

NO. 36143-4

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

ANDREW KIMBROUGH, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Kitty Ann van Doorninck

No. 06-1-04093-9

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Should this court review defendant's claim that the trial court failed to order the State to disclose the confidential informant's identity for an *in camera* review where defendant has not made any relevant citation to the record below as required by RAP 10.3(a)?

2. Did the State produce sufficient evidence for the jury to find the defendant guilty of delivery of a controlled substance and unlawful possession of a controlled substance with the intent to distribute beyond a reasonable doubt?

B. STATEMENT OF THE CASE.

1. Procedure

On August 31, 2006, the Pierce County Prosecuting Attorney's Office filed an information charging appellant, ANDREW BAILEY KIMBROUGH, hereinafter "defendant," with one count of unlawful delivery of a controlled substance, and one count of unlawful possession of a controlled substance with intent to deliver. CP¹ 1-2.

¹ CP refers to the Clerk's Papers.

1RP refers to the verbatim report of proceedings that occurred on February 22, 2007.

2RP refers to the verbatim report of proceedings that occurred on February 27, 2007.

3RP refers to the verbatim report of proceedings that occurred on March 2, 2007.

A jury trial commenced on February 22, 2007, before the Honorable Kitty Ann van Doorninck. 1RP 3. At the conclusion of trial, the jury found defendant guilty of one count unlawful delivery of a controlled substance and one count of unlawful possession of a controlled substance with intent to deliver. 2RP 105; CP 3, 4. Defendant was sentenced to 40 months on each count to run concurrently. CP 8-20. Defendant filed a timely notice of appeal. CP 21.

2. Facts

At trial, Tacoma Police Officer Daryl Higgins testified that, as a detective for the special investigation unit, he conducted surveillance during a controlled buy operation on August 30, 2006. 1RP 30, 34. Officer Higgins testified that he was able to capture and record a controlled buy transaction. 1RP 36. Detective Higgins testified that the video showed a confidential informant performing a narcotics buy, and that the informant was kept under continuous surveillance and observation. 1RP 40, 41.

Tacoma Police Officer Ryan Lane testified describing a typical street level drug sale transaction. 1RP 45-46. Officer Lane described the role of a “middler” as being a “go-between person between the drug dealers themselves and the person who’s wanting to purchase those

drugs.” 1RP 46-47. A middler is generally a drug addict, who is assisting the dealer in order to obtain drugs for himself. 1RP 47. Officer Lane also described the role of a confidential informant, including eligibility and the department’s purpose in using informants. 1RP 48-52.

Officer Lane testified that he organized and facilitated a controlled narcotics buy on August 30, 2006. 1RP 55. Officer Lane utilized a confidential informant for the operation, and that the informant was kept under continuous surveillance. 1RP 55. The confidential informant was given “buy money,” that had been photocopied to record the serial number, in order to complete the transaction. 1RP 54.

Tacoma Police Officer Gretchen Ellis testified that she conducted a pat-down search of the informant prior to beginning the controlled buy operation. 2RP 7-8. After the informant successfully completed the controlled buy, the informant returned to the officers, turned in the drugs she purchased and submitted to another pat-down search. 2RP 8-10.

Tacoma Police Officer Aaron Quinn testified that he participated in the controlled buy operation by conducting surveillance. 2RP 22-23. Officer Quinn observed the transaction and witnessed the informant contact defendant. 2RP 24-25. Officer Quinn testified that the informant successfully completed the buy. 2RP 25-26. The transaction that occurred during the controlled buy was consistent with the hundreds of

other street-level drug transaction that Officer Quinn had previously observed. 2RP 26.

Tacoma Police Officer Shawn Stringer testified that he arrested defendant after the completion of the controlled buy. 2RP 40-41. Officer Stringer searched defendant incident to arrest and discovered seven rocks of cocaine on his person. 2RP 42. Officer Stringer also discovered a large amount of cash on defendant, totaling \$445. 2RP 440. One of the \$20 bills discovered on defendant was confirmed as the buy money given to the informant. 2RP 44. Officer Stringer did not recover a smoking device on defendant. 2RP 47. Officer Stringer also testified to the street purchase price of various quantities of rock cocaine. 2RP 50-52.

