IN THE SUPREME COURT OF OHIO

STATE OF OHIO, Plaintiff-Appellee, v. NIGEL J. BRUNSON Defendant-Appellant.	Case No. 2020-1505 On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District Case No. 107683

MERIT BRIEF OF APPELLEE STATE OF OHIO

Counsel for Defendant-Appellant,

CULLEN SWEENEY (0077187)
Cuyahoga County Public Defender

AARON T. BAKER (0082994)
Assistant Public Defender
310 Lakeside Avenue, Suite 200
Cleveland, Ohio 44113
Phone: (216) 443-7583
abaker@cuyahogacounty.us

Counsel for amicus curiae
Ohio Association of Criminal Defense Lawyers,

RUSSELL S. BENSING (0010602)
1360 East Ninth Street, Suite 600
Cleveland, OH 44114
(216) 241-6650
rbensing@ameritech.net

Counsel for Plaintiff-Appellee,

MICHAEL C. O'MALLEY (0059592)
Cuyahoga County Prosecutor

* TASHA L. FORCHIONE (0085814)
KATHERINE MULLIN (0084122)
Assistant Prosecuting Attorneys
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113
Phone: (216) 443-5771
Fax: (216) 443-7602
tforchione@prosecutor.cuyahogacounty.us
* Counsel of Record

Counsel for amicus curiae
Ohio Attorney General Dave Yost,

BENJAMIN M. FLOWERS (0095284)
Solicitor General
*Counsel of Record
ZACHERY P. KELLER (0086930)
Deputy Solicitor General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
Phone: 614-466-8980
Fax: 614-466-5087
benjamin.flowers@OhioAGO.gov

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STATEMENT OF THE CASE AND FACTS

Appellant, Nigel Brunson, was indicted by a Cuyahoga County Grand Jury on April 25, 2017 with four counts of aggravated murder in violation of R.C. 2903.01, one count of murder in violation of R.C. 2903.02, seven counts of armed robbery in violation of R.C. 2911.01, seven counts of kidnapping in violation of R.C. 2905.01, two counts of aggravated burglary in violation of R.C. 2911.11, six counts of felonious assault in violation of R.C. 2903.11, and one count of having a weapon under disability in violation of R.C. 2923.13. This indictment was a re-indictment of case number CR 613372 which was originally indicted on February 17, 2017 and dismissed on January 9, 2018.

On June 11, 2018, Appellant waived his right to a trial by jury on count 29 only and proceeded to a jury trial on all remaining counts. Appellant requested assigned counsel to withdraw from the case on May 8, 2018. (Tr. 100). The court granted the motion and appointed another lawyer to represent Appellant that same day. (Tr. 103). Appellant engaged in plea discussions but did not enter any change of pleas. (Tr. 117-118).

Voir dire commenced and was interrupted to conduct a hearing on co-defendant Dwayne Sims' Motion to Suppress. (Tr. 129-749). Defense counsel argued that the recorded statement of Garry Lake contained *Brady* material regarding the discussion among Lake, his counsel, and his private investigator. (Tr. 728-730). The State argued that the dialogue was covered by the attorney-client privilege, which Lake never waived, and should have been redacted. (Tr. 732). Lake's attorney was present during this testimony and did not object to the line of questioning at issue. (Tr. 741-42). A Motion was made to use this *Brady* material, and Appellant joined in the Motion. (Tr. 748). The trial court indicated that it would consider whether the testimony waived the attorney-client privilege; whether the conversation amounted to a fraud on the court and whether

there was any ineffectiveness of counsel for failing to object. (Tr. 749). Lake's counsel was called to testify, and he stated that he knew that the homicide interview room is tape and video recorded. (Tr. 989). However, counsel stated that he believed the attorney-client privilege was intact at the time he spoke privately with Mr. Lake. (*Id*.). The trial court ruled that the attorney-client privilege cannot be waived by the State's inadvertent disclosure of privileged information. (Tr. 998-1004). Additionally, the court ruled that Lake's testimony did not waive the privilege. (Tr. 1050).

The jury heard the following evidence. On October 24, 2016, at approximately 11:00 p.m., Melissa Morton went to the Cooley Lounge where her friend Melissa Brinker was bartending and joined a number of the regular patrons at the bar whom she recognized as regulars. (Tr. 1482-1485). Melissa Morton testified that she was a regular patron at the Cooley Lounge on W. 130th Street and a good friend of the victim, Melissa Brinker. (Tr. 1478-1480). The victim, Melissa Brinker, was a bartender at the Cooley Lounge. (Tr. 1478-1480). She and the victim went to a back room and smoked marijuana. (Tr. 1483). Five to seven minutes later, Melissa Morton, takes a seat near the center section of the bar. (Tr. 1483-85).

Melissa Brinker, the bartender, received a phone call on the Cooley Lounge landline phone, which discussed whether the bar was closing early that night. (Tr. 1489). It was typical for the bar to close early on a Monday night. (Tr. 1489, 1539). Thomas Platt, also known as "Andy," was sweeping and taking care of the garbage in preparation for the Cooley Lounge to close. (Tr. 1736, 1738-39). Andy was a regular who would go to the Cooley Lounge every day, and would assist with sweeping, taking out the trash, and other duties in exchange for free drinks. (Tr. 1734-35). Since he was at the Cooley Lounge daily, Andy was familiar with the regular customers. (Tr. 1734-35). Andy took the garbage to the dumpster behind the bar and emptied the garbage cans just prior to the robbery. (Tr. 1742-43, Exhibit 311).

Shortly after the phone call, two new patrons arrived at the bar, which prompted Melissa Brinker to keep the bar open. (Tr. 1489, 1521). These two new patrons were both black males that the other regular patrons had not seen before. (Tr. 1490, 1736) One of the males sat in the very last seat at the end of the bar and the other stood nearby. (Tr. 1490). The males ordered a single shot and an additional cup so that they could split the drink. (Tr. 1489, 1494). One of the two males had his hood up and walked behind all the seated patrons to the front of the bar, stood there for a moment, and then returned to the back of the bar by the other male. (Tr. 1490-91).

Two more males entered the bar, one of which Melissa Morton recognized as a regular patron who would usually get cigarettes and leave. (Tr. 1492-93). He realized that he forgot his money at home and left. (Tr. 1492-93). After this male left, everyone was ordered to get on the floor and that "this is a robbery, everybody get down…I could shoot you." (Tr. 1493, 1519). One of the three males held a gun to James Fox's head and said, "if you look at me, I will shoot you." (Tr. 1557). James stated that this male had gold gloves. (Tr. 1560). James is thrown out of the barstool and forced onto his stomach while at gunpoint. (Tr. 1560). The male removed James' wallet from his back pocket. (Tr. 1562).

Andy hid on the ground by the ATM machine, unable to view the perpetrators in the act of the robbery but he was able to hear what was being said. (Tr. 1737). Morton called 911 while she was laying on the ground near the bar, but she testified that the communication was poor because she was trying to whisper into her phone. (Tr. 1495). One of the individuals came over and grabbed her phone and hit her in the head with a gun. (Tr. 1495). She was unable to identify who took her cell phone and her wallet. (Tr. 1497). After her phone was taken, Melissa remembers hearing banging sounds off in the distance that sounded like a door being kicked or a gunshot. (Tr. 1496-97).

