Arbitration CAS 2014/A/3571 Asafa Powell v. Jamaica Anti-Doping Commission (JADCO), award of 7 July 2015

Panel: The Hon. Hugh Fraser (Canada), President; Mr Jeffrey Benz, (USA); The Hon. Michael Beloff QC (United Kingdom)

Athletics (sprint)
Doping (oxilofrine)
Distinction between answer and (cross) appeal (ultra petita)
Requirements for the application of a reduced period of ineligibility for the use of a Specified Substance
Source of the Prohibited Substance in the Athlete's body
No intent to enhance sport performance
Assessment of the degree of fault

1. **CAS rules provide strict time limits and formalities with regards to appeals with a perceptible and proper purpose of ensuring that the parties know at the earliest opportunity what issues can be raised before a CAS panel. It results from a party's omission to file its own appeal that it cannot seek an increased sanction over and above that ordered by the first instance body having rendered the challenged decision, as an answer to an appeal is not in substance or in form the same as a (cross) appeal. A party cannot take advantage of its own procedural omission albeit unintentional, as doing so would unfairly countenance consideration of a penalty that is the product of procedural unclean hands. That would be *ultra petita*.**

2. **In order to prove his entitlement to any reduced period of ineligibility under article 10.4 of the JADCO Anti-Doping Rules which incorporates the WADA Code, an athlete must establish: 1) how the specified substance entered his body on a balance of probability; and 2) that the specified substance was not intended to enhance his sport performance. He must also produce corroborating evidence in addition to his word which establishes to the comfortable satisfaction of the adjudicating panel the absence of an intent to enhance sport performance. If these requirements are satisfied, the athlete's *"degree of fault"* will be considered to determine whether the presumptive two-year period of ineligibility should be reduced, and if so, by what period of time.**

3. **The evidence of test results establishing that a supplement contained a prohibited substance is sufficient to establish that the supplement purchased for the athlete was the source of the prohibited substance which was found in his urine sample.**

4. **The fact that the specified substance is a low grade, mild stimulant with little if any performance-enhancing benefit, that it is very easy to detect, the open disclosure by the athlete of his/her use of the specified substance and the fact that he/she gave credible evidence that he/she used the product containing the specified substance as**

a nutritional supplement are objective circumstances which in combination might lead a hearing panel to be comfortably satisfied that the athlete did not intend to enhance his/her sport performance by unknowingly ingesting the specified substance (or indeed by knowingly ingesting the nutritional supplement).

5. It is incumbent upon any international level competitor to at the very least be aware of the risk of supplement use. While it would be unreasonable to expect an athlete to go to the lengths of having each batch of a supplement tested before use, there are other less onerous steps that could be taken, such as making a direct inquiry to the manufacturer and seeking the advice of professionally qualified doctors. The fact to research the ingredients of the specified substance on the internet and to compare each ingredient searched with the WADA Prohibited List constitute some significant steps to minimize any risk associated with the taking of the specified substance. The fact that there is no way short of a laboratory test in which the substance could have been identified as one of the ingredient of the supplement is also to be taken into account to assess the athlete's degree of fault.

1. THE PARTIES

1.1 The Athlete, Asafa Powell (hereinafter referred to as "Powell", or the "Appellant"), is a 31-year-old, internationally renowned Athletics sprinter. Powell is a former world record holder in the 100 meter dash, and also won Olympic Gold and World Championships Gold as a member of Jamaica's 4 x 100 meter relay teams.

1.2 The Respondent, Jamaica Anti-Doping Commission (JADCO) (hereinafter referred to as "JADCO" or "the Respondent") is the independent organization responsible for Jamaica's anti-doping programme. JADCO is charged with implementing the World Anti-Doping Agency ("WADA") Code ("WADA Code"), as well as directing the collection of samples and conducting results management and hearings at the national level. JADCO is the National Anti-Doping Organization ("NADO") for Jamaica, as defined in the WADA Code, recognized by WADA, and accepted by JADCO, and as designated by the relevant statutes in Jamaica, The Anti-Doping in Sport Act, 2008 and the JADCO Anti-Doping Rules ("Anti-Doping Rules").

2. FACTUAL BACKGROUND

2.1 Below is a summary of the relevant facts, as established on the basis of the parties' written submissions and pleadings, and evidence adduced at the hearing.

2.2 Powell was born and raised in Jamaica. He first competed internationally for Jamaica at the 2002 Commonwealth Games. Powell held the world record in the 100 meter sprint from June

2004 to May 2008. Powell's personal best time in the 100 meters is 9.72 seconds. He has run more sub 10 second 100 meter races than any man in history and was a member of Jamaica's Olympic gold medal 4 x 100 meter relay team at the 2008 Olympic Games in Beijing.

2.3 From June 21, 2013 to June 23, 2012, the Jamaican National Senior Championships in Athletics were held at the National Stadium in Kingston, Jamaica. On June 21, 2013, Powell participated in the final of the 100 meter event finishing seventh. Following the completion of his event he was notified that he had been selected for doping control and he agreed to provide a urine sample for the said purpose.

2.4 Powell was taken to the Doping Control Station at the National Stadium where he provided a urine sample under the supervision of the witnessing chaperone, Mr. Dorrel Savage. Powell was accompanied to the Doping Control Station by Adrian Laidlaw, a representative of his MVP track club.

2.5 Powell's urine sample was transported to the JADCO office at 5-9 South Odeon Avenue, Kingston 10, where it was secured. On June 24, 2013 the said sample was delivered to the FEDEX office at 40 Half Way Tree Road, Kingston for safe dispatch to INRS Armand-Frappier, the Doping Control laboratory in Laval, Quebec, Canada ("the Laboratory"). The said sample was received at the Laboratory on June 25, 2013.

2.6 Analysis of the urine sample taken from Powell was carried out at the Laboratory and on July 11, 2013, a certificate was issued by Doctor Christiane Ayotte, Director of the Laboratory. The certificate revealed an adverse analytical finding for the said sample and that the substance present in the sample was Oxilofrine.

2.7 Oxilofrine is identified as a Category S6 substance in the WADA prohibited Substance List and is therefore considered a "Specified Substance". As such there is a presumptive two-year period of ineligibility for anyone testing positive for such a substance.

2.8 On July 12, 2013, the JADCO Review Panel carried out a review in accordance with the provisions of Article 7.3.1 of the Anti-Doping Rules and on the same day a letter was written to Powell by Dr. Herbert Elliott, Chairman of JADCO notifying him of the adverse analytical finding and advising him of his rights. By email dated July 18, 2013, Powell requested analysis of his "B" sample.

2.9 The "B" Sample analysis was carried out at the Laboratory and on August 1, 2013, a certificate was issued by Dr. Ayotte, confirming the presence of Oxilofrine in Powell's "B" sample. Powell was duly notified on August 5, 2013.

2.10 On August 14, 2013, Powell's attorneys-at-law, wrote to JADCO advising that Powell was admitting the Anti-Doping Rule violation and that he would accept a provisional suspension.

2.11 Paul Doyle has been Powell's agent and manager since 2005. Doyle has represented a number of athletes in athletics over the years. Part of Doyle's responsibilities included arranging for

physiotherapists to treat Powell. Over the years, Doyle had recommended many physical therapists to Powell.

2.12 In May, 2013, Powell told Doyle that his hamstring muscles had been bothering him and that he was not able to train properly. He expressed concern that he would not be ready for the upcoming Diamond League competitions. Powell asked Doyle if he could find a physiotherapist or trainer to come to Jamaica to work with him on a full time basis to help him get ready for the summer season.