Franklin Boshears, a forensic scientist for the Washington State Patrol Crime Laboratory testified that he performed analysis on the substances recovered on defendant and the informant. 1RP 6, 7, 14. Both substances tested positive as cocaine. 1RP 12, 14.

C. ARGUMENT.

1. THIS COURT SHOULD NOT REVIEW DEFENDANT'S CLAIM THAT THE TRIAL COURT FAILED TO ORDER THE STATE TO DISCLOSE THE CONFIDENTIAL INFORMANT'S IDENTITY FOR AN *IN CAMERA* REVIEW BECAUSE DEFENDANT HAS NOT MADE ANY RELEVANT CITATION TO THE RECORD BELOW AS REQUIRED BY RAP 10.3(a).

Defendant argues that the trial court erred in failing to order the State to disclose the confidential informant's identity for purposes of an *in camera* hearing. Brief of Appellant at 12. However, defendant's only citation to the record in support of his argument is a citation to defendant's motion for disclosure and testimony by Officer Shafner that Randolph Faison was the dealer. Brief of Appellant at 26. Defendant's brief provides no citation to an argument or ruling on defendant's motion for disclosure. The record before this court does not show whether defendant's motion was argued or withdrawn, and if argued, what the court ruled.

Under RAP 10.3(a)(5), an appellate brief should contain references to the relevant parts of the record, argument supporting issues presented for review, and citations to legal authority. An appellate court need not consider issues unsupported by specific references to relevant parts of the record. Estate of Lint, 135

Wn.2d 518, 531-32, 957 P.2d 755 (1998). This is especially important because to claim evidentiary error objections must be timely and specific. State v. Avendano-Lopez, 79 Wn. App. 706, 710, 904 P.2d 324 (1995).

Defendant has failed to specifically identify in the record where the motion for an *in camera* review was argued or what ruling the judge made. Given the record below it is possible that the court granted defendant's motion for an *in camera* review, but found that disclosure was not appropriate. Neither the court nor the respondent should have to do the work that should have been done by the appellant in this regard. The court should refuse to review this claim as it has not been properly presented under the rules of appellate procedure.

2. SUFFICIENT EVIDENCE WAS ADDUCED FOR THE JURY TO FIND THE DEFENDANT GUILTY OF DELIVERY OF A CONTROLLED SUBSTANCE AND UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE WITH THE INTENT TO DISTRIBUTE BEYOND A REASONABLE DOUBT.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); see also Seattle

v. Gellein, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); State v. Mabry, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. State v. Barrington, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), review denied, 111 Wn.2d 1033 (1988) (citing State v. Holbrook, 66 Wn.2d 278, 401 P.2d 971 (1965); State v. Turner, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981)). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. Id.; State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing State v. Casbeer, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

great deference . . . is to be given the trial court's factual findings. It, alone, has had the opportunity to view the witness' demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

In this case, defendant challenges the sufficiency of evidence to support his conviction for delivery of a controlled substance and unlawful possession of a controlled substance. However, as argued below, the State produced evidence of all the elements of both crimes with which defendant was convicted.

- a. The State produced evidence to establish all of the elements of defendant's conviction of delivery of a controlled substance.

The jury was instructed that, in order to find the defendant guilty of delivery of a controlled substance, it needed to find each of the following elements beyond a reasonable doubt:

- (1) That on or about the 30th day of August, 2006, the defendant, or an accomplice, delivered a controlled substance;
- (2) That the defendant knew that the substance delivered was cocaine; and
- (3) That the acts occurred in the State of Washington

Instruction No 11, CP 27-51.

The jury was further instructed that in order to find that defendant had acted as an accomplice, it needed to find each of the following elements beyond a reasonable doubt:

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

- (1) solicits, commands, encourages, or requests another person to commit the crime; or
- (2) aids or agrees to aid another person in planning or committing the crime.