After the individuals who robbed the bar left, Melissa got up and called 911 again and looked for Melissa Brinker. (Tr. 1498). During this call, she informed dispatch that three black males were responsible for the robbery and that she was unable to find her friend Melissa Brinker. (Tr. 1498, 1507). While Melissa Morton was on the phone, Andy found Brinker in the back room and observed that she had been shot more than one time. (Tr. 1748). Andy came from the back area and stated that Brinker was shot. (Tr. 1498-99).

James Fox went to the back room to look at Brinker and saw her slumped over and did not speak to her because "she was probably already dead." (Tr. 1564). Morton also went to the back area and saw Brinker laying on the floor. (Tr. 1500). Morton called 911 a third time to inform the dispatcher that Brinker was shot. (Tr. 1500).

Sergeant Bernard Norman was the first police officer to arrive at the bar the night of October 24, 2016. (Tr. 1588-1589, Exhibit 320). When he arrived on scene, he observed that the suspects had already left. (Tr. 1590). He was led to the back area and observed a female, Melissa Brinker, lying on the floor. (Tr. 1590). Sergeant Norman observed that she had been shot, from the bullet wounds in her body and the bullet casings in the room. (Tr. 1600, 1625). Sergeant Norman also observed that the door to the office looked like it was freshly damaged as if it had been kicked in. (Tr. 1595).

Officer Eric Shelton arrived on scene after Sergeant Norman and was immediately led to the back to tend to Melissa Brinker since he had prior EMS service. (Tr. 1595, 1612, 1615-16, Exhibit 321). Officer Shelton observed that Brinker was lying on her side, pale and breathing weakly, with a gunshot wound to her back. (Tr. 1615-16, Exhibit 321).

Patrolman Kyle Rinkus and his partner, Officer Fox, also responded to dispatch call of a robbery in progress and tended to the victim. (Tr. 1716-23, 1766-67). Patrolman Rinkus did not

observe unusual motor vehicle or pedestrian activity in the area of the bar. (Tr.1723). Patrolman Rinkus also conducted on-scene interviews of bar customers and prepared a report with his findings based on those interviews and his observations of the scene. (Tr. 1719). This report indicated that the suspects were four young black males, one with a green hoodie and chin hair, and another with a red vest over a black long sleeve shirt. (Tr. 1719). Upon his arrival at the scene, Officer David Fox first saw Melissa Morton, who had a head injury but appeared stable. (Tr. 1767). Officer Fox then went to the back room and located Brinker with her gunshot wounds. (Tr. 1767). He assisted with giving Brinker medical attention until EMS arrived. (Tr. 1768). Brinker was unable to speak to the officers and did not appear to be conscious. (Tr. 1768).

Officer David Fox located three shells from bullets, at least one bullet, and cups that the suspects drank from. (Tr. 1770). The shell casings were on the ground next to Brinker and the bullet was wedged into the floor where Brinker lay. (Tr. 1774). The two plastic cups that the suspects drank from were located inside the garbage can behind the bar. (Tr. 1770, 1774, 1835, Exhibit 75). Officer Fox and the other officers secured the scene and made sure that all evidence was not touched until the detectives and crime scene unit arrived. (Tr. 1770-71).

Dr. Todd Barr, the deputy medical examiner for the Cuyahoga County Medical Examiner's Office, performed the autopsy of Melissa Brinker. (Tr. 1646, Exhibit 302). Dr. Barr recovered one bullet from Brinker's upper chest and noted that this bullet did not hit any main arteries and was a survivable wound. (Tr. 1654). He noted that Brinker also sustained a bullet wound that entered from her back side which damaged the aorta and vena cava among other vital organs such as the diaphragm, lungs, and liver. (Tr. 1658-59). Dr. Barr stated that this second wound caused a great deal of blood loss and caused Brinker to lose consciousness a few seconds after being shot. (Tr. 1658). Dr. Barr was unable to determine which wound was caused first. (Tr. 1673). The cause of

death was multiple gunshot wounds of the trunk with soft tissue, visceral, and vascular injuries. (Tr. 1671). Based on his findings, Dr. Barr ruled Melissa Brinker's death a homicide. (Tr. 1672).

Lisa Przepyszny, a forensic scientist in the trace evidence department at the Cuyahoga County Regional Forensic Science Laboratory, was assigned to conduct trace evidence testing on the body of Melissa Brinker. (Tr. 1688). She examined numerous items including Brinker's hands, clothing, shoes, undergarments, and defects in her jacket and shirt that indicated the entry and exit points of the bullets. (Tr. 1699-1707).

Crime Scene Unit Detective Mark Peoples documented the scene at the Cooley Lounge on the night of October 24, 2016. (Tr. 1786-87). Detective Peoples took over one hundred photographs of the inside and outside of the Cooley Lounge, and gathered and processed numerous items within the bar and made a written report regarding all photographs and evidence recovered from the scene. (Tr. 1788, Exhibit 1-110, Exhibit 332).

Lisa Moore was assigned to perform the DNA analysis for this case. (Tr. 1897-98). She produced two reports regarding her findings. (Tr. 1898, Exhibits 305 and 306). She indicated that the swab from the plastic cup in Item 19 contained an equal mixture DNA profile of Nigel Brunson and Dana Thomas. (Tr. 1926-29).

Thomas Ciula, a forensic video specialist for the Cleveland Police Department, testified that the DVR unit from the Cooley Lounge did not display the correct time. (Tr. 1992-93, 1998). He further testified that the DVR unit was dirty and not well maintained but it was functioning and recording. (Tr. 2000).

Hollie Smith testified that she is good friends with co-defendant Anita Hollins and that she met Dana Thomas through Hollins. (Tr. 2137-43). Hollie Smith further testified that Anita Hollins

was injured after being assaulted in the Cooley Lounge on the night of December 6, 2015 and that Anita was not happy when the people who assaulted her were acquitted. (Tr. 2145-47).

Hollie Smith also testified that she heard about the homicide at the Cooley Lounge the night it occurred from James Fox's brother Rob while she was working at M&M. (Tr. 2149). She also stated that the night of the homicide, she was picked up by Anita Hollins after work and that they went to Headquarter Lounge on W. 117th Street with two other males, one was named Derrick and her testimony is unclear as to the name of the second male. (Tr. 2150-52). She recalled that the four of them partook in conversation regarding what occurred at the Cooley Lounge that night but does not recall and specifics about that conversation. (Tr. 2153). Hollie also testified as to how she knew "Chick," also known as Dana Thomas. (Tr. 2143).

Detective Kathleen Carlin testified that she responded to the Cooley Lounge just after midnight the night of the homicide and separately interviewed bar patrons Donald Bernard, Patrick Lorden, James Fox, and Thomas Platt ("Andy"). (Tr. 2263-69). She also retrieved the DVR unit containing the video of the bar that evening, three plastic cups, two .380 caliber casings and one .45 caliber casing in the back room and viewed the DVR footage four or five days later. (Tr. 2270-72). Detective Carlin learned of Dana Thomas (a.k.a. "Chick") through a jail call placed on December 7, 2016 between Anita Hollins and Nigel Brunson while Brunson was in County Jail. (Tr. 2307-09, 2319-2321, Exhibit 430). Carlin testified about additional jail calls. On one jail call, Appellant asked "why isn't Wayne locked up." (Tr. 2434).

