

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term, 2012

4 (Argued: June 20, 2013 Decided: August 12, 2013)

5 Docket No. 12-2010-cr

6 -----

7 UNITED STATES OF AMERICA,

8 Appellee,

9 - v -

10 ELIZABETH MORAN-TOALA,

11 Defendant-Appellant.

12 -----

13 Before: CALABRESI, CABRANES, and SACK, Circuit Judges.

14 Appeal from a May 10, 2012 judgment of the United
15 States District Court for the Eastern District of New York
16 (Frederic Block, Judge), after a jury trial, convicting
17 Elizabeth Moran-Toala of conspiracy to exceed authorized
18 access to a government computer in furtherance of a
19 narcotics conspiracy in violation of 18 U.S.C. §§ 371 and
20 1030(c)(2)(B)(ii). The jury acquitted her of narcotics
21 conspiracy charges, however, after the district court
22 instructed the jury in effect that it was permitted to
23 return inconsistent verdicts. We conclude that this

1 instruction was erroneous and that the error was not
2 harmless.

3 Vacated and remanded.

4 PATRICIA E. NOTOPOULOS (Jo Ann M.
5 Navickas, on the brief), Assistant
6 United States Attorneys, for Loretta
7 E. Lynch, United States Attorney for
8 the Eastern District of New York,
9 Brooklyn, NY, for Appellee.

10 FLORIAN MIEDEL, Law Office of
11 Florian Miedel, New York, NY, for
12 Defendant-Appellant.

13 SACK, Circuit Judge:

14 Although juries are supposed to render verdicts
15 that are consistent with one another, from time to time they
16 do not. When this happens, it is well established that a
17 criminal defendant cannot exploit any such inconsistency in
18 the jury's verdicts to secure a new trial. This appeal
19 presents not a direct challenge to inconsistent verdicts,
20 but instead a related question: whether the district court
21 erred when it instructed the jury in effect that it was
22 permissible to render inconsistent verdicts, and whether, in
23 light of that instruction, the jury verdicts and judgment
24 based thereon can stand.¹

¹ The government concedes (and we agree) that in light of the fact that the jury acquitted the defendant of one of the conspiracy charges, no matter how that acquittal was affected by the court's supplemental instruction, the judgment of acquittal on that charge cannot be appealed

1 **BACKGROUND**

2 From February 2003 to October 2007, Defendant
3 Moran-Toala was employed as a Federal Customs and Border
4 Patrol ("CBP") officer at Hollywood International Airport in
5 Fort Lauderdale, Florida. She worked in a "Passenger
6 Analytical Unit," which required her to review flight
7 manifests to identify airline passengers who were suspected
8 of involvement in criminal activity. In order to do so,
9 Moran-Toala cross-checked names in a database known as the
10 Treasury Enforcement Communications System ("TECS"), which
11 collects information from thousands of databases, including
12 those containing flight and travel information, border
13 crossings, reports of seizures of contraband, criminal
14 history information, outstanding warrants, and motor vehicle
15 records. CBP officers are prohibited from "browsing" the
16 TECS database for personal reasons or for information
17 otherwise unrelated to official business, and they must
18 complete various privacy awareness training courses in order
19 to understand these obligations.

because, under protections afforded to the defendant by the Double Jeopardy Clause of the Fifth Amendment, the charge could not in any event be pursued by the government on remand. See U.S. CONST. amd. V.

1 The Eastern District of New York Conspiracy

2 In 2005, Immigration and Customs Enforcement
3 agents began investigating a suspected narcotics conspiracy
4 involving Jorge Espinal, a Delta Airlines baggage handler at
5 New York's John F. Kennedy Airport. Law enforcement agents
6 obtained a judicially-authorized wiretap on Espinal's phone,
7 which disclosed that Espinal was working with a New York-
8 based narcotics distributor named Henry Polanco. Espinal
9 told Polanco that because he was a luggage-ramp supervisor,
10 he could intercept shipments of narcotics from Delta planes
11 arriving at the airport, and that such shipments would not
12 be screened on arrival by CBP agents. Polanco arranged for
13 a supplier in the Dominican Republic to hide packages
14 containing cocaine, heroin, and ecstasy on many Delta
15 flights that traveled directly from Santiago, in the
16 Dominican Republic, to New York. CBP agents ultimately
17 seized six of Polanco and Espinal's shipments, two of which
18 are pertinent to Moran-Toala's case.

