

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Appeal from Pickens County

Honorable R. Scott Sprouse, Circuit Court Judge

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JASON ERVIN BLACK,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2025-002119

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BRIEF OF PETITIONER

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## **QUESTIONS PRESENTED**

1.

Did the Court of Appeals improperly weigh witness credibility in this sexual assault case when it found appellate counsel's error harmless?

2.

Alternatively, if this Court finds that the deficiency in this PCR case is attributable to trial counsel instead of appellate counsel, is the error harmless?

## STATEMENT

Jason Black was tried in Pickens County before the Honorable John C. Few and a jury on June 25, 2007. App. 1. Peter Them represented the State and John DeJong represented Black. App. 1. The jury convicted Black of first-degree criminal sexual conduct with a minor and lewd act. App. 333, l. 10 – 18. Then-Judge Few sentenced Black to concurrent terms of imprisonment of twenty years for the CSC charge and fifteen years for lewd act. App. 339, l. 8 – 13. On direct appeal, Black was represented by Joseph L. Savitz, III. App. 341. This Court affirmed in a divided Opinion. App. 367. App. 420. See State v. Black, 400 S.C. 10, 732 S.E.2d 880 (2012) (3-2 decision with Justices Pleicones and Hearn dissenting).

On July 2, 2013, Black filed a PCR application. App. 439. On March 4, 2021, a hearing was held before the Honorable R. Scott Sprouse. App. 483. Don A. Thompson represented Black and Lillian L. Meadows represented the State. App. 483. Judge Sprouse granted PCR relief. App. 530. The State sought certiorari and Black filed a cross-petition. After transfer to the Court of Appeals and the granting of certiorari, a panel consisting of Chief Judge Williams, Judge Geathers, and Judge Turner heard oral argument on May 27, 2025. On July 30, 2025, the Court of Appeals reversed the PCR court's grant of a new trial in an unpublished per curiam Opinion. Black v. State, No. 2025-UP-273 (S.C. Ct. App. Filed July 30, 2025). The Court of Appeals denied rehearing. This Court granted Black's petition for certiorari and this Brief of Petitioner follows.

### **STANDARD OF REVIEW**

The appellate court defers to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (citing Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)).

## ARGUMENT

1.

The Court of Appeals improperly weighed witness credibility in this sexual assault case when it found appellate counsel's error harmless.

### *Introduction*

This alleged sexual assault happened during a thirty-minute time window in the bedroom of a trailer owned by petitioner Jason Black's friend, Richard Bush. Bush was present in the trailer the entire time and testified that Black and Complainant never left the living room.

Justice Few presided over Black's sexual assault trial when he was a circuit judge. He correctly spotted the primacy of the jury's assessment of Bush's credibility. In deciding whether to allow impeachment of Bush with convictions from Florida, then-Judge Few aptly stated that Bush's "testimony here is critical. It's a very important piece of testimony. If his testimony is true, then it means that this crime could not have even happened at all." App. 284.

In Black's direct appeal, this Court unanimously found the impeachment of Bush improper, but appellate counsel inexplicably failed to appeal all of the convictions used to impeach Bush. As a result, the error was found harmless by a 3-2 majority. State v. Black, 400 S.C. 10, 732 S.E.2d 880 (2012). After the PCR court granted Black a new trial because of appellate counsel's error, the Court of Appeals reversed and weighed the testimony of the witnesses at Black's trial. A jury (not an appellate court) needs to weigh the testimony of these witnesses without the corrupting effect of Bush's impeachment.

*The Testimony at Trial*

Complainant testified she was fifteen years old when she began dating Black, who was 26. App. 83-85. She met Black at Warpath Landing where they laid on the beach and talked. App. 85-88. They left to meet Complainant's friend, Candie, who took Complainant to work at a Japanese restaurant. App. 88-89. Complainant was hiding her relationship with Black from her parents. App. 84.

Complainant got off work at 9:00 and went to a skating rink. App. 89-90. She and Black spoke on the phone while Complainant was at the skating rink. App. 90-91. Black asked her to come to Bush's trailer. App. 90-91. Candie and her friend Travis took Complainant to Bush's trailer. App. 92. Candie, Travis, and Complainant all went inside. App. 92-93. Candie and Travis left after about 10-15 minutes. App. 96.

