STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2014AP2965-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TIRON JUSTIN GRANT,

Defendant-Appellant.

APPEAL FROM AN ORDER DENYING POSTCONVICTION RELIEF AND A JUDGMENT OF CONVICTION ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE J.D. WATTS AND THE HONORABLE DANIEL L. KONKOL, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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BRIEF OF PLAINTIFF-RESPONDENT

ISSUES PRESENTED

1. This court does not reverse a conviction unless the evidence is so insufficient that no reasonable jury could have found guilt beyond a reasonable doubt. Here, the State presented evidence of each element of the crime: that Tiron Justin Grant possessed cocaine, he knew it was cocaine, he intended to deliver the cocaine, and the

cocaine weighed 2.79 grams. Was the evidence sufficient to allow the jury to convict Grant of possession with intent to deliver?

2. If the State fails to preserve evidence, it can violate a defendant's due process rights if the evidence was apparently exculpatory. Here, the State did not preserve a medicine bottle that Grant threw while being chased by the police and that had cocaine inside. Did Grant meet his burden to prove that the medicine bottle was apparently exculpatory because it might have been dirty and too small to hold the amount of cocaine allegedly found there?

3. Did Grant present sufficient facts in his postconviction motion to allege that his attorney provided ineffective assistance when he failed to challenge an expert witnesses testimony, a challenge that the circuit court would have denied?

4. Did the circuit court properly exercise its sentencing discretion when it expressly declined to make Grant eligible for the Challenge Incarceration and Earned Release Programs because of the seriousness of the offense and the need to protect the community?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request either oral argument or publication. This case may be resolved by applying well-established legal principles to the facts of this case.

SUPPLEMENTAL STATEMENT OF FACTS

On May 30, 2013, Grant and a group of other people were standing in the street (55:56-57). Six police officers on bicycles were patrolling in the area (55:57). When the officers got within 30 to 40 feet of the group, Grant ran from the group onto the porch of a nearby home (55:57-58).

Officer Brian Maciejewski approached Grant because, in his experience, people who run from the police are either wanted by the police or in possession of illegal drugs or firearms (55:60). So Officer Maciejewski asked Grant if he lived at that house and what were his intentions standing on the street (55:60). Grant never answered and

instead jumped over the porch railing and ran to the back alley (55:60-61).

Officer Martez Ball followed Grant on foot and saw Grant take a pill bottle from his front right pocket while running (56:6-7). Officer Ball grabbed Grant's feet as he attempted to jump over a fence (56:7). At the same time, Grant threw the pill bottle (56:7). Officer Ball saw where the pill bottle landed about ten to 15 feet away (56:7).

Officer Matthew Bughman also saw Grant throw the bottle and went over to pick it up (56:28-29). The bottle contained two clear sandwich bags (56:30). Inside the first bag were 15 smaller corner-cuts of an off-white chunky substance, and the second bag had eight corner-cuts of the same substance (56:30). The substance in both bags tested positive for cocaine and weighed 2.79 grams (56:30, 32). Officer Bughman sealed the cocaine into the drug safe and inventoried the drugs with inventory numbers of 13016408 and 0131500106 (56:33-34).

Birjees Kauser, a crime lab employee, opened a manila envelope with inventory numbers 0131500106 and 13016408 (56:65, 67). She tested the substances in the envelope and concluded that each was cocaine, all together weighing 1.1209 grams (56:75-76). She knew that crack cocaine could lose weight through evaporation and that it could even lose up to two-thirds of its weight (56:77-78).

Detective James Henner believed that the average cocaine user had one to three uses at most and each use would weigh about one-tenth of a gram (56:52). He concluded that having 2.79 grams alone would indicate intent to deliver the cocaine (56:59). Additionally, putting the crack cocaine into individual baggies of about one tenth of a gram each indicated intent to sell the drugs (56:60).

Grant testified that he ran from the police officers because he thought he had an outstanding arrest warrant (56:97). He said that he never had a pill bottle on him (56:97). He testified that the police set him up because he would not work as a confidential informant to find drug dealers (56:98).

ARGUMENT

I. The State presented sufficient evidence to convict Grant.

A. Applicable Statutes.

> [I]t is unlawful for any person to possess, with intent to manufacture, distribute or deliver, a controlled substance or a controlled substance analog. Intent under this subsection may be demonstrated by, without limitation because of enumeration, evidence of the quantity and monetary value of the substances possessed, the possession of manufacturing implements or paraphernalia, and the activities or statements of the person in possession of the controlled substance or a controlled substance analog prior to and after the alleged violation. Any person who violates this subsection is subject to the following penalties:
>
> . . . .
>
> (cm) *Cocaine and cocaine base.* If a person violates this subsection with respect to cocaine or cocaine base, or a controlled substance analog of cocaine or cocaine base, and the amount possessed, with intent to manufacture, distribute or deliver, is:
>
> . . . .
>
> 1r. More than one gram but not more than 5 grams, the person is guilty of a Class F felony.

