1 UNITED STATES COURT OF APPEALS
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3 For the Second Circuit
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5
6 August Term, 2013
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8 Argued: March 8, 2013 Decided: September 5, 2013
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10 Docket No. 12-626-cr
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13 United States of America,
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15 Appellee,
16
17 —v.—
18
19 Tara Haynes
20
21 Defendant-Appellant.
22
23
24 Before: SACK and LOHIER, Circuit Judges, and KOELTL, District Judge.*
25
26 After a jury trial in the United States District Court for the Northern
27 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.

28 one count of importation of 500 grams or more of a substance containing
29 methamphetamine in violation of 21 U.S.C. §§ 952 and 963 and one count of
30 possession with intent to distribute that substance in violation of 21 U.S.C.
31 § 841(a)(1). The defendant was sentenced principally to 188 months
32 imprisonment on each count to run concurrently. In this appeal from the
33 judgment entered on January 30, 2012, the defendant alleges numerous errors.
34 We find that the cumulative effect of the various errors—including the
35 defendant's improper shackling, the failure to investigate potential jury
36 misconduct, an improper Allen charge, and serious evidentiary errors—
37 undermined the guarantee of fundamental fairness to which the defendant is
38 entitled. Therefore, we vacate the defendant's conviction and remand for
39 proceedings consistent with this opinion.
40
41 VACATED AND REMANDED.
42 ______________
43 MARC FERNICH AND JONATHAN SAVELLA, Law Office of Marc Fernich, for
44 Defendant-Appellant Tara Haynes.
45

46 JULIE S. PFLUGER AND PAUL D. SILVER, Assistant United States Attorneys,
47 for Richard S. Hartunian, United States Attorney for the Northern District of
48 New York, for Appellee United States of America.
49 ______________

50 John G. Koeltl, District Judge:

51 After a jury trial in the United States District Court for the Northern
52 District of New York ("NDNY"), the defendant, Tara Haynes, was convicted of
53 one count of importation of 500 grams or more of a substance containing
54 methamphetamine in violation of 21 U.S.C. §§ 952 and 963 and one count of
55 possession with intent to distribute that substance in violation of 21 U.S.C.
56 § 841(a)(1). The defendant was sentenced principally to 188 months
57 imprisonment on each count to run concurrently. In this appeal from the
58 judgment entered on January 30, 2012, the defendant alleges numerous errors.
59 We find that the cumulative effect of the various errors—including the
60 defendant's improper shackling, the failure to investigate potential jury
61 misconduct, an improper Allen charge, and serious evidentiary errors—
62 undermined the guarantee of fundamental fairness to which the defendant is

63 entitled. Therefore, we **VACATE** the defendant's conviction and **REMAND** for

64 proceedings consistent with this opinion.

65

66 **BACKGROUND**

67 On June 2, 2011, the defendant, Tara Haynes, was arrested at the border of

68 the United States and Canada at the Champlain Port of Entry in New York.

69 Customs and Border Patrol Officers recovered approximately 70,000 pills

70 wrapped in plastic from the gas tank of the rental car the defendant was driving.

71 The pills contained methamphetamine.

72 On August 11, 2011, a grand jury in the NDNY returned a two-count

73 superseding indictment against the defendant. Count I alleged that the

74 defendant had knowingly and intentionally imported and attempted to import

75 into the United States various controlled substances, including 500 grams or

76 more of a mixture or substance containing a detectable amount of

77 methamphetamine, in violation of 21 U.S.C. §§ 952 and 963. Count II alleged that

78 the defendant knowingly and intentionally possessed with the intent to

79 distribute those controlled substances in violation of 21 U.S.C. § 841(a)(1).

80 The defendant's trial began on August 16, 2011. The defendant was

81 shackled throughout the trial. The trial transcript does not contain any findings

82 as to why it was necessary to shackle the defendant during the trial. However,

83 when the defendant took the stand to testify, the Court instructed the jury to

84 leave the courtroom, and the defendant walked to the stand out of the presence

85 of the jury. The only other mention of the shackles in the record occurred when

86 defense counsel stated in summation as follows:

> 87 [The defendant is] locked here in shackles right now. She was
> 88 sitting up in the [witness stand] and I don't want you to think it was
> 89 disrespect that she didn't stand up but it's the rules of the court
> 90 because they had taken awa[y] her liberty. It's not the judge's fault.
> 91 This is what these agents did. No criminal record, no prior arrests,
> 92 34 years old, consistent job for four years, two kids and they have
> 93 taken away her liberties on this.