While Bush was still in the living room watching TV, Complainant said Black asked her to come into the bedroom. App. 96-97. After kissing, Complainant and Black had what would have been consensual sex (as described by Complainant) if Complainant had been of legal age. App. 97-99. Complainant originally told police that she wiped ejaculate off herself, but in her trial testimony she claimed Black wiped it off with a rag. App. 122-23.

When they went back into the living room, Candie had returned, and Complainant left with Candie. App. 99. Candie testified that she was gone only "[a]bout 30 minutes." App. 138. Complainant spent the night at Candie's house. App. 99. Complainant said she noticed blood in her underwear when she got back to Candie's house. App. 100-01. She washed the underwear at Candie's house. App. 101. Candie testified that she saw "a little bit of blood in them." App. 140. The clothing was washed and not entered into evidence at trial. App. 100; 139-40.

The following Wednesday, Complainant's mother confronted her about Black. App. 101-04. From the questions her mother asked, Complainant believed her mother "knew something might have happened." App. 101-04. A couple of days later, she told her mother what happened with Black because she believed her mother "already knew." App. 101-04. Complainant described her mother as "angry" and admitted that when her mother gets angry, she wanted to please her mother. App. 114-15.

On cross-examination, Candie admitted that she was fifteen when she was driving Complainant that night and disregarded the restrictions on her license. App. 143-44. Candie agreed that Bush was at the house when she arrived and when she returned to pick up Complainant. App. 148-153.

Black testified in his own defense and denied having sex with Complainant. App. 228. Bush was friends with Black. App. 233. Bush had no driver's license and was on disability, so Black would take him on errands. App. 233. Black agreed that he met Complainant at Warpath Landing and dropped her off with Candie. App. 234-35.

Black testified that he was a die-hard race fan and the Chevy Rock and Roll 400 race at Richmond came on at 7:30 PM. App. 234-35. Black did not have cable, so he went to Bush's single-wide trailer to watch the race. App. 234-36. The race was still on when Complainant, Candie, and Candie's boyfriend arrived. App. 242-43. Dale Junior eventually won the race. App. 246.

Complainant went outside on the porch for a few minutes and when she returned, she told Black that Candie was taking her boyfriend home. App. 244-45. Black said Complainant was at the trailer with him and Bush for about forty-five minutes. App. 245. During that time, Complainant never left the living room. App. 245. Black never left the living room. App. 245.

Bush never left the living room. App. 245. Black never went to Bush's bedroom with Complainant. App. 246.

Bush was the trial's last witness. He was sixty-six years old, but nothing was wrong with his hearing. App. 263, 267. He could see fine with his glasses. App. 267. He remembered watching the race with Black and the cable channel that broadcast the race (TNT). App. 264. Bush said Complainant and her two friends came to his trailer. App. 265. Complainant stayed on the couch watching the race with him and Black. App. 270. Black and Complainant never went in any bedroom. App. 270.

#### *The Improper Impeachment*

Before the solicitor began his cross-examination of Bush, the trial judge excused the jury to hear argument about impeaching Bush with his prior convictions from Florida. App. 271-285. The solicitor stated his intention to impeach Bush with two convictions for manslaughter and a conviction for shooting/throwing a deadly missile. App. 275-77. Defense counsel objected that the convictions were too old. App. 278-79.

Then-Judge Few decided to allow the impeachment. App. 282-85. As part of the basis for his ruling, the judge stated that Bush's "testimony here is critical. It's a very important piece of testimony. If his testimony is true, then it means that this crime could not have even happened at all." App. 284. The judge added, "That, of course, makes the issues of credibility, his credibility essential." App. 284.

Defense counsel stated he would "have to object to it when the Solicitor gets into it. Obviously, I have no further argument but I will have to object to it." App. 285. When the solicitor asked Bush, "And on or about that date, were you in criminal court in Florida—" and defense counsel objected "as previously stated." App. 289. The trial judge overruled the

objection. App. 289. The solicitor then asked about both manslaughter convictions and the shooting/throwing a deadly missile conviction, and ended his cross-examination. App. 289-90.