Detective Carlin also testified regarding the recovery of the .380 Grendel on December 26. 2016 and the .45 caliber Springfield recovered on March 25, 2017. (Tr. 2359-60, Exhibits 348 and 349). She also stated that Dana Thomas's cell phone records indicate that he received incoming calls from Dwayne Sims's and Nigel Brunson's cell phones on the night of October 24, 2016. (Tr.

2374). Detective Carlin also testified regarding what she observed from the DVR video footage. She stated that two suspects, specifically suspect one and suspect three, are seen drinking from the same plastic cup and that the DNA associated with that cup are from Nigel Brunson and Dana Thomas. (Tr. 2490-2491). Detective Carlin also stated that suspect three and Melissa Brinker went to the back room and suspect three kicked in the door. (Tr. 2409). When the victim went into the office area, two shots were fired. (Tr. 2409-10). After the shots were fired suspect three disappears back in the direction of the front of the bar. (Tr. 2410). Suspect one appears on camera in the back room and knelt down to the floor area of the office before stepping out of the office and firing a shot. (Tr. 2410-11). Detective Carlin testified that based on physical characteristics collected at the time of arrest, suspect one is Nigel Brunson and that suspect three is Dana Thomas. (2411-14). Detective Carlin testified that she received forensic evidence from a DNA lab on January 10, 2017 informing her that Dana Thomas could not be excluded. (Tr. 2329). Based on this DNA evidence, Detective Carlin issued a warrant for Dana Thomas's arrest. (Tr. 2329). Dana Thomas was arrested January 11, 2017. (Tr. 2343).

Kristen Koeth testified that she determined based on test fires of the .380 Grendal pistol that the two casings submitted were fired from the .380 Grendel auto pistol confiscated by Bratenahl police. (Tr. 2499, Exhibit 348). The morgue bullet recovered from Melissa Brinker was also fired from the same .380 Grendel pistol. (Tr. 2503, Exhibit 322). She also testified that the .45 caliber casing and bullet fragment found in the Cooley Lounge were fired from a .45 caliber that was recovered at the IX Center. (Tr. 2504).

Jacob Kunkle, a special agent for the FBI Cellular Analysis Survey Team testified that the cell number of Dana Thomas had activity on the west side of Cleveland on the night of October

24, 2016 and that there was activity between the cell phones of Dwayne Sims and Nigel Brunson. (Tr. 2564-2608).

Garry Lake testified that he was close friends with co-defendant Dana Thomas. (Tr. 2627). Anita Hollins picked him up with Nigel Brunson, Dana Thomas, and Dwayne Sims in the vehicle along with two small children. (Tr. 2645-49). Garry Lake fell asleep during the ride to the west side and he awoke near a playground on the west side with just Anita and the kids in the car. (Tr. 2653-55). When the males came back to the car, they had purses in their hands and they "robbed a bar." (Tr. 2658-59). Dana Thomas stated that "she looked at his face, so he shot her." (Tr. 2660). Nigel said that he "finished her." (Tr. 2660). Lake said he was present for a conversation with Dana Thomas and Anita about that night in which they discussed that they did not know there were cameras in the Cooley Lounge. (Tr. 2674-77). Lake gave a statement to police and pled guilty to robbery regarding his involvement the night of October 24. 2016. (Tr. 2685).

The jury found Appellant guilty of all charges except for one count of aggravated murder as set forth in Count 1 of the indictment and one count of aggravated robbery as set forth in Count 24 of the indictment. (Tr. 3227-3229). On the counts of conviction, the jury found Appellant guilty of both firearm specifications. (Id.). The trial court found Appellant guilty of having a weapon while under disability as set forth in Count 29 of the indictment. (Tr. 3258-3259).

On August 23, 2018, the trial court sentenced Appellant to life without parole with a three year firearm specification to be served prior to the life sentence on Count 2, aggravated murder; seven years on Count 5; seven years on Count 12; six years plus a three year firearm specification on Count 14; seven years on count 15; two years on Count 17; seven years on Count 18; seven years on Count 21; and seven years on Count 25. The court ordered Appellant to serve Counts 12

and 14 consecutively. Appellant was also sentenced in relation to his involvement in CR-611426 and CR-612454.

Appellant filed a timely direct appeal to the Eighth District Court of Appeals raising twelve assignments of error. *State v. Brunson*, 8th Dist. Cuyahoga No. 107683, 2020-Ohio-5078, ¶ 10. His convictions and sentence were affirmed on October 29, 2020. *Id*. at ¶ 77. On December 14, 2020, Appellant file a notice of appeal and memorandum in support of jurisdiction. This Honorable Court accepted jurisdiction on the first, third, and fourth propositions of law.

ARGUMENT

Response to Proposition of Law No. I: A trial court does not violate a defendant's right against self-incrimination when it notes that the defendant's silence shows a lack of remorse.

1. Brunson forfeited a constitutional challenge to his sentence by failing to raise the issue before the trial court.

Brunson chose not to make a statement to the probation department for the pre-sentence investigation report and also chose not to allocate at sentencing. (Tr. 3291-3292). The trial court told Brunson, in part, "You killed her and you have no remorse. That's what I don't understand. You have no remorse. You don't acknowledge what you did. The PSI, you don't want to talk to them and tell them about anything that you did." (Tr. 3283-3284). After reviewing several factors, the trial court imposed a prison term of life imprisonment without the possibility of parole. (Tr. 3284, 3286). Mr. Brunson's attorney did not specifically object to the constitutionality of his sentence. Instead, his counsel had the following conversation with the trial court about Brunson's silence:

MR. BUTLER: Judge, the only thing I would indicate and I think the record should reflect that in the PSI where Mr. Brunson had no comment as to facts of this case, it's because he was under instructions from his lawyers not to discuss the case with the probation officer, that any comments that he had about the case, he should wait until he comes to the courtroom and make those comments in court.

Obviously he chose not to talk. But in terms of the PSI, the reason he didn't comment to the probation officer is because I had advised him not to.

THE COURT: That's understood and noted for the record. And so to the extent that you advised him not to speak to the probation officer, I will no longer include that as part of my sentencing or basis therefor.

But the fact remains that -- I'm assuming that you did not tell him not to speak this morning, correct?

MR. BUTLER: That's correct, your Honor.

THE COURT: To allocute. And he chose nonetheless not to speak this morning, not to allocute, not to acknowledge anything that he had done, not to express any kind of remorse to anyone in this courtroom, particularly the family and friends of Missy Brinker, who he shot very coldly and with no consequence.

And I should note then for the record as well, Mr. Butler, since you brought it up after the fact and it was included in the trial, it was testified to that Mr. Brunson was laughing when he said, "I finished her."

All right. We will proceed to sentencing in the other two cases that he pled

(Tr. 3291-3292). Brunson did not object to his sentence or otherwise raise the constitutionality of his sentencing at the hearing. As such, he forfeited the constitutional challenge to his sentence by failing to raise the issue before the trial court. *State v. Awan*, 22 Ohio St.3d 120, 122, 489 N.E.2d 277 (1986).

2. Brunson's rule is unenforceable and encroaches on the power of the General Assembly.

Brunson argues that the trial court used his silence during the pre-sentence investigation and sentencing hearing against him in violation of the Fifth Amendment privilege against self-incrimination. Brief of Appellant, p. 6. He proposes a very broad rule in which the trial court can never rely upon the defendant's silence as a basis for imposing a sentence of life without parole. *Id*. There are several apparent problems with this rule. First, it is not practical. Like this case, "it will almost always be unenforceable, since it will ordinarily be impossible to tell whether the sentencer has used the silence" against the defendant. *Mitchell v. United States*, 526 U.S. 314, 340 (1999).