Instruction No. 10, CP 27-51.

Defendant's sole challenge to the sufficiency of the evidence is that the evidence adduced was insufficient to show that defendant acted as an accomplice to the delivery of the cocaine. Appellant's Brief at p. 16. However, looking at the evidence adduced below in the light most favorable to the State, this element was supported with sufficient evidence.

First, Tacoma Police Officer Lane testified that he organized and facilitated a controlled narcotics buy on August 30, 2006. 1RP 55.

Officer Lane testified that a confidential informant was used to conduct a

controlled buy. 1RP 51. The informant was kept under continuous surveillance during the controlled narcotics buy. 1RP 57. The officers' constant surveillance upon the informant suggests that they also maintained surveillance upon the individuals who came into contact with the informant. Tacoma Police Officer Quinn testified that while conducting surveillance of the controlled buy, he witnessed the informant contact defendant. 2RP 24-25. Officer Quinn testified that the informant spoke with defendant for a few seconds or more, before contacting another party. 2RP 25. Officer Lane testified that a "middler is a go-between person between the drug dealer themselves and the person who's wanting to purchase the drugs." 1RP 46-47. Officer Quinn also testified that, based upon his experience in witnessing hundreds of street-level drug exchanges, defendant's actions were consistent with those of a middler. 2RP 26. Officer Quinn testified that the informant successfully completed a controlled buy on August 30, 2006. 2RP 25. Based upon the testimony of experienced and knowledgeable police officers, defendant's activities on August 30, 2006, indicate that he was involved in the controlled buy as a middler.

Second, the State introduced detailed testimony by numerous officers that demonstrated that defendant was in possession of the buy money given to the informant prior to the performance of the controlled

buy. Officer Lane testified that he made a photocopy of the buy money prior to the buy in order to record the serial number printed on the currency. 1RP 53. Tacoma Police Officer Ellis testified that the buy money recovered after the buy matched the serial number of the buy money recorded prior to the buy. 2RP 12. Tacoma Police Officer Stringer testified that he placed defendant under arrest, and searched him incident to the arrest. 2RP 41. Officer Stringer testified that he recovered \$445 from defendant's wallet. 2RP 44. Officer Stringer also testified that the serial number on one of the \$20 bills found on defendant at the time of his arrest matched the recorded serial number of the \$20 bill used as buy money. 2RP 44. As the buy money was used in the purchase of the cocaine, its presence in defendant's wallet indicates his involvement in the sale and delivery of the cocaine to the informant.

Additionally, at the time of his arrest, defendant was in possession of seven rocks of cocaine. 2RP 42. Officer Stringer testified that it is common for a drug dealer to carry several pieces of crack cocaine. 2RP 43. Officer Stringer also testified that it would be unusual for a user to break a piece of cocaine into several smaller pieces, such as the ones found on defendant. 2RP 44. Officer Stringer testified that defendant was not in possession of a crack pipe, or any other means with which to use the crack. 2RP 47. Defendant's possession of the cocaine (but no pipe with

which to use the drugs), as well as a large amount of cash supports the inference that he was selling drugs and therefore participated in the delivery of the cocaine.

Third, Detective Higgins testified that he conducted the audio and video surveillance used in the controlled buy. 1RP 34. Detective Higgins testified that during the course of his surveillance, he recorded a transaction involving the informant. 1RP 34, 36. The video of the surveillance was admitted and published to the jury. 1RP 38, 39. Detective Higgins testified that the recorded transaction was consistent with a controlled narcotics sale or buy. 1RP 40. The contents of the video support the conclusion that defendant was involved in the drug sale transaction with the confidential informant.

Upon examining the evidence introduced at trial in the light most favorable to the State, it is clear to see that more than sufficient evidence was adduced to convince a rational trier of fact that defendant participated in delivering the controlled substance of cocaine. This court should uphold the verdict of the jury rendered below.

- b. The State produced evidence to establish all of the elements of defendant's conviction of unlawful possession of a controlled substance with the intent to distribute.