### *The Appeal*

Black was represented by Joseph L. Savitz, III, on appeal. App. 348. The issue Savitz raised was, “The trial judge committed reversible error by allowing the State to impeach Black’s corroborating witness with two Florida manslaughter convictions from 1987, as this evidence violated Rules 404 and 609, SCRE.” App. 344. The brief mentioned the deadly missile conviction, but only argued that admission of the manslaughter convictions was error. App. 346 – 47.

After the Court of Appeals affirmed in an unpublished Opinion, this Court granted certiorari. App. 393. After oral argument, this Court issued a published, divided Opinion finding that the trial judge erred in allowing impeachment of Bush with the two manslaughter convictions. State v. Black, 400 S.C. 10, 26-27, 732 S.E.2d 880, 889 (2012). The majority found the error harmless because of the unappealed admission of the deadly missile conviction. Id. at 27-31, 732 S.E.2d at 890-91. The majority stated, “We find the jury’s knowledge of this conviction unquestionably established the fact that Bush was a former convict, and it would have similarly diminished the jury’s view of his character.” Id. The dissenting justices would have reversed because of the prejudicial effect of the manslaughter convictions. Id. at 31, 732 S.E.2d at 891-92.

The majority discussed the other evidence in the State’s case and Black’s own prior CSC convictions, but in the Conclusion section of the Opinion, made clear that the specific prejudice complained of by the error—the diminishment of Bush’s credibility—was harmless because of the admission of the deadly missile conviction which was “now law of the case.” Id.

In its brief before this Court in the direct appeal, the State argued, “Given the conflicting versions of events in Bush’s trailer on May 6, 2006, it cannot be seriously contended that any evidence impacting Bush’s credibility was not relevant.” App. 362. “As the circuit court found, and Black asserts, Bush’s credibility was ‘essential.’” App. 362. The State made no harmless error argument in its brief. App. 361-363.

*The Court of Appeals’ Decision Reversing the PCR Court*

The PCR court granted Black relief based on a finding of ineffective assistance of appellate counsel. App. 537-39. Black filed a cross-petition making the alternative argument that if appellate counsel was not deficient, then trial counsel was deficient for failing to preserve the issue. The Court of Appeals correctly recognized that the prejudice analysis is the same regardless of which attorney was deficient. Opinion at 5.

The Court of Appeals found that the PCR court’s conclusion on prejudice conflicted with this Court’s decision in Black. Opinion at 5-6. The court focused its reasoning on the harmless error portion of the majority’s decision in Black that examined the impact of the unchallenged impeachment of Bush and also discussed the other evidence in the case. Opinion at 5-6. It then discussed the credibility of Black and the testimony of Candie and Complainant. Opinion at 6-7. The court concluded that the missile-throwing conviction alone could not establish prejudice. Opinion at 6-7. Black’s petition for rehearing asked the Court of Appeals to revisit its weighing of the credibility of these witnesses, but the petition was denied.

*Discussion*

The Court of Appeals erred in oversimplifying the harmless error ruling in Black’s direct appeal and then weighing the credibility of the witnesses. This Court’s decision in Black does not support the conclusion that had the deadly missile conviction also been appealed, the result

would have been the same. Instead of looking at the decision as a whole, the Court of Appeals improperly focused on the parts of the Black Opinion that discussed the other evidence in the case along with the impeachment error.

The majority in Black's analysis is more nuanced. The majority first dealt with the impact of the improper impeachment. Because of appellate counsel's error, the unappealed impeachment of Bush with the throwing a deadly missile conviction "right or wrong, [became] the law of the case." Black at 28, 732 S.E.2d at 890. This meant that when the Black majority assessed the error involving the two manslaughter convictions, the comparison was not made between the other evidence in the case and an unimpeached Bush. The comparison was between the other evidence in the case and an *impeached* Bush. The majority wrote:

Bush's unchallenged prior conviction for shooting/throwing a deadly missile involves a serious felony offense, for which Bush was given a consecutive sentence of seven years in prison. We find the jury's knowledge of this conviction unquestionably established the fact that Bush was a former convict, and it would have similarly diminished the jury's view of his character. . . .