19 First, Espinal and Polanco arranged for a backpack
20 containing heroin and cocaine to be stashed on a February
21 11, 2006 Delta flight from the Dominican Republic to New
22 York. CBP agents seized the backpack before Espinal could
23 retrieve it. Espinal did not immediately realize that the
24 shipment had been intercepted. He told Polanco, wrongly as

1 it turned out, that the bag had been placed on the
2 international baggage carousel, and then in unclaimed
3 baggage, but that he, Espinal, was trying to get it back.

4 The Dominican supplier became concerned about
5 Espinal's failure to retrieve the backpack, suspecting that
6 Espinal and Polanco had stolen the drugs. The supplier
7 demanded that Espinal and Polanco return the shipment or pay
8 him for the loss. To prove to the Dominican supplier that
9 they had not stolen the drugs, Espinal said that "his
10 girlfriend worked for the government and that she had access
11 to [seizure of contraband] information," so "he was going to
12 tell her to get the information of the seizure to prove
13 . . . that the seizure was real." Trial Transcript ("Trial
14 Tr.") at 248:17-249:5; Joint App'x at 329-30. On February
15 14, 2006, three days after the shipment went missing, Moran-
16 Toala used TECS to access the seizure report for the
17 backpack in question.

18 Second, as a result of a wiretap, law enforcement
19 agents knew that Espinal and Polanco had arranged for a
20 "mule"² named Henry Cabrera to carry a suitcase containing
21 narcotics on an August 24, 2007 Delta flight from the

² "In the quaint jargon of the narcotic trade, individuals who smuggle narcotics on their persons are known as 'mules.'" United States v. Vivero, 413 F.2d 971, 972 n.1 (2d Cir. 1969) (per curiam).

1 Dominican Republic to JFK Airport. The agents planned to
2 arrest Cabrera as he exited the plane. While they were
3 waiting for the flight to arrive, they saw Espinal attempt
4 to enter a sterile area, apparently to meet Cabrera and take
5 the suitcase before Cabrera reached customs screening.
6 Espinal reported to Polanco that the heavy law enforcement
7 presence prevented him from meeting Cabrera and that he did
8 not know what happened to the suitcase, but Polanco
9 suspected that Espinal had stolen the drugs. Again, Espinal
10 said that he would contact his girlfriend to confirm that
11 Cabrera had been arrested as he deplaned, as proof that the
12 drugs were seized by law enforcement, and not stolen.

13 On August 29, 2007, Moran-Toala again used TECS to
14 access Cabrera's arrest report. According to her telephone
15 records, on the morning of August 30, 2007, Moran-Toala
16 placed a telephone call to the phone located at Espinal's
17 work station at JFK Airport.

18 In addition, Espinal had an associate named Victor
19 Perez who smuggled money to the Dominican Republic at
20 Espinal's behest. Perez was planning to fly to the
21 Dominican Republic for that purpose, but was afraid that
22 there might be an unrelated outstanding warrant for his
23 arrest issued as a result of his failure to pay child
24 support, which might pose a problem for him during reentry

1 into the United States. On or about August 29, 2007,
2 Espinal told Perez that he had a "lady friend" who could
3 check to see whether Perez had any outstanding warrants.
4 Trial Tr. at 486:18; Joint App'x at 566. Perez gave Espinal
5 his date of birth and social security number. On September
6 1, 2007, Moran-Toala conducted a TECS search using Perez's
7 personal information. The search did not unearth any
8 outstanding warrants or criminal history information.
9 Moran-Toala's phone records reflect two outgoing calls to
10 Espinal on that day. A few days later, Espinal told Perez
11 that it was safe for him to travel.

12 Moran-Toala was indicted in the United States
13 District Court for the Eastern District of New York on
14 February 19, 2008, in connection with these events. In a
15 superseding indictment filed on April 2, 2009, she was
16 charged, in Count One, with conspiracy to import more than
17 one kilogram of heroin and more than five kilograms of
18 cocaine, in violation of 21 U.S.C. §§ 960, 963; and, in
19 Count Two, with conspiracy to use a government computer
20 unlawfully, in violation of 18 U.S.C. §§ 1030(a)(2)(B),
21 1030(c)(2)(B)(ii). Unlawful use of a computer is a
22 misdemeanor offense, but is subject to a felony enhancement
23 if "the offense was committed in furtherance of any criminal

1 or tortious act in violation of the Constitution or laws of
2 the United States." 18 U.S.C. § 1030(c)(2)(B)(ii).