2.13 Doyle contacted Dr. Carmine Stillo a Canadian chiropractor who Powell had used in the past to see if he could assist. Dr. Stillo said that he was himself unavailable and that none of the other physiotherapists who had previously worked with Powell were available to go to Jamaica, but that he knew someone who was *"pretty good"* and who would be available to go to Jamaica for a week to be tested out by Powell.

2.14 Chris Xuereb was the person recommended by Stillo to Doyle. Arrangements were made for Xuereb to travel to Jamaica and upon his arrival at Powell's residence in Jamaica he immediately took out his massage table and began to work on Powell's legs.

2.15 After the initial one-week trial period, Powell and Doyle decided to retain Xuereb and he moved into Powell's home. Powell and Xuereb quickly became friends and within a few weeks of their first meeting, Xuereb had recommended a number of supplements for Powell to take.

2.16 One of the supplements recommended by Xuereb to Powell was Epiphany D1, when he had observed that Powell was going to his early morning track workouts without, eating breakfast because of the very early hour.

2.17 Powell researched the supplements given to him by Xuereb on the Internet for six hours over two days and upon completion of his research had satisfied himself that it was safe to take the recommended supplements including the Epiphany D1.

2.18 On June 21, 2013, the day in which he provided the positive sample, Powell took four Epiphany tablets at around 6:00 a.m. When he completed the Doping Control Form that evening, Powell did not list all of the supplements that he had been taking including Epiphany D1. He explained later that he had forgotten to list them, especially the new ones, due to the excitement of the competition and the chaos of the doping control process.

2.19 After competing in the Jamaican National Championships on June 21, 2013, Powell travelled to his training base in Lugano, Italy and competed in Ostrava and then Lausanne. He ran the 100 meters in 9.9 seconds in Ostrava and 9.88 in Lausanne. He then returned to Lugano and it was there that he learned of the positive test.

2.20 After learning that Powell as well as his teammate, Sherone Simpson had tested positive for the same substance, Oxilofrine, and suspecting that the source might have been one of the supplements recently introduced by Xuereb, Doyle arranged through the United States Anti-

Doping Agency ("USADA") and WADA for a raid by Italian police on the hotel where the Jamaican team had been staying.

2.21 Powell then returned to Jamaica, and Doyle next arranged for tests to be conducted on the Epiphany D1 that had been taken from a batch purchased for Powell by Xuereb.

2.22 The first test was conducted by Caritox, a Laboratory at the University of the West Indies, in Jamaica, on a sealed bottle of the Epiphany Dwhich had been taken from the batch purchased by Xuereb for Powell. This test revealed the presence of Oxilofrine in the tablets.

2.23 A second test was conducted by HFL Sport Science Inc. of Lexington, Kentucky, USA, on another bottle of Epiphany D1 taken from the batch purchased by Xuereb for Powell, and this test also revealed the presence of Oxilofrine.

USADA also tested a bottle of Epiphany D1 which they had independently obtained and found the presence of Oxilofrine in the test sample. USADA subsequently posted the results on their high risk list of dietary supplements located on their website.

2.24 On August 5, 2013, Powell was notified of the adverse analytical finding of his "B" sample and was told that a hearing date would be set. He responded by letter dated August 14, 2013, that he was anxious for a hearing date before the Jamaica Anti-Doping Disciplinary Panel.

2.25 Under IAAF rules, a disciplinary hearing shall be held within three months of the date on which the athlete requests a hearing after an adverse analytical finding.

2.26 Powell's hearing date was ultimately scheduled to begin on January 14, 2014, which was more than six months after his adverse analytical finding.

2.27 The hearing, which was originally scheduled to last two days, was held over four non-consecutive days, on January 14, 2014, January 15, 2014, February 12, 2014, and February 26, 2014.

2.28 On April 10, 2014, the Jamaica Anti-Doping Disciplinary Board handed down its oral decision which rendered Powell ineligible to compete for a period of eighteen months from the date of sample collection, June 21, 2013.

2.29 The Chairman of the Panel also indicated that the written reasons for the decision would be delivered within a month.

2.30 On May 1, 2014 the Jamaica Anti-Doping Disciplinary Panel issued its written reasons for the decision that had been delivered on April 10, 2014.

2.31 In its written reasons, the Panel indicated that it accepted that Oxilofrine is a Specified Substance based on the WADA Prohibited List of 2013. The Panel also found that the HFL Sports Science Laboratory in the USA and Caritox Laboratory in Jamaica, supported the fact

that Oxilofrine had been found in the batches of Epiphany D1 which were supplied to the Powell camp. The Panel noted, in addition, that USADA's Dietary Supplement High Risk List added Epiphany D1 as a source of Oxilofrine in September, 2013.

2.32 Based on the totality of the evidence the Panel accepted Powell's assertions on a balance of probability that Oxilofrine entered his body as a result of the ingestion of Epiphany D1.

2.33 Consistent with the argument raised in CAS 2011/A/2495, the Panel found that the failure by Powell to disclose Epiphany D1 or any of the new supplements given to him by Chris Xuereb on the Doping Control Form is not *per se* sufficient to conclude that there was an intention to enhance sport performance.

2.34 The Panel found that Powell's evidence which was corroborated by that of Sherone Simpson, established to their comfortable satisfaction that Powell did not intend to enhance his sport performance by knowingly ingesting Oxilofrine.

2.35 The Panel followed the CAS decision in CAS 2010/A/2107 rather than in CAS A2/2011, and on that basis sought to determine the effect of the athlete's degree of fault or negligence, if any, on his sanction.

2.36 The Jamaica Anti-Doping Disciplinary Panel found that considering all the circumstances Powell acted with fault and negligence greater than mere ordinary fault and negligence. The Panel found that although he took some steps to meet the due diligence requirement, he could have done much more.

2.37 The Panel concluded that Powell's degree of fault and negligence was similar to that found in the cases of CAS 2010/A/2107 and CAS 2005/A/847, therefore an eighteen month period of ineligibility was imposed.

3. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

3.1 On, April 22, 2014, Powell filed an appeal at the Court of Arbitration for Sport ("CAS") against the decision of the Jamaican Anti-Doping Disciplinary Panel rendered April 10, 2014, pursuant to Articles R47 and R48 of the Code of Sports-related Arbitration (the "Code").

3.2 The statement of appeal included a request for an expedited hearing.

3.3 In accordance with Article R51 of the Code, Powell filed his appeal brief on April 23, 2014.

3.4 In his statement of appeal and appeal brief, Powell expressed his hope that he could have a hearing and final decision on the merits prior to the deadline to enter the Jamaica Commonwealth Games Trials which were to be contested in Kingston, Jamaica, from June 26 to June 29, 2014.

3.5 The deadline for submission of entries for the Commonwealth Games Trials was June 20, 2014.

3.6 On April 30, 2014, the Respondent wrote to CAS advising that it was unable to agree to an expedited hearing because the Jamaica Anti-Doping Disciplinary Panel had not yet issued their written reasons.

3.7 On May 1, 2014, the Jamaica Anti-Doping Disciplinary Panel issued their written reasons.

3.8 On May 8, 2014, WADA and the International Association of Athletics Federations ("IAAF") sought leave to intervene in the proceedings. No objection was raised regarding their applications.

3.9 On May 22, 2014, the Respondent filed its answer, in accordance with Article R55 of the Code.

3.10 On May 30, 2014, the Parties were advised that permission was granted for the IAAF and WADA to intervene as parties.

