

1 12-626  
2 United States v. Haynes

3 UNITED STATES COURT OF APPEALS

4  
5 For the Second Circuit

6  
7  
8 August Term, 2013

9  
10 Argued: March 8, 2013 Decided: September 5, 2013

11  
12 Docket No. 12-626-cr

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14  
15 United States of America,

16  
17 Appellee,

18  
19 — v. —

20  
21 Tara Haynes

22  
23 Defendant-Appellant.

24  
25  
26 Before: SACK and LOHIER, Circuit Judges, and KOELTL, District Judge.\*

27  
28 After a jury trial in the United States District Court for the Northern

29 District of New York (“NDNY”), the defendant, Tara Haynes, was convicted of

\_\_\_\_\_  
\* The Honorable John G. Koeltl, of the United States District Court for the Southern District of New York, sitting by designation.

1 one count of importation of 500 grams or more of a substance containing  
2 methamphetamine in violation of 21 U.S.C. §§ 952 and 963 and one count of  
3 possession with intent to distribute that substance in violation of 21 U.S.C.  
4 § 841(a)(1). The defendant was sentenced principally to 188 months  
5 imprisonment on each count to run concurrently. In this appeal from the  
6 judgment entered on January 30, 2012, the defendant alleges numerous errors.  
7 We find that the cumulative effect of the various errors—including the  
8 defendant’s improper shackling, the failure to investigate potential jury  
9 misconduct, an improper Allen charge, and serious evidentiary errors—  
10 undermined the guarantee of fundamental fairness to which the defendant is  
11 entitled. Therefore, we vacate the defendant’s conviction and remand for  
12 proceedings consistent with this opinion.

13  
14 VACATED AND REMANDED.

15 \_\_\_\_\_  
16 MARC FERNICH AND JONATHAN SAVELLA, Law Office of Marc Fernich, for  
17 Defendant-Appellant Tara Haynes.  
18

1 JULIE S. PFLUGER AND PAUL D. SILVER, Assistant United States Attorneys,  
2 for Richard S. Hartunian, United States Attorney for the Northern District of  
3 New York, for Appellee United States of America.

4 \_\_\_\_\_

5 John G. Koeltl, District Judge:

6       After a jury trial in the United States District Court for the Northern  
7 District of New York (“NDNY”), the defendant, Tara Haynes, was convicted of  
8 one count of importation of 500 grams or more of a substance containing  
9 methamphetamine in violation of 21 U.S.C. §§ 952 and 963 and one count of  
10 possession with intent to distribute that substance in violation of 21 U.S.C.  
11 § 841(a)(1). The defendant was sentenced principally to 188 months  
12 imprisonment on each count to run concurrently. In this appeal from the  
13 judgment entered on January 30, 2012, the defendant alleges numerous errors.  
14 We find that the cumulative effect of the various errors—including the  
15 defendant’s improper shackling, the failure to investigate potential jury  
16 misconduct, an improper Allen charge, and serious evidentiary errors—  
17 undermined the guarantee of fundamental fairness to which the defendant is

1 entitled. Therefore, we **VACATE** the defendant's conviction and **REMAND** for  
2 proceedings consistent with this opinion.

3

4

#### **BACKGROUND**

5 On June 2, 2011, the defendant, Tara Haynes, was arrested at the border of  
6 the United States and Canada at the Champlain Port of Entry in New York.  
7 Customs and Border Patrol Officers recovered approximately 70,000 pills  
8 wrapped in plastic from the gas tank of the rental car the defendant was driving.  
9 The pills contained methamphetamine.

10 On August 11, 2011, a grand jury in the NDNY returned a two-count  
11 superseding indictment against the defendant. Count I alleged that the  
12 defendant had knowingly and intentionally imported and attempted to import  
13 into the United States various controlled substances, including 500 grams or  
14 more of a mixture or substance containing a detectable amount of  
15 methamphetamine, in violation of 21 U.S.C. §§ 952 and 963. Count II alleged that  
16 the defendant knowingly and intentionally possessed with the intent to  
17 distribute those controlled substances in violation of 21 U.S.C. § 841(a)(1).

1 The defendant's trial began on August 16, 2011. The defendant was  
2 shackled throughout the trial. The trial transcript does not contain any findings  
3 as to why it was necessary to shackle the defendant during the trial. However,  
4 when the defendant took the stand to testify, the Court instructed the jury to  
5 leave the courtroom, and the defendant walked to the stand out of the presence  
6 of the jury. The only other mention of the shackles in the record occurred when  
7 defense counsel stated in summation as follows:

8 [The defendant is] locked here in shackles right now. She was  
9 sitting up in the [witness stand] and I don't want you to think it was  
10 disrespect that she didn't stand up but it's the rules of the court  
11 because they had taken awa[y] her liberty. It's not the judge's fault.  
12 This is what these agents did. No criminal record, no prior arrests,  
13 34 years old, consistent job for four years, two kids and they have  
14 taken away her liberties on this.

15

16 (Trial Tr. 626)

17 The trial lasted only four days from the start of jury selection to the  
18 beginning of jury deliberations. The evidence was introduced in less than three  
19 days. The Government's theory at trial was that the defendant was a "drug  
20 courier," which was why she acted nervously and gave inconsistent responses to

1 law enforcement officers at the border. (Trial Tr. 25) The defendant's theory at  
2 trial was that she was simply a "blind mule" who had no knowledge that there  
3 were any narcotics in her rental car. (Trial Tr. 34)

4 At trial, law enforcement officers testified about the circumstances of the  
5 defendant's arrest at the border and the inconsistent statements that the  
6 defendant made during her arrest. The officers testified that they observed  
7 indications that drugs were present in the car, including the presence of masking  
8 agents used to hide the odor of drugs, namely a newly opened air freshener  
9 hanging from the car's windshield and an aerosol spray can described as "new  
10 car scent" recovered from the defendant's purse. (Trial Tr. 201, 227) The  
11 defendant asked if she could discard the aerosol can, but was told that she could  
12 not. There was also an overwhelming smell of gasoline in the car. A law  
13 enforcement agent also testified that the defendant had a history of border  
14 crossings into the United States and provided details about the circumstances of  
15 those prior crossings.

