

# Judge's Faulty Instruction on Inconsistent Verdicts Dooms Guilty Verdict

BY MARK HAMBLETT

A JUDGE'S INSTRUCTION to a jury that it was allowed to return inconsistent verdicts has led a federal appeals court to throw out the guilty verdict of a woman for using her position with Customs and Border Control to tip off drug dealers.

While it is well established that defendants cannot challenge their convictions based on inconsistent jury verdicts, the U.S. Court of Appeals for the Second Circuit said in *United States v. Moran-Toala*, 12-2010-cr, that judges can't encourage the practice.

The circuit vacated the conviction of Elizabeth Moran-Toala for conspiracy to exceed authorized access to a government computer in furtherance of a narcotics conspiracy in violation of 18 U.S.C. §§371 and 1030(c)(2)(B)(ii).

Moran-Toala was acquitted of narcotics conspiracy charges in 2011 after Eastern District Judge Frederic Block told the jury it could return an inconsistent verdict. But a circuit panel of judges Guido Calabresi, Jose Cabranes and Robert Sack said the instruc-

tion "mised the jury as to its duty to follow the law."

Moran-Toala worked from 2003 to 2007 in the "passenger analytical unit" at the federal Customs and Border Control at Hollywood International Airport in Fort Lauderdale, Fla. As part of her job, she checked flight manifests for individuals suspected of criminal activity, cross-checking names in a database called the Treasury Enforcement Communications System (TECS), a collection of several other databases on flight and travel information, border crossings, criminal history information, warrants and motor vehicle records.

Federal law prohibits employees from "browsing" TECS for any reason unrelated to official business.

Moran-Toala was accused of doing just that to help prove that a backpack containing heroin, cocaine and ecstasy had in fact been seized in 2006—information that Jorge Espinal, a Delta Airlines baggage handler, and narcotics distributor Henry Polanco needed to provide proof to their supplier in the Dominican Republic that they did not steal the drugs.

A wiretap on Espinal's phone

produced a tape in which he could be heard telling his supplier that he had a "girlfriend" who worked for the government who could prove the backpack was seized.

Moran-Toala allegedly went "browsing" again in 2007 to obtain a copy of the arrest report of a courier who was captured while delivering drugs from the Dominican Republic to John F. Kennedy International Airport and Espinal. And she allegedly did so again to help Espinal reassure another conspirator that there was no criminal history information or outstanding warrants on TECS and it was therefore safe for him to travel.



Judge Sack

She was charged in the Eastern District with conspiracy to import heroin and cocaine as well as conspiracy to use a government computer unlawfully—a misdemeanor that can be enhanced to a felony upon proof that, in the language of §1030, "the offense was committed in furtherance of any criminal

or tortious act in violation of the Constitution or laws of the United States."

While that case was pending, she was indicted on, and pleaded guilty to, charges in federal court in Florida for a separate heroin conspiracy and using TECS to run travel checks for drug couriers. She received 10 years in prison.

At trial before Block in Brooklyn in 2011, Moran-Toala admitted to misusing her computer but insisted she had no knowledge of the Espinal-Polanco criminal purpose.

During deliberations on June 28, the jury sent the court a note asking whether the verdict on the felony enhancement count had to be consistent with the narcotics conspiracy count. The government said the jury should be told no; the defense said the answer should be yes.

Block, who initially told the jury that the two verdicts should be "linked," told the lawyers his "gut feeling" was to agree with the defense but that he had had a change of heart because he was reluctant to "charge the government out of court." The judge answered the jury's question with a simple no.

Twenty minutes after receiving this instruction, the jury returned its verdict. Block later sentenced Moran-Toala to one year in prison to run concurrent with the Florida sentence.

At the circuit, Sack said inconsistent verdicts are normally unreviewable. "But it does not follow from judicial inability to disturb inconsistent verdicts after the fact that district court may sanction potentially inconsistent verdicts *ex ante*," he said.

"The jury clearly recognized the tension" between the two charges, he said, as "we can think of no other coherent reason for the jury to send a note seeking judicial guidance, a note that we understand to be tantamount to a request for permission to unlink its verdicts by ignoring the intent requirement in the felony enhancement charge or by disregarding the majority of the narcotics conspiracy charge."

Block's instruction, he said, "blessed the jury's clear desire to render verdicts it considered inconsistent."

The error, Sack added, was not harmless, as there is "no serious doubt that the erroneous instruction contributed to any inconsis-

tency in the verdicts inasmuch as it explicitly permitted them."

Sack said the panel was well aware that the instruction "resulted in a highly favorable verdict" for Moran-Toala.

"But, in light of the dearth of evidence of Moran-Toala's knowledge of the Espinal-Polanco airport conspiracy, it is nevertheless possible that a jury would have acquitted her of the narcotics conspiracy and declined to apply the felony enhancement had the supplemental instruction been correct and informed the jury that inconsistent verdicts are impermissible," Sack said.

Assistant U.S. attorney Patricia Notopoulos argued the appeal before the circuit on June 20.

Florian Miedel of Kiedel & Mysliwicz argued for Moran-Toala.

"The court recognized the difference between the power to recognize an inconsistent verdict and a situation where a judge sanctions or, in this case, essentially directs such a verdict," Miedel said. "It's an important distinction."

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Online

The Second Circuit decision is posted at [nylj.com](http://nylj.com).

## Martin Act

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gence claims to proceed, despite the overlap between those claims and the Martin Act.

Following the decision in *Assured Guaranty*, however, Driscoll was called upon to reconsider his earlier ruling. In so doing, he summarized the Court of Appeals' *Assured Guaranty* decision as follows: "an injured investor may bring a common-law claim

empted by the Martin Act, as plaintiffs "premise[d] their claims upon omissions in the Amendments to the Offering Plan."

Similarly, the court dismissed the fraud count against the architects as it was based on the architects' failure to disclose facts in

deceptive practices against developers of a new condominium unit for making false statements in the offering plan, incorporated into purchase agreements, regarding the construction of the building. Dismissing this claim on the basis of preemption, the court

tations in the offering plan. Thus, the court denied the defendants summary judgment as this claim was not predicated "solely on omissions from documents filed pursuant to the Martin Act." The court did state, however, that had this claim been based solely on omis-

of fiduciary duty), with *Anwar v. Fairfield Greenwich*, 728 F. Supp. 2d 354 (S.D.N.Y. 2010) (describing in detail the Martin Act's history in finding that the Martin Act does not preempt common law claims).

4. *Assured Guaranty (UK) v. J.P. Morgan Investment Management*, 18 N.Y.3d 341, 939 N.Y.S.2d 274 (2011).

5. N.Y. Gen. Bus. Law §353(1).

6. *People v. Federated Radio*, 244 N.Y. 33, 20 20 (1926) (in a broad sense, the term