Wis. Stat. § 961.41(1m) (2011-12).[1]

B. Legal Principles.

A defendant seeking to overturn a verdict on the basis of insufficient evidence has an exceptionally high hurdle to clear. The test to determine sufficiency of the evidence to convict is highly

[1]All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

deferential. *State v. Kimbrough*, 2001 WI App 138, ¶ 12, 246 Wis. 2d 648, 630 N.W.2d 752. This court "may not reverse unless the evidence is so insufficient in probative value and force that as a matter of law, no reasonable fact finder could have determined guilt beyond a reasonable doubt." *Id.* (citation omitted). Moreover,

> the rules governing our review strongly favor the verdict. We affirm the verdict if the evidence adduced, believed, and rationally considered by the jury was sufficient to prove the defendant's guilt beyond a reasonable doubt. In reviewing the evidence, we view it in the light most favorable to the verdict, and, if more than one reasonable inference can be drawn from the evidence, we adopt the inference that supports the verdict.

State v. Hahn, 221 Wis. 2d 670, 683, 586 N.W.2d 5 (Ct. App. 1998) (citations and internal quotation marks omitted).

When the evidence supports more than one inference, this court must accept the inference that supports the jury's verdict. *State v. Routon*, 2007 WI App 178, ¶ 17, 304 Wis. 2d 480, 736 N.W.2d 530. This court should give evidence all reasonable inferences that support the verdict. *State v. Fonte*, 2005 WI 77, ¶ 19, 281 Wis. 2d 654, 698 N.W.2d 594. If the jury could possibly have drawn the appropriate inference to find guilt, this court will not overturn the verdict even if it believes the jury should not have found guilt. *State v. Kimberly B.*, 2005 WI App 115, ¶ 21, 283 Wis. 2d 731, 699 N.W.2d 641.

C. The State presented sufficient evidence to prove that Grant possessed cocaine with intent to deliver.

Grant fails to clear the exceptionally high hurdle and prove that the State presented insufficient evidence to allow the jury to convict him. There is no requirement that each piece of evidence recovered be presented to the jury at trial. The jury only needed to determine whether Grant possessed a substance, the substance was cocaine, Grant knew it was cocaine, and Grant intended to deliver the cocaine. *See* Wis. JI-Criminal 6035 (2010). The medicine bottle was irrelevant to any of the four elements of the crime.

Grant argues that the medicine bottle was needed to prove the chain of custody. Grant's brief at 14.[2] He asserts that cocaine does not have any identifying feature and to ensure the cocaine tested at the crime lab was from the medicine bottle, the bottle needed to be transported with the cocaine. Grant's brief at 14. But the chain was complete because the inventory numbers that Officer Bughman assigned matched the inventory numbers attached to the substances that Kauser tested (56:35, 65, 67).

And a complete chain of custody is not needed to admit evidence. *State v. McCoy*, 2007 WI App 15, ¶ 19, 298 Wis. 2d 523, 728 N.W.2d 54. The fact that the State did not admit the medicine bottle did not mean that the cocaine was inadmissible. Instead, it meant that Grant could argue that without the medicine bottle the State could not meet his burden. Grant did that. He asked Officer Bughman to show him the bottle, and Officer Bughman admitted it was not in court (56:41-42). He argued that the State failed to produce the medicine bottle because it did not exist (57:28). The jury plainly rejected that assertion.

The jury had evidence from which it could conclude that Grant possessed cocaine with the intent to deliver it. The State presented sufficient evidence and the conviction should not be overturned.

D. Reversal in the interest of justice is not appropriate.

1. Legal principles.

"Appellate courts may also reverse judgments 'where unobjected-to error results in either the real controversy not having been fully tried or for any reason justice is miscarried.'" *State v. Zdzieblowski*, 2014 WI App 130, ¶ 24, 359 Wis. 2d 102, 857 N.W.2d 622 (quoting *Vollmer v. Luety*, 156 Wis. 2d 1, 17, 456 N.W.2d 797 (1990)).

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[2]To the extent that Grant argues the court should not have admitted the cocaine, he forfeited that argument by failing to object at trial. *See State v. Hershberger*, 2014 WI App 86, ¶ 22 n.6, 356 Wis. 2d 220, 853 N.W.2d 586.