16 The officers recovered approximately 70,000 pills weighing approximately  
17 49.4 pounds wrapped in plastic and stuffed tightly in the rental car's gas tank.

1 An expert witness estimated that the value of the pills, which contained  
2 methamphetamine, was between \$500,000 and \$2,100,000.

3 Customs and Border Protection Officer Troy Rabideau testified in detail  
4 about the fuel light in the car, which indicated that the gas tank was empty  
5 although his search revealed that there were approximately four or five gallons  
6 of gas in the tank. The Government asked Officer Rabideau why the fuel light  
7 would be on when there was gas in the car, and defense counsel objected on the  
8 ground that the question called for expert testimony. The objection was  
9 overruled. Officer Rabideau answered as follows:

10 On the outside of this cylinder, there's a float and that's -- the float is  
11 what shows that the gas level, so as the float goes down, the gas  
12 level in the vehicle obviously goes down. So, when the drugs were  
13 placed and the float was pushed to the bottom, drugs holding that to  
14 the bottom would always read zero kilometers to empty. That  
15 would always be on empty.  
16

17 (Trial Tr. 287-88) Officer Rabideau testified that the fuel indicator would remain  
18 on empty "[f]or as long as those drugs were in the vehicle." (Trial Tr. 288)  
19 Defense counsel objected on the basis of lack of foundation, and the Court  
20 overruled the objection. Officer Rabideau testified that he had not attended

1 “mechanic school,” but that he had “looked in the gas tank prior to this” and that  
2 the fuel light had been on throughout his investigation. (Trial Tr. 309)

3 Before lunch on the third day of trial, the Government rested. The defense  
4 case consisted of the testimony of a friend of the defendant who explained that  
5 the defendant was a single mother of two children and that she had once taken a  
6 seemingly benign New Year’s Eve trip with the defendant from Canada to New  
7 York in the defendant’s car.

8 The defendant testified in her own defense. She testified that she rented  
9 the car on Tuesday, May 31, 2011 in anticipation of traveling to New York City  
10 for the weekend. On Wednesday, June 1, 2011, the defendant was driving with  
11 her former boyfriend who pointed out the aerosol can in the car’s glove  
12 compartment. The defendant testified that at about 9:30p.m. on Thursday, June  
13 2, 2011, just prior to leaving for New York, she stopped at a convenience store  
14 and purchased some food for her ride. She also bought a hanging air freshener  
15 because she thought it was cute. She testified that as she approached the  
16 Champlain Port of Entry she removed the aerosol can from the glove  
17 compartment to use it to mask her foot odor, but she found that it was empty.



1 The defendant testified that she noticed the fuel light turn on as she approached  
2 the border, and she decided that she would refuel after crossing the border. She  
3 denied knowing that there were any drugs in the car.

4 The defendant described her interactions with law enforcement officers at  
5 the border and the circumstances surrounding her arrest. The defendant  
6 admitted that she had lied to the officers about whether she took the rental car in  
7 for an oil change prior to reaching the border crossing. The defendant also  
8 testified that she was "very upset" and "shocked" when an agent told her that  
9 70,000 ecstasy pills had been recovered from the rental car. (Trial Tr. 542-43)

10 On cross-examination, the Government pointed out that although the  
11 defendant had testified that the agent had told her there were 70,000 ecstasy pills  
12 recovered from the car, the pills had not been counted by the time the agent met  
13 with the defendant. The defendant also admitted on cross-examination that she  
14 had lied to the officers about why she was going to New York.

15 The defense called an expert witness to support its theory that the  
16 defendant was operating as a "blind mule" for drug distributors. The defense's  
17 expert witness, Richard Stratton, had been a marijuana distributor who had

1 trafficked drugs across international borders and had studied and written articles  
2 about drug distribution. Over the Government's objection, the Court permitted  
3 the defense expert witness to testify regarding the modus operandi of drug  
4 distributors provided that neither party would attempt to "elicit the expert's  
5 opinions on the ultimate issue of defendant's knowledge." (Trial Tr. 499) Mr.  
6 Stratton testified that when he was a drug distributor he "used blind mules  
7 whenever [h]e had the opportunity," and explained their advantages. (Trial Tr.  
8 567)

9 In its rebuttal case, the Government re-called Special Agent Russell Linstad  
10 of the Department of Homeland Security who had testified as an expert witness  
11 in the Government's case-in-chief about the value of the drugs seized. The  
12 Government re-called Agent Linstad to "point out the flaws in a blind mule  
13 scenario" as explained by the defense and its expert witness. (Trial Tr. 589) Agent  
14 Linstad testified as follows:

15 With the blind mule . . . the person's going to be unwitting, not  
16 know that there's anything going on with the load. So in this case,  
17 after reviewing the case, in my opinion the defendant realized,  
18 especially with inconsistency in the [defendant's] statements, the  
19 strong odor of gasoline, the fuel light and also masking agents to

1 keep it. Again, an organization wants it blind. They can't have  
2 people know that there is a load or that there [are] narcotics in the  
3 vehicle.

4  
5 (Trial Tr. 589)

6 The defense rested at the end of the third day of trial. The following day,  
7 after summations, the Court charged the jury. The jury deliberated for  
8 approximately three and a half hours before sending a deadlock note, which the  
9 Court explained as follows:

10 I have received a note, timed 3:36, from the foreperson of the jury,  
11 and I have now given copies to both counsel. I have asked our clerk  
12 to mark the note for identification as Court's Exhibit No. 1. The note  
13 says, "Your Honor, we are hopelessly deadlocked. Help."

14  
15 As both counsel know, the jury's been out since approximately 12  
16 P.M., and at this point in time my plan is to bring them back in and  
17 informally ask them to go back in and continue their deliberations  
18 with an eye toward whether they can reach a verdict.

19  
20 . . . .

21  
22 I'm not at the point right at this moment where I think that I have to  
23 give the Allen charge. . . . [M]y plan is to bring [the jury] in,  
24 acknowledge that they have been at it for a few hours, but to tell  
25 them that for both sides this is a very important matter and to ask  
26 them to continue their deliberations.

27

1 (Trial Tr. 681) There were no objections. The Judge then called the jury back into  
2 the courtroom, but did more than simply ask the jury to continue to deliberate.