Here, the trial court considered a number of factors "including the fact that Brunson's criminal record created a high risk of recidivism, that the offenses here were committed while Brunson was on postrelease control for other offenses, and that in addition to causing death and physical harm, Brunson caused significant terror and emotional harm to numerous people." *Brunson*, 2020-Ohio-5078, ¶ 75. The trial court explicitly stated that it was not considering Brunson's silence as a sentencing factor. The court told trial counsel, "to the extent that you advised him not to speak to the probation officer, I will no longer include that as part of my sentencing or basis therefor." (Tr. 3292). This proposition of law should be dismissed as improvidently granted because the record reflects the trial court did not consider Brunson's silence in determining sentencing.

Moreover, remorse, or lack thereof, is a sentencing factor trial courts are required to consider. This broad rule certainly impedes the trial court from considering remorse when a defendant remains silent, rendering Ohio's sentencing statutes meaningless and encroaching on the powers of the General Assembly. In the Eighth District's well-reasoned opinion, it found that the trial court "properly considered Brunson's lack of remorse pursuant to the statutory sentencing factors" and "the court was only considering Brunson's lack of allocution at sentencing to the extent that it indicated a lack of genuine remorse pursuant to R.C. 2929.12(D)(5)." *Id.* The proposed rule would take away discretion from the trial court to consider remorse, something the court is required to do by Ohio law.

3. Under United States Supreme Court precedent, some adverse inferences are permissible at sentencing.

The Fifth Amendment to the United States Constitution provides that, "No person … shall be compelled in any criminal case to be a witness against himself …[.]" This privilege against self-incrimination is made applicable to the states through the Fourteenth Amendment. *Malloy v. Hogan*, 378 U.S. 1, 6 (1964). Article I, Section 10, of the Ohio Constitution contains similar language which states, "No person shall be compelled, in any criminal case, to be a witness against himself …[.]"

Crim. R. 32(A)(1) requires a trial court to give the defendant and his or her counsel an opportunity "to make a statement in his or her own behalf or present any information in mitigation of punishment." However, a defendant is not required to make a statement and retains the privilege against self-incrimination at sentencing. *Mitchell v. United States*, 526 U.S. 314, 321 (1999).

In *Mitchell*, the United States Supreme Court held that the Fifth Amendment prohibits a trial court from drawing an adverse inference from the defendant's silence at sentencing "with

regard to factual determinations respecting the circumstances and details of the crime." *Id*. at 328-330.

The defendant in *Mitchell* was convicted for her participation in a conspiracy to traffic cocaine. *Id*. at 317. She pled guilty to federal drug offenses and the range of punishment was to be determined by the drug quantity. *Id*. At sentencing, the government presented evidence about the quantity of drugs attributed to the defendant *Id*. at 319. The defendant remained silent. *Id*. The District Court imposed a ten-year prison term and expressly told the defendant, "I held it against you that you didn't come forward today and tell me that you really only did this a couple times …[.]" *Id*. In a 5-4 decision, a majority of the Supreme Court found this practice violated the Fifth Amendment privilege against self-incrimination because the trial court "enlist[ed] the defendant" to relieve the Government of its "burden of proving facts relevant to the crime at the sentencing phase." *Id*. at 330.

The *Mitchell* Court expressly declined to answer the question now before this Honorable Court, stating "Whether silence bears upon the determination of a lack of remorse … is a separate question. It is not before us, and we express no view on it." *Id*. Years later, the Supreme Court noted again that "*Mitchell* itself leaves open the possibility that some inferences might permissibly be drawn from a defendant's penalty-phase silence." *White v. Woodall*, 572 U.S. 415, 421 (2014). The Court rejected an "an across-the-board rule against adverse inferences." *Id*. at 424.

At issue in *Woodall* was whether the defendant was entitled to a no adverse inference instruction at the penalty phase of his capital murder trial. He requested an instruction that a "defendant is not compelled to testify and the fact that the defendant did not testify should not prejudice him in any way," which the trial court refused to issue. *Id*. at 418. In a 6-3 decision, a majority of the Supreme Court agreed with the trial court that "'no case law … precludes the jury

from considering the defendant's lack of expression of remorse . . . in sentencing.'" *Id.* at 423. Namely, he had no right to the instruction under *Carter v. Ky.*, 450 U.S. 288 (1981), *Estelle v. Smith*, 451 U.S. 454 (1981), or *Mitchell v. United States*, 526 U.S. 314, 321 (1999).

The *Woodall* decision is important because it discusses how the holding and logic of *Mitchell* is inapplicable to cases like this one where the defendant is requesting a blanket rule requiring no adverse inferences. First, the Court points out that, "if *Mitchell* suggests that *some* actual inferences might be permissible at the penalty phase, it certainly cannot be read to require a *blanket* no-adverse-inference instruction at every penalty-phase trial." *White v. Woodall*, 572 U.S. at 422. Second, the Court indicates that the Fifth Amendment privilege against self-incrimination does not apply to inferences unrelated to facts of the offense such as remorse and acceptance of responsibility. *Id.* at 423-424. In other words, it is proper for the trial court to infer lack of genuine remorse from the defendant's silence. A blanket rule prohibiting such inference, like the one the defendant proposes, is not required.

4. The trial court properly weighed sentencing factors when it noted that Brunson's silence showed a lack of remorse.

Although the United States Supreme Court has passed on the specific issue before this Court, Ohio Appellate Courts and the Sixth Circuit have consistently distinguished *Mitchell* and held that a trial court does not violate a defendant's right against self-incrimination when it notes that the defendant's silence shows a lack of remorse. Of particular relevance in Ohio is the fact that remorse, or lack thereof, is a sentencing factor trial courts are required to consider.

In Ohio, a sentence is contrary to law if the sentence falls outside the statutory range for the offense or if the trial court fails to consider the purposes and principles of felony sentencing set forth in R.C. 2929.11 and the sentencing factors set forth in R.C. 2929.12. *State v. Pawlak*, 8th Dist. Cuyahoga No. 103444, 2016-Ohio-5926, ¶ 58.

The trial court has discretion to determine the most effective way to comply with the purposes and principles of sentencing. R.C. 2929.12(A). In exercising that discretion, the trial court must consider the factors set forth in R.C. 2929.12(B) and (C) (relating to the seriousness of the conduct), the factors provided in R.C. 2929.12(D) and (E) (relating to the likelihood of the offender's recidivism), and the factors set forth in R.C. 2929.12(F) (pertaining to the offender's service in the armed forces of the United States). R.C. 2929.12(A).

Pursuant to R.C. 2929.12(D)(5) and 2929.12(E)(5), the trial court must consider whether the offender shows genuine remorse, or a lack thereof, as an indication of the likelihood to commit future crimes, as one factor among many considered under R.C. 2929.11 and 2929.12.