94

95 (Trial Tr. 626)

96 The trial lasted only four days from the start of jury selection to the

97 beginning of jury deliberations. The evidence was introduced in less than three

98 days. The Government's theory at trial was that the defendant was a "drug

99 courier," which was why she acted nervously and gave inconsistent responses to

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

103 At trial, law enforcement officers testified about the circumstances of the
104 defendant's arrest at the border and the inconsistent statements that the
105 defendant made during her arrest. The officers testified that they observed
106 indications that drugs were present in the car, including the presence of masking
107 agents used to hide the odor of drugs, namely a newly opened air freshener
108 hanging from the car's windshield and an aerosol spray can described as "new
109 car scent" recovered from the defendant's purse. (Trial Tr. 201, 227) The
110 defendant asked if she could discard the aerosol can, but was told that she could
111 not. There was also an overwhelming smell of gasoline in the car. A law
112 enforcement agent also testified that the defendant had a history of border
113 crossings into the United States and provided details about the circumstances of
114 those prior crossings.

115 The officers recovered approximately 70,000 pills weighing approximately
116 49.4 pounds wrapped in plastic and stuffed tightly in the rental car's gas tank.

117 An expert witness estimated that the value of the pills, which contained

118 methamphetamine, was between $500,000 and $2,100,000.

119 Customs and Border Protection Officer Troy Rabideau testified in detail

120 about the fuel light in the car, which indicated that the gas tank was empty

121 although his search revealed that there were approximately four or five gallons

122 of gas in the tank. The Government asked Officer Rabideau why the fuel light

123 would be on when there was gas in the car, and defense counsel objected on the

124 ground that the question called for expert testimony. The objection was

125 overruled. Officer Rabideau answered as follows:

> 126 On the outside of this cylinder, there's a float and that's –- the float is
> 127 what shows that the gas level, so as the float goes down, the gas
> 128 level in the vehicle obviously goes down. So, when the drugs were
> 129 placed and the float was pushed to the bottom, drugs holding that to
> 130 the bottom would always read zero kilometers to empty. That
> 131 would always be on empty.

132

133 (Trial Tr. 287-88) Officer Rabideau testified that the fuel indicator would remain

134 on empty "[f]or as long as those drugs were in the vehicle." (Trial Tr. 288)

135 Defense counsel objected on the basis of lack of foundation, and the Court

136 overruled the objection. Officer Rabideau testified that he had not attended

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

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

144 The defendant testified in her own defense. She testified that she rented
145 the car on Tuesday, May 31, 2011 in anticipation of traveling to New York City
146 for the weekend. On Wednesday, June 1, 2011, the defendant was driving with
147 her former boyfriend who pointed out the aerosol can in the car’s glove
148 compartment. The defendant testified that at about 9:30p.m. on Thursday, June
149 2, 2011, just prior to leaving for New York, she stopped at a convenience store
150 and purchased some food for her ride. She also bought a hanging air freshener
151 because she thought it was cute. She testified that as she approached the
152 Champlain Port of Entry she removed the aerosol can from the glove
153 compartment to use it to mask her foot odor, but she found that it was empty.

154 The defendant testified that she noticed the fuel light turn on as she approached
155 the border, and she decided that she would refuel after crossing the border. She
156 denied knowing that there were any drugs in the car.
157 The defendant described her interactions with law enforcement officers at
158 the border and the circumstances surrounding her arrest. The defendant
159 admitted that she had lied to the officers about whether she took the rental car in
160 for an oil change prior to reaching the border crossing. The defendant also
161 testified that she was “very upset” and “shocked” when an agent told her that
162 70,000 ecstasy pills had been recovered from the rental car. (Trial Tr. 542-43)
163 On cross-examination, the Government pointed out that although the
164 defendant had testified that the agent had told her there were 70,000 ecstasy pills
165 recovered from the car, the pills had not been counted by the time the agent met
166 with the defendant. The defendant also admitted on cross-examination that she
167 had lied to the officers about why she was going to New York.
168 The defense called an expert witness to support its theory that the
169 defendant was operating as a “blind mule” for drug distributors. The defense’s
170 expert witness, Richard Stratton, had been a marijuana distributor who had

171 trafficked drugs across international borders and had studied and written articles
172 about drug distribution. Over the Government's objection, the Court permitted
173 the defense expert witness to testify regarding the modus operandi of drug
174 distributors provided that neither party would attempt to "elicit the expert's
175 opinions on the ultimate issue of defendant's knowledge." (Trial Tr. 499) Mr.
176 Stratton testified that when he was a drug distributor he "used blind mules
177 whenever [h]e had the opportunity," and explained their advantages. (Trial Tr.
178 567)