3 The Court instructed the jury as follows:

4 Members of the jury, I'm going to ask you to return to the jury room  
5 and deliberate further. I realize that you are having some difficulty  
6 reaching a unanimous agreement, but that is not unusual. And  
7 often after further discussions jurors are able to work out their  
8 differences and agree.

9  
10 It is your duty as jurors to consult with one another and to deliberate  
11 with a view toward reaching an agreement, if you can do so without  
12 violence to individual judgment. Each of you must decide the case  
13 for yourself. But do so only after an impartial consideration of the  
14 evidence in the case with your fellow jurors. In the course of your  
15 deliberations, do not hesitate to re-examine your own views and  
16 change your opinion if convinced it is erroneous but do not  
17 surrender your honest conviction as to the weight or effect of  
18 evidence solely because of the opinion of your fellow jurors or for  
19 the mere purpose of returning a verdict.

20  
21 Listen carefully to what the other jurors have to say and then decide  
22 for yourself if the Government has proved the defendant guilty  
23 beyond a reasonable doubt.

24  
25 What I have just said is not meant to rush or pressure you into  
26 agreeing on a verdict. Take as much time as you need to discuss  
27 things. There is no hurry with this instruction, I will now return you  
28 to the jury room. Thank you.

29

1 (Trial Tr. 682-83)

2 Although the Court had said that it was not going to give an Allen charge,  
3 the supplemental charge that the Court gave had the hallmarks of what is  
4 generally known as a modified Allen charge. See Allen v. United States, 164 U.S.  
5 492 (1896); see also Spears v. Greiner, 459 F.3d 200, 204 n.3 (2d Cir. 2006). It  
6 instructed the jurors to consult with each other, to deliberate with a view toward  
7 reaching a verdict, and told them not to “hesitate to re-examine [their] own  
8 views and change [their] opinion,” but not to “surrender [their] honest  
9 conviction.” (Trial Tr. 682-83) Neither the Government nor the defense objected  
10 to the supplemental charge.

11 Later that day, at approximately 5:00p.m., the Judge explained to counsel  
12 that the jury would be dismissed and asked to return the following Monday at  
13 9:30a.m. The Court said that it would not “give [the jury] a full Allen charge at  
14 this time,” but would ask them to come back on Monday to try to come to a  
15 unanimous verdict.” (Trial Tr. 684) At that point, defense counsel indicated that  
16 he wanted to discuss another matter with the Court concerning a statement

1 made to him by an alternate juror about a conversation between jurors prior to  
2 the beginning of their deliberations:

3 Judge, I just note that when I had gone outside last time I saw the  
4 alternate, he talked to me and he said that some of the women on the  
5 jury had said that [the defendant] might be guilty, she's here. And  
6 he had said that didn't fly, in sum and substance of that. I mean,  
7 obviously they shouldn't have – he obviously didn't give any  
8 specifics or anything like that but [it] really does concern me that  
9 there was some sort of discussion to that extent and, I mean, it  
10 would be a dereliction of my duty if I didn't ask for a mistrial in  
11 th[is] case.  
12

13 (Trial Tr. 684-85) The Judge responded that the jury had been “continuously  
14 advised that if there were any discussions prior to deliberations, that it should be  
15 brought to [the Court's] attention immediately,” and “no juror brought anything  
16 like that to [the Court's] attention.” (Trial Tr. 685) The Court continued, “I'm not  
17 saying that the information that you're getting from the alternate isn't accurate.  
18 I'm just saying that no juror brought anything like that to my attention.” (Trial  
19 Tr. 685) The Judge denied the motion for a mistrial and did not inquire further  
20 into the comments that defense counsel had brought to the Court's attention.

1 The Judge then received a note from the jury requesting clarification on the  
2 counts, the amount of drugs, reasonable doubt, and the absence of evidence. The  
3 Judge explained to the parties that the Judge intended to dismiss the jurors and  
4 address the note on Monday morning by re-reading the portions of the  
5 indictment, verdict sheet, and charge referenced in the note from the jury.

6 However, before the Court brought the jury out to be dismissed for the  
7 day, defense counsel again raised the alleged comments by the alternate juror  
8 and requested a “curative instruction” or for a renewal of the instruction that “if  
9 there was any discussion about the presumption [of innocence] or anything like  
10 that prior to the entry of deliberations, that it be disclosed to the Court.” (Trial Tr.  
11 689) The Judge responded that the Court had “reminded the jury that [the  
12 defendant] is presumed innocent at all times” and that because there was “no  
13 indication from any juror that there was any inappropriate discussion [the Court  
14 would] refrain from questioning the jury at [this] time.” (Trial Tr. 689) The Judge  
15 also stated that the Judge would not inquire about any premature deliberations.

16 The jury re-entered the courtroom, and the Court dismissed the jurors for  
17 the day. In the course of dismissing the jurors, the Judge stated:

1 I believe that on Monday, after you've had a restful weekend and  
2 are given instructions by me, when you retire into the jury  
3 deliberation room and you give each other fair and full  
4 consideration, you will be able to arrive at a just verdict.

5  
6 Remember that you should not feel -- you should not feel any  
7 pressure of time in reaching your verdict. You should listen to each  
8 other's views and work as diligently as you can to arrive at a  
9 unanimous verdict. Rest assured that I will respond to your note  
10 Monday morning and then let you continue your deliberations.

11  
12 (Trial Tr. 692) There was no objection.

13  
14 On Monday, with the agreement of the parties, the Judge reviewed the  
15 verdict sheet with the jury and reread the charge on reasonable doubt, direct and  
16 circumstantial evidence, and certain charges relating to the absence of evidence.

17 At approximately 10:00a.m., the Judge excused the jury to continue their  
18 deliberations. At approximately 2:30p.m., after about eight total hours of  
19 deliberations, the jury returned a unanimous verdict of guilty on both counts of  
20 the indictment.<sup>1</sup>

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<sup>1</sup> On the Special Verdict Form, the jury found the defendant guilty of importation and possession with intent to distribute 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, but found that the Government had not proved the defendant's guilt beyond a reasonable doubt



1 On January 30, 2012, the defendant was sentenced principally to a term of  
2 188 months imprisonment on each count to run concurrently. On February 13,  
3 2012, the defendant filed a notice of appeal.