Brunson's proposition of law would, in effect, be an across the board rule against adverse inferences and would take away the trial court's discretion to consider whether the offender shows genuine remorse, or a lack thereof. Ohio courts have rejected this approach. *See,*

- *State v. Duhl*, 2nd Dist. Champaign No. 2016-CA-30, 2017-Ohio-5492, ¶ 31-33 ("The trial court did not attempt to have Duhl testify about details of the crime in order to enhance his sentence or to prove facts upon which the State had the burden of proof; instead, the court was simply inquiring to see if Duhl had any remorse. This was an appropriate consideration, and we see no evidence that the court punished Duhl for his silence.")
- *State v. Taft*, 6th Dist. Huron No. H-18-003, 2019-Ohio-1565, ¶ 33-34 (The trial court cited Taft's silence and refusal to acknowledge his wrongdoing as evidence that Taft did not have genuine remorse. This was a proper consideration for sentencing under R.C. 2929.12 and did not violate Taft's constitutional rights.)
- *State v. Clunen*, 7th Dist. Columbiana No. 12 CO 30, 2013-Ohio-5525, ¶ 21 (A trial court's determination of a defendant's lack of remorse and refusal to take responsibility indicate

the court considered the statutory sentencing factors and are not related to a defendant's silence.)

- *State v. Fuller*, 7th Dist. Belmont No. 14 BE 0016, 2016-Ohio-4796, ¶ 56-57 (The trial court never commented on the defendant's silence. Rather, the trial court commented on the defendant's lack of remorse which does not constitute error.)
- *State v. Nitsche*, 8th Dist. Cuyahoga No. 103174, 2017-Ohio-529, ¶ 31-32 *(*Counsel was not ineffective in failing to challenge the trial court's finding that the defendant had "no remorse" as a result of his decision not to say anything at sentencing.)
- *State v. Hodges*, 8th Dist. Cuyahoga No. 101145, 2014-Ohio-4690, ¶ 10-13 ("even where a defendant does not speak at sentencing, the court's statement that the defendant demonstrated a lack of remorse and an unwillingness to take responsibility, does not demonstrate that a court's sentencing decision is based upon the silence but shows only that the court was considering the statutory sentencing factors.")
- *State v. Scheffield*, 11th Dist. Geauga No. 2015-G-0053, 2017-Ohio-2593, ¶ 111-113 (The trial court's sentence was based upon the defendant's lack of remorse rather than her decision not to allocate at sentencing.)
- *State v. Moore*, 11th Dist. Geauga No. 2011-G-3027, 2012-Ohio-3885, ¶ 47 (Rejected defendant's argument that "if he expressed remorse at the sentencing hearing, he would have had to give up his Fifth Amendment right against self-incrimination" because the trial court was considering whether the defendant was remorseful.)
- *State v. Moore*, 11th Dist. Trumbull No. 2015-T-0072, 2017-Ohio-7024, ¶ 58 (Defendant failed to establish the trial court imposed a harsher sentence because he chose not to allocate at sentencing.)

Similarly, the Sixth Circuit has consistently found that a trial court does not violate a defendant's right against self-incrimination when it notes that the defendant's silence shows a lack of remorse or risk of recidivism. *See* e.g., *Pollard v. Macauley*, 2020 U.S. App. LEXIS 12858, *7, 2020 WL 3499215 (6th Cir. 2020); *United States v. Williams*, 520 Fed. Appx. 420, 425-426 (6th Cir. 2013); *Miller v. Lafler*, 505 Fed. Appx. 452, 458-459 (6th Cir. 2012); *United States v. Kennedy*, 499 F.3d 547, 551-552 (6th Cir. 2007).

Mr. Brunson had a Fifth Amendment right against self-incrimination at his sentencing hearing, but that right did not prevent the trial court from inferring from his silence that he lacked genuine remorse. This outcome promotes the legislative and public policy of weighing "determinations of acceptance of responsibility, repentance, character, and future dangerousness" in sentencing and is consistent with the text and history of the Fifth Amendment. Both of which are explained in the brief of amicus curiae, Ohio Attorney General Dave Yost, and in Justice Scalia's dissenting opinion in *Mitchell v. United States*, 526 U.S. 314, 331-343.

<u>Response to Proposition of Law No. III</u>: Mr. Lake did not implicitly waive his attorney client privilege by failing to assert the privilege or by testifying at a suppression hearing.

<u>Response to Proposition of Law No. IV</u>: A testifying witness' assertion of the attorney-client privilege does not yield to a criminal defendant's right to confrontation under the Sixth Amendment.

The State will address the third and fourth propositions of law together because they are related. During a meeting with investigating detectives, co-defendant and state's witness, Garry Lake, and his counsel, Mr. Ramsey, spoke at length, in private, about what Mr. Lake's statement was to include. Unbeknownst to Mr. Lake and his attorney, the conversation was inadvertently recorded by the detectives interviewing Mr. Lake. These statements were unintentionally turned over to counsel since the recorder was not shut off prior to the detectives leaving Mr. Lake alone

with his attorney. This section of the recording was not reviewed or deleted prior to adopting the entire video as Mr. Lake's formal statement.

Before trial, Mr. Lake testified during a hearing on a motion to suppress filed by co-defendant Dwayne Sims. During Mr. Lake's testimony, Mr. Ramsey was present in the courtroom. Relevant to this issue, the following exchange occurred between the Assistant Prosecuting Attorney and Mr. Lake:

> PROSECUTOR: And before you had this — this interview on April 6th that we have here on the screenshot, State's 1, did you let your attorney know what you were going to tell law enforcement on that day?
>
> LAKE: I let him know what I was going to tell them?
>
> PROSECUTOR: Correct.
>
> LAKE: No.
>
> PROSECUTOR: All right. Did you ever indicate that you knew the names or identification or individuals that committed this crime on October 24, 2016?
>
> LAKE: You said did I tell them who the names was?
>
> PROSECUTOR: Correct.
>
> LAKE: Yes.

Mr. Ramsey did not object to this line of questioning. (Tr. 984-95).

Brunson sought to introduce the statements made by Mr. Lake to his attorney outside the presence of detectives. At a subsequent hearing on the issue of whether Mr. Lake's recorded statements were protected by attorney-client privilege, Mr. Ramsey indicated that he would have objected had the above line of questioning continued into any particulars of the discussion. (Tr. 991).

Mr. Ramsey testified that he knew that the room was audio and video recorded, but he forgot to ask the detectives to turn off the recording when he asked the detectives to leave the room

so that he could speak with his client. (Tr. 1075-76). Furthermore, he forgot to ask for that section of the video be deleted from Mr. Lake's formal statement nor did he give permission that the privileged conversation be recorded or released. (Tr. 1076-77). The first time he was aware of the recorded discussion was during the proceedings in this case. (Tr. 1076-77). Mr. Lake never authorized his attorney to waive the attorney-client privilege or that the conversation was being taped and turned over to counsel in this case. (Tr. 1044).

The trial court ruled that Brunson could not cross-examine Mr. Lake regarding his statements made to his trial attorney. In particular, the trial court found that that the attorney-client privilege cannot be waived by the State's inadvertent disclosure of privileged information (Tr. 9981004) and Mr. Lake's testimony did not waive the privilege. (Tr. 1050). The Eighth District agreed finding that, "[n]othing in the record indicates that Lake waived his attorney-client privilege, either prior to making the statement in question or during his testimony at the suppression hearing." *Brunson*, 2020-Ohio-5078, ¶ 31. The Eighth District also noted the fact that Mr. Lake did not testify "as to the contents of that communication" with his attorney. *Id.*

Brunson argues that by finding Mr. Lake's statements were protected by the attorney-client privilege, the trial court denied him his due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963) and his Sixth Amendment right to confront a witness against him. The State disagrees.