3 The Southern District of Florida Conspiracy

4 While the New York conspiracy case was pending,
5 Moran-Toala was indicted in the Southern District of Florida
6 for her alleged involvement in a separate heroin importation
7 and distribution conspiracy with her sister and brother-in-
8 law, officers of the CBP and Transportation Security
9 Administration, respectively. On April 16, 2010, she
10 pleaded guilty to the Florida narcotics conspiracy charges.
11 In her signed, written plea allocution, Moran-Toala admitted
12 that she used the TECS system to run travel checks for drug
13 couriers flying out of Fort Lauderdale to help ensure safe
14 delivery of the drugs. She also admitted that when a
15 shipment of narcotics was seized in April 2007, she used
16 TECS to access the seizure report to prove to her supplier
17 that the product was seized and not stolen. Moran-Toala was
18 sentenced to a term of 120 months' imprisonment for the
19 Florida conspiracy.

20 Trial in the Eastern District of New York

21 Back in the Eastern District of New York, on June
22 21, 2011, Moran-Toala proceeded to trial before a jury on
23 both counts of the superseding indictment. She admitted to
24 misusing her CBP computer, but asserted that she did so with

1 no knowledge of Espinal and Polanco's criminal purpose, let
2 alone any intent to further it.

3 Rule 404(b) Evidence

4 During trial, the government moved under Rule
5 404(b) of the Federal Rules of Evidence to admit Moran-
6 Toala's Florida plea allocution as evidence of her knowledge
7 of the New York narcotics conspiracy. Although the defense
8 conceded that the plea allocution fell within the ambit of
9 Rule 404(b), it objected to the admission of this evidence
10 on Rule 403³ prejudice grounds. The district court
11 initially hesitated, noting that if the plea allocution came
12 in, "[i]t wouldn't take more than ten seconds [for the jury]
13 to find her guilty." Trial Tr. at 293:9-10; Joint App'x at
14 374. Ultimately, however, the district court decided to
15 allow the evidence to be admitted, noting that "knowledge
16 and scheme and intent [are] very much at play." Trial Tr.
17 at 515:24; Joint App'x at 595. Over the defense's objection

³ Federal Rule of Evidence 403 provides: "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." (emphasis added).

1 and after heavy editing by the court, the government was
2 allowed to present the following stipulation to the jury:

3 [I]t is agreed among the parties that as
4 part of the statement under oath during a
5 guilty plea in a different case on April
6 16th, 2010, before the Honorable James I.
7 Cohen, United States District Judge,
8 Southern District of Florida, the
9 defendant admitted the following.

10 In furtherance of a drug conspiracy that
11 began in approximately June 2006, between
12 herself, her sister Cindy Moran, and a
13 third individual, [a defendant in the
14 Florida case,] Elizabeth Moran-Toala
15 misused her work computer and ran the
16 names of people she knew entering the
17 United States from the Dominican Republic
18 carrying narcotics. Elizabeth Moran-
19 Toala scrolled down the manifest in order
20 to avoid detection, rather than simply
21 entering the courier's name.

22 [T]he purpose of those inquiries [was] to
23 ensure the couriers . . . would not
24 encounter[] any difficult[ies] at
25 Customs[.] [F]or her part in this
26 conspiracy, Elizabeth Moran-Toala was
27 paid \$10,000.

28 Trial Tr. at 534:13-535:4; Joint App'x at 614-15. When the
29 prosecutor had finished reading the stipulation into the
30 record, the district court immediately gave the jury a
31 strongly worded limiting instruction, emphasizing that they
32 could consider the stipulation only for the purpose of
33 determining whether Moran-Toala knew that she was misusing
34 the computer to further a crime -- the narcotics conspiracy

-- and not as evidence that she has a "propensity to commit crimes." Trial Tr. at 535:16; Joint App'x at 615.

The Jury Charge and Verdict Sheet

In its charge as to the law with respect to the felony enhancement for the unlawful computer use conspiracy, the district court instructed the jury:

If you determine, in respect to count two [conspiracy to exceed authorized computer access], that the defendant is guilty of that count, you must determine whether the government has proved beyond a reasonable doubt that Section [1030(a)(2)(B)(ii)] -- that the offense in that section was committed in furtherance of a criminal act in violation of the Constitution and laws of the United States; namely, the conspiracy to import narcotics as charged in count one. It's linked to count one if you find she is guilty.

The phrase in furtherance means with the intent to help, advance, move forward, promote or facilitate. The government must therefore show that the defendant engaged in the conduct of accessing the United States Department of Homeland Security computer in excess of authorization, with the intent to advance, move forward, promote or facilitate the conspiracy charged in count [one] about which I've already instructed you.

Trial Tr. at 665:10-25; Joint App'x at 745. Neither party objected to this instruction.

