IN THE SUPREME COURT OF MISSOURI

No. SC 92252

STATE OF MISSOURI

Respondent,

v.

ELTON NORFOLK,

Appellant.

On Transfer from the Missouri Court of Appeals – Eastern District

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BRIEF OF AMICI CURIAE

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&
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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Interest of Amici Curiae

The Missouri Association of Criminal Defense Lawyers (MACDL) is an affiliate organization of the National Association of Criminal Defense Lawyers. It is dedicated to protecting the rights of persons accused of crimes in Missouri and to fostering and enhancing the ability of Missouri lawyers to provide effective representation. The MACDL often files amicus briefs to further these objectives.

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit corporation with membership of more than 10,000 attorneys and 28,000 affiliate members in all fifty states. Founded in 1958, the NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice. The NACDL often files amicus briefs in cases that implicate its interest in preserving the procedural and evidentiary mechanisms necessary to ensure fairness in the criminal justice system.

Amici file this brief in order to inform the court of developments in the law governing the evaluation of the prejudice caused by erroneously admitted evidence. In short, Missouri is one of the very few states that still applies a harmless error rule that most states have abandoned.

Argument

When evidence is erroneously admitted at trial, the Defendant's subsequent testimony about that evidence cannot render the error harmless if the testimony was induced by the error.

Before the U.S. Supreme Court's criminal procedure revolution of the 1960s, the standard harmless error rule was the rule established in *Motes v. United States*, 178 U.S. 458 (1900). Under the *Motes* rule, erroneously admitted evidence was harmless as a matter of law if the defendant testified about that evidence at trial. *Id.* at 475-76. Missouri has used the *Motes* rule since at least 1948. *See, e.g.*, *State v. Ussery*, 208 S.W.2d 245, 246-47 (Mo. 1948); *State v. Smith*, 209 S.W.2d 138, 140 (Mo. 1948); *State v. Brown*, 404 S.W.2d 179, 182 (Mo. 1966); *State v. Walker*, 416 S.W.2d 134, 140 (Mo. 1967); *State v. McGee*, 447 S.W.2d 270, 275-76 (Mo. 1969); *State v. Eacret*, 456 S.W.2d 324, 326-28 (Mo. 1970); *State v. Nunn*, 646 S.W.2d 55, 57 (Mo. 1983). Many other states once followed the *Motes* rule as well.

Criminal procedure today looks very different from the criminal procedure of 1900, however, and the issue of harmless error is no exception. By now, Missouri is one of only a handful of states that still uses the *Motes* rule to evaluate the prejudice caused by erroneously admitted evidence. Under the rule that now prevails, the defendant's testimony cannot render the error harmless if the testimony was *induced* by the error – that is, the error is not harmless if the

defendant testified about the evidence *because* of its erroneous admission. Only if the defendant would have given the same testimony, with or without the erroneous admission of the evidence, can his testimony be considered independent evidence of guilt in evaluating whether the error was harmless.

There are two reasons the old *Motes* rule has nearly withered away. First, the *Motes* rule has been superseded by more recent U.S. Supreme Court precedent. Second, the *Motes* rule makes little practical sense. The time has come for Missouri to join the large majority of states on this issue.

A. Missouri's Harmless Error Rule has been superseded by U.S. Supreme Court precedent.

In the 1960s, the U.S. Supreme Court decided three cases that fatally undermined the *Motes* rule.

First, in *Fahy v. Connecticut*, 375 U.S. 85 (1963), the Court held that the defendant's testimony does not render erroneously admitted evidence harmless if the defendant's testimony was *caused* by the erroneously admitted evidence. Fahy was convicted of painting black swastikas on a synagogue. *Id.* at 85-86. The primary evidence against him was a can of black paint and a paintbrush found in his car. *Id.* at 87. After the evidence was introduced, Fahy took the stand, admitted that he had painted the swastikas, and tried to argue that his act did not violate state law. *Id.* at 91. On appeal, it turned out that the paint and the brush were inadmissible, because the police had obtained them during an unlawful

search. *Id.* at 87. Under *Motes*, the error would clearly have been harmless; after all, Fahy admitted at trial that he possessed the paint and the brush, and indeed he confessed that he painted the swastikas. But the Supreme Court nevertheless reversed. "It was only after admission of the paint and brush," the Court reasoned, "that the defendants took the stand [and] admitted their acts." *Id.* at 91. Because the defendant's testimony was a result of the erroneously admitted evidence, his testimony did not render the error harmless.