1. Mr. Lake did not implicitly waive his attorney client privilege by failing to assert the privilege.

"The attorney client privilege is one of the oldest recognized privileges for confidential communications." *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998). "Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

In Ohio, the attorney-client privilege is governed both by statute, R.C. 2317.02(A), and by common law. *State ex rel. Toledo Blade Co. v. Toledo-Lucas Cty. Port Auth.*, 121 Ohio St.3d 537, 2009-Ohio-1767, 905 N.E.2d 1221, ¶ 24. "R.C. 2317.02(A), by its very terms, is a mere testimonial privilege precluding an attorney from testifying about confidential communications." *State ex rel. Leslie v. Ohio Hous. Fin. Agency*, 105 Ohio St. 3d 261, 2005-Ohio-1508, 824 N.E.2d 990, ¶ 26. Whereas "the common-law attorney-client privilege … 'reaches far beyond a proscription against testimonial speech. The privilege protects against any dissemination of information obtained in the confidential relationship.'" *Id.* quoting *Am. Motors Corp. v. Huffstutler*, 61 Ohio St.3d 343, 348, 575 N.E.2d 116 (1991).

This Court has held that R.C. 2317.02, "provides the exclusive means by which privileged communications directly between an attorney and a client can be waived." *State v. McDermott*, 651 N.E.2d 985, 72 Ohio St. 3d 570 (1995), at syllabus. The privilege is waived only when (1) the client expressly consents, or (2) the client "voluntarily reveals the substance of attorney-client communications in a nonprivileged context." R.C. 2317.02(A)(1).

Here, the parties agree that "Mr. Lake's privilege belongs solely to Mr. Lake …[.]" Merit Brief of Appellant, p. 15. Because the privilege belongs to Mr. Lake, only he can waive it. That did not happen here. It is undisputed that Mr. Lake did not "expressly consent" to divulge confidential communications between himself and his attorney. Nothing in the record indicates that Mr. Lake distinctly or unequivocally waived his attorney-client privilege. Moreover, Mr. Ramsey testified that Mr. Lake never authorized him to waive the attorney-client privilege. (Tr. 1044).

Absent express consent to reveal the privileged communications, Brunson argues that Mr. Lake implicitly waived his attorney client privilege by failing to raise the issue and by testifying

at the suppression hearing. This Court has repeatedly rejected implicit waiver of the attorney client privilege. *See e.g., Jackson v. Greger*, 110 Ohio St. 3d 488, 2006-Ohio-4968, 854 N.E.2d 487 (client did not implicitly waive her attorney-client privilege when she filed 1983 action); *State v. McDermott*, 72 Ohio St. 3d 570, 651 N.E.2d 985 (1995) (no implicit waiver when the client told the attorney's brother about his conversation with the attorney); *Waldmann v. Waldmann*, 48 Ohio St. 2d 176, 177, 358 N.E.2d 521 (1976) (filing divorce complaint does not waive the attorney client privilege); *Swetland v. Miles*, 101 Ohio St. 501, 504, 130 N.E. 22 (1920) (refusing to create exception allowing heirs to waive attorney client privilege).

In refusing to add judicially created waivers, this Court consistently recognizes the separation of power between itself and the legislature. For example, the Court has stated, "the General Assembly has chosen to limit the means by which a client's conduct may effect waiver of the attorney-client privilege. It is not the role of this court to supplant the legislature by amending that choice." *Jackson v. Greger*, 110 Ohio St. 3d 488, at 491.

Brunson thinks that Mr. Lake's silence on the issue implicitly waived the privilege. Silence is not contemplated by R.C. 2317.02. Therefore this Court should decline Brunson's invitation to "add a judicially created waiver to the statutorily created privilege." *McDermott* at 574. Such a rule "would be a most glaring instance of the supreme court invading the powers of the general assembly of Ohio." *Swetland v. Miles*, 130 N.E. 22, at 23.

2. Mr. Lake' testimony at the suppression hearing did not waive his attorney client privilege.

In addition, Mr. Lake' testimony at the suppression hearing did not waive his attorney client privilege. Brunson's third proposition of law argues that "a witness waives attorney client privilege with respect to a subject when he or she offers testimony on the same subject." Merit Brief of Appellant, p. 10. However, Brunson does not analyze this issue except to say "Mr. Lake

… went on to offer testimony on the same subject he discussed with counsel. Given this peculiar scenario, Mr. Lake waived any attorney-client privilege he may have had." Merit Brief of Appellant, p. 16.

This Court has interpreted earlier versions of R.C. 2317.02 and its predecessor, G.C. 11494, which provided that if a client voluntarily *testified* in a case, the attorney could be *compelled* to testify "on the same subject." *See State v. McDermott*, 72 Ohio St.3d 570, 572-573, 1995-Ohio- 80, 651 N.E.2d 985 (1995); *Westervelt v. Rooker*, 4 Ohio St. 3d 146, 149, 447 N.E.2d 1307 (1983); *Swetland v. Miles*, 101 Ohio St. 501, 130 N.E. 22 (1920); *Spitzer v. Stillings*, 109 Ohio St. 297, 142 N.E. 365 (1924). G.C. 11494 stated, in part:

> The following persons shall not testify in certain respects: * * * An attorney, concerning a communication made to him by his client in that relation, or his advice to his client; or a physician, concerning a communication made to him by his patient in that relation, or his advice to his patient. But the attorney or physician may testify by express consent of the client or patient; and if the client or patient voluntarily testifies, the attorney or physician may be compelled to testify on the same subject.

Former R.C. 2317.02 stated, in part:

> The following persons shall not testify in certain respects: * * * An attorney, concerning a communication made to him by his client in that relation or his advice to his client; but the attorney may testify by express consent of the client, or if the client is deceased, by the express consent of the surviving spouse or the executor or administrator of the estate of such deceased client; and if the client voluntarily testifies, the attorney may be compelled to testify on the same subject;

R.C. 2317.02(A)(1) was amended, effective March 22, 2013, changing the second type of waiver. The statute currently states, in part,

> The following persons shall not testify in certain respects:
>
> (A)(1) An attorney, concerning a communication made to the attorney by a client in that relation or concerning the attorney's advice to a client, except that the attorney may testify by express consent of the client or, if the client is deceased, by the express consent of the surviving spouse or the executor or administrator of the estate of the deceased client. However, if the client voluntarily reveals the substance

> of attorney-client communications in a nonprivileged context or is deemed by section 2151.421 of the Revised Code to have waived any testimonial privilege under this division, the attorney may be compelled to testify on the same subject.

Notably, the language "if the client or patient voluntarily testifies" has been deleted and amended to read "if the client voluntarily reveals the substance of attorney-client communications in a nonprivileged context." This change demonstrates why this Court's prior cases are not dispositive of the issue here. First, the cases are interpreting different statutes with different language and second, the prior cases only discussed application of the prior statutes in the context of civil, not criminal, cases. *Spitzer v. Stillings,* 109 Ohio St. 297, at 307.

Under the new law, the relevant inquiry is whether the client voluntarily revealed the substance of his communications. In this case, the inquiry is broken down further into whether Mr. Lake's statements made during the suppression hearing are sufficiently voluntary to constitute waiver of the testimonial privilege and whether the statements revealed the substance of his communications with Mr. Ramsey.