4

5

## DISCUSSION

6 The defendant argues that her conviction should be vacated because of  
7 numerous trial errors. In particular, the defendant raises the following grounds  
8 for vacating her conviction: (i) denial of due process because she was tried in  
9 shackles without a finding of necessity on the record; (ii) the Court's failure to  
10 investigate alleged juror misconduct; (iii) an improper Allen charge; (iv)  
11 evidentiary errors; and (v) ineffective assistance of counsel. We find that the  
12 defendant was improperly tried in shackles, the Court did not fulfill its  
13 obligation to investigate the allegation of juror misconduct, the Court gave an  
14 improper Allen charge, and certain lay and expert testimony was erroneously  
15 admitted at trial. These errors occurred in the context of a relatively short trial

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of importation or possession with intent to distribute 50 grams or more of  
methamphetamine.

1 during which the jury deliberated for approximately three and a half hours  
2 before returning a deadlock note, and then deliberated for approximately  
3 another five hours before returning a verdict of guilty on both counts. Under all  
4 the circumstances of this case, the cumulative effect of these errors was to cast  
5 serious doubt on whether the defendant was provided due process of law at her  
6 trial. Accordingly, we vacate the defendant's conviction and remand for further  
7 proceedings consistent with this opinion.

8

9

**I.**

10

**A.**

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The defendant argues that her conviction should be vacated because she was tried in shackles without a specific finding of necessity on the record by the District Court Judge. It is beyond dispute that a defendant may not be tried in shackles unless the trial judge finds on the record that it is necessary to use such a restraint as a last resort to satisfy a compelling interest such as preserving the safety of persons in the courtroom. "The law has long forbidden routine use of visible shackles during the guilt phase; it permits a State to shackle a criminal

1 defendant only in the presence of a special need.” Deck v. Missouri, 544 U.S. 622,  
2 626 (2005). This rule of fundamental fairness is a basic element of the due  
3 process of law protected by the Constitution. Id. at 629. As the Supreme Court  
4 has emphasized:

5 [T]o contemplate such a technique, much less see it, arouses a feeling  
6 that no person should be tried while shackled and gagged except as  
7 a last resort. Not only is it possible that the sight of shackles and  
8 gags might have a significant effect on the jury’s feelings about the  
9 defendant, but the use of this technique is itself something of an  
10 affront to the very dignity and decorum of judicial proceedings that  
11 the judge is seeking to uphold.

12  
13 Illinois v. Allen, 397 U.S. 337, 344 (1970).

14 This Court has therefore held that a trial judge may order physical  
15 restraints on a party only “when the court has found those restraints to be  
16 necessary to maintain safety or security; but the court must impose no greater  
17 restraints than are necessary, and it must take steps to minimize the prejudice  
18 resulting from the presence of the restraints.” Davidson v. Riley, 44 F.3d 1118,  
19 1122-23 (2d Cir. 1995). A court may not delegate this discretion to another party,  
20 including the Bureau of Prisons or the United States Marshals, because the court  
21 must “consider all the evidence and ultimately make the decision [for itself].” Id.

1 at 1123 (quoting Lemons v. Skidmore, 985 F.2d 354, 358 (7th Cir. 1993)); see  
2 Hameed v. Mann, 57 F.3d 217, 222 (2d Cir. 1995). A judge may receive evidence  
3 if there is any factual dispute relevant to trying a defendant in physical restraints.  
4 See Hameed, 57 F.3d at 222. However, the ultimate decision to impose any  
5 physical restraints during trial must be made by the District Court judge alone  
6 and must be made on the record. See id. Moreover, “[w]hen the trial judge  
7 delegates a decision, and gives no reason for the decision, that is not an exercise  
8 of discretion but an absence of and an abuse of discretion.” Davidson, 44 F.3d at  
9 1123 (quoting Lemons, 985 F.2d at 358)); see Hameed, 57 F.3d at 222.

10 In this case, there is no suggestion and certainly no finding on the record  
11 why it was necessary to shackle the defendant, who had no prior criminal  
12 history. There was no finding why the defendant was a threat to anyone or why  
13 the presence of United States Deputy Marshals in the courtroom would not have  
14 been sufficient to maintain the safety and security of all those present.  
15 Accordingly, it was clear error and a violation of the defendant’s constitutional  
16 right to due process of law to have required the defendant to stand trial in  
17 shackles without a specific finding of necessity on the record by the trial judge.

1           During oral argument in this case, the Government explained the  
2 defendant's shackling in part by representing that it has been standard practice  
3 in the NDNY for criminal defendants in custody to be shackled during trial  
4 without a particularized finding of necessity on the record by the District Court  
5 judge. Because that troubling representation indicated that the practice was  
6 inconsistent with long-standing Supreme Court and Second Circuit precedent,  
7 this Court ordered the Government to explain in detail the alleged practice of  
8 trying defendants in shackles. After an initial incomplete response, the  
9 Government submitted a letter explaining as follows:

10           [T]he Marshals Service advised . . . that defendants are neither  
11 routinely nor arbitrarily shackled during jury trials. In those cases  
12 where the Marshals Service believes that shackling is prudent or  
13 necessary, the Marshals Service articulates the basis for its  
14 recommendation to the trial judge. This recommendation is based  
15 upon factors such as the defendant's criminal history, the sentence  
16 the defendant faces upon conviction and the defendant's conduct  
17 while incarcerated. In all cases, it is the trial judge who makes the  
18 final determination regarding shackling. In the event the trial judge  
19 agrees with the Marshals Service's recommendation regarding  
20 shackling, leg irons, not handcuffs or waist chains, generally are  
21 utilized. Additionally, the Marshals Service made clear that they  
22 make every effort to ensure that the leg irons are obscured from the  
23 jury's view, both inside and outside of the courtroom. . . .  
24

1 [T]he judges [with the exception of one who could not be reached]  
2 reported a practice consistent with the practice described by the  
3 Marshals Service.

4  
5 The judges in this District take into account any security concerns  
6 raised by the Marshals Service that bear upon whether shackles  
7 ought to be used in a particular case. Armed with that information,  
8 the judges make an independent determination, on a case-by-case  
9 basis, whether the use of shackles is warranted. The judges also  
10 relayed that in the event shackles are used, every precaution is taken  
11 to ensure that those shackles are not visible to the jury. . . .