Second, in *Harrison v. United States*, 392 U.S. 219 (1968), the Court elaborated on this new harmless error standard. Harrison's initial conviction had been reversed because the prosecutor introduced his illegally obtained confessions. *Id.* at 220. At that first trial, after the confessions had been erroneously introduced, Harrison had taken the stand to give his version of events. *Id.* The question before the Supreme Court was whether, in a second trial, the prosecutor could introduce Harrison's testimony from the first trial. *Id.* at 221. The Supreme Court held that the prosecutor could not introduce Harrison's testimony because the testimony had been "impelled" by the erroneously admitted confessions – it was "the fruit of the poisonous tree, to invoke a time-worn metaphor." *Id.* at 222. The Court explained: "The question is not *whether* the petitioner made a knowing decision to testify, but *why*. If he did so in order to overcome the impact of confessions illegally obtained and hence improperly introduced, then his testimony was tainted by the same illegality that rendered the confessions themselves inadmissible." *Id.* at 223. The Court concluded that Harrison had in fact testified

for that purpose. "It thus appears that, but for the use of his confessions, the petitioner might not have testified at all," the Court reasoned. *Id.* at 225. "But even if the petitioner would have decided to testify whether or not his confessions had been used, it does not follow that he would have admitted being at the scene of the crime and holding the gun when the fatal shot was fired. On the contrary, the more natural inference is that no testimonial admission so damaging would have been made if the prosecutor had not already spread the petitioner's confessions before the jury." *Id.* at 225-26.

Third, a week after deciding *Harrison*, the Court relied on *Harrison* in summarily vacating Dennis McDaniel's conviction. *McDaniel v. North Carolina*, 392 U.S. 665 (1968). In *McDaniel*, the North Carolina Supreme Court had applied the *Motes* rule (without citing *Motes*) to find harmless the erroneous introduction of the defendant's confession, on the ground that the defendant subsequently testified to the same facts. *State v. McDaniel*, 158 S.E.2d 874, 880-82 (N.C. 1968). The U.S. Supreme Court vacated the judgment and remanded the case to the North Carolina Supreme Court for reconsideration in light of *Harrison*. 392 U.S. at 665. The plain implication was that the appropriate method of harmless error review was the method used in *Harrison*. On remand, the court was to determine whether the defendant would have confessed at trial if his erroneously introduced confession had not already been admitted. If not, then his trial testimony could not render the error harmless.

The U.S. Supreme Court did not mention *Motes* in any of these cases, but it was clear that the Court was employing a harmless error rule different from the one it had established sixty years earlier in *Motes*. Under the *Motes* rule, these three cases would have come out differently. In all three cases, the defendant's testimony would have rendered the errors harmless. Under *Motes*, the Court would have affirmed all three convictions.

In the decades since *Fahy*, *Harrison*, and *McDaniel*, the large majority of jurisdictions that have addressed this issue have concluded that these cases established a harmless error rule different from the *Motes* rule. Under the now-prevailing rule, the defendant's testimony cannot be considered as independent evidence of guilt in evaluating the harmlessness of an evidentiary error if the testimony was itself caused by the error. Only if the defendant would have given the same testimony, with or without the error, can his testimony render the error harmless. As the U.S. Court of Appeals for the Fifth Circuit put it, "[i]f Smith would not have taken the stand but for the admission of his unlawful pre-trial confession, introduced through the testimony of Officer Rippey, then his trial testimony was tainted thereby and cannot be considered as independent evidence of guilt for purposes of applying the harmless error rule." *Smith v. Estelle*, 527 F.2d 430, 433 (5th Cir. 1976). Or in the pithier words of the Massachusetts Supreme Court, "[w]e do not subscribe to the bootstrap argument that the defendant's apparent attempt to mitigate the effect of the already improperly

admitted evidence may be used to render the evidence admissible." *Commonwealth v. Benoit*, 415 N.E.2d 818, 824 (Mass. 1981).