3.11 On June 7, 2014, WADA advised that it was withdrawing its participation in the Appeal with immediate effect.

3.12 On June 10, 2014, the IAAF advised that it was withdrawing its participation in the Appeal with immediate effect.

3.13 On June 11, 2014, Powell filed a request for a stay of execution of the appealed decision, in accordance with Article R37 of the Code.

3.14 On June 17, 2014, the Respondent filed its reply to Powell's request for a stay of execution.

3.15 On June 18, 2014, the Panel issued the operative part of the Order which granted a stay of execution of the appealed decision, until a final determination of the Appeal was made by CAS.

3.16 On the same date as this award is notified, the Panel issues a fully reasoned Order relating to the June 18, 2014 Order providing simply the operative part. The reasoned Order provides, in its relevant parts, the following:

"[…] 6. LEGAL DISCUSSION

6.1 Article 37 of the Code permits provisional relief to be awarded by CAS panels upon a proper showing. In addition, the World Anti-Doping Code (2009 edition) expressly permits suspension of appeals in Article 13, Section 13.1 (providing that, "Decisions made under the Code or rules adopted pursuant to the Code may be appealed as set forth below in Articles 13.2 through 13.4 or as otherwise provided in the Code. Such decisions shall remain in effect while under appeal unless the appellate body orders otherwise".) (emphasis added).

6.2 In accordance with regular CAS jurisprudence, and as a general rule, when deciding whether provisional measures may be granted, it is necessary to consider whether the measure is necessary to protect the Appellant from irreparable harm, the likelihood of the Appellant succeeding in the substantive appeal, and whether the interests of the Appellant outweigh those of the Respondent. See Award of CAS 2003/O/486; Orders of CAS 2013/A/3199; CAS 2010/A/2071; 2001/A/329; and CAS 2001/A/324. These criteria are cumulative. See Orders of CAS 2013/A/3199; CAS 2010/A/2071; and 2007/A/1403. Accord, Paolo Patocchi, "Provisional Measures in International Arbitration", in International Sports Law and Jurisprudence of the CAS (M. Bernasconi, ed.), pp. 68-72 (2012).

6.3 Such criteria are also clearly set forth in Article R37 (5) of the Code.

6.4 In evaluating whether the criteria are satisfied, the Panel has taken into account the following submissions of the parties.

6.5 The Appellant's main submissions were:

- *The Appellant will not have another opportunity to compete in the Commonwealth Games if not permitted to enter the Trials by 20 June 2014, and compete in the Trials between 26 and 29 June 2014. If he is not permitted to contest the Trials, he will have irrevocably lost the opportunity to compete in the Commonwealth Games in Glasgow this summer even if the CAS panel ultimately reduces his sanction. This would result in irreparable harm to the Appellant.*
- *The Appellant is likely based on the facts of his case and on existing CAS jurisprudence to succeed on the merits of his claim and therefore to have his sanction reduced.*
- *The Appellant's interests outweigh those of JADCO in that if JADCO is successful in the final appeal before CAS they can retroactively alter the results of the Commonwealth Games Trials and disqualify the Appellant without any prejudice to anyone.as long as the final award is handed down in time to allow for selection of a replacement team member The same measures could be taken for any other competitions in which the Appellant takes part prior to the imposition of the final sanction.*

6.6 The Respondent's main submissions were:

- *It is indisputable that the Appellant will not be selected for the Commonwealth Games if he does not participate at the National Trials and that the damage occasioned by his inability to participate in the Trials could not be remedied even if the final ruling is in his favour. The Respondent accepts that in these circumstances it is open to the Panel to find that the Appellant could suffer irreparable harm if the application were denied.*
- *However, the Respondent submits that the Appellant has failed to demonstrate that he would suffer any damage if he were unable to participate in the upcoming Diamond League competitions since his inability to participate in one meet would not preclude his participation in other meets should the Court rule in his favour. The Respondent therefore submits that with regard to the Appellants participation in Diamond League competitions, the application for a stay should be dismissed.*
- *The Respondent submits that with regard to the consideration of the Likelihood of Success of the Appeal criteria, the Appellant has incorrectly stated the test in that the Panel is not required to make a determination on the merits of the case. Rather, the Respondent submits that the question for determination by the Panel is whether the Appellant has a plausible case or whether the Appellant's case is arguable, that is, it is not frivolous or vexatious, which is understood to be a low threshold. The Respondent submits therefore that it is open to the Panel to find that this condition has been satisfied.*

- *The Respondent acknowledges that the grant of the application would lead to a postponement and not a cancellation of the sanction and moreover only for a short period and submits that it is therefore open to the Panel to find that the balance of convenience condition has been satisfied*

IRREPARABLE HARM

6.7 In accordance with CAS jurisprudence, when deciding whether to stay the execution of the decision being appealed, the CAS considers whether such a stay is necessary to protect the applicant from substantial damage that would be difficult to remedy at a later stage. See CAS 2013/A/3199, quoting CAS 2007/A/1370-1376 ("The Appellant must demonstrate that the requested measures are necessary in order to protect his position from damage or risks that would be impossible, or very difficult, to remedy or cancel at a later stage".).

6.8 While, according to CAS case law (CAS 2008/A/1569 […]), it is not in itself sufficient that a professional athlete is prevented from competing in sports events to justify a stay in itself, CAS has consistently recognized that, given the finite and brief career of most athletes, a suspension (subsequently found to be unjustified) can cause irreparable harm (see Preliminary Decision in CAS 2008/A/1453 p. 10, par. 7.1), especially when it bars the athlete from participating in a major sports event.

6.9 The Panel holds that the prerequisite of irreparable harm is met in the present case. It discounts the argument, sometimes advanced in such a context, to the effect that a suspension will always be without effect if a stay is granted, and so a stay should not be granted for that sole reason. In this case first this athlete has already served almost two thirds of the suspension issued against him by Respondent. Secondly, the relative brevity of the Athlete's remaining track and field career, coupled with the imminent approach of the pre-scheduled qualifying event for Jamaica for the 2014 Commonwealth Games, and other potentially remunerative athletics meetings, would, were the Athlete to remain ineligible to compete in those events, give rise, on any reasonable objective view, to irreparable harm.

LIKELIHOOD OF SUCCESS OF THE APPEAL

6.10 CAS jurisprudence also indicates that "the Appellant must make at least a plausible case that the facts relied upon by him and the rights which he seeks to enforce exist and that the material criteria for a cause of action are fulfilled". See CAS 2010/A/2113, CAS 2011/A/2615, CAS 2012/A/2943.

6.11 Suffice is to say at this stage that the Appellant has more than nugatory arguments at his disposal regarding the length of his suspension. Whether these arguments will prevail to the extent requested by the Appellant, or less, can only be fully addressed in the final award after the hearing and need not be addressed at this interlocutory stage of the proceedings. However, the Panel holds that they are sufficiently plausible to justify the grant of a stay in this case which is enough to satisfy the second criterion.

BALANCE OF COMPETING INTERESTS

6.12 As indicated in the above referenced decisions as well as others, the applicant must demonstrate that the harm or inconvenience it would suffer from the refusal of the requested provisional measures would be comparatively greater than the harm or inconvenience the other parties would suffer from the granting of the provisional measures.

6.13 Were the Panel to find in the full hearing that the suspension pronounced in the Appealed Decision should be upheld and accordingly that the appeal dismissed, then the sanction can bite for the remaining albeit later months, with similar adverse consequences for the Athlete. By contrast, were the requested stay to be denied, but the Panel were to find in the hearing that the suspension should be lifted or materially reduced, then

the athlete will have lost the chance of medals and earnings forever. Therefore, the Panel holds that the balance of interests tips decisively in favour of the Appellant.