The district court provided the jury with a verdict sheet containing various questions. Question 1

1 asked the jury to report its verdict on Count One, the
2 narcotics conspiracy count. Question 2 asked the jury to
3 find the amounts of heroin and cocaine involved in the
4 narcotics conspiracy, if any. Question 3 asked the jury to
5 report its verdict on Count Two, for conspiracy to exceed
6 authorized computer access. Question 4 asked, "Was the
7 [unlawful computer use] conspiracy in furtherance of the
8 crime charged in Count One, namely, the conspiracy to import
9 a controlled substance?" If the jury answered Question 4
10 affirmatively, Moran-Toala would be subject to a felony
11 enhancement on Count Two, for conspiring to unlawfully use a
12 computer.

13 Jury Deliberations

14 At approximately 4:15 p.m. on June 28, 2011, the
15 first full day of deliberations, the jury sent back a note
16 asking "Count 2: must the verdict in #4 be in agreement with
17 Count #1?" Jury Note, June 28, 2011; Joint App'x at 799.
18 In other words, the jury was asking whether the findings on
19 which it based its response to Question 4 on the verdict
20 sheet (i.e., did Moran-Toala participate in a conspiracy to
21 unlawfully use a computer in furtherance of the crime
22 charged in Count One, conspiracy to import a controlled
23 substance) had to be consistent with its verdict on Count
24 One itself. The district court shared the contents of the

1 note with counsel and solicited their respective views. The
2 government argued that the answer should be "no." In the
3 government's view, Moran-Toala could have intended to exceed
4 her authorized computer access in furtherance of the
5 narcotics conspiracy without agreeing to join it or without
6 having enough knowledge of the narcotics conspiracy to be
7 deemed a member. Defense counsel urged the district court
8 to answer the jury's question affirmatively, foreclosing any
9 possibility of inconsistent verdicts.

10 Although the district court's "gut feeling" was to
11 agree with the defense that the verdicts must be consistent,
12 Trial Tr. at 697:20; Joint App'x at 777, the court
13 ultimately told the jury that its verdict on the narcotics
14 conspiracy and the felony enhancement did not have to be "in
15 agreement," Trial Tr. at 700:3-4; Joint App'x at 780. The
16 court explained its change of heart as a reluctance "to
17 charge the government out of court." Trial Tr. at 700:16-
18 17; Joint App'x at 780.

19 Approximately twenty minutes after the district
20 court responded to the jury's note, at 5:02 p.m., the jury
21 returned its verdict. Consistent with the district court's
22 supplemental instruction, the jury acquitted Moran-Toala of
23 the narcotics conspiracy, but convicted her of conspiring to

1 unlawfully access a computer in furtherance of the same
2 narcotics conspiracy.

3 Rule 33 Motion

4 Following trial, Moran-Toala moved to set aside
5 the jury's findings with respect to the felony enhancement
6 pursuant to Rule 33 of the Federal Rules of Criminal
7 Procedure. In a memorandum and order dated March 8, 2012,
8 the district court denied Moran-Toala's Rule 33 motion. The
9 court began by noting:

10 While there may be scenarios in which an
11 individual can act in furtherance of a
12 conspiracy without joining the
13 conspiracy, there is no view of the
14 evidence in this particular case that
15 would permit that conclusion. The
16 government's theory at trial was that
17 Moran-Toala would, at a co-conspirator's
18 request, periodically access confidential
19 information regarding narcotics seizures
20 and other information and pass it on to
21 the coconspirator. . . . By finding that
22 Moran-Toala committed the conspiracy
23 computer offense "in furtherance of the
24 crime charged in Count one," the jury
25 necessarily determined that she had
26 agreed with another -- her co-conspirator
27 on the computer charge -- to commit the
28 crime; that she had intentionally
29 advanced the narcotics conspiracy; and
30 that she had committed an overt act in
31 furtherance of the conspiracy. Put
32 simply, Moran-Toala could not have
33 intentionally misused her computer to
34 advance a narcotics conspiracy without
35 being a member of that conspiracy. Thus,
36 when the jury asked whether the special
37 verdict on the [felony] enhancement
38 needed to be "in agreement" with its

1 verdict on count one, it was effectively
2 asking whether the verdict had to be
3 consistent.

4 United States v. Moran-Toala, No. 08 Cr. 103, 2012 WL
5 748612, at *3, 2012 U.S. Dist. LEXIS 30893, at *7-*8
6 (E.D.N.Y. Mar. 8, 2012) (footnote omitted). Nevertheless,
7 the district court rejected the Rule 33 motion because "even
8 assuming that the Court erroneously sanctioned an
9 inconsistent verdict, that error would not alter the general
10 rule that such verdicts are unreviewable." Id., 2012 WL
11 748612, at *4, 2012 U.S. Dist. LEXIS 30893, at *9.