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

> 185 With the blind mule . . . the person's going to be unwitting, not
> 186 know that there's anything going on with the load. So in this case,
> 187 after reviewing the case, in my opinion the defendant realized,
> 188 especially with inconsistency in the [defendant's] statements, the
> 189 strong odor of gasoline, the fuel light and also masking agents to

190 keep it. Again, an organization wants it blind. They can't have
191 people know that there is a load or that there [are] narcotics in the
192 vehicle.
193
194 (Trial Tr. 589)

195 The defense rested at the end of the third day of trial. The following day,

196 after summations, the Court charged the jury. The jury deliberated for

197 approximately three and a half hours before sending a deadlock note, which the

198 Court explained as follows:

199 I have received a note, timed 3:36, from the foreperson of the jury,
200 and I have now given copies to both counsel. I have asked our clerk
201 to mark the note for identification as Court's Exhibit No. 1. The note
202 says, "Your Honor, we are hopelessly deadlocked. Help."
203
204 As both counsel know, the jury's been out since approximately 12
205 P.M., and at this point in time my plan is to bring them back in and
206 informally ask them to go back in and continue their deliberations
207 with an eye toward whether they can reach a verdict.
208
209 . . . .
210
211 I'm not at the point right at this moment where I think that I have to
212 give the Allen charge. . . . [M]y plan is to bring [the jury] in,
213 acknowledge that they have been at it for a few hours, but to tell
214 them that for both sides this is a very important matter and to ask
215 them to continue their deliberations.
216

217 (Trial Tr. 681) There were no objections. The Judge then called the jury back into

218 the courtroom, but did more than simply ask the jury to continue to deliberate.

219 The Court instructed the jury as follows:

220 Members of the jury, I'm going to ask you to return to the jury room
221 and deliberate further. I realize that you are having some difficulty
222 reaching a unanimous agreement, but that is not unusual. And
223 often after further discussions jurors are able to work out their
224 differences and agree.
225
226 It is your duty as jurors to consult with one another and to deliberate
227 with a view toward reaching an agreement, if you can do so without
228 violence to individual judgment. Each of you must decide the case
229 for yourself. But do so only after an impartial consideration of the
230 evidence in the case with your fellow jurors. In the course of your
231 deliberations, do not hesitate to re-examine your own views and
232 change your opinion if convinced it is erroneous but do not
233 surrender your honest conviction as to the weight or effect of
234 evidence solely because of the opinion of your fellow jurors or for
235 the mere purpose of returning a verdict.
236
237 Listen carefully to what the other jurors have to say and then decide
238 for yourself if the Government has proved the defendant guilty
239 beyond a reasonable doubt.
240
241 What I have just said is not meant to rush or pressure you into
242 agreeing on a verdict. Take as much time as you need to discuss
243 things. There is no hurry with this instruction, I will now return you
244 to the jury room. Thank you.
245

246 (Trial Tr. 682-83)

247 Although the Court had said that it was not going to give an Allen charge,
248 the supplemental charge that the Court gave had the hallmarks of what is
249 generally known as a modified Allen charge. See Allen v. United States, 164 U.S.
250 492 (1896); see also Spears v. Greiner, 459 F.3d 200, 204 n.3 (2d Cir. 2006). It
251 instructed the jurors to consult with each other, to deliberate with a view toward
252 reaching a verdict, and told them not to "hesitate to re-examine [their] own
253 views and change [their] opinion," but not to "surrender [their] honest
254 conviction." (Trial Tr. 682-83) Neither the Government nor the defense objected
255 to the supplemental charge.

256 Later that day, at approximately 5:00p.m., the Judge explained to counsel
257 that the jury would be dismissed and asked to return the following Monday at
258 9:30a.m. The Court said that it would not "give [the jury] a full Allen charge at
259 this time," but would ask them to come back on Monday to try to come to a
260 unanimous verdict." (Trial Tr. 684) At that point, defense counsel indicated that
261 he wanted to discuss another matter with the Court concerning a statement

262 made to him by an alternate juror about a conversation between jurors prior to

263 the beginning of their deliberations:

> 264 Judge, I just note that when I had gone outside last time I saw the
> 265 alternate, he talked to me and he said that some of the women on the
> 266 jury had said that [the defendant] might be guilty, she's here. And
> 267 he had said that didn't fly, in sum and substance of that. I mean,
> 268 obviously they shouldn't have – he obviously didn't give any
> 269 specifics or anything like that but [it] really does concern me that
> 270 there was some sort of discussion to that extent and, I mean, it
> 271 would be a dereliction of my duty if I didn't ask for a mistrial in
> 272 th[is] case.