In the current appeal, we believe a review of the entire record indicates the error was harmless under the circumstances. In addition to the fact that Bush's credibility **had already been significantly compromised by the revelation that he was a former convict**, we note, in considering the overall strength of the State's case, that Petitioner's *own* credibility was seriously impeached at trial as well by testimony that he had a criminal record that included two prior offenses for CSC with a minor.

Id. at 28-29, 732 S.E.2d at 890-91 (emphasis added). The majority then recited the other evidence in the case and this recitation was quoted extensively in the Court of Appeals' Opinion.

The Court of Appeals did not grapple with the majority's conclusion paragraph in Black. When this paragraph is read as a whole, it becomes clear that the appellate error produced the

harmless error result in the direct appeal:

#### IV. CONCLUSION

Rule 609(b) imposes a high standard for the admissibility of remote convictions. We conclude the factual findings and legal analysis the trial court relied upon do not demonstrate that the probative value of the remote manslaughter convictions substantially outweighed their prejudicial effect. Consequently, we hold the trial court abused its discretion in admitting these convictions. However, Petitioner does not challenge on appeal the trial court's admission of the defense witness's prior conviction for shooting/throwing a deadly missile, and this conviction was also used to impeach the witness. Since its admission is now law of the case, **we find any error in the admission of the two remote manslaughter convictions was harmless as the defense witness's character was similarly diminished by the admission of the unchallenged conviction for shooting/throwing a deadly missile**, and the record as a whole indicates the error could not reasonably have impacted the result reached in this case.

Id. at 30-31, 732 S.E.2d at 891 (emphasis added).

The majority was not comparing the prejudice of two manslaughter convictions versus the missile-throwing conviction. The majority was not comparing an unimpeached defense witness with the other evidence in the case. The majority compared an *impeached* defense witness with the other evidence in the case. Because the error was impeachment, it was found harmless because of the unchallenged impeachment. As is proper, the majority also considered the other evidence presented by the State. The two dissenting justices would have reversed on the prejudice of the manslaughter convictions alone. The outcome of this direct appeal was as close as it gets.

Because of appellate counsel's error, the majority could not make the critical comparison that can now be made in this PCR.<sup>1</sup> The proper comparison is an **unimpeached defense witness**

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<sup>1</sup> In the direct appeal, two justices voted to reverse even with appellate counsel's error making the deadly missile conviction law of the case.

versus the other evidence in the State’s case. But for appellate counsel’s error, the jury would have heard Bush’s testimony and **nothing at all about his criminal record**.

The question now properly before this Court is whether Bush’s testimony—unimpeached with any conviction—was sufficient to remove this case from the harmless error category. The Court of Appeals was only able to conclude the error was still harmless by weighing the credibility of the other witnesses in the case.

Appellate courts do not weigh the credibility of witnesses. “In a law case tried before a jury, it is the jury that must decide what part of the witness’s testimony it wants to believe and what part it wants to disbelieve. Under such circumstances, it is not the function of this Court to weigh the evidence and determine the credibility of the witnesses.” Small v. Pioneer Mach., Inc., 329 S.C. 448, 465, 494 S.E.2d 835, 843-44 (Ct. App. 1997). Particularly in sexual assault cases, which usually are *only* credibility contests, an appellate court should not weigh the credibility of the witnesses. State v. Stukes, 416 S.C. 493, 500, 787 S.E.2d 480, 483 (2016).

In Stukes, the defendant testified that his sex with the adult complainant was consensual. Id. at 496-97, 787 S.E.2d at 481. The Stukes Court concluded that the error, which bolstered the complainant’s credibility, was not “amenable to a harmless error analysis.” Id. at 500, 787 S.E.2d at 483. See also State v. Witherspoon, 418 S.C. 641, 643, 795 S.E.2d 685, 686 (2016) (reversing CSC conviction because of “the centrality of the issue of credibility in this case, and the absence of other overwhelming evidence of petitioner’s guilt”); Chappell v. State, 429 S.C. 68, 81, 837 S.E.2d 496, 502 (Ct. App. 2019) (reversing because CSC case “hinged” on credibility). Like in Stukes, Black’s testimony here was pitted against the complainant and, as then-Judge Few recognized, Bush’s testimony was “critical” and his credibility “essential.” If the jury believed Bush, then the alleged crime did not happen. The State agreed on direct appeal

about the primacy of Bush's credibility and, unusually, made no harmless error argument. App. 361-63.