12  
13 One of the responding judges indicated that he informs the  
14 defendant of his decision and provides the defendant an  
15 opportunity to be heard. Other judges do not create a record of their  
16 determinations; a record would be created if the defendant raised an  
17 objection to the use of shackles.

18  
19 (Letter of Richard S. Hartunian by Paul D. Silver, ECF No. 82 (Apr. 11, 2013), at 2)

20 The general procedures, to the extent that they were accurately portrayed  
21 to this Court, do not conform to the requirements of clear Supreme Court and  
22 Second Circuit precedent. No physical restraints may be imposed on a criminal  
23 defendant during trial unless the District Court finds on the record that they are  
24 a necessary last resort. Where the District Court finds that shackles are necessary  
25 for the safety of the defendant or any persons in the courtroom, the Court must

1 ensure that the restraints are no greater than necessary to ensure safety during  
2 trial, and the Court must take steps to minimize any prejudice to the defendant  
3 from being tried in physical restraints. See Davidson, 44 F.3d at 1122-23. Any  
4 finding of necessity and all accommodations made to minimize the extent of the  
5 defendant's restraint during trial or to ensure that the jury does not become  
6 aware of any physical restraints on the defendant must be made on the record by  
7 the District Court.

8         The Government argues that there is no basis for reversal unless the  
9 shackles had a substantial and injurious effect on the jury's verdict, and the  
10 presence of the shackles could not have affected the jury's verdict unless the jury  
11 actually saw them. See Williams v. Woodford, 306 F.3d 665, 689 (9th Cir. 2002),  
12 abrogated on other grounds by Williams v. Woodford, 384 F.3d 567 (9th Cir.  
13 2004); Moon v. Head, 285 F.3d 1301, 1307 (11th Cir. 2002). The record is silent as  
14 to whether any of the jurors saw the shackles during the trial. Defense counsel  
15 made some effort to avoid having the jurors see the shackles when the defendant  
16 took the stand to testify, but then—for whatever reason—he drew attention to

1 the shackling in the course of his summation. The jury was thus well aware of  
2 the shackling during their deliberations.

3 While we could remand this case for an evidentiary hearing to determine when  
4 the jurors first became aware of the shackles, any such hearing would be time  
5 consuming and burdensome for the jurors. Moreover, the trial court erred in  
6 permitting the defendant to be tried in shackles without a finding on the record  
7 that there was a compelling reason to do so that could not be achieved by less  
8 onerous means. It is unnecessary to remand this case for a hearing as to the  
9 necessity of trying the defendant in shackles and when the jurors became aware  
10 of the shackles because, as explained below, the cumulative effect of all the errors  
11 denied the defendant a fundamentally fair trial.<sup>2</sup> At any subsequent proceedings

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<sup>2</sup> To the extent that the defendant asserts that defense counsel's acquiescence in the decision to try the defendant in shackles and then to raise that fact with the jury during summation constitutes ineffective assistance of counsel, this argument is addressed infra at III.

The Government argues that defense counsel's decision to refer in summation to the physical restraints on the defendant constitutes waiver. See United States v. Quinones, 511 F.3d 289, 320-21 (2d Cir. 2007) ("The law is well established that if, as a tactical matter, a party raises no objection to a purported error, such inaction constitutes a true waiver which will negate even plain error review." (internal quotation marks omitted)). However, it was error for the



1 consistent with this opinion, the District Court should decide on the record  
2 whether shackling the defendant is necessary as a last resort to satisfy a  
3 compelling reason, such as the preservation of safety in the courtroom.

4

5

**B.**

6 The defendant argues that her conviction should be reversed because the  
7 District Court failed to investigate the allegation of juror misconduct that defense  
8 counsel brought to the Court's attention. Defense counsel moved for a mistrial  
9 because he had heard from one of the alternate jurors that prior to deliberations  
10 "some of the women on the jury had said that [the defendant] might be guilty,  
11 [because] she's here." (Trial Tr. 684-85) The Court denied the motion for a  
12 mistrial and declined to investigate the matter or to speak with the alternate

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Court to try the defendant in shackles without making a finding of necessity on the record, and that error contributed to the cumulative effect of a series of errors that denied the defendant a fundamentally fair trial. There is no indication that defense counsel waived that error. See id. Moreover, we do not know the rationale for referring to the shackles in summation and whether any of the jurors were aware of the shackles before that time.

1 regarding the jurors' alleged comments even though the Court conceded that it  
2 was not disputing the accuracy of the alternate juror's account.

3         The alleged comments of the jurors as reported to defense counsel raise  
4 two concerns: (i) that members of the jury were actually biased against the  
5 defendant; and (ii) that the jury deliberated prematurely in violation of the  
6 Judge's instructions not to deliberate until they had heard all the evidence and  
7 were instructed on the law. It is well established that at minimum, "[d]ue  
8 process means a jury capable and willing to decide the case solely on the  
9 evidence before it, and a trial judge ever watchful to prevent prejudicial  
10 occurrences and to determine the effect of such occurrences when they happen."  
11 Smith v. Phillips, 455 U.S. 209, 217 (1982). Furthermore, "jurors must not engage  
12 in discussions of a case before they have heard both the evidence and the court's  
13 legal instructions and have begun formally deliberating as a collective body."  
14 See United States v. Cox, 324 F.3d 77, 86 (2d Cir. 2003) (quoting United States v.  
15 Resko, 3 F.3d 684, 688 (3d Cir. 1993)). Where the District Court instructs the jury  
16 to refrain from premature deliberations, as the Court did in this case, and the  
17 jury nevertheless discusses the case prior to the close of trial, that premature

1 deliberation may constitute juror misconduct. Cox, 324 F.3d at 86. The  
2 allegation of premature deliberations in this case was exacerbated by the fact that  
3 the alternate juror allegedly said that jurors had questioned the presumption of  
4 innocence for the defendant simply because she was on trial.

5 Faced with a credible allegation of juror misconduct during trial, a court  
6 has an obligation to investigate and, if necessary, correct the problem. United  
7 States v. Peterson, 385 F.3d 127, 134 (2d Cir. 2004); Cox, 324 F.3d at 88. The  
8 District Court “has broad flexibility in such matters, especially when the alleged  
9 prejudice results from statements by the jurors themselves, and not from media  
10 publicity or other outside influences.” United States v. Thai, 29 F.3d 785, 803 (2d  
11 Cir. 1994) (internal quotation marks omitted); see Cox, 324 F.3d at 87. A trial  
12 judge’s handling of juror misconduct and the Court’s findings with respect to a  
13 jury’s impartiality are reviewed for abuse of discretion. Peterson, 385 F.3d at 134.