273

274 (Trial Tr. 684-85) The Judge responded that the jury had been "continuously

275 advised that if there were any discussions prior to deliberations, that it should be

276 brought to [the Court's] attention immediately," and "no juror brought anything

277 like that to [the Court's] attention." (Trial Tr. 685) The Court continued, "I'm not

278 saying that the information that you're getting from the alternate isn't accurate.

279 I'm just saying that no juror brought anything like that to my attention." (Trial

280 Tr. 685) The Judge denied the motion for a mistrial and did not inquire further

281 into the comments that defense counsel had brought to the Court's attention.

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

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

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

> I believe that on Monday, after you've had a restful weekend and are given instructions by me, when you retire into the jury deliberation room and you give each other fair and full consideration, you will be able to arrive at a just verdict.
>
> Remember that you should not feel –- you should not feel any pressure of time in reaching your verdict. You should listen to each other's views and work as diligently as you can to arrive at a unanimous verdict. Rest assured that I will respond to your note Monday morning and then let you continue your deliberations.

(Trial Tr. 692) There was no objection.

On Monday, with the agreement of the parties, the Judge reviewed the verdict sheet with the jury and reread the charge on reasonable doubt, direct and circumstantial evidence, and certain charges relating to the absence of evidence. At approximately 10:00a.m., the Judge excused the jury to continue their deliberations. At approximately 2:30p.m., after about eight total hours of deliberations, the jury returned a unanimous verdict of guilty on both counts of the indictment.[1]

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[1] 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

319 On January 30, 2012, the defendant was sentenced principally to a term of
320 188 months imprisonment on each count to run concurrently. On February 13,
321 2012, the defendant filed a notice of appeal.
322
323 **DISCUSSION**

324 The defendant argues that her conviction should be vacated because of
325 numerous trial errors. In particular, the defendant raises the following grounds
326 for vacating her conviction: (i) denial of due process because she was tried in
327 shackles without a finding of necessity on the record; (ii) the Court's failure to
328 investigate alleged juror misconduct; (iii) an improper Allen charge; (iv)
329 evidentiary errors; and (v) ineffective assistance of counsel. We find that the
330 defendant was improperly tried in shackles, the Court did not fulfill its
331 obligation to investigate the allegation of juror misconduct, the Court gave an
332 improper Allen charge, and certain lay and expert testimony was erroneously
333 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.

334 during which the jury deliberated for approximately three and a half hours

335 before returning a deadlock note, and then deliberated for approximately

336 another five hours before returning a verdict of guilty on both counts. Under all

337 the circumstances of this case, the cumulative effect of these errors was to cast

338 serious doubt on whether the defendant was provided due process of law at her

339 trial. Accordingly, we vacate the defendant's conviction and remand for further

340 proceedings consistent with this opinion.

341

342 **I.**

343 **A.**

344 The defendant argues that her conviction should be vacated because she

345 was tried in shackles without a specific finding of necessity on the record by the

346 District Court Judge. It is beyond dispute that a defendant may not be tried in

347 shackles unless the trial judge finds on the record that it is necessary to use such

348 a restraint as a last resort to satisfy a compelling interest such as preserving the

349 safety of persons in the courtroom. "The law has long forbidden routine use of

350 visible shackles during the guilt phase; it permits a State to shackle a criminal

351 defendant only in the presence of a special need." Deck v. Missouri, 544 U.S. 622,

352 626 (2005). This rule of fundamental fairness is a basic element of the due

353 process of law protected by the Constitution. Id. at 629. As the Supreme Court

354 has emphasized:

> 355 [T]o contemplate such a technique, much less see it, arouses a feeling
> 356 that no person should be tried while shackled and gagged except as
> 357 a last resort. Not only is it possible that the sight of shackles and
> 358 gags might have a significant effect on the jury's feelings about the
> 359 defendant, but the use of this technique is itself something of an
> 360 affront to the very dignity and decorum of judicial proceedings that
> 361 the judge is seeking to uphold.

362

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

364 This Court has therefore held that a trial judge may order physical

365 restraints on a party only "when the court has found those restraints to be

366 necessary to maintain safety or security; but the court must impose no greater

367 restraints than are necessary, and it must take steps to minimize the prejudice

368 resulting from the presence of the restraints." Davidson v. Riley, 44 F.3d 1118,

369 1122-23 (2d Cir. 1995). A court may not delegate this discretion to another party,

370 including the Bureau of Prisons or the United States Marshals, because the court

371 must "consider all the evidence and ultimately make the decision [for itself]." Id.