Mr. Lake's statements made during the suppression hearing are not sufficiently voluntary to constitute waiver. This Court's analysis in *Harpman v. Devine,* 133 Ohio St. 1, 10 N.E.2d 776 (1937) is helpful. In *Harpman,* this Court held that mere responses to questions on cross-examination cannot constitute a waiver of privilege, because "[s]uch testimony is not voluntary within the purview of the statute." *Id.* at 776. The Court noted the following,

> The only testimony the plaintiff gave respecting [his physician] is to be found in his answers on cross-examination in response to questions by counsel for defendant. Is such testimony voluntary within the meaning of the stat[ute]? Is it something brought forth 'voluntarily' by the plaintiff? He was obliged to answer the questions whether he desired to or not. Whatever was developed respecting [plaintiff's physician] in cross-examination was brought out by the defendant. In that cross-examination of the plaintiff, it was counsel for defendant who directed the course of the inquiry. It was counsel for defendant who propounded the subjects of the questions which plaintiff was obliged to answer. The plaintiff had no choice about the matter. He was obliged to answer or be in contempt of court. Obviously,

> in such a situation the plaintiff did not 'voluntarily' testify respecting any 'communications' or 'advice' from [his physician]. There was no waiver in the testimony on cross-examination.

Id. at 778. Mr. Lake testified at the suppression hearing, but he was not the plaintiff or the defendant bringing the motion. As such, Mr. Lake and his counsel had no control over the questions asked or the information to be elicited. Under these circumstances, lower courts have found the testimony was not voluntary and therefor does not waive the attorney client privilege. See, e.g., *Tandon v. Tandon*, 7th Dist. Jefferson No. 99 JE 36, 1999 Ohio App. LEXIS 6416, *9, 1999 WL 1279162 (December 27, 1999); *State v. Miller*, 5th Dist. Perry No. 16-CA-00004, 2016-Ohio-8248, ¶ 62; *Carver v. Township of Deerfield*, 139 Ohio App. 3d 64, 77, 742 N.E.2d 1182 (11th Dist. 2000).

In addition, Mr. Lake's statements during the suppression hearing did not reveal the substance of his communications with Mr. Ramsey. At the suppression hearing, the Assistant Prosecuting Attorney asked Mr. Lake, "did you let your attorney know what you were going to tell law enforcement on that day?" He later responded, "No." The Assistant Prosecuting Attorney then asked, "Did you ever indicate that you knew the names or identification or individuals that committed this crime on October 24, 2016?" In response, Mr. Lake asked, "You said did I tell them who the names was?" Mr. Lake later responded, "Yes." Mr. Lake's statement lacked clarity in terms of who "them" was. *Brunson*, 2020-Ohio-5078, ¶ 31.

In reviewing these statements, the Eighth District found that "although Lake did testify as to his conversation with his attorney, the record does not clearly establish that he testified as to the contents of that communication." *Id*. Therefore, the trial court did not abuse its discretion in ruling that Brunson could not cross-examine Lake as to his privileged statements. *Id*. The Eighth District was correct. During his suppression hearing testimony, Mr. Lake did not reveal the substance of

any legal questions he asked of Mr. Ramsey or any legal advice he may have received. Moreover, Mr. Ramsey testified that he would have objected had the questioning continued into any particulars of the discussion. (Tr. 991).

By contrast, the privilege is typically waived when the defendant testifies at a hearing on his or her motion to withdraw guilty plea regarding the substance of communications with counsel. In *State v. Hale*, 8th Dist. Cuyahoga No. 107646, 2019-Ohio-3276, the defendant testified regarding advice his attorneys gave him including a false "story" he claimed counsel told him he needed to tell police to obtain the plea deal. *Id*. The Eighth District found that, "By testifying regarding these communications with counsel, Hale waived any privilege that would have otherwise been associated with them." *Id*.

In *State v. Houck*, 2nd Dist. Miami No. 09-CA-08, 2010-Ohio-743, the defendant testified that her trial attorney told her that she had to plead guilty to "stay out of jail." *Id*. at ¶ 24. The Second District found that Houck "unequivocally waived the confidential, privileged nature of her communication with Layman concerning whether she should plead guilty to the charged offense." *Id*. at ¶ 37. Similarly, in *State v. Rozell*, 2018-Ohio-1722, 111 N.E.3d 861 (2nd Dist.), the defendant testified regarding his communications with trial counsel in an effort to establish ineffective assistance of counsel. *Id*. at ¶ 18 The Second District found that, "By publishing their communications in such a manner, Rozell, like the defendant in *Houck*, waived the privileged nature of those communications." *Id*.

In *State v. Goodwin*, 2nd Dist. Montgomery No. 28681, 2020-Ohio-5274, the defendant testified regarding communications with his attorney regarding potential pleas, the amount of time he would serve, and whether he had any viable defenses. *Id*. at ¶ 38-40. The Second District held that Goodwin's "testimony waived his attorney-client privilege not only with respect to the

communications regarding the terms of the plea, but also with respect to whether Goodwin had a viable defense to the charges." *Id*. at ¶ 40.

Mr. Lake's testimony is distinguishable from these cases because he was not the party pursuing the motion; he was called to testify by another party. And, he did not reveal the substance of his communications with counsel. As Mr. Lake did not offer testimony "on the same subject" of his privileged communications, the third assignment error should be dismissed as improvidently granted.

3. A testifying witness' assertion of the attorney-client privilege does not yield to a criminal defendant's right to confrontation under the Sixth Amendment.

The Sixth Amendment's Confrontation Clause provides that, "In all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him …[.]" "The Confrontation Clause provides two types of protections for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination." *Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987). However, the right to conduct cross-examination is not absolute, and does not guarantee that a defendant may cross-examine a witness "in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer,* 474 U.S. 15, 20 (1985). The trial court may limit cross-examination based on concerns including, but not limited to, "harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware v. Van Arsdall,* 475 U.S. 673, 679 (1986).

The issue here is whether a testifying witness' attorney-client privilege must yield to a criminal defendant's right to confrontation under the Sixth Amendment. The attorney-client privilege and the right to confrontation under the Sixth Amendment are not mutually exclusive.

The Seventh Circuit reviewed this issue in *United States v. Rainone*, 32 F.3d 1203 (7th Cir. 1994). In *Rainone*, the defendant subpoenaed documents including notes the witness wrote to his attorney. *Id*. at 1206. The defendant tried to use the notes to impeach the witness at trial and the government objected that the notes were privileged. *Id*. The trial court held a hearing and determined the notes were protected by the attorney client privilege. *Id*. The Court of Appeals agreed and found "[a] trial judge does not violate the Constitution when he limits the scope of cross examination for a good reason, and here as in the usual case desire to protect the attorney-client privilege was a good reason." *Id*. at 1207. The Court also found the notes would have added little, if any, value to the cross-examination.

