

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2017
No.

THE PEOPLE OF THE STATE OF MICHIGAN,
Petitioner,
vs.

TRESHAUN TERRANCE,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE MICHIGAN THIRD CIRCUIT COURT

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE QUESTIONS

I.

Issue preclusion was not part of the double jeopardy clause when the Bill of Rights was adopted, and the doctrine is ill suited for criminal contexts. Yet the Court held in *Ashe v Swenson* that the double jeopardy clause includes the doctrine of issue preclusion. Should *Ashe* be overturned?

II.

A jury acts inconsistently when it acquits on one count but fails to return a verdict on another count where the same facts and law are at issue; *Powell v US* holds that issue preclusion cannot apply to inconsistent verdicts. Yet this Court held in *Yeager v US* that issue preclusion applies in this circumstance. Should *Yeager* be overturned?

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2017

THE PEOPLE OF THE STATE OF MICHIGAN,
Petitioner,

vs.

TRESHAUN TERRANCE,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE MICHIGAN THIRD CIRCUIT COURT

NOW COMES the State of Michigan, by **KYM L. WORTHY**, *Prosecuting Attorney for the County of Wayne*, **JASON W. WILLIAMS**, *Chief of Research, Training, and Appeals*, and **DAVID A. MCCREEDY**, *Lead Appellate Attorney*, and prays that a Writ of Certiorari issue to review the judgment of the Michigan Third Circuit Court, entered in this cause on May 19, 2017, with orders denying leave to appeal by the Michigan Court of Appeals on August 24, 2017, and by the Michigan Supreme Court on October 31, 2017.

OPINIONS AND ORDERS BELOW

The rationale for the 3rd Circuit Court's dispositive order was given orally from the bench on May 19, 2017. That transcript appears in the Appendix, as well as (i) the trial court's written order of that same date, (ii) the Michigan Court of Appeals August 24, 2017 order denying leave, and (iii) the Michigan Supreme Court's October 31, 2017 order denying leave.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 USC §1257(a). This petition is timely filed 90 days after the Michigan Supreme Court entered an order, on October 31, 2017, denying the People's application for leave to appeal the Michigan Third Circuit's dispositive order entered on May 19, 2017.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

No person shall ... be subject for the same offense to be twice put in jeopardy of life or limb.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

***STATEMENT OF MATERIAL FACTS
AND PROCEEDINGS***

Respondent murdered his live-in girlfriend, a fact which he has admitted under oath. 9.12.2016 at 7-8. Nevertheless, *Yeager v US*, 557 US 110 (2009), prohibits his prosecution for that crime because, before he pleaded guilty to second-degree murder, a trial ended with a hung jury as to felony murder and an acquittal on premeditated murder. 5.20.2016 at 8, 12, 15. According to *Yeager*, the doctrine of issue preclusion holds that the jury's acquittal on premeditated murder means that Respondent is not guilty of felony murder, even though the jury itself could have, but did not, so find on that count. Because of *Yeager*, Respondent thus cannot ever be held criminally accountable for the murder that he admitted under oath he perpetrated.

And it *is* clear that Respondent is guilty of Delona Tillman's murder. In addition to having pleaded guilty to it,¹ he is the one that called 911, and he is the one that admitted to the responders that she had died in his presence. 5.12.16 at 219-220, 225. At the time, he claimed that she had been

¹The following is the colloquy from Respondent's guilty plea on September 12, 2016:

[Prosecutor]: And on that day, did she die, in that location?

[Respondent]: Yes.

[Prosecutor]: And did you cause her death?

[Respondent]: Yes.

[Prosecutor]: Did she die as a result of being smothered?

[Respondent]: Yes.

[Prosecutor]: And at that time, did you intend to kill her, or intend to cause her great bodily harm?

[Respondent]: Yes.

beaten by two other women, and died of her injuries once returning to their house. *Id.* at 208, 212-13; 5.17.16 at 25. But the medical examiner discovered that although the victim *had* been savagely beaten, with head-to-toe contusions and more than 70 abrasions over her body, she *died* of asphyxiation. 5.16.16 at 13-14, 16-17, 21-25, 32, 48. By his own admission, Respondent was the only person who could have smothered her to death. 5.18.16 at 24-25, 31.