372 at 1123 (quoting Lemons v. Skidmore, 985 F.2d 354, 358 (7th Cir. 1993)); see
373 Hameed v. Mann, 57 F.3d 217, 222 (2d Cir. 1995). A judge may receive evidence
374 if there is any factual dispute relevant to trying a defendant in physical restraints.
375 See Hameed, 57 F.3d at 222. However, the ultimate decision to impose any
376 physical restraints during trial must be made by the District Court judge alone
377 and must be made on the record. See id. Moreover, "[w]hen the trial judge
378 delegates a decision, and gives no reason for the decision, that is not an exercise
379 of discretion but an absence of and an abuse of discretion." Davidson, 44 F.3d at
380 1123 (quoting Lemons, 985 F.2d at 358)); see Hameed, 57 F.3d at 222.
381 In this case, there is no suggestion and certainly no finding on the record
382 why it was necessary to shackle the defendant, who had no prior criminal
383 history. There was no finding why the defendant was a threat to anyone or why
384 the presence of United States Deputy Marshals in the courtroom would not have
385 been sufficient to maintain the safety and security of all those present.
386 Accordingly, it was clear error and a violation of the defendant's constitutional
387 right to due process of law to have required the defendant to stand trial in
388 shackles without a specific finding of necessity on the record by the trial judge.

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

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

> [T]he judges [with the exception of one who could not be reached] reported a practice consistent with the practice described by the Marshals Service.
>
> The judges in this District take into account any security concerns raised by the Marshals Service that bear upon whether shackles ought to be used in a particular case. Armed with that information, the judges make an independent determination, on a case-by-case basis, whether the use of shackles is warranted. The judges also relayed that in the event shackles are used, every precaution is taken to ensure that those shackles are not visible to the jury. . . .
>
> One of the responding judges indicated that he informs the defendant of his decision and provides the defendant an opportunity to be heard. Other judges do not create a record of their determinations; a record would be created if the defendant raised an objection to the use of shackles.

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

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

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

445 The Government argues that there is no basis for reversal unless the
446 shackles had a substantial and injurious effect on the jury's verdict, and the
447 presence of the shackles could not have affected the jury's verdict unless the jury
448 actually saw them. See Williams v. Woodford, 306 F.3d 665, 689 (9th Cir. 2002),
449 abrogated on other grounds by Williams v. Woodford, 384 F.3d 567 (9th Cir.
450 2004); Moon v. Head, 285 F.3d 1301, 1307 (11th Cir. 2002). The record is silent as
451 to whether any of the jurors saw the shackles during the trial. Defense counsel
452 made some effort to avoid having the jurors see the shackles when the defendant
453 took the stand to testify, but then—for whatever reason—he drew attention to

454 the shackling in the course of his summation. The jury was thus well aware of

455 the shackling during their deliberations.

456 While we could remand this case for an evidentiary hearing to determine when

457 the jurors first became aware of the shackles, any such hearing would be time

458 consuming and burdensome for the jurors. Moreover, the trial court erred in

459 permitting the defendant to be tried in shackles without a finding on the record

460 that there was a compelling reason to do so that could not be achieved by less

461 onerous means. It is unnecessary to remand this case for a hearing as to the

462 necessity of trying the defendant in shackles and when the jurors became aware

463 of the shackles because, as explained below, the cumulative effect of all the errors

464 denied the defendant a fundamentally fair trial.[2] At any subsequent proceedings

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[2] 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

465 consistent with this opinion, the District Court should decide on the record

466 whether shackling the defendant is necessary as a last resort to satisfy a

467 compelling reason, such as the preservation of safety in the courtroom.

468

469 **B.**

470 The defendant argues that her conviction should be reversed because the

471 District Court failed to investigate the allegation of juror misconduct that defense

472 counsel brought to the Court's attention. Defense counsel moved for a mistrial

473 because he had heard from one of the alternate jurors that prior to deliberations

474 "some of the women on the jury had said that [the defendant] might be guilty,

475 [because] she's here." (Trial Tr. 684-85) The Court denied the motion for a

476 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.

477 regarding the jurors' alleged comments even though the Court conceded that it
478 was not disputing the accuracy of the alternate juror's account.
479 The alleged comments of the jurors as reported to defense counsel raise
480 two concerns: (i) that members of the jury were actually biased against the
481 defendant; and (ii) that the jury deliberated prematurely in violation of the
482 Judge's instructions not to deliberate until they had heard all the evidence and
483 were instructed on the law. It is well established that at minimum, "[d]ue
484 process means a jury capable and willing to decide the case solely on the
485 evidence before it, and a trial judge ever watchful to prevent prejudicial
486 occurrences and to determine the effect of such occurrences when they happen."
487 Smith v. Phillips, 455 U.S. 209, 217 (1982). Furthermore, "jurors must not engage
488 in discussions of a case before they have heard both the evidence and the court's
489 legal instructions and have begun formally deliberating as a collective body."
490 See United States v. Cox, 324 F.3d 77, 86 (2d Cir. 2003) (quoting United States v.
491 Resko, 3 F.3d 684, 688 (3d Cir. 1993)). Where the District Court instructs the jury
492 to refrain from premature deliberations, as the Court did in this case, and the
493 jury nevertheless discusses the case prior to the close of trial, that premature

