights to due process and equal protection.

Vague statutes beg for arbitrary enforcement and application in violation of Due Process. *See Chicago v. Morales*, 527 U.S. 41, 58 (1999). The court below arbitrarily and spontaneously applied Maryland's mandatory reporting statute to imprison Mr. Sewell for life in violation of his fundamental constitutional rights to Due Process.

The decision below further violates Due Process by answering a question that was never presented to the court for review and resolving "ambiguities" of the sacred marital communications privilege against the privilege. The prosecution never argued that Mr. Sewell waived his marital privilege because of the mandatory reporting statute, and Mr. Sewell was not afforded the opportunity to advance



the present arguments below before his conviction and life sentence were upheld. The decision below is unprecedented and baseless where the legislature fails to provide guidance to judges confronted with conflicts between marital privilege and the reporting statute.

**V. Maryland's Mandatory Reporting Statute Violates Mr. Sewell's Fifth Amendment Right against Self-Incrimination and the Decision Below Must be Reviewed.**

The Fifth Amendment guarantees the right against self-incrimination. U.S. CONST. amend. V; *see also Malloy v. Hogan*, 378 U.S. 1, 6 (1964). The Fifth Amendment is made applicable to the states through the Due Process Clause of the Fourteenth Amendment. *See Griffin v. California*, 380 U.S. 609, 611 (1965) (incorporating the right against self-incrimination against the states). The decision below violates Mr. Sewell's right against self-incrimination where it announces that the unconstitutional statute at issue defeats marital privilege, creating law that does not exist in statute and allowing privileged self-incriminating statements to reach the jury.

Information privately disclosed between husband and wife in the confidence of the marital relationship is privileged under the independent rule protecting confidential marital communications. *Trammel v. U.S.*, 445 U.S. 40, 51 (1980) (citing *Blau v. United States*, 340 U.S. 332 (1951)). The witness spouse alone has a privilege to refuse to testify adversely and cannot be compelled to testify. *Trammel* at 53 (modifying the sweeping marital

privilege rule established by *Hawkins v. United States*, 358 U.S. 74 (1958)).

The marital privilege serves to protect confidential communications induced by the sanctity of marriage. See *Tramel*, 444 U.S. at 44; see also *United States v. Pineda-Mateo*, 905 F.3d 13, 27 (1st Cir. 2018) (holding that there is no joint participant exception to spousal testimonial privilege even where spouse is co-criminal-conspirator and government cannot compel spousal testimony); *Coleman v. State*, 380 A.2d 49 (Md. 1977) (holding that the marital privilege is applicable even where confidential communication is made in furtherance of a crime). This Court has stated: **“The basis of the immunity given to communications between husband and wife is the protection of marital confidences, regarded as so essential to the preservation of the marriage relationship as to outweigh the disadvantages to the administration of justice which the privilege entails.”** *Wolfe v. United States*, 291 U.S. 7, 14 (1934).

The common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege unless the United States Constitution, a federal statute or rules prescribed by the Supreme Court provide otherwise. FED. R. EVID. 501. In Maryland, “one spouse is not competent to disclose any confidential communication between the spouses occurring during their marriage.” MD. CODE, CTS. & JUD. PROC., § 9-105.

Mr. Sewell essentially confided in himself when he expressed his frustrations related to child care with his wife through text messages. At the pre-

trial hearing on the defense's Motion to Exclude the text messages, the prosecution stated that it would not offer privileged marital communications into evidence at trial through Mr. Sewell's wife. The trial court summarily denied the defense motion without an opinion detailing the ruling. At trial, the privileged communications were admitted into evidence over Mr. Sewell's objection through his wife's testimony. The State failed to present any argument that Mr. Sewell had waived his marital privilege. Both of the lower appellate courts agree that the text messages used against Mr. Sewell at trial were privileged marital communications.

Without the support of this Court and against public policy, Maryland, relying on unconstitutional State law, created law by announcing that the duty to report suspected child abuse trumped the marital privilege. The decision below denies Mr. Sewell's due process by retroactively applying judge made law to his criminal trial.

**VI. Maryland's Mandatory Reporting Statute Violates the Confrontation Clause of the Sixth Amendment by Denying Criminal Defendants the Right to Cross-Examine Their Accusers.**

The Sixth Amendment protects defendants from the admission of testimony relating to out-of-court statements regarding the allegations against the defendant where the statements are testimonial and the defendant was not given prior opportunity to cross examine the witness. U.S. CONST. amend. V; *Crawford v. Washington*, 541 U.S. 36, 50 (2004) (holding that admission of wife's out-of-court

statement to police violated the Confrontation Clause). The Sixth Amendment is made applicable to the states through the Due Process Clause of the Fourteenth Amendment. *See Pointer v. Texas*, 380 U.S. 400, 401 (1965) (incorporating the right to confront adverse witnesses against the states).

This Court has held that anonymous reporting violates a defendant’s Sixth Amendment right to confront his accuser. *See Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 104 (1979) (holding that constitutional rights of criminal defendants must prevail over the state’s interest in protecting juveniles). Further, important rights created by the First Amendment must be considered along with the rights guaranteed by the Sixth Amendment. *Id.*

Justices Scalia and Ginsburg, concurring in *Ohio v. Clark*, write that the original meaning of Confrontation Clause is “to exclude unconfro<sup>n</sup>ted statements made by *witnesses*—*i.e.*, *statements that were testimonial*. 541 U.S. at 51. We defined testimony as a ‘sole<sup>m</sup>n declaration or affirmation made for the purpose of establishing or proving some fact,’ . . . a fact [is] potentially relevant to later criminal prosecution.” *Ohio v. Clark*, 135 S. Ct. 2173, 2184 (2015) (*quoting Davis v. Washington*, 547 U.S. 813, 822 (2006)). Further, “[t]he Confrontation Clause categorically entitles a Defendant to be confronted with the witnesses against him.” *Clark*, 135 S. Ct. at 2185.

Maryland offends the Sixth Amendment and categorically denies this right to those accused of child abuse where it permits anonymous reporting and prescribes mandatory investigations. A defendant’s

constitutional right to confront his accuser is not outweighed by the State's interest in investigating suspected child abuse.

## **VII. Conclusion**

Statutes that mandate reporting for all persons violate fundamental rights guaranteed by the United States Constitution. This case is difficult because it seeks to invalidate a statute that aims to protect children. Nevertheless, Md. Code, Family Law § 5-705 is unconstitutional because it is not narrowly tailored to accomplish a compelling state interest. Rather, it is vague and overbroad and violates the First, Fifth, and Sixth Amendments. Maryland's unconstitutional statute does not defeat Mr. Sewell's sacred right to privacy in the home or his right to privileged marital communications. Maryland's mandatory reporting statute must be invalidated, and Mr. Sewell is entitled to a new trial.

## **CONCLUSION**

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully Submitted,

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