The Court of Appeals first erred when it weighed Black's credibility. It found (like this Court in the direct appeal) that Black's credibility was damaged because the jury learned of his own prior CSC conviction. Undoubtedly that fact hurt Black's credibility. But the diminishment of Black's credibility made Bush's testimony even more important to the defense case. Instead of hearing from just one impeached defense witness, the jury heard from two impeached defense witnesses. The jury weighed the credibility of the Complainant and Candie against two convicts, not one. And if this case were re-tried today, the jury would not learn of Black's prior record until after it settled a fair credibility contest because of the bifurcation procedure adopted in State v. Cross, 427 S.C. 465, 832 S.E.2d 281 (2019).

The Court of Appeals strayed into forbidden ground when it made its own improper credibility finding, writing "[W]e find Black's testimony at trial was evasive and not credible in other ways . . . ." Opinion at 7. The court criticized Black's description of his interactions with Complainant. Opinion at 7. Juries are supposed to decide whether a witness is evasive. A jury should assess Black's description of his interactions with Complainant.

The error here cannot be harmless beyond a reasonable doubt. See State v. Chavis, 412 S.C. 101, 109, 771 S.E.2d 336, 340 (2015) (using harmless beyond a reasonable doubt standard to evaluate error in a child sexual abuse case); Chapman v. California, 386 U.S. 18, 24 (1967) (applying harmless beyond a reasonable doubt standard to constitutional errors). Black made no confession. Complainant made no contemporaneous report to authorities. No physical evidence existed in this case. While Candie and Complainant testified about the blood in the underwear, that testimony is all the State could present because they washed the underwear. Only testimony

about the blood was presented to the jury, not the blood itself. That testimony had to be considered and weighed along with their credibility.

Candie had reason to mislead because she violated the restrictions on her driver's license and was driving around with her boyfriend after dark. Complainant was afraid of her mother's reaction about her hiding her interactions with Black. They were both two teenagers likely in deep trouble with their parents. Complainant's description of the contents of Bush's bedroom was hardly an earth-shaking revelation. The "contents" Complainant described were hardly anything extraordinary: a television, a bed, a table lamp, and a comforter. App. 97. App. 124. It would be the rare bedroom in America that did not contain these four generic items. Furthermore, Complainant and Bush agreed that she had been in Bush's trailer multiple times. App. 111. Complainant could have gone in Bush's bedroom on a different occasion and seen a comforter, et al.

Pantovich v. State, 427 S.C. 555, 832 S.E.2d 596 (2019) also shows that because the error pertained to a witness's credibility and not to the defendant's, the error is not diminished to the point it is harmless. In Pantovich, the defendant called several character witnesses. Id. The defendant asked for an instruction on "good character," which the trial court refused to give. Id. Appellate counsel (the same attorney as in Black's case) failed to appeal this issue and this Court reversed in PCR. Id. In Pantovich, the error only affected how the jury assessed the defendant's character witnesses, but this Court found that the error satisfied Strickland prejudice. Id. The Pantovich Court noted that a jury should be entitled to consider such information. Id. at 564, 832 S.E.2d at 601.

Black should be allowed to have an untainted jury assess Bush's credibility. The solicitor's closing argument about Bush's credibility shows why the PCR court got this right.

When the solicitor told the jury about Bush, "... isn't that something you would want to know in evaluating the believability, the truthfulness of somebody that he had killed two human beings and launched a missile at either one of them or a third person versus a 15-year old girl. . . . **Realistically speaking, if you kill two people, is it really a big deal to tell a lie in court.**" App. 314 (emphasis added). Without appellate counsel's error, in a new trial a solicitor could not make such a devastating argument and nullify Bush's testimony that exonerated Black. This Court should reverse the Court of Appeals, reaffirm that weighing credibility is a function of fact-finders, not appellate courts, and reinstate the PCR court's grant of a new trial.