12 On May 4, 2012, the district court sentenced
13 Moran-Toala, principally, to a term of 12 months'
14 imprisonment, to run concurrently with the 10-year sentence
15 she is serving for the Florida narcotics conspiracy
16 conviction. Moran-Toala now challenges the supplemental
17 instruction regarding the jury's power to render
18 inconsistent verdicts, as well as the admission of the
19 Florida plea allocution, seeking a new trial on the unlawful
20 computer access conspiracy charge.

21 **DISCUSSION**

22 We note at the outset that because the jury,
23 rightly or wrongly, consistently or inconsistently,
24 acquitted the defendant on Count One, the narcotics
25 conspiracy count, the Double Jeopardy Clause bars any

1 retrial of the defendant for that offense. See Evans v.
2 Michigan, -- U.S. --, 133 S. Ct. 1069, 1074 (2013) ("It has
3 been half a century since we first recognized that the
4 Double Jeopardy Clause bars retrial following a court-
5 decreed acquittal"). This appeal is therefore
6 limited to the defendant's conviction on Count Two: the
7 misdemeanor conspiracy to exceed authorized computer access
8 count, and its accompanying felony enhancement, which
9 applies only if the unlawful computer-use conspiracy was
10 committed in furtherance of the narcotics conspiracy charged
11 in Count One.

12 **I. The Supplemental Jury Instruction**

13 As we previously noted, whether the jury rendered
14 inconsistent verdicts is not, in and of itself, the basis
15 for this appeal. On the face of it, it does seem hopeless
16 to try to reconcile the jury's acquittal as to the
17 defendant's participation in the Espinal-Polanco narcotics
18 conspiracy charged in Count One with the jury's conviction
19 as to Count Two, the defendant's participation in a
20 conspiracy to access TECS with the intent to further the
21 Espinal-Polanco narcotics conspiracy.⁴ But Moran-Toala does

⁴ By ultimately convicting Moran-Toala of the unlawful computer access conspiracy, the jury determined that: she agreed with Espinal to gain access to TECS, she committed an overt act in furtherance of the conspiracy, and she did so

1 not directly challenge, nor could we review, the verdict for
2 inconsistency. It has long been the law that "[c]onsistency
3 in the verdict is not necessary." Dunn v. United States,
4 284 U.S. 390, 393 (1932). "[T]he jury, though presumed to
5 follow the instructions of the trial court, may make its
6 ultimate decisions 'for impermissible reasons,' such as
7 'mistake, compromise, or lenity.'" United States v. Acosta,
8 17 F.3d 538, 545 (2d Cir. 1994) (quoting United States v.
9 Powell, 469 U.S. 57, 63, 65 (1984)). Inconsistent verdicts
10 are unreviewable on appeal, even though "'error,' in the
11 sense that the jury has not followed the court's
12 instructions, most certainly has occurred," because "the
13 possibility that the inconsistent verdicts may favor the
14 criminal defendant as well as the Government militates
15 against review of such convictions at the defendant's
16 behest." Powell, 469 U.S. at 65.

17 But it does not follow from judicial inability to
18 disturb inconsistent verdicts after the fact that the
19 district court may sanction potentially inconsistent
20 verdicts ex ante. It is on that basis that Moran-Toala

with the intent to advance the narcotics conspiracy. It is difficult to see how these findings would not compel the jury also to find that Moran-Toala agreed with Espinal to import narcotics and that she misused used her CBP computer to further that narcotics conspiracy.

1 challenges the supplemental jury instruction: the court's
2 single-word answer "No" to the note from the jury, which,
3 she argues, wrongly gave the jury explicit permission to
4 return inconsistent verdicts, at its discretion.

5 A. The District Court's Supplemental Jury
6 Instruction was Erroneous

7 "A jury instruction is erroneous if it misleads
8 the jury as to the correct legal standard or does not
9 adequately inform the jury on the law." United States v. Al
10 Kassar, 660 F.3d 108, 126 (2d Cir. 2011) (alterations and
11 internal quotation marks omitted). Here, the court
12 initially explained to the jury that its verdict on the
13 narcotics conspiracy count should be "linked" to its
14 findings with respect to the felony enhancement because
15 Moran-Toala could be subject to the felony enhancement only
16 if the government proved that she unlawfully used her CBP
17 computer with the intent to further the narcotics
18 conspiracy. This instruction reflected the considerable
19 overlap in the legal elements of the two conspiracy charges,
20 and the facts applicable to each. The jury clearly
21 recognized the tension between a potential verdict
22 acquitting Moran-Toala of participating in a narcotics
23 conspiracy while finding that she agreed with another to
24 misuse her CBP computer with the intent to further that

1 narcotics conspiracy, or vice versa. We can think of no
2 other coherent reason for the jury to send a note seeking
3 judicial guidance, a note that we understand to be
4 tantamount to a request for permission to unlink its
5 verdicts by ignoring the intent requirement in the felony
6 enhancement charge or by disregarding the majority of the
7 narcotics conspiracy charge. The district court, in
8 response, blessed the jury's clear desire to render verdicts
9 it considered inconsistent, or not "in agreement," with the
10 law and the evidence.