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

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

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

511 disturbing the jury deliberations, the Court could have asked the alternate juror
512 what exactly was said and by whom, and then made a determination of what, if
513 any, further investigation was required. Only if the preliminary inquiry
514 produced a specific and credible reason to conduct further inquiries would it
515 have been necessary to pursue further measures. See id. at 133-36 (finding that
516 the examination and recusal of an "unbalanced" juror together with satisfactory
517 responses by the remaining jurors as to their impartiality was within the trial
518 court's discretion). The Court abused its discretion by failing to conduct any
519 inquiry to determine if the allegation of juror misconduct was true.
520
521 **C.**
522 The defendant argues that her conviction should be vacated because the
523 Court gave the jury an improper Allen charge. After approximately four hours
524 of deliberations, which resulted in a deadlock note and a modified Allen charge,
525 the jury returned a note seeking clarification of the charges and the instruction on
526 guilt beyond a reasonable doubt. The Court and the parties agreed to dismiss
527 the jury for the weekend and to respond to their questions on Monday morning.

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

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

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

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

546 and ask themselves whether their own views were reasonable under
547 the circumstances. The instructions in Allen included statements
548 directing that "the verdict must be the verdict of each individual
549 juror, and not a mere acquiescence in the conclusion of his fellows,"
550 and that it was the jury's duty "to decide the case if they could
551 conscientiously do so." These statements served to remind jurors in
552 the minority that a verdict was not required, and that no juror
553 should surrender the juror's conscientiously held views for the sake
554 of rendering a verdict.
555
556 Id. at 204-05.

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

562 In Spears, this Court accepted the parties' representations that the Judge
563 had given a modified Allen charge and applied the standard developed in
564 Lowenfield v. Phelps, 484 U.S. 231 (1988), to determine whether that charge was
565 coercive. Lowenfield requires the Court to evaluate "the potential coercive effect
566 of a charge to a deadlocked jury . . . in its context and under all the
567 circumstances." Spears, 459 F.3d at 205 (quoting Lowenfield, 484 U.S. at 237)

568 (internal quotation marks omitted); see United States v. Vargas-Cordon, No. 11-
569 5165, 2013 WL 4046274, at *7 (2d Cir. Aug. 12, 2013). This Court observed that
570 "when an Allen charge directs jurors to consider the views of other jurors,
571 specific cautionary language reminding jurors not to abandon their own
572 conscientious beliefs is generally required." Spears, 459 F.3d at 205; see Smalls v.
573 Batista, 191 F.3d 272, 279 (2d Cir. 1999) ("[A] necessary component of any Allen-
574 type charge requires the trial judge to admonish the jurors not to surrender their
575 own conscientiously held beliefs.").

576 Evaluating the charge in Spears in the circumstances and the context in
577 which it was given, this Court found that the modified Allen charge was not
578 coercive. "The charge asked the jurors to consider the facts 'with an attempt to
579 reach a verdict if that be possible,' and to continue deliberations 'with a view
580 toward arriving at a verdict if that's possible.'" Spears, 459 F.3d at 206.
581 Although the trial court had failed to include the admonition not to give up
582 conscientiously held beliefs, "the charge did not urge the jurors to listen to the
583 views of other jurors with whom they disagreed or attempt to persuade each
584 other," and "the original charge, given to the jury earlier that day, did include

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

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

602 could reasonably be perceived by the jurors as the Court communicating its

603 insistence on the jury reaching a unanimous verdict. See United States v.

604 Ruggiero, 928 F.2d 1289, 1299 (2d Cir. 1991) (finding that a repeated Allen charge

605 is not "inevitably" coercive and noting that both instructions included cautionary

606 language counseling jurors not to surrender conscientiously held views); see also

607 United States v. Barone, 114 F.3d 1284, 1305 (1st Cir. 1997) ("[C]aution needs to

608 be used before the modified Allen charge is given for a second time.").

609 The Allen charge at issue encouraged the jurors to exchange views with

610 one another, consider each other's views, and work diligently to reach a verdict,

611 but did not contain the admonition not to give up conscientiously held beliefs.

612 The charge did more than simply advise jurors to continue their deliberations.

613 Unlike the charge in Spears, the charge in this case did not suggest that failing to

614 reach a unanimous verdict was permissible. To the contrary, the Court stated

615 that it "believe[d]" that the jury would "arrive at a just verdict" on Monday.