As a result, he was charged with both premeditated murder (count one) and felony murder (count two, with the underlying felony being torture). At trial, his jury was instructed that if he killed Tillman with the equivalent of malice aforethought, it would be second-degree murder, and the second-degree murder would be elevated to first-degree murder if it was also premeditated. Similarly, as to count two, if Respondent intended to kill, intended to do great bodily harm, or acted with a depraved heart and caused Tillman's death, it was second-degree murder, which would be increased to first-degree if it had occurred during the perpetration of torture.

Respondent's jury found him not guilty as to count one, and it could not reach a verdict as to count two. The court thus entered the acquittal on count one and declared a mistrial as to count two. Before the retrial on felony murder, however, Respondent pleaded guilty to a reduced charge of second-degree murder.

He then filed a motion to vacate in the trial court, arguing that double jeopardy precluded his conviction. The People—while objecting to the result—had to concede that, based on *Yeager*,

Respondent's requested relief was required. 5.19.16 at 4 (Appendix 7a, 9a-11a). The People further acknowledged that defendant's plea did not waive the issue, under *Menna v New York*, 423 US 61, 62 (1975) ("Where the State is precluded by the United States Constitution from haling a defendant into court on a charge, federal law requires that a conviction on that charge be set aside even if the conviction was entered pursuant to a counseled plea of guilty.").

Petitioner then sought leave to appeal in both the Michigan Court of Appeals and Michigan Supreme Court, both of which denied the application. (Appendix 1a, 2a.) This petition for certiorari ensues.

REASONS FOR GRANTING THE WRIT

- I. Because issue preclusion is not—or at least should not be—a doctrine of the double jeopardy clause: *Ashe v Swenson* should be overturned.

Issue preclusion is a civil doctrine that was not originally (and should not be now) a part of criminal constitutional jurisprudence. As Justice Scalia comprehensively explained in his dissents in *Yeager v US*, 557 US 110 (2009) and *Grady v Corbin*, 495 US 508 (1990), the double jeopardy clause codified the common law doctrines of *auterfoits acquit* and *auterfoits convict*. These doctrines precluded the government from re-prosecuting a citizen for an offense of which he had already been acquitted or convicted. But the common law clearly allowed subsequent prosecutions *for any other offense, even*

if it involved the same act. Thus a man could be acquitted of stealing a horse, and then prosecuted for theft of its saddle. *Yeager* at 128 (Scalia, J., dissenting, citing Sir Matthew Hale, 2 Pleas of the Crown 246 (1736)). As long as the offenses were distinct, an acquittal or conviction on one never barred prosecution on the other.

Issue preclusion as an aspect of double jeopardy was an invention of *Ashe v Swenson*, 397 US 436 (1970), which the Court borrowed from *US v Oppenheimer*, 242 US 85 (1916). In *Oppenheimer*, the defendant was able to quash his original indictment because of the one-year statute of limitations in the Bankruptcy Act. But a subsequent case held that the statute of limitations did not apply in such prosecutions, and so the government re-indicted Oppenheimer. This Court ruled that the second indictment was barred by res judicata, despite the fact that the defendant had never been placed in jeopardy. The Court's entire analysis in this regard was summed up in one sentence:

It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt.

Id. at 87.