14 In this case, the trial Court abused its discretion by not conducting any  
15 inquiry about what the Court acknowledged might well be an accurate allegation  
16 of juror misconduct. Defense counsel asked for further investigation and a  
17 curative instruction, but the Court denied both requests. Without ever

1 disturbing the jury deliberations, the Court could have asked the alternate juror  
2 what exactly was said and by whom, and then made a determination of what, if  
3 any, further investigation was required. Only if the preliminary inquiry  
4 produced a specific and credible reason to conduct further inquiries would it  
5 have been necessary to pursue further measures. See id. at 133-36 (finding that  
6 the examination and recusal of an “unbalanced” juror together with satisfactory  
7 responses by the remaining jurors as to their impartiality was within the trial  
8 court’s discretion). The Court abused its discretion by failing to conduct any  
9 inquiry to determine if the allegation of juror misconduct was true.

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C.

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The defendant argues that her conviction should be vacated because the Court gave the jury an improper Allen charge. After approximately four hours of deliberations, which resulted in a deadlock note and a modified Allen charge, the jury returned a note seeking clarification of the charges and the instruction on guilt beyond a reasonable doubt. The Court and the parties agreed to dismiss the jury for the weekend and to respond to their questions on Monday morning.

1 The Judge called the jury into the courtroom, read aloud the jury's note, and  
2 gave the jury additional instructions. Those instructions included the following  
3 language: "I believe that on Monday, after you've had a restful weekend and are  
4 given instructions by me, when you retire into the jury deliberation room and  
5 you give each other fair and full consideration, you will be able to arrive at a just  
6 verdict." (Trial Tr. 692) The Court also told the jury: "you should not feel any  
7 pressure of time in reaching your verdict. You should listen to each other's  
8 views and work as diligently as you can to arrive at a unanimous verdict." (Trial  
9 Tr. 692)

10 The parties do not dispute that this instruction was a modified Allen  
11 charge. The defining characteristic of an Allen charge is that "it asks jurors to  
12 reexamine their own views and the views of others." Spears, 459 F.3d at 204 n.3.  
13 An Allen charge is unconstitutional if it is coercive in the context and  
14 circumstances under which it is given. Id. at 205.

15 This Court has previously explained the history of the Allen charge:

16 In Allen, the Supreme Court approved of supplemental instructions  
17 given to a deadlocked jury urging them to continue deliberating and  
18 for the jurors in the minority to listen to the majority's arguments

1 and ask themselves whether their own views were reasonable under  
2 the circumstances. The instructions in Allen included statements  
3 directing that “the verdict must be the verdict of each individual  
4 juror, and not a mere acquiescence in the conclusion of his fellows,”  
5 and that it was the jury's duty “to decide the case if they could  
6 conscientiously do so.” These statements served to remind jurors in  
7 the minority that a verdict was not required, and that no juror  
8 should surrender the juror’s conscientiously held views for the sake  
9 of rendering a verdict.

10  
11 Id. at 204-05.

12 The original Allen charge has been criticized because it focused on the  
13 suggestion that jurors in the minority should reconsider their position. In more  
14 recent times, courts have tended to use charges that do not contrast the majority  
15 and minority positions, but ask all jurors to re-examine their own views and the  
16 views of others. Id. at 204 n.4.

17 In Spears, this Court accepted the parties’ representations that the Judge  
18 had given a modified Allen charge and applied the standard developed in  
19 Lowenfield v. Phelps, 484 U.S. 231 (1988), to determine whether that charge was  
20 coercive. Lowenfield requires the Court to evaluate “the potential coercive effect  
21 of a charge to a deadlocked jury . . . in its context and under all the  
22 circumstances.” Spears, 459 F.3d at 205 (quoting Lowenfield, 484 U.S. at 237)

1 (internal quotation marks omitted); see United States v. Vargas-Cordon, No. 11-  
2 5165, 2013 WL 4046274, at \*7 (2d Cir. Aug. 12, 2013). This Court observed that  
3 “when an Allen charge directs jurors to consider the views of other jurors,  
4 specific cautionary language reminding jurors not to abandon their own  
5 conscientious beliefs is generally required.” Spears, 459 F.3d at 205; see Smalls v.  
6 Batista, 191 F.3d 272, 279 (2d Cir. 1999) (“[A] necessary component of any Allen-  
7 type charge requires the trial judge to admonish the jurors not to surrender their  
8 own conscientiously held beliefs.”).

9 Evaluating the charge in Spears in the circumstances and the context in  
10 which it was given, this Court found that the modified Allen charge was not  
11 coercive. “The charge asked the jurors to consider the facts ‘with an attempt to  
12 reach a verdict if that be possible,’ and to continue deliberations ‘with a view  
13 toward arriving at a verdict if that’s possible.” Spears, 459 F.3d at 206.

14 Although the trial court had failed to include the admonition not to give up  
15 conscientiously held beliefs, “the charge did not urge the jurors to listen to the  
16 views of other jurors with whom they disagreed or attempt to persuade each  
17 other,” and “the original charge, given to the jury earlier that day, did include

1 cautionary language telling jurors that they had a right to stick to their  
2 arguments and stand up for their own strong opinions.” Id. This Court also  
3 found it significant that defense counsel did not object to the charge. Id.  
4 Moreover, following the Allen charge, the jury continued to deliberate for the  
5 rest of the day and ultimately could not reach a verdict with respect to one of the  
6 defendants. Id. at 207. This Court reasoned, “[t]his result strongly indicates that  
7 individual attention was given to each defendant as to each count, and that the  
8 charge did not cause jurors to surrender their opinions merely to reach a result.”  
9 Id. (quoting United States v. Fermin, 32 F.3d 674, 680 (2d Cir. 1994), overruled on  
10 other grounds by Bailey v. United States, 516 U.S. 137 (1995)) (internal quotation  
11 marks omitted).