The jury was instructed that, in order to find the defendant guilty of unlawful possession of a controlled substance with the intent to distribute, it needed to find each of the following elements beyond a reasonable doubt:

- (1) That on or about the 30th day of August, 2006, the defendant possessed a controlled substance;
- (2) That the defendant possessed the substance with the intent to deliver a controlled substance; and
- (3) That the acts occurred in the State of Washington

Instruction No 15, CP 27-51.

Defendant's sole challenge to the sufficiency of the evidence is that the evidence adduced was insufficient to show that defendant intended to deliver the cocaine. Brief of Appellant at 18. However, looking at the evidence adduced below in the light most favorable to the State, this element was supported with sufficient evidence.

First, the video of the controlled buy surveillance was admitted, and published to the jury. 1RP 38, 39. Detective Higgins, who has observed thousands of controlled narcotics buys during the course of his career, testified that the contents of the video surveillance were consistent with a narcotics sale. 1RP 40. Officer Lane testified that the informant

had contact with defendant during the controlled buy. 1RP 63. The video surveillance provided substantial evidence to demonstrate that defendant intended to deliver the cocaine.

Second, the State's evidence showed that the confidential informant was able to successfully complete the controlled buy. Officer Lane testified that when the informant returned after completing the controlled buy, she turned in drugs that she had purchased to the officers. 1RP 59. Officer Ellis also testified that the informant returned with drugs purchased during the controlled buy. 2RP 9. Forensic Scientist Mr. Boshears testified that after testing this substance, he was able to identify it as cocaine. 1RP 25. The informant's procurement of the cocaine during the transaction involving defendant provides support to the inference that defendant intended to deliver the cocaine in his possession.

Additionally, when defendant was searched incident to his arrest, he was in possession of seven rocks of cocaine. 2RP 42. Officer Stringer testified that it is common for a drug dealer to carry several pieces of crack cocaine, and that it would be unusual for a user to break a piece of cocaine into several smaller pieces. 2RP 43-44. Officer Stringer did not locate a crack pipe, or any other means with which to use the crack, on defendant's person. 2RP 47. Officer Stringer recovered \$445 from defendant's wallet. 2RP 44. Officer Stringer also testified that drug dealers usually carry

large sums of cash on their person, but it would be unusual for a crack user to have \$425. 2RP 46-47. The large amount of cocaine and cash found on defendant's person was evidence that defendant was not maintaining the drugs for his personal use, but rather to sell and deliver.

Upon examining the evidence introduced at trial in the light most favorable to the State, it is clear that more than sufficient evidence was adduced to convince a rational trier of fact that defendant possessed the cocaine with the intent of delivering it. Therefore, this court should uphold the verdict of the jury rendered below.

3. THE DEFENDANT HAS FAILED TO MEET HIS
BURDEN OF SHOWING INEFFECTIVE
ASSISTANCE OF COUNSEL.

The right to effective assistance of counsel is the right “to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” United States v. Cronin, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment of the United States Constitution has occurred. Id. “The essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was

rendered unfair and the verdict rendered suspect.” Kimmelman v. Morrison, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that the defendant received effective representation and a fair trial. State v. Ciskie, 110 Wn.2d 263, 751 P.2d 1165 (1988). To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); see also State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney’s representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she was prejudiced by the deficient representation. Prejudice exists if “there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.” State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); see also Strickland, 466 U.S. at 695 (“When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.”). An appellate court is unlikely

to find ineffective assistance on the basis of one alleged mistake. State v. Carpenter, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

There is a strong presumption that a defendant received effective representation. State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996); Thomas, 109 Wn.2d at 226. The reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls within the wide range of professionally competent assistance. Strickland, 466 U.S. at 489; United States v. Layton, 855 F.2d 1388, 1419-20 (9th Cir. 1988), cert. denied, 489 U.S. 1046 (1989); Campbell v. Knicheloe, 829 F.2d 1453, 1462 (9th Cir. 1987), cert. denied, 488 U.S. 948 (1988). A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. McFarland, 127 Wn.2d at 336. Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." Strickland, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690; State v. Benn, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

Post-conviction admissions of ineffectiveness by trial counsel have been viewed with skepticism by the appellate courts. Ineffectiveness is a question which the courts must decide and “so admissions of deficient performance by attorneys are not decisive.” Harris v. Dugger, 874 F.2d 756, 761 n.4 (11th Cir. 1989).