11 Inconsistent verdicts are often characterized as a
12 form of jury nullification. "Nullification is, by
13 definition, a violation of a juror's oath to apply the law
14 as instructed by the court -- in the words of the standard
15 oath administered to jurors in the federal courts, to render
16 a true verdict according to the law and the evidence."
17 United States v. Thomas, 116 F.3d 606, 614 (2d Cir. 1997)
18 (internal quotation marks omitted; emphasis in original).
19 The case before us does not arise from jury nullification --
20 the jury followed the court's instruction that an
21 inconsistent verdict was permissible. The jury's act would
22 have been one of nullification had the district court
23 answered "yes" to the jury's question as to whether
24 inconsistent verdicts were prohibited and the jury

1 nevertheless returned the same verdict. But irrespective of
2 the jury's ultimate decision, the supplemental instruction
3 cleared the way for the jury to return verdicts the jurors
4 themselves could not reconcile in light of the court's
5 charge of law and the evidence presented.

6 In Thomas, "[w]e categorically reject[ed] the idea
7 that, in a society committed to the rule of law, jury
8 nullification is desirable or that courts may permit it to
9 occur when it is within their authority to prevent." Id. at
10 614. It plainly follows, as we have concluded, that there
11 is no error in a district court's refusal to give a jury a
12 charge that informs them of their right or ability to
13 nullify. See United States v. Edwards, 101 F.3d 17, 19 (2d
14 Cir. 1996) (per curiam). Nor have we faulted a district
15 court for instructing a jury that it has a "duty" to convict
16 if the government proves a defendant's guilt beyond a
17 reasonable doubt. United States v. Carr, 424 F.3d 213, 219-
18 20 (2d Cir. 2005) ("Nothing in our case law begins to
19 suggest that the court cannot also tell the jury
20 affirmatively that it has a duty to follow the law, even
21 though it may in fact have the power not to."). Thus "the
22 power of juries to 'nullify' or exercise a power of lenity
23 is just that -- a power; it is by no means a right."
24 Thomas, 116 F.3d at 615.

1 We conclude that, in its very brief and
2 extemporaneous late-afternoon response to the jury's
3 question regarding a possible inconsistent verdict on the
4 narcotics conspiracy count and the felony enhancement, the
5 district court was effectively inviting them so to rule,
6 contrary to law. Such an "explicit instruction . . .
7 conveys an implied approval that runs the risk of degrading
8 the legal structure" United States v. Dougherty,
9 473 F.2d 1113, 1137 (D.C. Cir. 1972). Thus, the district
10 court's instruction misled the jury as to its duty to follow
11 the law.

12 B. Nature of the Error

13 1. Structural Error. "The Supreme Court has
14 distinguished two kinds of errors that can occur at, or in
15 relation to, a criminal proceeding: so-called 'trial
16 errors,' which are of relatively limited scope and which are
17 subject to harmless error review, and 'structural defects,'
18 which require reversal of an appealed conviction because
19 they 'affect[] the framework within which the trial
20 proceeds.'" United States v. Feliciano, 223 F.3d 102, 111
21 (2d Cir. 2000) (quoting Arizona v. Fulminante, 499 U.S. 279,
22 307-10 (1991)). "Errors are properly categorized as
23 structural only if they so fundamentally undermine the
24 fairness or the validity of the trial that they require

voiding its result regardless of identifiable prejudice."
Yarborough v. Keane, 101 F.3d 894, 897 (2d Cir. 1996).

Courts have recognized a limited number of structural errors, all involving the violation of bedrock constitutional rights, such as total deprivation of the right to counsel, see Gideon v. Wainwright, 372 U.S. 335 (1963); United States v. Triumph Capital Grp., Inc., 487 F.3d 124, 131 (2d Cir. 2007); exclusion of jurors on the basis of race, see Vasquez v. Hillery, 474 U.S. 254 (1986); Tankleff v. Senkowski, 135 F.3d 235, 240 (2d Cir. 1998); and improper closure of a courtroom to the public, see Waller v. Georgia, 467 U.S. 39 (1984); United States v. Gupta, 699 F.3d 682, 688 (2d Cir. 2012).