12 The issue in this case is whether the modified Allen charge given at the  
13 end of the day was coercive in the circumstances and context in which it was  
14 given. The Court was aware that the jury was deadlocked, and the Court had  
15 already given a modified Allen charge. The jury had continued to deliberate and  
16 asked for instructions on reasonable doubt and the absence of evidence.  
17 Repeating a modified Allen charge at this time, without a request from the jury,



1 could reasonably be perceived by the jurors as the Court communicating its  
2 insistence on the jury reaching a unanimous verdict. See United States v.  
3 Ruggiero, 928 F.2d 1289, 1299 (2d Cir. 1991) (finding that a repeated Allen charge  
4 is not “inevitably” coercive and noting that both instructions included cautionary  
5 language counseling jurors not to surrender conscientiously held views); see also  
6 United States v. Barone, 114 F.3d 1284, 1305 (1st Cir. 1997) (“[C]aution needs to  
7 be used before the modified Allen charge is given for a second time.”).

8         The Allen charge at issue encouraged the jurors to exchange views with  
9 one another, consider each other’s views, and work diligently to reach a verdict,  
10 but did not contain the admonition not to give up conscientiously held beliefs.  
11 The charge did more than simply advise jurors to continue their deliberations.  
12 Unlike the charge in Spears, the charge in this case did not suggest that failing to  
13 reach a unanimous verdict was permissible. To the contrary, the Court stated  
14 that it “believe[d]” that the jury would “arrive at a just verdict” on Monday.  
15 (Trial Tr. 692)

16         A reasonable juror could view this instruction as lending the Court’s  
17 authority to the incorrect and coercive proposition that the only just result was a

1 verdict. However, a verdict is just only if it represents the conscientiously held  
2 beliefs of all jurors. Under these circumstances, the Court should have given the  
3 balancing, cautionary instruction that no juror should give up conscientiously  
4 held beliefs. See Smalls, 191 F.3d at 278.

5 The failure to give such a cautionary instruction was coercive in these  
6 circumstances although there are some factors that argue against concluding that  
7 the modified Allen charge given at the end of the day was coercive under all the  
8 circumstances: the previous Allen charge had included cautionary language;  
9 defense counsel did not find the charge sufficiently coercive to object; and the  
10 jury deliberated for about four and a half hours on the following Monday after  
11 the weekend break before reaching a verdict. It is unnecessary to decide whether  
12 these factors were sufficient to overcome the coercive aspects of the modified  
13 Allen charge. The Court should have refrained from giving an unsolicited  
14 modified Allen charge or, at the very least, should have included the balancing,  
15 cautionary language. The defective charge can be considered in determining the  
16 fairness of the trial, particularly given that the jurors expressed difficulty in  
17 reaching a unanimous verdict.

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**II.**

The defendant argues that her conviction should be vacated because of numerous evidentiary errors. It is only necessary to deal with two such errors that may be relevant on remand. We find that Officer Rabideau’s testimony about how the fuel tank functions and Agent Linstad’s testimony on the ultimate issue of whether the defendant knew she possessed drugs were erroneously admitted at trial.

**A.**

The defendant argues that the Court admitted the lay opinion testimony of Officer Rabideau regarding how the fuel tank in the rental car functions in violation of Federal Rule of Evidence 701 because that testimony was based on specialized knowledge. The defendant argues that the admission of this testimony prejudiced her because she did not have the opportunity to present a rebuttal expert or to prepare to cross-examine Officer Rabideau on the technical subject of how the fuel tank operates. The testimony was important to the Government’s case because it supported the Government’s argument that the

1 fuel gauge must have been showing “empty” throughout the trip from Canada  
2 and that the defendant was not being truthful when she explained that she only  
3 saw the warning light shortly before reaching the border.

4 Federal Rule of Evidence 701 limits lay witness testimony to testimony that  
5 is “(a) rationally based on the witness’s perception; (b) helpful to clearly  
6 understanding the witness’s testimony or to determining a fact in issue; and (c)  
7 not based on scientific, technical, or other specialized knowledge within the  
8 scope of Rule 702.” Fed. R. Evid. 701. Under Federal Rule of Evidence 701, “lay  
9 opinion must be the product of reasoning processes familiar to the average  
10 person in everyday life.” United States v. Garcia, 413 F.3d 201, 215 (2d Cir. 2005).  
11 This rule “prevent[s] a party from conflating expert and lay opinion testimony  
12 thereby conferring an aura of expertise on a witness without satisfying the  
13 reliability standard for expert testimony set forth in Rule 702 and the pre-trial  
14 disclosure requirements set forth in Fed. R. Crim. P. 16 . . . .” Id.

15 The defendant argues that the testimony at issue was not rationally based  
16 on Officer Rabideau’s perceptions, but on expert or specialized knowledge. The  
17 relevant portion of Officer Rabideau’s testimony is as follows:

1 On the outside of this cylinder, there's a float and that's -- the float is  
2 what shows that the gas level, so as the float goes down, the gas  
3 level in the vehicle obviously goes down. So, when the drugs were  
4 placed and the float was pushed to the bottom, drugs holding that to  
5 the bottom would always read zero kilometers to empty. That  
6 would always be on empty.

7  
8 (Trial Tr. 287-88) Officer Rabideau also testified that he had not been to  
9 "mechanic school," but had "looked in the gas tank prior to this," and that his  
10 experience investigating other cars at the border served as a basis for his  
11 knowledge of how the fuel tank functions. (Trial Tr. 309)

12 If the opinion of a witness "rests in any way upon scientific, technical, or  
13 other specialized knowledge, its admissibility must be determined by reference  
14 to Rule 702, not Rule 701" because "lay opinion must be the product of reasoning  
15 processes familiar to the average person in everyday life." Garcia, 413 F.3d at  
16 215 (internal quotation marks and citation omitted). Accordingly, this Court has  
17 held that "the foundation requirements of Rule 701 do not permit a law  
18 enforcement agent to testify to an opinion so based and formed if the agent's  
19 reasoning process depended, in whole or in part, on [the agent's] specialized  
20 training and experience." Id. at 216.