2.

Alternatively, if this Court finds that the deficiency in this PCR case is attributable to trial counsel instead of appellate counsel, the error is also prejudicial.

The Court of Appeals did not decide whether the deficient performance was attributable to appellate counsel or trial counsel because the prejudice analysis is the same. Counsel for Black agrees the prejudice analysis is the same. Counsel for Black also contends the error was appellate counsel's. The Black opinion noted that the deadly missile conviction "occurred at the same time as the manslaughter convictions and ostensibly arose from the same set of facts." Id. The deadly missile conviction would have been analyzed in an identical fashion to the two manslaughter convictions. Under the same analysis, admission of the deadly missile conviction would also have been error.

Black submits, however, that he is entitled to relief even if this Court finds that appellate counsel was not ineffective because the issue was unpreserved. If the issue was somehow unpreserved, then the fault lies at the feet of trial counsel. The solicitor listed the deadly missile conviction along with the two manslaughter convictions during the discussion with the trial

judge. App. 275, l. 17 – 276, l. 15. When trial counsel stated his objection, he did not refer specifically to the deadly missile conviction. App. 281, l. 10 – 285, l. 20. Nor did trial counsel refer specifically to the two manslaughter convictions. App. 281, l. 10 – 285, l. 20. He argued in general terms that the convictions were not probative and were inadmissible. App. 281, l. 10 – 285, l. 20.

When the solicitor began cross-examining Bush about his prior convictions, trial counsel made a single objection. App. 289, l. 4 – 290, l. 3. The solicitor asked Bush if he was in criminal court in Florida on the date of the convictions and trial counsel stated, “Objection, Your Honor, as previously stated.” App. 289, l. 9 – 290, l. 3. The trial judge overruled the objection. App. 289, l. 9 – 290, l. 3.

The solicitor then asked about the two manslaughter convictions. App. 289, l. 9 – 290, l. 3. Trial counsel made no further objection. App. 289, l. 9 – 290, l. 3. The solicitor then asked about the deadly missile conviction. App. 289, l. 9 – 290, l. 3. Trial counsel made no further objection. App. 289, l. 9 – 290, l. 3.

Trial counsel arguably failed to raise a sufficiently specific objection to the deadly missile conviction to preserve the issue for appeal. See State v. Byers, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011) (holding that objections must be made with specificity to preserve issue for appellate review). It could also be argued that trial counsel failed to make a contemporaneous objection to the solicitor’s deadly missile conviction question. See State v. Hoffman, 312 S.C. 386, 393, 440 S.E.2d 869, 873 (1994) (“A contemporaneous objection is required to properly preserve an error for appellate review.”).

On direct appeal, the State argued trial counsel failed to preserve **any** objection regarding Bush’s prior convictions. App. 411-13. Therefore, in the event that appellate counsel Savitz and

the State (during the direct appeal) were correct that trial counsel failed to preserve the issue, this Court should grant certiorari so that Black can have a Court examine the prejudice prong of Strickland—regardless of whether the prejudice flows from trial counsel’s error or appellate counsel’s error.

Again, Black asserts that the error is attributable to Savitz, not trial counsel.<sup>2</sup> The argument made in this section of Black’s brief is an alternative one concerning deficient performance, but the prejudice analysis is the same. The error was: (1) almost certainly appellate counsel’s; (2) potentially trial counsel’s; (3) definitely not Jason Black’s. See Stone v. State, 419 S.C. 370, 389-90, 798 S.E.2d 561, 571-72 (2017) (discussing twin failures of trial and appellate counsel). Jason Black suffered the prejudice and this Court should reverse so that he can have a fair trial.

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<sup>2</sup> The PCR court held trial counsel preserved the issue and the fault was Savitz’s. App. 537-39.

**CONCLUSION**

For the foregoing reasons, this Court should reverse the Court of Appeals and affirm the PCR court's grant of a new trial to Jason Black.



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This 26th day of February, 2026.