7. CONCLUSION

7.1 As can be seen from the above summary of its arguments the Respondent has in effect conceded that in these circumstances it would be appropriate to grant a stay of execution of the decision of the Jamaica Anti-Doping Disciplinary Panel so that the Appellant may compete in the Jamaican Commonwealth Games Trial. However, the Respondent submits that such a stay if granted should be limited to this competition only.

7.2 The Panel disagrees with the suggestion that the stay, if granted, should be so limited. The Panel takes the view that if it is appropriate (as it has found it is) to grant a stay of execution in this matter, the stay must remain in effect for all purposes until the Panel renders its decision after a full hearing on the merits of the case. To draw the distinction sought by the Respondent would be unprincipled; what is good for one is good for the other and the principled basis for a stay relates to a period of time, not on the quality or characteristics of one event over another.

7.3 The Panel concludes therefore, that after considering the submissions of the Parties, the applicable artides of the Code of Sports Related Arbitration and the relevant jurisprudence, the execution of the decision of the Jamaica Anti-Doping Disciplinary Panel rendered on 10 April 2014, be stayed until such time as the Appeal filed by the Appellant has been heard and a decision rendered by CAS.

[…]".

4. THE CONSTITUTION OF THE PANEL AND THE HEARING

4.1 On June 6, 2014, CAS confirmed the appointment of Mr. Jeffrey G. Benz as Arbitrator nominated by Powell, the Hon. Michael J. Beloff, Q.C. as Arbitrator nominated by JADCO, and the Hon. Hugh L. Fraser, appointed by CAS as President of the Panel.

4.2 On June 30, 2014, an Order of Procedure was signed by Powell.

4.3 On July 2, 2014, an Order of Procedure was signed by JADCO.

4.4 The Order of Procedure confirmed that a hearing had been scheduled for July 7, 2014, in New York, New York.

4.5 On July 7, 2014, a hearing was held at the American Arbitration Association offices. The parties confirmed that they had no objection to the composition of the Panel.

4.6 The following persons attended the hearing:

For the Appellant:	Mr. Paul J. Greene, Counsel for Mr. Asafa Powell, Mr. Asafa Powell, Mr. Paul Doyle, Agent for Asafa Powell.
For the Respondent:	Mr. Lackston L. Robinson, Counsel for JADCO.

4.7 The Panel was assisted at the hearing by Mr. Christopher Singer, Counsel to CAS who served as Ad hoc clerk.

4.8 Powell had been granted permission by the Panel to call witnesses by telephone but he indicated at the hearing itself that the only witnesses that the Panel would hear from would be himself and his agent, Paul Doyle.

4.9 The Respondent did not call any witnesses at the hearing.

4.10 At the hearing the Panel heard the detailed submissions of counsel as well as the evidence of the following witnesses:

- Mr. Asafa Powell testified about his dismay upon discovering that he had tested positive for a specified substance. He also testified about his relationship with his manager Paul Doyle, his relationship with his physical therapist, Chris Xuereb, and the steps that he took to ensure that no prohibited substance entered his body.
- Mr. Paul Doyle, the agent and manager of Asafa Powell testified about his relationship with Powell, his involvement with Chris Xuereb, and the steps he took to discover the source of the positive test.
- Counsel for JADCO, Mr. Lackston Robinson, chose not to cross examine Mr. Doyle and had only a few questions on cross-examination for Mr. Powell.
- Mr. Robinson indicated to the Panel that he would rely on the evidence presented in the hearing before the Jamaica Anti-Doping Disciplinary Panel since that evidence was available for the CAS Panel to consider in its deliberations.

4.11 The parties, particularly JADCO, made lengthy oral arguments in closing. At the conclusion of the hearing, the Parties indicated that they were satisfied that their right to be heard had been duly respected and they had been treated fairly and equally in the arbitration proceedings.

4.12 The Parties were reminded that the Panel would render the operative part of the award at the earliest opportunity which was notified to them by the CAS Court Office on July 14, 2014.

5. JURISDICTION OF THE CAS AND ADMISSIBILITY

5.1 Article R47 of the Code provides as follows:

"An appeal against the decision of a federation, association or sports-related body may be filed with the CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of that body.

An appeal may be filed with the CAS against an award rendered by the CAS acting as a first instance tribunal if such appeal has been expressly provided by the rules of the federation or sports-body concerned".

5.2 In its statement of appeal, Powell relied on Section 23 of the Jamaica Anti-Doping in Sport Act which provides that:

"Where an appeal is in respect of an international event or a case involving an international-level athlete, the decision of the Disciplinary Panel may be appealed directly to the Court of Arbitration".

5.3 Both Powell and the Respondent confirmed CAS' jurisdiction by signing the Order of Procedure, and there were no objections raised at any time to the CAS' jurisdiction by anyone. Based on the foregoing, the Panel is satisfied that it has jurisdiction to decide the present dispute.

5.4 Article R49 of the CAS Code provides as follows:

"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. The Division President shall not initiate a procedure if the statement of appeal is, on its face, late and shall so notify the person who filed the document".

5.5 The Jamaica Anti-Doping in Sport Act does not set a time limit to file an appeal with CAS, therefore Article R49 of the Code applies. Powell received the decision from the Jamaica Anti-Doping Disciplinary Panel on April 10, 2014. He filed his Appeal on April 22, 2014, making it a timely appeal. No objection to the admissibility of the appeal has been raised by JADCO. It follows that the appeal is admissible.

6. ISSUES

6.1 At the CAS hearing, Powell maintained that the sole issue that the Panel was required to determine was the appropriate length of his period of ineligibility. Powell sought to demonstrate to the Panel that his lack of intent to use a prohibited substance, his reasonable explanation as to how the prohibited substance entered his body, and his efforts to ensure that the nutritional supplements that he used did not contain any prohibited substances, should result in a sanction significantly less than eighteen months.

6.2 The Respondent submitted that Powell would have to satisfy this Panel on a balance of probabilities as to how the substance entered his system and that Epiphany D1 was in fact the source of the positive test before any reduction of the presumptive two-year period of ineligibility could be considered.

6.3 The CAS Panel agrees that since this is a *de novo* appeal, Powell would be required to establish the source of the Oxilofrine and also to establish the absence of an intent to enhance performance. However, the Panel does not agree that the Respondent can properly invite it to impose a sanction as high as two years. That would amount to seeking a different order rather than upholding the same order on different grounds and would be *ultra petita*. *See* CAS 2010/A/2283, at para. 14.30.

6.4 More particularly, if the Respondent intended to seek a sanction between eighteen months and two years it should have launched a cross appeal. The Panel notes that if WADA or the IAAF had wished to challenge the decision of the Jamaica Anti-Doping Disciplinary Panel, it would have been necessary for them to file an appeal. No such appeal seeking a sanction above the 18 month period was filed by any party.

6.5 The Panel recognizes that the Respondent's answer sets out clearly the remedy that they are seeking, *inter alia*, the imposition of a two-year sanction. However, an answer to an appeal is not in substance or in form the same as a Respondent's own (cross) appeal.

6.6 CAS rules provide strict time limits and formalities with regards to appeals with a perceptible and proper purpose of ensuring that the parties know at the earliest opportunity what issues can be raised before a CAS panel.

6.7 The Panel acknowledges that this ruling creates a potential anomaly in that logically if Powell does not succeed in establishing the first two requirements regarding the source of the Oxilofrine and the absence of intent to enhance performance, he will not be able to rely on Article 10.4 of the WADA Code to reduce sanction at all.