For more examples of courts applying this now-standard rule, see *Robinson v. State*, 698 So. 2d 1160, 1164-65 (Ala. Crim. App. 1996); *State ex rel. LaSota v. Corcoran*, 583 P.2d 229, 236-38 (Ariz. 1978); *People v. Spencer*, 424 P.2d 715, 719-20 (Cal. 1967); *State v. Hoeplinger*, 537 A.2d 1010, 1016-18 (Conn. 1988); *LaRue v. State*, 224 S.E.2d 837, 838-41 (Ga. Ct. App. 1976); *People v. Wilson*, 326 N.E.2d 378, 380 (Ill. 1975); *Hendricks v. State*, 897 N.E.2d 1208, 1212-13 (Ind. Ct. App. 2008); *State v. McCoy*, 692 N.W.2d 6, 29-30 (Iowa 2005); *Hay v. Commonwealth*, 432 S.W.2d 641, 643-44 (Ky. Ct. App. 1968); *State v. Ayers*, 433 A.2d 356, 362 (Me. 1981); *Hillard v. State*, 406 A.2d 415, 420-22 (Md. Ct. App. 1979); *Keys v. State*, 283 So. 2d 919, 922-27 (Miss. 1973); *State ex rel. Mazurek v. District Court*, 22 P.3d 166, 170 (Mont. 2000); *State v. Moore*, 245 P.3d 101, 106-09 (Or. 2010), *cert. denied sub nom. Coen v. Oregon*, 131 S. Ct. 2461 (2011); *State v. Valentine*, 911 S.W.2d 328, 332-33 (Tenn. 1995); *Leday v. State*, 983 S.W.2d 713, 718-19 (Tex. Crim. App. 1998); *State v. Anson*, 698 N.W.2d 776, 788-89 (Wis. 2005).

Many of these states, like Missouri, once followed the *Motes* rule. Courts in these states overruled their own prior decisions in order to comply with U.S. Supreme Court precedent. *See, e.g.*, *LaRue*, 224 S.E.2d at 838-39 (overruling *Taylor v. State*, 213 S.E.2d 137 (Ga. Ct. App. 1975) and *Cadle v. State*, 221 S.E.2d 59 (Ga. Ct. App. 1975)); *Hay*, 432 S.W.2d at 643-44 (overruling *Fugate v.*

Commonwealth, 171 S.W.2d 1020 (Ky. Ct. App. 1943)); *Keys*, 283 So. 2d at 922-23 (overruling several cases, including *Bowman v. State*, 119 So. 176 (Miss. 1928)); *Thomas v. State*, 572 S.W.2d 507, 516 (Tex. Crim. App. 1976) (overruling a long line of Texas cases).

There appear to be only four jurisdictions left, apart from Missouri, that still adhere to the old harmless error rule. They are Colorado, Nevada, Pennsylvania, and the U.S. Court of Appeals for the Eighth Circuit. *See People v. Alexis*, 806 P.2d 929, 932 (Colo. 1991); *Allen v. State*, 530 P.2d 1195, 1197 (Nev. 1975); *Commonwealth v. Hart*, 370 A.2d 298, 300 (Pa. 1977); *United States v. Hill*, 864 F.2d 601, 603 (8th Cir. 1988), *cert. denied*, 489 U.S. 1089 (1989). These cases do not mention *Fahy*, *Harrison*, or *McDaniel*. In any event, this view is gradually dwindling away. As Professor LaFave observes, "[o]f the distinct minority of states which have followed the rule that a defendant waives his objection to the admission of illegally seized evidence if he testifies to having owned or possessed the evidence, about half have abandoned the rule in recent years. This is an encouraging development, for the rule is unsound." 6 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 11.1(c) (4th ed. 2004).