In addition to proving his attorney’s deficient performance, the defendant must affirmatively demonstrate prejudice, i.e. “that but for counsel’s unprofessional errors, the result would have been different.” Strickland, 466 U.S. at 694.

A defendant must demonstrate both prongs of the Strickland test, but a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

In the present case, defendant is alleging that he received ineffective assistance of counsel for the single reason that his attorney failed to introduce the cash found on defendant at the time of his arrest into evidence. Defendant asserts that but for this failure to introduce the cash as evidence he would not have been convicted of both charges.

However, in order to meet his burden under Strickland, defendant must provide more than mere allegations or conjecture about the format of the currency; he must show that his attorney’s failure to introduce the cash

into evidence was unreasonable and that had the money been admitted its presence would have affected the outcome of the trial. See State v. Allen, 57 Wn. App. 134, 141, 788 P.2d 1084 (1990) (defendant never explained how he was prejudiced by attorney's failure to call witnesses to testify and ineffective assistance of counsel claim rejected). Defendant has not met this burden.

Defendant has failed to satisfy both prongs of the Strickland test. First, defendant has failed to demonstrate that his attorney's representation fell below an objective standard of reasonableness. At trial, the State presented substantial evidence in the form of testimony by Tacoma Police Officers that defendant had \$445 in his possession at the time of his arrest. 2RP 44, 46-47, 53. Defense counsel cross examined Officer Stringer about the format of the currency, specifically questioning him about the denomination of the bills found on defendant. 2RP 52-53. In his closing argument, defense counsel argued that defendant was not in possession of the denomination of bills that would be indicative of dealing drugs, and stated:

The other thing that I don't understand is that the officer said somebody out there is selling \$20 at a time. Assume Mr. Kimbrough would have just a wad of money in his pocket that he had been accumulating all day. But the only evidence that we had was when I tried to pin the officer down, "What were the denominations: \$100 bill and one

20 [sic].” Not consistent with a street dealer, I would submit.

2RP 86.

Defense counsel therefore, raised issues pertaining to the format of the cash. On appeal, defendant fails to articulate how his trial counsel’s representation fell below an objective standard of reasonableness, when he raised the very issues that defendant claims were kept from the jury. Brief of Appellant at 24.

Second, defendant cannot show that he was prejudiced by the failure to introduce the cash into evidence. Prejudice occurs if there is a reasonable probability that, except for counsel’s unprofessional errors, the outcome of the proceeding would have been different. McFarland, 127 Wn.2d at 335. Defendant has failed to show that the results of his trial would have been different even if the currency had been admitted into evidence. The State presented more than sufficient evidence of defendant’s guilt (see argument above), such that even if the cash had been admitted the fact finder would not have had a reasonable doubt that defendant was guilty. Defendant cannot demonstrate that the outcome of the case would have differed had the currency been admitted. He has failed to meet his burden of demonstrating the prejudice prong of the Strickland test.

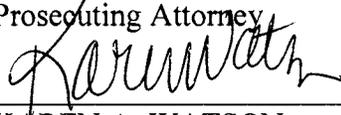
Defendant has failed to meet his burden under the Strickland test as he is unable to demonstrate that his trial counsel's performance was deficient or that he suffered any resulting prejudice. Therefore, defendant is not entitled to relief on this issue.

D. CONCLUSION.

For the foregoing reasons, the State asks this court to affirm the conviction below.

DATED: JANUARY 16, 2008

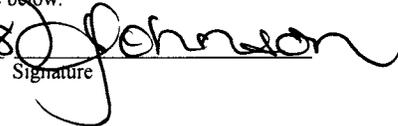
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Pierce County
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KAREN A. WATSON
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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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Date Signature

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