The category of recognized structural errors with regard to jury instructions is even more limited. Thus, as a general proposition, "harmless-error analysis applies to instructional errors so long as the error at issue does not categorically 'vitiate all the jury's findings.'" Hedgpeth v. Pulido, 555 U.S. 57, 61 (2008) (quoting Neder v. United States, 527 U.S. 1, 11 (1999) (alteration omitted) (emphasis in original)).

The instructional error here does not cross that threshold, nor does it implicate the overall fundamental fairness of Moran-Toala's otherwise well-trying case. In the

1 event of inconsistent verdicts, to the extent they occurred
2 in this case, "[t]he most that can be said . . . is that the
3 verdict shows that either in the acquittal [on Count One] or
4 the conviction [on Count Two] the jury did not speak their
5 real conclusions, but that does not show that they were not
6 convinced of the defendant's guilt." Powell, 469 U.S. at
7 64-65 (internal quotation marks omitted). An instruction
8 permitting inconsistent verdicts calls into doubt only one
9 of the jury's verdicts -- which one we cannot say -- but not
10 both. Because the supplemental instruction did not infect
11 all of the jury's findings, we employ harmless error review.
12 Cf. United States v. Bunchan, 626 F.3d 29, 33-34 & n.2 (1st
13 Cir. 2010) (reviewing for plain error defendant's
14 unpreserved challenge to instruction that jurors "don't have
15 to follow my instructions anymore [W]e close the
16 door, and we can't tell whether or not you're doing what we
17 ask you to do," and declining to reach the question of
18 structural error).

19 2. Harmless Error. Since the error in the charge
20 was not structural, we are required to review it for
21 harmlessness. "We review a district court's jury
22 instructions de novo, reversing only where appellant can
23 show that, viewing the charge as a whole, there was a
24 prejudicial error." Carr, 424 F.3d at 218 (citations and

1 internal quotation marks omitted). "An erroneous
2 instruction, unless harmless, requires a new trial." Id.
3 (internal quotation marks omitted). Instructional error is
4 harmless only if it is "clear beyond a reasonable doubt that
5 a rational jury would have found the defendant guilty absent
6 the error." Neder, 527 U.S. at 18.

7 Harmless error review in this case is complicated
8 by the factual, if not legal, inconsistency in the jury's
9 verdicts. The very reason such verdicts are unreviewable in
10 and of themselves is because we could do no more than "try
11 to guess which of the inconsistent verdicts is the one the
12 jury really meant." Acosta, 17 F.3d at 545 (internal
13 quotation marks omitted). We might speculate as to what the
14 jury actually had in mind in order to seek to reconcile the
15 two verdicts: perhaps the jury found that Moran-Toala had
16 insufficient knowledge of the narcotics conspiracy to
17 support a conviction on Count One, in which case a properly
18 instructed jury likely would have also rejected the felony
19 enhancement. Or the jury might have found that Moran-
20 Toala's intent to further the narcotics conspiracy by
21 misusing her CBP computer also proved her membership in the
22 narcotics conspiracy, but it did not wish to convict on such
23 a serious charge without evidence that she personally
24 imported or sold drugs; in that case, a properly instructed

1 jury likely would have applied the felony enhancement. The
2 problem with either speculation, though, beyond the fact
3 that they are speculations, is that they do not account for
4 the jury's query: "Count 2: must the verdict in #4 be in
5 agreement with Count #1?" This note strongly suggests that
6 the jury itself could not reconcile the verdicts on the two
7 counts and was seeking (and obtained) permission to render
8 its contemplated verdicts despite the inconsistency.

9 There is thus no serious doubt that the erroneous
10 instruction contributed to any inconsistency in the verdicts
11 inasmuch as it explicitly permitted them.⁵ We are not
12 unaware of the fact that the district court's instruction
13 ultimately resulted in a highly favorable verdict for Moran-
14 Toala, who was convicted of the less serious charge and
15 acquitted of the more serious one. But, in light of the
16 dearth of evidence of Moran-Toala's knowledge of the
17 Espinal-Polanco airport conspiracy, it is nevertheless
18 possible that a jury would have acquitted her of the
19 narcotics conspiracy and declined to apply the felony
20 enhancement had the supplemental instruction been correct

⁵ Of course, the jury instruction also permitted the jury to return a verdict convicting Moran-Toala on the narcotics conspiracy charge, but declining to elevate the unlawful computer access conspiracy conviction from a misdemeanor to a felony. That the jury chose otherwise is to Moran-Taola's substantial benefit.