616 (Trial Tr. 692)

617 A reasonable juror could view this instruction as lending the Court's

618 authority to the incorrect and coercive proposition that the only just result was a

619 verdict. However, a verdict is just only if it represents the conscientiously held
620 beliefs of all jurors. Under these circumstances, the Court should have given the
621 balancing, cautionary instruction that no juror should give up conscientiously
622 held beliefs. See Smalls, 191 F.3d at 278.
623 The failure to give such a cautionary instruction was coercive in these
624 circumstances although there are some factors that argue against concluding that
625 the modified Allen charge given at the end of the day was coercive under all the
626 circumstances: the previous Allen charge had included cautionary language;
627 defense counsel did not find the charge sufficiently coercive to object; and the
628 jury deliberated for about four and a half hours on the following Monday after
629 the weekend break before reaching a verdict. It is unnecessary to decide whether
630 these factors were sufficient to overcome the coercive aspects of the modified
631 Allen charge. The Court should have refrained from giving an unsolicited
632 modified Allen charge or, at the very least, should have included the balancing,
633 cautionary language. The defective charge can be considered in determining the
634 fairness of the trial, particularly given that the jurors expressed difficulty in
635 reaching a unanimous verdict.

636 **II.**

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

643

644 **A.**

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

653 fuel gauge must have been showing "empty" throughout the trip from Canada
654 and that the defendant was not being truthful when she explained that she only
655 saw the warning light shortly before reaching the border.

656 Federal Rule of Evidence 701 limits lay witness testimony to testimony that
657 is "(a) rationally based on the witness's perception; (b) helpful to clearly
658 understanding the witness's testimony or to determining a fact in issue; and (c)
659 not based on scientific, technical, or other specialized knowledge within the
660 scope of Rule 702." Fed. R. Evid. 701. Under Federal Rule of Evidence 701, "lay
661 opinion must be the product of reasoning processes familiar to the average
662 person in everyday life." United States v. Garcia, 413 F.3d 201, 215 (2d Cir. 2005).
663 This rule "prevent[s] a party from conflating expert and lay opinion testimony
664 thereby conferring an aura of expertise on a witness without satisfying the
665 reliability standard for expert testimony set forth in Rule 702 and the pre-trial
666 disclosure requirements set forth in Fed. R. Crim. P. 16 . . . ." Id.

667 The defendant argues that the testimony at issue was not rationally based
668 on Officer Rabideau's perceptions, but on expert or specialized knowledge. The
669 relevant portion of Officer Rabideau's testimony is as follows:

670 On the outside of this cylinder, there's a float and that's -– the float is
671 what shows that the gas level, so as the float goes down, the gas
672 level in the vehicle obviously goes down. So, when the drugs were
673 placed and the float was pushed to the bottom, drugs holding that to
674 the bottom would always read zero kilometers to empty. That
675 would always be on empty.
676
677 (Trial Tr. 287-88) Officer Rabideau also testified that he had not been to
678 "mechanic school," but had "looked in the gas tank prior to this," and that his
679 experience investigating other cars at the border served as a basis for his
680 knowledge of how the fuel tank functions. (Trial Tr. 309)
681 If the opinion of a witness "rests in any way upon scientific, technical, or
682 other specialized knowledge, its admissibility must be determined by reference
683 to Rule 702, not Rule 701" because "lay opinion must be the product of reasoning
684 processes familiar to the average person in everyday life." Garcia, 413 F.3d at
685 215 (internal quotation marks and citation omitted). Accordingly, this Court has
686 held that "the foundation requirements of Rule 701 do not permit a law
687 enforcement agent to testify to an opinion so based and formed if the agent's
688 reasoning process depended, in whole or in part, on [the agent's] specialized
689 training and experience." Id. at 216.

690 Officer Rabideau's testimony was improperly admitted over the
691 defendant's objection because his opinion was based on specialized training and
692 experience. Officer Rabideau did more than simply describe what he found in
693 the gas tank and what he perceived. He described how the float on the outside
694 of the gas tank worked and why the gas gauge would have registered zero to
695 empty while the drugs were in the gas tank. As the Government concedes, this
696 testimony was based on knowledge that Officer Rabideau acquired inspecting
697 other cars at the border. That he did not attend "mechanic school" does not
698 render his testimony admissible under Federal Rule of Evidence 701. Officer
699 Rabideau acquired his knowledge of how a fuel tank operates through his
700 experience as a border agent inspecting vehicles, not through the reasoning
701 processes of the average person. Therefore, the admission of this testimony was
702 error.
703
704 **B.**
705 The defendant argues that it was error to permit Agent Linstad to testify to
706 the ultimate issue of the defendant's knowledge of drugs in the car in violation of