In making its decision, the Seventh Circuit noted two important policy concerns should the right to confrontation trump the attorney client privilege - (1) a co-defendant/witness will be deterred from openly communicating with his or her counsel resulting in a less effective defense for that witness and (2) the government will be less likely to secure the cooperation of co-defendants as State's witnesses hindering prosecution of complex conspiracies. The Court wrote,

> But we have difficulty imagining an actual case in which the right to counsel and the attorney-client privilege would clash; they are fundamentally complementary rather than antagonistic. If a defendant knows that his communications with his lawyers can be subpoenaed by his codefendants should he have a falling out with them, and then waved in front of a jury, and then used, having thus lost their privileged status, to convict him of additional crimes, he will be inhibited in communicating with his lawyer, and it will be more difficult for him to prepare an effective defense; the practical value of his Sixth Amendment right to the effective assistance of counsel will therefore be less. At the same time, the government's ability to pry one defendant loose from the others and induce him to turn state's evidence will be impaired as well, to the detriment of the successful prosecution of complex and sophisticated conspiracies, as in the present case.

Id. at 1206.

The Second Circuit also examined this issue in *United States v. Coven*, 662 F.2d 162 (2d Cir. 1981). In *Coven*, the trial court would not permit the defendant to cross-examine a witness

about conversations the witness had with his lawyers concerning his cooperation agreement with the government. *Id*. at 170. The defendants argued that their right of confrontation was denied when the government witness was permitted to invoke the attorney-client privilege. *Id*. The Court of Appeals did not agree finding that counsel had the opportunity to cross-examine the witness about the witness' state of mind when signing the agreement thus exposing potential bias to the jury. *Id*. at 171.

In addition, the Eighth Circuit analyzed the subject in *United States v. Fox*, 396 F.3d 1018 (8th Cir. 2005). In *Fox*, the defendant sought to cross-examine a witness about conversations he had with his attorney regarding the nature of his plea agreement and the potential sentence he could receive. *Id*. at 1022. The trial court, *sua sponte*, asserted the attorney-client privilege on the witness' behalf. *Id*. The defendant argued the trial court abused its discretion and violated his Sixth Amendment right of confrontation. *Id*. The Court of Appeals found there was no constitutional violation because defense counsel was permitted to engage in lengthy cross-examination about the benefits the witness may receive for cooperating. *Id*. at 1024. Thus, he could not show that a reasonable jury might have had a *significantly* different impression of the witness had defense counsel been able to pursue the proposed line of questioning. *Id*.

Brunson argues the witness' attorney-client privilege must yield to a criminal defendant's right to confrontation because he was "not able to fully confront the only person the State had to offer who was part of this alleged plot." Merit Brief of Appellant, p. 20. Simply put, he should be able to cross-examine Mr. Lake about privileged communication because it is relevant to his defense. However, relevance is no justification for divulging privileged communications. This Court has said, "the legislature, wisely or unwisely, has absolutely so far closed the door of all courts to the receipt of these communications, no matter how much light they might throw upon

the controversy, no matter how much logical connection they may have with the issue of facts to be proven or disproven." *Swetland v. Miles,* 130 N.E. 22, at 23.

Brunson was able to fully confront Mr. Lake during the trial. Defense counsel cross-examined Mr. Lake regarding all manner of subjects including, but not limited to whether he co-conspired to rob the lounge; what happened before, during, and after the homicide; his plea deal with the state; and any discrepancies between his statement to police and his trial testimony. (Tr. 2647-2681, 2706-2742, 2756-2765).

The United State Supreme Court has held that "The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney." *Upjohn Co. v. United States*, 449 U.S. 383, 395-396, (1981). This means the client "cannot be compelled to answer the question, 'What did you say or write to the attorney?' but may not refuse to disclose any relevant fact within his [or her] knowledge …" *Id. citing Philadelphia* v. *Westinghouse Electric Corp.*, 205 F.Supp. 830, 831 (ED Pa. 1962). As such, Brunson could, and did, cross-examine Mr. Lake regarding the underlying facts of the offense. It is of no significance that cross-examination may have been easier if counsel could simply play the video of Mr. Lake and Mr. Ramsey's privileged communications. "Considerations of convenience do not overcome the policies served by the attorney-client privilege." *Upjohn Co. v. United States,* 449 U.S. at 396.

Moreover, any alleged error here, if error at all, was harmless error. "The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence …[.]" *Delaware v. Van Arsdall,* 475 U.S. 673, 681 (1986). Crim. R. 52(A) defines the harmless-error doctrine in criminal cases and provides that "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be

disregarded." In other words, "the accused has a constitutional guarantee to a trial free from prejudicial error, not necessarily one free of all error." *State v. Brown*, 65 Ohio St.3d 483, 485, 1992-Ohio-61, 605 N.E.2d 46.

Brunson has not explained how revealing privileged communications between Mr. Lake and Mr. Ramsey would have changed the outcome of the trial. The record reflects it would not make any difference. The state presented overwhelming evidence of Brunson's guilt including the following:

> Beyond the surveillance footage of the incident, the state introduced DNA evidence indicating that the plastic cup shared by two of the suspects contained DNA from Brunson and Thomas. The state also introduced cell phone records showing not only that a number belonging to Brunson had called the bar shortly before the shooting and asked who was working at the time, but also that Brunson's cellphone was in the area of the bar at the time of the shooting. In addition, Lake testified at trial that Brunson and the other codefendants had "robbed a bar" on the west side of Cleveland, and that Brunson said that he "finished" the victim.

Brunson, 2020-Ohio-5078, ¶ 37. Mr. Lake's testimony merely corroborated other evidence linking Brunson to the homicide. The outcome of the trial would not change upon admission of privileged communications between Mr. Lake and Mr. Ramsey.

Appellant's proposed rules would create needless uncertainty wherein privileged communications made to one's attorney could be divulged any time a defendant asserts the topic is tangentially related to the case. "An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Upjohn Co. v. United States*, 449 U.S. at 393. When a defendant and counsel cannot be sure their communications are confidential, they will be hesitant to discuss matters fully and frankly. Therefore the proposed rule arbitrarily places the right to confrontation above the right to effective assistance of counsel. Such a drastic result is not necessary. This case demonstrates that the attorney-client privilege and the right to confrontation can co-exist.

CONCLUSION

Consistent with Ohio's sentencing laws, the State respectfully requests this Honorable Court hold that a trial court does not violate a defendant's right against self-incrimination when it notes that the defendant's silence shows a lack of remorse. Further, the State respectfully requests that the Court maintain the attorney-client privilege and find that a testifying witness' assertion of the attorney-client privilege does not yield to a criminal defendant's right to confrontation under the Sixth Amendment. Therefore, the State respectfully requests this Honorable Court affirm the judgment of the Eighth District Court of Appeals.

Respectfully submitted,

MICHAEL C. O'MALLEY (0059592)
CUYAHOGA COUNTY PROSECUTOR

/s/Tasha Forchione
Tasha L. Forchione (0085814)
Assistant Prosecuting Attorney
The Justice Center, 8th floor
1200 Ontario Street, 8th Floor
Cleveland, Ohio 44113
Phone: (216) 443-5771
Fax: (216) 443-7602
tforchione@prosecutor.cuyahogacounty.us

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief of Appellee has been electronically filed with this Court and sent via electronic mail and/or electronic service on this 26th day of July 2021 to the following:

Aaron T. Baker, Esq. at abaker@cuyahogacounty.us;
Russell S. Bensing, Esq. at rbensing@ameritech.net;
Benjamin Flowers, Esq. at Benjamin.Flowers@OhioAGO.gov; and
Zachery Keller, Esq. at Zachery.Keller@OhioAGO.gov.

/s/Tasha Forchione
Tasha L. Forchione (0085814)
Assistant Prosecuting Attorney