This court has discretionary reversal power:

> if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

Wis. Stat. § 752.35.

2. This court should refuse to reverse in the interest of justice.

The rarely used exceptional discretionary power to grant a new trial in the interest of justice is not warranted. Grant does not explain whether he believes the real controversy was not tried or whether there was a miscarriage of justice. He simply argues that the cocaine should not have been admitted because the medicine bottle was missing from the chain of custody. Grant's brief at 21. For the reasons stated above, the circuit court did not commit an error by allowing the cocaine in without the medicine bottle. This court should deny Grant's request for reversal of the conviction in the interests of justice.

II. Grant fails to show that his due process rights were violated.

A. Standard of review.

Whether state action constitutes a violation of due process is a question of law that this court decides independently from the circuit court but benefitting from its analysis. *State v. Luedtke*, 2015 WI 42, ¶ 37, ___ Wis. 2d ___, ___ N.W.2d ___.

B. Legal principles.

Failure to preserve material evidence can violate due process. *State v. Ehlen*, 119 Wis. 2d 451, 455, 351 N.W.2d 503 (1984). But the evidence destroyed must be material evidence. *Id.* A defendant's due process rights are violated if the police: (1) failed to preserve the evidence that is apparently exculpatory; or (2) acted in bad faith by failing to preserve evidence which is potentially exculpatory. *Luedtke*, 2015 WI 42, ¶ 46.

C. Grant fails to prove that the medicine bottle was apparently exculpatory.

Grant argues that the State violated his due process rights by its failure to preserve the medicine bottle. Grant's brief at 16. He does not argue that the officers destroyed the bottle in bad faith. Grant's brief at 16. Instead, Grant asserts that the medicine bottle was apparently exculpatory because it might have been too small to hold the amount of cocaine recovered and it might have been old. Grant's brief at 16-17. Grant fails to prove that the medicine bottle was apparently exculpatory, and he cannot show a due process violation.

At best, the medicine bottle was potentially exculpatory. But because the bottle likely was clean, because Grant just threw it, and because the officers found cocaine in it, it was much more likely to be inculpatory. Thus, because the bottle was only potentially exculpatory, Grant needed to show bad faith in the failure to preserve it. *See Luedtke*, 2015 WI 42, ¶ 46. He cannot. Grant fails to show that the State violated his right to due process by failing to preserve the medicine bottle.

Grant had the opportunity to challenge the failure to produce the medicine bottle on cross-examination at trial and at closing argument. These opportunities are sufficient to ensure due process. Under these circumstances, Grant fails to show that the State violated his due process rights.

III. The circuit court properly denied Grant's ineffective assistance of counsel claims without an evidentiary hearing.

A. Standard of review.

If a postconviction motion is deficient, the circuit court has the discretion to deny it without an evidentiary hearing because it fails to allege sufficient facts, presents only conclusory allegations, or the record conclusively shows that the defendant is entitled to no relief. *State v. Bentley*, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). Whether the motion alleges sufficient facts, presents only conclusory allegations, or the record conclusively shows that the defendant is not entitled to relief is a question this court reviews independent of the circuit court. *Id.* at 310; *see State v. Allen*, 2004 WI 106, ¶¶ 9, 12, 274 Wis. 2d 568, 682 N.W.2d 433. If the motion fails to allege sufficient facts, presents only conclusory allegations, or the record conclusively shows that the defendant is not entitled to relief, the circuit court decision to deny an evidentiary hearing will be subject to deferential appellate review. *Bentley*, 201 Wis. 2d at 310-11.

B. Legal principles.

A hearing on a postconviction motion is required only when the movant states sufficient material facts that, if true, would entitle the defendant to relief. *State v. Pinno*, 2014 WI 74, ¶ 38, ___ Wis. 2d ___, 850 N.W.2d 207. The motion must allege facts that allow the reviewing court to meaningfully assess the defendant's claim. *Allen*, 274 Wis. 2d 568, ¶ 21. The facts must be material to the issue presented. *Id*. ¶ 23. A sufficient postconviction motion alleges the "five 'w's' and one 'h'; that is, who, what, where, when, why, and how." *Id.*

A defendant claiming ineffective assistance of counsel must prove both that his lawyer's representation was deficient and that he suffered prejudice as a result of that deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Love*, 2005 WI 116, ¶ 30, 284 Wis. 2d 111, 700 N.W.2d 62. If the court concludes that the defendant has not proven one prong of this test, it need not address the other. *Strickland*, 466 U.S. at 697.