This court has not taken a hard look at this issue since 1970. In *State v. Eacret*, 456 S.W.2d 324 (1970), the court considered whether *Harrison*, decided only two years before, required Missouri to abandon the *Motes* rule. (Eacret's lawyer must have neglected to apprise the court of the Supreme Court's other two then-recent cases, *Fahy* and *McDaniel*, because the *Eacret* opinion does not

mention them.) In *Eacret*, this court distinguished *Harrison*, on the ground that in Eacret's testimony he admitted committing the crime, while in Harrison's testimony he only admitted having been at the scene of the crime. *Id.* at 327.

This may have been a plausible interpretation of *Harrison* in 1970, when the case was still new and the law in this area was still unsettled. Forty-two years later, it is no longer plausible. To our knowledge, no other court in the country has distinguished *Harrison* on this ground. Most courts have understood the three Supreme Court cases to mean that when a defendant's testimony is induced by erroneously admitted evidence, a court evaluating the prejudice caused by the error cannot consider the testimony as independent evidence of guilt, whether the testimony confesses guilt or simply attempts to place the erroneously admitted evidence in context.

B. Missouri's Harmless Error Rule makes little practical sense.

The *Motes* rule puts the defendant in an impossible dilemma when evidence is erroneously admitted against him. If he wishes to preserve his ability to appeal the error, he cannot take the stand at trial to rebut or explain the evidence, because if he does so, he is ensuring that on appeal, the error will be viewed as harmless. On the other hand, if he wishes to rebut or explain the evidence at trial, he will lose the ability to appeal the error. As Professor LaFave puts it, "[t]his can only be described as 'Catch-22.'" LaFave, § 11.7(f). *See also id.* § 11.1(c) (observing that

the rule "places the defendant in the dilemma where he must either ignore the damaging evidence introduced against him or waive his right to appeal its erroneous introduction"). A defendant has the right to testify *and* the right to appeal erroneous suppression rulings. It makes little sense to have a harmless error rule that forces him to choose one or the other.

Two panels of the Missouri Court of Appeals have already expressed this concern. The first was in *State v. Davalos*, 128 S.W.3d 143, 148 (Mo. Ct. App. 2004) ("Although it is troubling that Defendant may be forced to testify due to evidence that was obtained from a possible illegal search, this court has found that voluntary incriminating testimony renders illegally obtained evidence cumulative and results in harmless error."). The second was in this case. *State v. Norfolk*, 2011 WL 5541791, *6 (Mo. Ct. App. 2011) ("While Missouri precedent compels this result, we echo the concerns raised in *Davalos*.").

When a defendant appeals from the erroneous denial of a suppression motion, and the defendant testified at trial, it makes much more sense to do what most other courts do – that is, to ask whether the defendant's testimony was itself a "fruit of the poisonous tree." This method of review allows defendants to testify without, in effect, waiving their right to appeal. If the defendant's testimony was *not* prompted by the erroneous suppression ruling, his testimony should be considered as independent evidence of guilt in evaluating whether the error was prejudicial. But if the defendant's testimony *was* prompted by the erroneous

suppression ruling, his testimony should *not* be considered as independent evidence of guilt in evaluating whether the error was prejudicial.

Conclusion

This court should abandon an outdated harmless error rule and replace it with the more sensible rule used by the United States Supreme Court and the courts of most other jurisdictions.

Respectfully submitted,

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Certificate of Service

The undersigned hereby certifies that in addition to being electronically filed with the Supreme Court of Missouri, a true and accurate copy of the foregoing was sent via U.S. mail on this 20th day of March, 2012 to:

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Certificate of Compliance with Rule 84.06

The undersigned certifies that the foregoing Brief of Amici Curiae includes the information required by Rule 55.03, and complies with the requirements contained in Rule 84.06.

Relying on the word count of the Microsoft Word Program, the undersigned certifies that the total number of words contained in the Brief of Amici Curiae is 2,622 exclusive of the cover, signature block and certificates of service and compliance.

The undersigned further certifies that the disk filed with the Brief of Amicus Curiae was scanned for viruses and was found virus-free through the McAfee Virus Scan anti-virus program.

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