1           Officer Rabideau’s testimony was improperly admitted over the  
2 defendant’s objection because his opinion was based on specialized training and  
3 experience. Officer Rabideau did more than simply describe what he found in  
4 the gas tank and what he perceived. He described how the float on the outside  
5 of the gas tank worked and why the gas gauge would have registered zero to  
6 empty while the drugs were in the gas tank. As the Government concedes, this  
7 testimony was based on knowledge that Officer Rabideau acquired inspecting  
8 other cars at the border. That he did not attend “mechanic school” does not  
9 render his testimony admissible under Federal Rule of Evidence 701. Officer  
10 Rabideau acquired his knowledge of how a fuel tank operates through his  
11 experience as a border agent inspecting vehicles, not through the reasoning  
12 processes of the average person. Therefore, the admission of this testimony was  
13 error.

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**B.**

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The defendant argues that it was error to permit Agent Linstad to testify to the ultimate issue of the defendant’s knowledge of drugs in the car in violation of

1 Federal Rule of Evidence 704. Federal Rule of Evidence 704(b) provides: “In a  
2 criminal case, an expert witness must not state an opinion about whether the  
3 defendant did or did not have a mental state or condition that constitutes an  
4 element of the crime charged or of a defense. Those matters are for the trier of  
5 fact alone.” Fed. R. Evid. 704(b). The defendant argues that the admission of  
6 Agent Linstad’s testimony that the defendant “realized” narcotics were in the  
7 rental car was improper expert testimony on the ultimate issue of the defendant’s  
8 knowledge of whether there were drugs in the rental car, which was a critical  
9 element of the charges against the defendant. (Trial Tr. 589)

10 It is well established that Rule 704(b) “disables even an expert from  
11 expressly stating the final conclusion or inference as to a defendant’s actual  
12 mental state at the time of a crime.” United States v. DiDomenico, 985 F.2d 1159,  
13 1164 (2d Cir. 1993) (internal quotation marks and citations omitted). Such  
14 testimony is prohibited because it “poses a uniquely heightened danger of  
15 intruding on the jury’s function.” Id.; see id. at 1164-65 (collecting cases).

16 Agent Linstad’s testimony regarding whether the defendant “realized”  
17 that there were drugs in the car was erroneously admitted because it is expert

1 testimony about the defendant's state of mind. Indeed, whether the defendant  
2 "realized" that there were drugs in the car was the key issue in this case.  
3 Moreover, Agent Linstad used the opportunity to summarize some of the  
4 Government's evidence as to why the defendant must have known that she was  
5 transporting drugs, which included the defendant's inconsistent statements, the  
6 strong odor of gasoline, the fuel light, and the presence of masking agents. The  
7 Court had previously warned the parties that it would not permit such testimony  
8 about the defendant's knowledge, but when it was actually introduced, the  
9 Court erroneously failed to strike it. The admission of this testimony at trial was  
10 plain error. See United States v. Dukagjini, 326 F.3d 45, 55 (2d Cir. 2002) (finding  
11 error where a case agent certified as an expert "acted at times as a summary  
12 prosecution witness[, with] the effect [of] . . . bolstering . . . the testimony" of  
13 other witnesses and "impinging upon the exclusive function of the jury").

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### III.

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17 The defendant argues that her conviction should be reversed because her  
counsel provided constitutionally ineffective assistance at trial. To succeed on an



1 ineffective assistance of counsel claim, a defendant must demonstrate that  
2 counsel's choices were not strategic because they "were outside the wide range  
3 of professionally competent assistance," and "that there is a reasonable  
4 probability that, but for counsel's unprofessional errors, the result of the  
5 proceeding would have been different." Strickland v. Washington, 466 U.S. 668,  
6 690, 694 (1984). However, a cold trial record usually "will not disclose the facts  
7 necessary to decide either prong of the Strickland analysis." Massaro v. United  
8 States, 538 U.S. 500, 505 (2003). Therefore, "in most cases a motion brought  
9 under § 2255 is preferable to direct appeal for deciding claims of ineffective  
10 assistance." Id. at 504.

11 When a defendant raises a claim of ineffective assistance of trial counsel,  
12 this Court may (i) decline to hear the claim and permit the defendant to raise the  
13 claim as part of a subsequent motion filed pursuant to 28 U.S.C. § 2555; (ii)  
14 remand the claim to the District Court for fact-finding; or (iii) decide the claim  
15 based on the record before it. United States v. Doe, 365 F.3d 150, 152 (2d Cir.  
16 2004). In this case, it is unnecessary to reach the merits of the ineffective  
17 assistance of counsel claim because the conviction must be vacated on other

1 grounds. Moreover, because the conviction is being vacated there will be no  
2 occasion for a section 2255 motion. Therefore, we decline to reach the  
3 defendant's claim of ineffective assistance of trial counsel.

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#### IV.

6 This trial was marred by significant errors, including: trying the defendant  
7 in shackles without a finding of necessity on the record; failing to investigate  
8 alleged juror misconduct; and providing an improper Allen charge to the jury.  
9 There were also serious evidentiary errors, in particular the improper admission  
10 of lay opinion testimony and the failure to strike expert testimony regarding the  
11 defendant's realization that there were drugs in her rental car. These errors  
12 occurred in the context of a short trial in which the evidence was introduced in  
13 less than three days. This was a close case that prompted approximately eight  
14 hours of jury deliberations and a jury note asking for help because the jury was  
15 hopelessly deadlocked. It was only after the Judge instructed the jury that the  
16 Court "believe[d]" that they would reach a verdict that the jury did just that.

1 Individually, these errors may not provide a basis for vacating the  
2 defendant's conviction. However, when considered together, in the context of  
3 this trial, these errors call into serious doubt whether the defendant received the  
4 due process guarantee of fundamental fairness to which she and all criminal  
5 defendants are entitled. See Taylor v. Kentucky, 436 U.S. 478, 487 n.15 (1978);  
6 see, e.g., United States v. Al-Moayad, 545 F.3d 139, 178 (2d Cir. 2008); United  
7 States v. Guglielmini, 384 F.2d 602, 607 (2d Cir. 1967). Therefore, we **VACATE**  
8 the judgment of the District Court and **REMAND** for proceedings consistent  
9 with this opinion.

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## CONCLUSION

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We have considered all of the arguments of the parties. To the extent not  
specifically addressed above, they are moot. For the reasons explained above,  
we **VACATE** the judgment of the District Court and **REMAND** for proceedings  
consistent with this opinion.