To prove deficient performance, a defendant must show specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. To demonstrate prejudice, the defendant must show that there is: "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Id.*

C. The circuit court properly denied Grant's motion without a hearing.

In his motion for a new trial, Grant alleged that his attorney provided ineffective assistance for failing to challenge Detective James Henner's testimony on *Daubert* grounds (40:9-11). Grant's claim fails. The circuit court made the proper decision when it refused to hold a fact-finding hearing.

In 2011, the legislature amended § 907.02 to make Wisconsin law consistent with the *Daubert* reliability standard embodied in Federal Rule of Evidence 702. *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1973). The rule provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.

Wis. Stat. § 907.02(1).

The circuit court has discretion whether to admit or exclude expert testimony. *State v. Giese*, 2014 WI App 92, ¶ 16, 356 Wis. 2d 796, 854 N.W.2d 687. This court reviews that decision under an erroneous exercise of discretion standard. *Id.*

If Grant's attorney had objected to the testimony, the circuit court would have exercised its discretion to determine whether the testimony met the Wis. Stat. § 907.02 standard. The circuit court would have allowed the testimony based on the foundation of Detective Henner's testimony (44:2; A-Ap. 115). That conclusion would not have been erroneous.

Other courts have concluded that a police officer's training and experience meets the *Daubert* standard in the field of drugs and drug trafficking. *See, e.g., United States v. Schwarch*, 719 F.3d 921, 923-24 (8th Cir. 2013) (permitting a police officer to give expert testimony concerning the modus operandi of drug dealers to rebut the defendant's claim that he was merely a user and not a trafficker); *United States v. West*, 671 F.3d 1195, 1201 n.6 (10th Cir. 2012)(upholding a police officer's expert opinion that items found in the defendant's apartment were consistent with the distribution of marijuana); *United States v. Garcia*, 447 F.3d 1327, 1335 (11th Cir. 2006)(recognizing that an experienced narcotics officer may provide expert testimony to help a jury understand the significance of certain conduct or methods of operation unique to the drug distribution business); *United States v. Parra*, 402 F.3d 752, 757-58 (7th Cir. 2005)(allowing a DEA agent to testify about the use of counter-surveillance in drug transactions).

Since the circuit court would have overruled the objection, Grant's motion fails to allege sufficient facts to prove prejudice. Even with an objection, the result at trial would not have changed. *See Strickland*, 466 U.S. at 694. This court should affirm the circuit court's order denying Grant's motion without a trial. Grant failed to allege sufficient facts to meet the standard for an evidentiary hearing.

IV. The circuit court properly exercised its discretion in sentencing Grant.

A. Standard of review.

A circuit court properly exercises its discretion if, by reference to the relevant facts and factors, it explains how the sentence's component parts promote the sentencing objectives. *State v. Gallion*, 2004 WI 42, ¶ 46, 270 Wis. 2d 535, 678 N.W.2d 197. There is a strong

public policy against interference with the sentencing discretion of the circuit court, and sentences are afforded the presumption that the circuit court acted reasonably. *Id.* ¶ 18; *McCleary v. State*, 49 Wis. 2d 263, 281, 182 N.W.2d 512 (1971).

A court erroneously exercises its discretion when it "imposes its sentence *based on* or in *actual reliance upon* clearly irrelevant or improper factors." *State v. Harris*, 2010 WI 79, ¶ 30, 326 Wis. 2d 685, 786 N.W.2d 409.

B. Legal Principles.

The objectives of the sentence, including, but not limited to, the protection of the public, punishment, rehabilitation, and deterrence should be articulated on the record. *Gallion*, 270 Wis. 2d 535, ¶ 40. Which objectives should be given greatest weight is up to the circuit court to identify in each case. *Id.* ¶ 41. Courts must also describe, on the record, the facts relevant to the objectives. *Id.* ¶ 42.

The circuit court shall impose the minimum sentence consistent with the gravity of the offense, the rehabilitative needs of the offender, and the need for protection of the public. *Id.* ¶ 44. The factors that a circuit court can consider in sentencing include: past record of criminal offenses; history of undesirable behavior patterns; the defendant's personality, character and social traits; results of presentence investigation; vicious or aggravated nature of the crime; degree of defendant's culpability; defendant's demeanor; defendant's age, educational background and employment record; defendant's remorse, repentance and cooperativeness; defendant's need for close rehabilitative control; the rights of the public; and the length of pretrial detention. *State v. Harris*, 119 Wis. 2d 612, 623-24, 350 N.W.2d 633 (1984); *see also Gallion*, 270 Wis. 2d 535, ¶ 43 n.11. "An improper sentencing factor is a factor that is 'totally irrelevant or immaterial to the type of decision to be made.'" *State v. Samsa*, 2015 WI App 6, ¶ 8, 359 Wis. 2d 580, 859 N.W.2d 149.