But it *can* be so. As this Court went to great lengths to explain in *Standefer v US*, 447 US 10 (1980), there are many reasons to confine issue preclusion to civil cases. Unlike the prosecutor in criminal law, for instance, parties to civil litigation

have extensive rights of discovery, and it is that full and fair opportunity to litigate which establishes the “prerequisite of estoppel.” Additionally, unlike a civil party, the prosecution may never obtain a directed verdict in its favor, nor a judgment notwithstanding the verdict, when the proofs clearly demand it. Correspondingly, the prosecution may never appeal a loss at trial as being against the great weight of the evidence, as any civil party can. Nor may the prosecutor appeal an erroneous legal ruling at trial that leads to an unfavorable verdict. As *Standefor* noted, the estoppel doctrine “is premised upon an underlying confidence that the result achieved in the initial litigation was substantially correct. In the absence of appellate review, or of similar procedures, such confidence is often unwarranted.” *Id.* at 23 n18. Finally, as Chief Justice Burger recognized in *Ashe*, if issue preclusion were an appropriate criminal doctrine, it would apply both ways. But the prosecutor could never, after a conviction, seek to preclude the defendant from re-litigating that issue in a subsequent case. 397 US at 465 (Burger, CJ, dissenting).

This present case provides a perfect example of the shortcomings of issue preclusion in the criminal context. That is, there can be no doubt here that defendant killed Dalona Tillman, and yet *Yeager* prevents the People from going forward on the murder count for which Respondent was neither acquitted nor convicted. It is clear that Respondent was the perpetrator because—not only did he later admit to it under oath—at the time of Dalona’s death he claimed she was fatally beaten by others, and then expired in his presence sometime after returning

home. But that story was scientifically proved false: Dalona was smothered to death, leaving Respondent as the only possible suspect.

But no matter how wrong Respondent's jury was in acquitting him of second-degree murder as a lesser included of premeditated murder, the People—not to mention Dalona Tillman's family—are stuck with that verdict. And to add insult to injury, this Court's issue-preclusion doctrine prohibits a retrial on even the count that the jury did *not* resolve against the People.

For these reasons, as amplified by Justice Scalia's dissents in *Yeager* and *Grady*, and Chief Justice Burger's dissent in *Ashe*, certiorari should be granted, and *Ashe* overturned.

II. Because even if double jeopardy includes issue preclusion, that doctrine shouldn't apply when a jury cannot reach unanimity on a count: *Yeager v US* should be overruled.

If this Court keeps *Ashe*, it should at least discard *Yeager*; it is fanciful to conclude that a jury—in acquitting on one count but failing to reach a verdict on another count with the same issue—has not acted inconsistently. And inconsistent verdicts do not trigger issue preclusion. *US v Powell*, 469 US 57, 68 (1984).

Yeager's entire analysis rests on the proposition that nothing can be concluded from a hung jury, but that is demonstrably false. Jurors are instructed that they must render a unanimous verdict: *not guilty, guilty as charged, or guilty of a lesser offense*. And they are presumed to follow their

instructions. See *Powell*, 469 US at 66 (“Jurors, of course, take an oath to follow the law as charged, and they are expected to follow it.”). While it is within the realm of possibility that a jury could find that a defendant did not commit second-degree murder and so acquit on count one, but then conclude that they are too exhausted to check the box on count two acquitting of second-degree murder based on the same facts and law, see *Yeager* at 121 (“a host of reasons [including] exhaustion after a long trial” may account for a hung jury), it is also within the realm of the possible for a group of monkeys with typewriters to recreate Hamlet. *In re Chargit Inc*, 81 BR 243, 247 n5 (1987).

But the *possibility* of something other than inconsistency is not sufficient: the law requires that the defendant *prove* no explanation exists other than that the jury meant to acquit him. *Dowling v US*, 493 US 342, 351 (1990). Not only that, but according to *Ashe* itself, the analysis is to be practical, realistic, and rational, not hypertechnical and archaic. 397 US at 444. And the review is to take account of “*all* the circumstances of the proceedings” (*id.*, italics added), which would seem to include the circumstance that the trial ended with a hung jury on one count.

Given that framework, it defies credulity to maintain, as the majority did in *Yeager*, that a jury’s inability to reach a decision is *never* inconsistent with an acquittal on another count, merely because the nonverdict is not legally binding. While that may

be literally true,² it may also be a hypertechnical excuse for a preferred result.