6.8 The fact, however, that the Respondent is constrained in the Panel's view, not to seek an increased sanction over and above that ordered by the Jamaica Anti-Doping Disciplinary Panel results from their omission to take the course contemplated by the CAS rules, and in the Panel's judgment they cannot now take advantage of their own procedural omission, albeit that it was unintentional, as doing so would unfairly countenance consideration of a penalty that is the product of procedural unclean hands, even if unintentional.

7. SCOPE OF THE PANEL'S REVIEW

7.1 With regard to the scope of the Panel's powers in this Appeal, Article R57 of the CAS Code provides:

"The Panel has full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance. […]".

7.2 The Parties have acknowledged that this is a *de novo* review before this Tribunal and that the Panel has full authority to review the facts and the law and to undertake a d*e novo* determination of the decision under appeal from the Jamaica Anti-Doping Disciplinary Panel.

7.3 Accordingly, the Panel was satisfied that it had the power to undertake a full *de novo* hearing of the issues determined by the Jamaica Anti-Doping Disciplinary Panel.

7.4 Nonetheless, in conducting that new hearing, the Panel took into account, to the extent appropriate, the factual findings and conclusions expressed in that decision, especially, but with appropriate caution, where those findings were based on oral testimony of witnesses who did not appear before the Panel in this appeal.

8. APPLICABLE LAW

8.1 Article R58 of the Code provides as follows:

"The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

8.2 The Jamaica Anti-Doping Disciplinary Panel is established by Section 18 of the Anti-Doping in Sport Act, 2008 to conduct disciplinary hearings related to Anti-Doping Rules violations referred to it by JADCO which is the National Anti-Doping Organization established by Section 5 of the Anti-Doping in Sport Act, 2008.

8.3 The proceedings before the Jamaica Anti-Doping Disciplinary Panel were conducted and sanctions were imposed pursuant to the provisions of the JADCO Anti-Doping Rules which adopt the WADA Code.

8.4 On June 21, 2013, Powell was selected for Doping Control at the Jamaican National Senior Championships in Kingston, Jamaica. He was found to have committed an Anti-Doping Rule violation under Article 2.1 of the JADCO Anti-Doping Rules and the hearing was conducted and sanctions imposed under the JADCO Anti-Doping Rules.

8.5 The Respondent submits therefore that the applicable law is Jamaican law since the Jamaica Anti-Doping Disciplinary Panel is domiciled in Jamaica. The Panel notes, however, that there was no issue before it involving Jamaican law other than the application of the Anti-Doping Rules and the Jamaican statutes referenced herein.

8.6 The relevant JADCO and WADA anti-doping regulations are set out below:

"1.2.1 JADCO Anti-Doping rules apply to all Persons who:

1.2.1.1 are members of a National Sports Federation of Jamaica, regardless of where they reside or are situated;

1.2.1.2 are members of National Sports Federation's affiliated members, clubs, teams, associations or leagues;

1.2.1.3 participate in any capacity in any activity organized, held, convened or authorized by a National Sports Federation of Jamaica or its affiliated members, clubs, teams, associations or leagues; and

1.2.1.4 participate in any capacity in any activity organized, held, convened or authorized by a National Event organization, or a national league not affiliated with a National Sports Federation.

[…]

1.2.3 The Roles and Responsibilities of Athletes are to:

1.2.3.1 be knowledgeable of and comply with all applicable anti-doping

Policies and rules adopted pursuant to the Code;

1.2.3.2 be available for Sample collection;

1.2.3.3 take responsibility, in the context of anti-doping, for what they ingest and Use; and

1.2.3.4 inform medical personnel of their obligation not to use Prohibited Substances and Prohibited Methods and to take responsibility to make sure that any medical treatment received does not violate anti-doping policies and rules adopted pursuant to the Code".

8.7 Section 10 of the Jamaica Anti-Doping in Sport Act, states:

"10.--(I) Except in any case where an athlete holds a Therapeutic Use Exemption Certificate and is in compliance with the terms of such Therapeutic Use Exemption Certificate, the athlete shall be liable for the presence of any prohibited substance or its metabolites or markers found in his body.

(2) Subject to the exception mentioned in subsection (I), a reference in this Act to an Anti-Doping Rules violation shall mean any one of the following-

(a) the presence of a prohibited substance or its metabolites or markers in an athlete's specimen;

(b) the use or attempted use of a prohibited substance or a prohibited method";

8.8 Sections 18 to 20 of the Jamaica Anti-Doping in Sport Act read as follows:

"18. There is established for the purposes of this Act a body to be called The Jamaica Anti-Doping Disciplinary Panel and the provisions of the Second Schedule shall have effect as to the Constitution and Procedure of the Disciplinary Panel and otherwise in relation thereto.

19. Where it appears that there has been an Anti-Doping rules violation the Commission shall refer the matter to the Disciplinary Panel.

20. (1) The functions of the Disciplinary Panel shall be to:

- *(a) receive, examine and hear evidence relating to an Anti-Doping Rules violation;*
- *(b) conduct disciplinary hearings related to Anti-Doping Rules violations referred to it by the Commission;*
- *(c) determine whether a violation of the Anti-Doping Rules has occurred;*
- *(d) impose consequences of Anti-Doping Rules violations;*
- *(e) perform any other functions that are conferred or imposed on the Disciplinary Panel by this Act,*

(2) The Disciplinary Panel shall consequent on receiving a written reference from the Commission asserting an Anti-Doping rules violation:

- *(a) within fourteen days of the date of receipt of the reference, commence a hearing:*
- *(b) within twenty days of the date of receipt of the reference, issue a written decision;*
- *(c) within thirty days of the date of receipt of the reference, issue written reasons for the decision given in paragraph (b)".*

8.9 Section 23 of the Jamaica Anti-Doping in Sport Act deals with appeals involving international athletes.

"Where an appeal is in respect of an international event, or a case involving an international-level athlete, the decision of the Disciplinary Panel may be appealed directly to the Court of Arbitration [sic]".

8.10 The relevant articles of the WADA Anti-Doping Code read as follows:

"2.1 Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample

2.1.1 It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping violation under Article 2.1.

2.1.2 Sufficient proof of an anti-doping rule violation under Article 2.1 is established by either of the following: presence of a Prohibited Substance or its Metabolites or Markers in the Athlete's A Sample where the Athlete waives analysis of the B Sample and the B Sample is not analyzed; or, where the Athlete's B Sample is analyzed and the analysis of the Athlete's B Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in Athlete's A Sample. 2.1.3.

2.1.3 Excepting those substances for which a quantitative threshold is specifically identified in the Prohibited List, the presence of any quantity of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample shall constitute an anti-doping rule violation.

4.1 Publication and Revision of the Prohibited List

WADA shall, as often as necessary and no less often than annually, publish the Prohibited List as an International Standard. The proposed content of the Prohibited List and all revisions shall be provided in writing promptly to all Signatories and governments for comment and consultation. Each annual version of the Prohibited List and all revisions shall be distributed promptly by WADA to each Signatory and government and shall be published on WADA's Web site, and each Signatory shall take appropriate steps to distribute the Prohibited List to its members and constituents. The rules of each Anti-Doping Organization shall specify that, unless provided otherwise in the Prohibited List or a revision, the Prohibited List and revisions shall go into effect under the Anti-Doping Organization's rules three (3) months after publication of the Prohibited List by WADA without requiring any further action by the Anti-Doping Organization".