C. The circuit court properly exercised its sentencing discretion.

Grant argues that the circuit court erroneously exercised its discretion by refusing to grant him eligibility into the Challenge Incarceration and Earned Release Programs. Grant's brief at 21-24. The circuit court properly exercised its discretion when it refused to make Grant eligible for the programs. This court should affirm Grant's sentence.

The Challenge Incarceration Program is for inmates to participate in "manual labor, personal development counseling, substance abuse treatment and education, military drill and ceremony, counseling, and strenuous physical exercise" or appropriate exercise if the participant is over thirty years old. Wis. Stat. § 302.045(1). Completion of the program may grant an inmate early release. *See* Wis. Stat. §§ 302.045(3) and (3m).

The Earned Release Program eligibility is governed by Wis. Stat. § 302.05(3). The program treats inmates for substance abuse problems. Wis. Stat. § 302.05(1). Inmates who complete the program can be granted early release on parole or have the confinement portion of their sentence shortened. Wis. Stat. §§ 302.05(3)(b) and (c).

In addition to the eligibility requirements in Wis. Stat. §§ 302.045 and 302.05, there is an additional eligibility requirement that the sentencing court determine that the offender is eligible. *State v. Steele*, 2001 WI App 160, ¶ 7, 246 Wis. 2d 744, 632 N.W.2d 112. Even if the offender meets all the eligibility requirements under Wis. Stat. §§ 302.045(2) and 302.05(3), the circuit court under Wis. Stat. § 973.01(3m) may declare an offender ineligible for the programs. *See id.*, ¶ 8.

In determining eligibility for the Challenge Incarceration and Earned Release Programs, the statutes each use identical phrases "the [circuit] court shall, as part of the exercise of its sentencing discretion, decide whether the person being sentenced is eligible or ineligible" to participate in the respective program "during the term of confinement in prison portion of the bifurcated sentence," to

describe the circuit court's responsibility. *See* Wis. Stat. §§ 973.01(3g) and (3m).

Grant complains that the circuit court did not make him eligible for either program even though he is statutorily eligible for both programs. Grant's brief at 23. But eligibility for these programs is discretionary, applying the same criteria as those considered when imposing sentence. *See Steele*, 246 Wis. 2d 744, ¶¶ 8-11.

At sentencing, the circuit court orally considered many factors and sentencing criteria before pronouncing its sentence (60:10-14; A-Ap. 108-12). The circuit court's sentencing comments largely addressed the standard sentencing factors. The court first examined the nature and seriousness of the offense and concluded it was a "fairly mid level felony" (60:10; A-Ap. 108). The court found it aggravated because cocaine was involved and cocaine is highly addictive and it is causing tremendous damage in the community (60:10; A-Ap. 108).

The court also considered Grant's individual characteristics, including his age, education, employment, and prior record (60:11-12, A-Ap. 109-10). The court found it disturbing that he was already a felon and had already committed the same offense, and concluded that Grant failed to learn that this behavior is not tolerated (60:12; A-Ap. 110). The court noted that Grant himself did not have a drug problem but a drug delivery problem, and concluded that that was a worse problem to have (60:12; A-Ap. 110).

The court considered the need to protect the public and the needs of society. The court found that probation would not protect the public, and decided that its sentence must deter Grant from committing a crime again (60:12-13; A-Ap. 110-11).

The court felt a significant period of supervision was needed (60:13; A-Ap. 111). The court did not make Grant eligible for the Challenge Incarceration or Earned Release Programs (60:13; A-Ap. 111). The court believed those programs were better suited for people with drug addiction (60:13; A-Ap. 111). The court sentenced Grant to six years imprisonment (60:14; A-Ap. 112). The court sentenced Grant within the statutory limits and weighed the proper

sentencing factors. The court properly exercised its discretion when fashioning the sentence.

The circuit court's exercise of sentencing discretion demonstrated the link between the facts to its decision not to allow Grant the potential privilege of an early release from confinement. Because of the seriousness of the crime and the need to protect the community, the court did not make Grant eligible for either program (44:3; A-Ap. 116). The circuit court properly exercised its discretion when sentencing Grant. This court should not disturb its decision.

CONCLUSION

This court should affirm the circuit court's order denying postconviction relief and Grant's judgment of conviction.

Dated this 21st day of May, 2015.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4,059 words.

_____
Christine A. Remington
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 21st day of May, 2015.

_____
Christine A. Remington
Assistant Attorney General