As the Eighth, First, and DC Circuits all observed pre-*Yeager*, it *is* the practical and rational reality that the jury has acted inconsistently for issue preclusion purposes when it acquits on one count while failing to reach a verdict on another count that “necessarily followed.” *US v Aguilar-Aranceta*, 957 F2d 18 (CA 1, 1992); see also *US v Howe*, 538 F3d 820 (CA 8, 2008); and *US v White*, 936 F2d 1326 (CA DC, 1991). Certainly, in the context of all the circumstances of the proceedings, a defendant in such a case could not prove otherwise.

Thus when a jury cannot reach a verdict on a count that necessarily follows from an acquitted count, the trial court may not speculate that perhaps the jury had sharp disagreement about one count but not the other, was confused about one count but not the other, or was exhausted after a long trial and so just gave up. See *Yeager* at 121. Instead, the court must face the fact that the jury—in rendering an inconsistent nonverdict—acted inconsistently, thereby making unavailable to the defendant a claim of issue preclusion.

This line of reasoning is entirely consistent with this Court’s well-established rule that, when a jury cannot return a verdict and a mistrial is declared, the jeopardy does not end, but rather

²This Court in *Green v US*, 355 US 184 (1957), actually suggested that such is *not* true. In that case, the jury convicted the defendant of second-degree murder, but left the first-degree count blank. This Court stated that doing so constituted an implied verdict of acquittal. *Id.* at 190.

continues through the re-trial. *Richardson v US*, 468 US 317, 325 (1984). In this vein, the *Richardson* Court acknowledged that the government is entitled to “one complete opportunity to convict those who have violated its laws.” *Id.* at 324 (quoting *Arizona v Washington*, 434 US 497 (1978)). Thus, “a defendant’s valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public’s interest in fair trials designed to end in just judgments.” *Id.* at 325. A just judgment is, at the very least, one where the jury actually renders a verdict on all charged counts. The double jeopardy clause requires no less a result.

Granted, this analysis might be different if the government had proceeded *seriatim* against Respondent, as did the prosecution in *Ashe*: trying the same underlying issue on successive prosecutions after an acquittal. But when, as here, the same issue underlies more than one charge *and the charges are tried together*, it cannot constitute a second jeopardy for one of the charges to continue through a retrial. Again, the prosecution is entitled to a full and fair trial, through the verdict, on all counts. See *Richardson* at 330 (Brennen, J., concurring in part and dissenting in part). Issue preclusion of the *Yeager* variety unfairly, and impermissibly, denies that opportunity.

Here, the jury’s failure to reach a verdict on count two, while acquitting him on count one, likely signaled (i) the jurors’ conclusion that there was insufficient proof of premeditation, and (ii) their inability to agree whether torture had been proven beyond a reasonable doubt on count two. It is apparent that the jury did not then properly consider

second-degree murder as a lesser included offense on either count. In other words, to paraphrase the majority in *Bravo-Fernandez*, “the jurors in this case might not have acquitted on the [premeditated murder count] absent their belief that the [felony murder count] would [remain viable].” See *Bravo-Fernandez v US*, 137 S Ct 352 (2016). Like in the Court of Appeals cases cited above, if the jury here had really concluded that Respondent did not murder the victim, it would have found him not guilty on both counts. The prosecution should not be penalized for the jury’s failure to reach unanimity or to properly consider all the verdict options.

Regardless, it is not necessary to determine *why* the jury acted inconsistently, only that it did. And since it did, issue preclusion is precluded. To summarize, Respondent cannot prove that his jury meant to find him not guilty of felony murder, or else it would have found him not guilty of felony murder. Such a straightforward line of thinking is not unfair, unreasonable, or (most importantly) inconsistent with double jeopardy.

Certiorari should be granted so that this Court can overturn *Yeager*, and so that the People of Michigan can obtain the verdict on felony murder that they are entitled to.

Conclusion

Respondent brutally murdered a young woman involved with him, and he will go scot free unless this Court reverses its double jeopardy issue-preclusion precedent: either *Ashe* or *Yeager*, or both. Since there is no basis for those decisions in the Fifth Amendment and no justification for them in practice, the Court should find it relatively easy to do so.