8.11 The World Anti-Doping Code 2013 List of Prohibited Substances came into effect on January 1, 2013. Oxilofrine (methylsynephrine) is one of the specified stimulants contained in the list. Articles 10.2 and 10.4 of the Code state that:

"10.2 Ineligibility for Presence, Use or Attempted Use, or Possession of Prohibited Substances and Prohibited Methods

The period of Ineligibility imposed for a violation of Article 2.1 (Presence of Prohibited Substance or its Metabolites or Markers), Article 2.2 (Use or Attempted Use of Prohibited Substance or Prohibited Method) or Article 2.6 (Possession of Prohibited Substances and Prohibited Methods) shall be as follows, unless the conditions for eliminating or reducing the period of Ineligibility, as provided in Articles 10.4 and 10.5, or the

conditions for increasing the period of Ineligibility, as provided in Article 10.6, are met: First violation: Two (2) years Ineligibility.

10.4 Elimination or Reduction of the Period of Ineligibility for Specified Substances under Specific Circumstances

Where an Athlete or other Person can establish how a Specified Substance entered his or her body or came into his or her Possession and that such Specified Substance was not intended to enhance the Athlete's sport performance or mask the Use of a performance-enhancing substance, the period of Ineligibility found in Artide 10.2 shall be replaced with the following:

First violation: At a minimum, a reprimand and no period of Ineligibility from future Events, and at a maximum, two (2) years of Ineligibility. To justify any elimination or reduction, the Athlete or other Person must produce corroborating evidence in addition to his or her word which establishes to the comfortable satisfaction of the hearing panel the absence of an intent to enhance sport performance or mask the Use of a performance-enhancing substance. The Athlete's or other Person's degree of fault shall be the criterion considered in assessing any reduction of the period of Ineligibility".

9. SUBMISSIONS OF THE PARTIES

9.1 The parties' submissions, in essence, may be summarized as follows:

A. The Appellant

9.2 Powell's Appeal Brief asks the CAS to grant the following relief:

"(a) Setting aside the Decision of the Jamaica Anti-Doping Disciplinary Panel of April 10, 2014.

(b) Reduce the eighteen (18) month period of ineligibility handed down by the Jamaica Anti-Doping Disciplinary Panel on April 10, 2014, to a period of ineligibility of three (3) months or less back dated.

(c) Order the Jamaica Anti-Doping Disciplinary Panel and/or JADCO to pay all of Powell's costs and legal fees associated with this appeal within thirty (30) days of the Panel's award.

(d) Order any other relief for Powell that the Panel deems to be just and equitable".

9.3 Powell submits that since Oxilofrine is a Specified Substance so designated in the WADA Code, Article 10 of the WADA Code confers discretion on the Panel to eliminate or replace the twenty-four-month period of ineligibility with a period ranging from zero to twenty-four months if Powell can establish: (1) how the Specified Substance entered his body; and (2) that the Specified Substance was not intended to enhance his sport performance or mask any other performance-enhancing substance.

9.4 Powell submits that he has established on a balance of probability how the specified substance entered his body. He points to the fact that he took four capsules of Epiphany D1 on the morning of June 21, 2013, and that Epiphany D1 was seized from his hotel room by the Italian

police in the aftermath of his adverse analytical finding. He also submits that Epiphany D1 was on the list of supplements sent by Chris Xuereb to Paul Doyle.

9.5 Powell further submits that the subsequent testing of the Epiphany D1 further supports his contention as to how the specified substance entered his body. He notes in this context that Caritox, a laboratory at the University of the West Indies in Kingston, Jamaica, tested a sealed bottle of the Epiphany D1 which was taken from the batch purchased by Xuereb for Powell and found that it contained Oxilofrine.

9.6 He notes, too, that a second test was carried out by HFL Sport Science Inc. of Lexington, Kentucky on a bottle of Epiphany D1 taken from the batch purchased by Xuereb for Powell and this test also revealed the presence of Oxilofrine. Furthermore, USADA also tested a bottle of Epiphany D1 and found the presence of Oxilofrine prompting that agency to post the results on their website as a high risk dietary supplement. Powell submits that these tests are more than adequate to establish on a balance of probability that the Oxilofrine entered his body through his ingestion of Epiphany D1.

9.7 In support of his contention that the presence of the specified substance was not intended to enhance his performance or mask the use of a performance-enhancing substance, Powell submits that he did not know that Epiphany D1 contained Oxilofrine, or what Oxilorfrine was. He refers to CAS 2010/A/2107 which holds that an athlete's lack of knowledge that a product contains a prohibited substance is sufficient to establish to the comfortable satisfaction of the hearing panel that the athlete ingesting the product had no intent to enhance his sport performance or mask the use of a performance-enhancing substance.

9.8 Powell highlights the following passage in CAS 2010/A/2107, in which the CAS Panel found that,

"Article 10.4 requires the Athlete only to prove [their] ingestion of [a banned substance] was not intended to enhance [their] sport performance. This construction of Article 10.4…is consistent with its explanatory Comment, which uses the term "Specified Substance" in providing "examples of the type of objective circumstances which in combination might lead a hearing panel to be comfortably satisfied of no performance-enhancing intent".

9.9 Powell submits that the CAS 2010/A/2107 reasoning was upheld in CAS 2011/A/2645. In CAS 2011/A/2645, the CAS Panel said the following about the application of Article 10.4:

"The Athlete did not even know that the Product contained [the prohibited substance] even though the [Federation] imputes the Athlete to a high level of fault, no concrete submission has been made by [the Federation] to claim that the [Athlete] actually knew that the Product contained a prohibited substance, which the Athlete used with the intent to enhance his sport performance or cover the use of another prohibited substance. As a result, no intent to use [the prohibited substance] for whatever purpose, can be imputed to the [Athlete]". CAS 2011/A/2645 at para. 9.17.

9.10 Powell submits that under the CAS 2010/A/2107 and CAS 2011/A/2645 rationale which has been followed by many CAS panels, an athlete who is not aware that the specified substance was actually included in the supplement that he ingested can have no intent to enhance his

sports performance. He also submits that if the Panel rejects the CAS 2010/A/2107 and CAS 2011/A/2645 approach and follows the approach taken in CAS A2/2011, which determined that an athlete must produce corroborating evidence sufficient to demonstrate the absence of his or her intent to enhance sport performance, he would still be able to derive the benefit from Article 10.4 because he has produced such corroborating evidence.

9.11 Powell submits that the consideration of the following objective criteria could lead a Panel to be comfortably satisfied that there was no intent on his part to enhance sport performance by use of Epiphany D1:

(1) Whether the nature of the specified substance which it contained would or would not have been beneficial to the athlete;

(2) Whether the timing of its ingestion would or would not have been beneficial to the athlete;

(3) Whether the athlete's use of the supplement was open or covert;

(4) The degree of the potential performance-enhancing benefit of the specified substance bearing in mind that the greater the potential performance-enhancing benefit, the higher the burden on the athlete to provide the lack of an intent to enhance sport performance;

(5) Whether the athlete did or did not take the supplement to give himself a "boost";

(6) Whether the athlete did or did not disclose use of the supplement on his doping form.

9.12 Powell submits that by reference to those criteria, the Panel can rely on the following evidence as corroborating his argument that he did not intend to enhance sport performance or mask the use of a performance-enhancing substance:

(1) Oxilofrine would not have been beneficial to him since it is a low grade, very mild stimulant with little performance-enhancing benefit;

(2) He took the Oxilofrine at 6:30 a.m. on the morning of June 21, 2013, more than 15 hours before the 100 meter final at the Jamaica National Championships. Thus, his ingestion of Oxilofrine would not have been beneficial to him so far ahead of his event, if at all.