1 and informed the jury that inconsistent verdicts are
2 impermissible. We therefore cannot say with any confidence
3 that it is clear beyond a reasonable doubt that a properly
4 instructed jury would have convicted Moran-Toala of felony-
5 level unlawful computer access conspiracy. Accordingly, the
6 conviction on Count Two must be vacated and the case
7 remanded to the district court for retrial, should the
8 government be inclined to pursue the charge.

9 **II. Rule 404(b) Evidence**

10 Although unnecessary to the disposition of this
11 appeal, we nevertheless address the question of the
12 propriety of the district court's admission of Moran-Toala's
13 Florida plea allocution under Rule 404(b). We do so in
14 light of the fact that the issue has been fully briefed and
15 argued, and for the benefit of the district court should the
16 unlawful computer access conspiracy charge be retried on
17 remand.

18 Rule 404(b)(1) of the Federal Rules of Evidence
19 provides that "[e]vidence of a crime, wrong, or other act is
20 not admissible to prove a person's character in order to
21 show that on a particular occasion the person acted in
22 accordance with the character." Prior crime evidence may,
23 however, be admissible "for another purpose, such as proving
24 motive, opportunity, intent, preparation, plan, knowledge,

1 identity, absence of mistake, or lack of accident." Fed. R.
2 Evid. 404(b)(2). This Circuit "follows the 'inclusionary'
3 approach, which admits all 'other act' evidence that does
4 not serve the sole purpose of showing the defendant's bad
5 character and that is neither overly prejudicial under Rule
6 403 nor irrelevant under Rule 402." United States v.
7 Curley, 639 F.3d 50, 56 (2d Cir. 2011) (citation omitted).

8 We review the district court's evidentiary ruling
9 for abuse of discretion. United States v. McCallum, 584
10 F.3d 471, 474 (2d Cir. 2009). Factors relevant to our
11 review include whether: "(1) the prior crimes evidence was
12 'offered for a proper purpose'; (2) the evidence was
13 relevant to a disputed issue; (3) the probative value of the
14 evidence was substantially outweighed by its potential for
15 unfair prejudice pursuant to Rule 403; and (4) the court
16 administered an appropriate limiting instruction." Id. at
17 475 (quoting Huddleston v. United States, 485 U.S. 681, 691-
18 92 (1988)).

19 It is undisputed that the Florida plea allocution
20 was offered to show Moran-Toala's knowledge that her TECS
21 searches furthered the JFK Airport narcotics conspiracy --
22 both a proper purpose under the Rule and a highly disputed
23 issue at trial. Instead, Moran-Toala objects that no jury
24 could neutrally determine that she conducted inappropriate

1 TECS searches, but not in furtherance of a narcotics
2 conspiracy, once it found out that she had done just that in
3 another narcotics conspiracy in Florida.

4 The Florida plea allocution was both highly
5 probative of Moran-Toala's knowledge of the New York
6 conspiracy and highly prejudicial, as the Florida conviction
7 is nearly identical to the New York charges. The court
8 recognized both the probative value of the proffered
9 evidence and the real problem of prejudice. The district
10 court initially reserved judgment on the government's Rule
11 404(b) motion, waiting first to review the other evidence
12 that was introduced at trial. It was only after weighing
13 the probative value of the plea allocution, by noting that
14 the issue of Moran-Toala's knowledge was "very much at
15 play," and limiting its prejudicial effect, by pruning the
16 government's proffered evidence to a focused and brief
17 stipulation, that the court allowed the government to inform
18 the jury about the Florida conviction. This reflects the
19 proper balancing process required under Rule 403, with the
20 district court engaging in a serious effort to minimize the
21 prejudicial effect of the Florida conviction on the jury.
22 Cf. id. at 477 (district court abused its discretion in
23 admitting evidence of prior conviction under Rule 404(b)
24 without conducting any Rule 403 balancing at all). "Only

1 rarely -- and in extraordinarily compelling circumstances --
2 will we, from the vista of a cold appellate record, reverse
3 a district court's on-the-spot judgment concerning the
4 relative weighing of probative value and unfair effect."
5 United States v. Awadallah, 436 F.3d 125, 134 (2d Cir. 2006)
6 (internal quotation marks omitted). This not such an
7 extraordinary case, and we find no abuse of discretion in
8 the district court's evidentiary ruling.

9 **CONCLUSION**

10 The judgment of conviction is vacated, and the
11 case is remanded to the district court for further
12 proceedings.