RELIEF

Therefore, the Petitioner requests that certiorari be granted.

Respectfully submitted,

KYM L. WORTHY
Prosecuting Attorney
County of Wayne

JASON W. WILLIAMS
Chief of Research,
Training and Appeals

DAVID A. McCREEDY (P56540)
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Order

**Michigan Supreme
Court
Lansing, Michigan**

October 31, 2017

Stephen J. Markman
Chief Justice

156394 & (23)

Brian K. Zahra
Bridget M. McCormack
David F. Vivano
Richard H. Bernstein
Joan L. Larsen

PEOPLE OF THE
STATE OF MICHIGAN

Kurtis T. Wider,
Justices

Plaintiff-Appellant,

v

SC: 156394

COA: 338938

Wayne CC: 16-001235-FC

TRESHAUN LEE TERRANCE,

Defendant-Appellee.

_____ /

On order of the Court, the motion for peremptory denial of leave to appeal or for expedited consideration of the application is GRANTED. The application for leave to appeal the August 24, 2017 order of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

Court of Appeals, State of Michigan

ORDER

People of MI v Treshaun Lee Terrance

Docket No. 338938

Michael J. Talbot

Presiding Judge

LC No. 16-001235-01-FC

Kirsten Frank Kelly

Thomas C. Cameron

Judges

The Court orders that the motion to affirm pursuant to MCR 7.211 (C)(3) is GRANTED for the reason that the question to be reviewed is so unsubstantial as to need no argument or formal submission.

August 24, 2017

State of Michigan Third Judicial Circuit	Order Denying/ Granting	Case No: 16- 001235- 01-FC
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The People of State of Michigan

vs

Treshaun Lee Terrance

Defendant

**At a Session of Said Court held in the Frank
Murphy Hall of Justice at Detroit in Wayne
County on 5/19/17**

PRESENT: Honorable Kevin J. Cox

A Motion for: Defendant's motion to vacate the 2nd
Degree Murder conviction and dismiss the charges

having been filed; and the People having filed and
answer in opposition; and the Court having
reviewed the briefs and records in the Cause and
being fully advised in the premises;

IT IS ORDERED THAT the Motion for Same Be
and is hereby granted.

STATE OF MICHIGAN

IN THE THIRD CIRCUIT COURT FOR THE
COUNTY OF WAYNE CRIMINAL DIVISION

THE PEOPLE OF THE STATE OF MICHIGAN,

-vs-

Case No. 16-01235

TRESHAUN LEE TERRANCE,

Defendant.

_____ /

POST-CONVICTION MOTION

BEFORE THE HONORABLE KEVIN J. COX
CIRCUIT COURT JUDGE

Friday - May 19, 2017

APPEARANCES:

MR. DAVID MC CREEDY,
Appearing on behalf of the People.

MS. ANGELES MENESES,
Appearing on behalf of the Defendant.

Transcribed by:
SuzanneL. Kinsey, CSMR 4477
Official Court Reporter

C O N T E N T S

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Post-Conviction Motion

May 19, 2017

Detroit, Michigan

(Proceedings commencing at 12:43 p.m.)

THE COURT: Okay. We are on the record in case number 16-001235-FC, People versus Treshaun Terrance.

Your appearances, please?

MR. MC CREEDY: Good morning, Your Honor. Good afternoon, I guess. David McCreedy for the People.

MS. MENESES: Good afternoon, Your Honor. Angeles Meneses, on behalf of Mr. Terrance, who is seated to my left.

THE COURT: Okay.

The Court has had an opportunity to review the motion and brief in support of Mr. Terrance's -- Mr. Terrance's motion to vacate the conviction, and dismiss all charges.

The Court has also had an opportunity to review the People's answer to the motion to vacate conviction, and dismiss charges.

Is there anything you wish to add to what has been articulated in the motion and brief, counsel?

MS. MENESES: No, Your Honor.

THE COURT: All right. Mr. McCreedy?