(3) He was open about his use of Epiphany D1, even leaving it out in his room when he knew that the Italian police were coming to search the room;

(4) If the potential performance-enhancing benefit of Oxilofrine is small, his burden to prove lack of intent to enhance sport performance is lower;

(5) He did not take the supplement intending to give himself a "boost", but rather at the same time every day as a substitute for breakfast.

(6) He did not list the supplement on his doping control form but had provided a satisfactory explanation in that this was a new supplement which he forgot to list due to the excitement after the trials and without the assistance of Chris Xuereb, the person most familiar with the new supplements who was not permitted in the doping control area since only one athlete's representative was permitted.

9.13 Powell submits that his failure to list Epiphany D1 on the doping control form is, in any event, only one factor to be considered when determining whether he intended to enhance performance and should be given little, if any, weight since all the other factors overwhelmingly show that he did not intend to enhance performance.

9.14 If Article 10.4 of the WADA Code applies, Powell then submits that his degree of fault is the criterion to be considered in assessing the appropriate period of ineligibility between zero and twenty-four months.

9.15 Powell agrees with the finding in CAS 2011/A/2645 that the circumstances to be considered in the assessment of his fault *"must be specific and relevant to explain* [his] *departure from the expected standard of behaviour"*. He submits that in determining whether he has done everything in his power to avoid ingesting any prohibited substance as well as for his request for relief that his sanction be reduced to three months or less, the following circumstances can be considered which include whether:

(1) His use of the supplement was not associated with sporting practice but rather as a way to replace breakfast;

(2) His use of the supplement was recommended by Chris Xuereb, a trusted medical advisor, for a non-performance related reason;

(3) His use of the supplement was supervised by Chris Xuereb who reminded him to take it on the morning of June 21, 2013;

(4) Epiphany D1 was purchased by Chris Xuereb from a reliable source, a nutrition supply store in Canada and not from an on-line supplier whose products could be associated with doping or intent to enhance performance. Powell's manager paid for Xuereb to fly to Canada specifically to purchase the supplements from a safe source;

(5) The Epiphany D1 label and the manufacturer's website did not contain any warning of the presence of a prohibited substance;

(6) The Epiphany D1 label did not contain the name "Oxilofrine" or a synonym for the banned substance;

(7) The search conducted by Powell prior to taking the supplement was more than 6 hours long and included a comparison of each ingredient on the Epiphany D1 label with the WADA Prohibited List. The exhaustive search was witnessed by his close friend Gregg Plummer;

(8) He has a personal history and clean anti-doping record over many years and has tested clean more than 100 times and has always paid attention to anti-doping issues;

(9) He consulted with his physio Chris Xuereb and his agent Paul Doyle prior to using the supplement to ensure that it was clean.

9.16 Powell submits that he falls within the range of sanction imposed in supplement cases such as CAS 2013/A/3075; CAS A2/2011; CAS 2011/A/2495; CAS 2011/A/2645; *UKAD v.*

Duckworth; *CCES v. Toor*; *FIBA v. Weeden*; *RFU v. Steencamp*; *UKAD v. Dooler*; and CAS 2011/A/2518. He takes the position that his degree of fault is low when compared to the above referenced athletes.

9.17 In conclusion of those circumstances, Powell argues that he could not have known that the Epiphany D1 contained a specified substance without conducting an analytical test in the lab since the supplement did not contain the name of the banned substance or a synonym for it anywhere.

9.18 Powell further submits that requiring him to do an analytical test in the lab prior to taking the supplement is beyond the level of due diligence expected of any athlete under the Code.

9.19 Powell concludes his submissions by stating that in accordance with the commentary to Article 10.2 of the WADA Code, his sanction must be harmonized so that the rules applied to other athletes in similar circumstances who have been sanctioned in the zero- to six-month range will also be applied to him.

B. The respondent

9.20 In its answer to Powell's brief, the Respondent JADCO asks the CAS for the following relief:

"(a) That the appeal be dismissed;

(b) That the Panel find that Powell has not established how the prohibited substance entered his body;

(c) Alternatively, that the Panel find that Powell has not satisfied the requirements of Article 10.4 of the JADCO Rules;

(d) Alternatively that the Panel find that Powell is significantly negligent within the meaning of Artide 10.5.2 of the JADCO Rules;

(e) That the Panel impose a sanction of two years ineligibility in accordance with the provisions of Artide 10.2 of the JADCO Rules;

(f) That Powell pays the Respondent's costs".

9.21 JADCO submits that Powell's responsibility is one of strict liability. Therefore, except in the case of a threshold substance, for the purposes of the imposition of sanctions under Article 10.2 and Article 10.5.2 of the JADCO rules, the quantity of the substance ingested by Powell or the duration for which Powell was using the substance are not relevant per se in the absence of other objective circumstances.

9.22 JADCO is not persuaded that the Oxilofrine which was present in Powell's urine sample entered his body as a result of his taking a dietary supplement called Epiphany D1.

9.23 JADCO contends that there is no evidence or no sufficient evidence which establishes that the Oxilofrine which was present in Powell's urine sample originated in the Epiphany D1 supplement which he had taken. In those circumstances the Respondent contends that the

sanction must be imposed in accordance with the provisions of Article 10.2 of the JADCO rules.

9.24 In the alternative, JADCO submits that Powell has not satisfied the conditions stipulated in Article 10.4 of the JADCO Rules and WADA Code which would permit the Panel to reduce his sanction in accordance with these provisions.

9.25 JADCO also contends that there are no exceptional circumstances and that Powell was significantly negligent, therefore he cannot rely on the provisions of Article 10.5.2 of the JADCO rules in mitigation of sanction.

9.26 JADCO submits that Article 10.4 allows for a reduction of sanction under specific circumstances which are as follows:

(1) The impugned substance must be a specified substance;

(2) The athlete must establish on a balance of probability how the substance entered his body or came into his possession as the case may be;

(3) The athlete must establish to the comfortable satisfaction of the hearing Panel that the presence or possession of the substance was not intended to enhance sport performance;

(4) The athlete must give evidence and adduce evidence from another person which supports his evidence and shows that he had no intention to enhance sport performance.

9.27 JADCO further submits that in order for Powell to benefit from a reduction of sanction under Article 10.4 he must satisfy all four preconditions stipulated in that provision.

9.28 JADCO also submits that where an athlete takes a prohibited substance which is incapable of enhancing his performance or masking the use of performance enhancing substance, but he mistakenly believes that it would have such effect, it would not assist him if he were to argue that his intention could not be realized.

9.29 JADCO goes on to say that in order for an athlete to benefit from a reduction of sanction under Article 10.4 he must, *inter alia*, satisfy the onerous condition of proving to the comfortable satisfaction of the adjudicating Tribunal that he did not use the substance with the intention of improving his sport performance or masking the use of a performance enhancing substance. In order to achieve this objective he must present evidence from another person which corroborates his story that there was no such intention.

9.30 Additionally, JADCO submits that in order to satisfy the evidential burden Powell's testimony must be intrinsically credible and the testimony of the supporting witness must also be credible since the purpose of corroboration is not to lend credence to evidence which is suspect or incredible and corroborative evidence will only fill its role if it is completely credible.

9.31 JADCO contends that the process under Article 10.4 must therefore commence with the testimony of an athlete who is open, frank, and truthful about the circumstances relative to the taking of the prohibited substance.

9.32 In considering the alternative remedy under Article 10.5.2, JADCO submits that the requirement for an athlete to prove:

"that his fault or negligence when viewed in the totality of the circumstances and taking into account the criteria for no fault or negligence, was not significant in relationship to the Anti-Doping Rules violation"

creates a very high standard to allow for the reduction of the standard sanction by a maximum of one-half where the circumstances are truly exceptional.