707 Federal Rule of Evidence 704. Federal Rule of Evidence 704(b) provides: "In a
708 criminal case, an expert witness must not state an opinion about whether the
709 defendant did or did not have a mental state or condition that constitutes an
710 element of the crime charged or of a defense. Those matters are for the trier of
711 fact alone." Fed. R. Evid. 704(b). The defendant argues that the admission of
712 Agent Linstad's testimony that the defendant "realized" narcotics were in the
713 rental car was improper expert testimony on the ultimate issue of the defendant's
714 knowledge of whether there were drugs in the rental car, which was a critical
715 element of the charges against the defendant. (Trial Tr. 589)

716 It is well established that Rule 704(b) "disables even an expert from
717 expressly stating the final conclusion or inference as to a defendant's actual
718 mental state at the time of a crime." United States v. DiDomenico, 985 F.2d 1159,
719 1164 (2d Cir. 1993) (internal quotation marks and citations omitted). Such
720 testimony is prohibited because it "poses a uniquely heightened danger of
721 intruding on the jury's function." Id.; see id. at 1164-65 (collecting cases).

722 Agent Linstad's testimony regarding whether the defendant "realized"
723 that there were drugs in the car was erroneously admitted because it is expert

724 testimony about the defendant's state of mind. Indeed, whether the defendant
725 "realized" that there were drugs in the car was the key issue in this case.
726 Moreover, Agent Linstad used the opportunity to summarize some of the
727 Government's evidence as to why the defendant must have known that she was
728 transporting drugs, which included the defendant's inconsistent statements, the
729 strong odor of gasoline, the fuel light, and the presence of masking agents. The
730 Court had previously warned the parties that it would not permit such testimony
731 about the defendant's knowledge, but when it was actually introduced, the
732 Court erroneously failed to strike it. The admission of this testimony at trial was
733 plain error. See United States v. Dukagjini, 326 F.3d 45, 55 (2d Cir. 2002) (finding
734 error where a case agent certified as an expert "acted at times as a summary
735 prosecution witness[, with] the effect [of] . . . bolstering . . . the testimony" of
736 other witnesses and "impinging upon the exclusive function of the jury").
737
738 **III.**
739 The defendant argues that her conviction should be reversed because her
740 counsel provided constitutionally ineffective assistance at trial. To succeed on an

741 ineffective assistance of counsel claim, a defendant must demonstrate that
742 counsel's choices were not strategic because they "were outside the wide range
743 of professionally competent assistance," and "that there is a reasonable
744 probability that, but for counsel's unprofessional errors, the result of the
745 proceeding would have been different." Strickland v. Washington, 466 U.S. 668,
746 690, 694 (1984). However, a cold trial record usually "will not disclose the facts
747 necessary to decide either prong of the Strickland analysis." Massaro v. United
748 States, 538 U.S. 500, 505 (2003). Therefore, "in most cases a motion brought
749 under § 2255 is preferable to direct appeal for deciding claims of ineffective
750 assistance." Id. at 504.

751 When a defendant raises a claim of ineffective assistance of trial counsel,
752 this Court may (i) decline to hear the claim and permit the defendant to raise the
753 claim as part of a subsequent motion filed pursuant to 28 U.S.C. § 2555; (ii)
754 remand the claim to the District Court for fact-finding; or (iii) decide the claim
755 based on the record before it. United States v. Doe, 365 F.3d 150, 152 (2d Cir.
756 2004). In this case, it is unnecessary to reach the merits of the ineffective
757 assistance of counsel claim because the conviction must be vacated on other

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

IV.

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

774 Individually, these errors may not provide a basis for vacating the
775 defendant's conviction. However, when considered together, in the context of
776 this trial, these errors call into serious doubt whether the defendant received the
777 due process guarantee of fundamental fairness to which she and all criminal
778 defendants are entitled. See Taylor v. Kentucky, 436 U.S. 478, 487 n.15 (1978);
779 see, e.g., United States v. Al-Moayad, 545 F.3d 139, 178 (2d Cir. 2008); United
780 States v. Guglielmini, 384 F.2d 602, 607 (2d Cir. 1967). Therefore, we **VACATE**
781 the judgment of the District Court and **REMAND** for proceedings consistent
782 with this opinion.
783
784
785 **CONCLUSION**
786 We have considered all of the arguments of the parties. To the extent not
787 specifically addressed above, they are moot. For the reasons explained above,
788 we **VACATE** the judgment of the District Court and **REMAND** for proceedings
789 consistent with this opinion.