MR. MCCREEDY: Just to articulate that while we concede, the Court has to do what it has to do, we do object, and we plan to appeal.

THE COURT: And when you say, the Court has to do what it has to do, you recognize, under the, the law that's been cited, and I, I've read your response, you recognize that under the, the present circumstances, this Court must grant the defendant's motion?

MR. MC CREEDY: That is correct.

THE COURT: Okay. Anything further?

MS. MENESES: No, Your Honor.

THE COURT: All right.

For the reasons set forth in the motion to vacate conviction, and dismiss charges, and in – and for the reasons set forth in the People's answer to same, the Court will, indeed, dismiss -- will vacate the second degree murder conviction, and dismiss the charges against Mr. Terrance.

Anything further from the People?

MR. MC CREEDY: No, Your Honor.

THE COURT: Counsel?

MS. MENESES: No, Your Honor.

THE COURT: All right.

I will sign an order consistent with my decision, in just a few minutes.

MS. MENESES: Thank you, your Honor.

(Whereupon the proceedings were concluded for the day at 12:46 p.m.)

**STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY
OF WAYNE
CRIMINAL DIVISION**

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs

Court No. 16-1235

Hon. Kevin J. Cox

TRESHAUN TERRANCE,

Defendant.

**ANSWER TO DEFENDANT'S MOTION
TO VACATE CONVICTION AND DISMISS
CHARGES**

The People of the State of Michigan, by David McCreedy, Lead Appellate Attorney, Wayne County Prosecutor's Office, concede that this court is bound by the United States Supreme Court's decision in *Yeager v US*, 557 US 110 (2009), which holds that a jury's failure to return a verdict on one count, while it renders an apparently inconsistent acquittal on another count, does not affect the acquittal's preclusive force under the Double Jeopardy clause of the US Constitution.

1. That is, under *Yeager*, a reviewing court cannot look to the jury's inability to reach a verdict on some counts in determining whether a verdict on another count constituted an acquittal for jeopardy purposes. Thus here, the fact that defendant's jury could not reach a verdict on felony murder (or the lesser-included offense of second-degree murder) can have no bearing on the fact that defendant was acquitted of second-degree murder as a lesser-included of premeditated murder: the verdicts are not legally inconsistent since there was no verdict on felony murder.
2. As such, the not-guilty verdict as to murder two under premeditated murder precludes prosecution for second-degree murder under felony murder in the death of Delonta Tillman. That is, since defendant was acquitted of second-degree murder under premeditated murder, he cannot be convicted of second-degree murder under felony murder where, as here, the jury was given identical instructions under both theories as to the elements of second-degree murder. Applied to this case, *Yeager* holds that by acquitting defendant of second-degree murder as a lesser of premeditated murder, the jury also acquitted him of second-degree murder as a lesser of felony murder. And because he was acquitted of second-degree murder under felony murder, he therefore was also acquitted of felony murder itself, since murder two is a necessary lesser-included offense of felony murder.

3. Moreover, a defendant's subsequent guilty plea does not waive a Double Jeopardy claim. *Menna v New York*, 423 US 61, 62 (1975) ("Where the State is precluded by the United States Constitution from haling a defendant into court on a charge, federal law requires that a conviction on that charge be set aside even if the conviction was entered pursuant to a counseled plea of guilty.").
4. Although *Yeager* was wrongly decided, as Justices Scalia and Alito articulated in their dissents, this court is bound by the precedent established by higher courts. *Boyd v WG Wade Shows*, 443 Mich 515, 523 (1993), overruled on other grounds *Karaczewski v Farbman Stein & Co*, 478 Mich 28 (2007). Thus, while the People will appeal this court's granting of defendant's motion, there exists no reasonable argument at this stage in the proceedings that *Yeager* does not control. Therefore, although the People object to the relief defendant seeks, this court must grant his motion.

Respectfully submitted,

/s/ David A. McCreedy
DAVID A. McCREEDY (P56540)
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(313) 224-3836 Date: May 17, 2017