9.33 With regard to the evidence available for consideration by the Panel, the Respondent submits that no evidence was adduced by Powell to show the reason for the use of each supplement other than to say that they were taken to repair his body.

9.34 JADCO further submits that there is no evidence that the taking of the said supplements was in any way related to the injuries with which Powell was seeking to deal.

9.35 JADCO contends that, although Powell maintains that he was injected with Actovegin and B12, no tests were done to determine what was contained in those bottles and Powell had no qualification which would allow him to make such a determination.

9.36 JADCO further submits that Powell did not know Mr. Xuereb's antecedents and there is no evidence that he made any enquiries about Mr. Xuereb's qualifications.

9.37 JADCO maintains that it is inconceivable that Powell would not take anything from anyone over an eleven-year period, yet after a mere four weeks would have placed such blind trust in Mr. Xuereb, that he would have accepted as many as nine supplements from him and would have allowed Mr. Xuereb to administer injections to him without seeking any professional advice.

9.38 It is submitted by the Respondent that Powell has not provided a credible explanation for failing to advise the Doping Control Officer of his inability to recall the names of the supplements that he was taking.

9.39 It is also submitted by the Respondent that there should be some doubt concerning the extent of the research done by Powell to ascertain whether the supplement he was taking contained a prohibited substance. The Respondent adds that merely comparing the ingredients on the Epiphany D1 label with the prohibited list would be insufficient to determine whether a substance had a similar chemical structure or similar biological effects.

9.40 In any event, JADCO submits that Powell's attempt at research, if any, was wholly inadequate and fell below the standard of utmost care.

9.41 It is further submitted by JADCO that Powell is deemed to be aware of the publications by IAAF, WADA and others that have been in the public domain including the advisory published by the IAAF Medical and Anti-Doping Department in 2013.

9.42 It is submitted by JADCO that an athlete who does not have a scientific test done on the supplements before he consumes them or who does not seek professional advice prior to consumption is significantly negligent. JADCO also contends that it would have been prudent for Powell to secure the invoices pertaining to the supplements to determine where they were purchased and if necessary to do his own investigation.

9.43 The Respondent submits that the report prepared by Professor Wayne McLauglin and his team at the Caratox Laboratory is completely unreliable and the conclusions arrived at were not substantiated. The basis for this submission by JADCO is their belief that the testing procedure used by Caritox was fundamentally flawed.

9.44 JADCO submits that the Panel cannot be satisfied that the Oxilofrine detected in Powell's urine sample would most likely have originated from the consumption of Epiphany D1 because no tests were done on the Epiphany D1 supplement which Powell consumed. JADCO further submits that the Epiphany D1 which was submitted to the HFL Laboratory for testing was unmistakably counterfeit, and that legitimate Epiphany D1 does not contain Oxilofrine.

C. Evidence adduced at the hearing

a) Powell's Oral Testimony

9.45 Powell testified orally at the hearing. He gave evidence about his religious upbringing, the importance of his family and the type of legacy that he wanted to leave when his competitive days were over. He stated his belief that doping was like committing a crime and told the Panel that his suspension over the past year and the allegations surrounding him have made it an extremely difficult year, but one in which he became mentally stronger. He testified about the joy he felt when he was advised that a resolution had been reached that would allow him to return to the track on June 6, 2014 and the complete deflation when he was advised by his agent and lawyer that the deal was off.

9.46 Powell also testified about his relationship with Paul Doyle who he first met in 2004. In 2005, Doyle became his agent, and they have since formed a very close friendship. Powell considers Doyle to be like a brother to him, part of his family. He trusts Doyle implicitly. One of the many responsibilities that Doyle had as manager/agent for Powell was to arrange physiotherapists to treat Powell. Powell gave evidence that although Doyle has arranged at least two physiotherapists for him in the past, they have been unable to find anyone who could commit for a lengthy period and in 2013 when Powell was battling hamstring injuries, he again made a request for Doyle to see what he could arrange.

9.47 Powell testified that he had used Dr. Carmine Stillo, a chiropractor in Canada, as a therapist in the past. He recalled being advised by Mr. Doyle that Dr. Stillo was too busy to assist with his treatment at that time and that *"none of the usual guys were available"* but that Dr. Stillo knew a guy who was pretty good and they could bring him to Jamaica for a week to test him out. According to Powell, the guy who was recommended by Dr. Stillo was someone named Chris Xuereb. Mr. Doyle made the arrangements to bring Xuereb to Jamaica and Powell met him at the airport.

9.48 Xuereb moved into Powell's residence and Powell was soon impressed by his treatment and his approach. Powell testified that he quickly came to trust Xuereb even allowing him to play with his daughter and feed his dogs. He recalled that Xuereb also treated Powell's mother and brother for back issues.

9.49 Powell testified that Xuereb had observed that he was rising early to go to practice without eating any breakfast and Xuereb recommended a supplement that Powell could take as an alternative to breakfast. Powell recalled that he advised Xuereb to make the arrangements for any supplement purchases with his agent Paul Doyle. Powell further testified that he knew that there were supplements that you are not supposed to take so he suggested to Xuereb that he send the list of recommended supplements to Doyle.

9.50 Powell gave evidence that discussions took place between Xuereb and Doyle, and since Xuereb said that he had a trusted source in Canada where he could purchase the supplement, Doyle arranged for Xuereb to fly to Canada on June 5, 2013 to purchase the supplements and return to Jamaica the next day. Powell testified that Xuereb swore on his mother's grave that the supplements were clean.

9.51 Powell recalled that when Xuereb returned on June 6, 2013 with the supplements, he took them out one by one, placed them on a table and asked Powell to get his lap top computer to do whatever checks he wanted to satisfy himself. Powell commenced his research accompanied by his friend Greg Plummer. He recollected that Epiphany D1 was the first supplement that he researched.

9.52 Powell testified that he went on the Google website and opened the 2013 WADA prohibited substance list. He recalled that he spent six hours over two days conducting his research and that he spent the most time researching Epiphany. He stated that he cross checked every ingredient and then sent a message to Doyle. He began to take the supplements including Epiphany D1 and with a reminder from Xuereb, ingested four tablets at 6:00 a.m. on June 21, 2013. He recalled that he ran poorly that evening not because of injury but because he felt unfit. He stated that he was not concerned about being selected for doping control, but found the atmosphere in the doping control room to be quite chaotic.

9.53 It was Powell's testimony that as he was filling out the doping control form he could not recall all of the supplements that he had been taking but didn't think it would be that important at the time. He left shortly thereafter for Europe where he ran two sub 10 second 100 meter

races and was feeling much better about his season until he received the news about his positive test.

9.54 Powell testified that he was devastated upon learning the news of the positive test. He requested a hearing as soon as possible and believed that it would take place within three months. Powell stated that he believes his reputation has been damaged and worries about his place in a sport that he wanted to stay in as long as possible. He also stated that he did everything that he could to be vigilant about taking the nutritional supplements and that in no way did he intend to do anything illegal to enhance his performance. Powell testified that he no longer takes supplements of any kind out of fear based on this experience. On cross examination he testified that contact with Xuereb ceased after the finger pointing and transfer of blame that followed Xuereb's discovery of the WADA contact and the raid by the Italian police.

b) Paul Doyle's Oral Testimony

9.55 Paul Doyle Powell's representative testified about the relationship that he had with Powell, and circumstances which led to the introduction of nutritional supplements into Powell's regimen. Mr. Doyle testified that once he started to represent Powell, his job description expanded to the point where he did virtually everything, including negotiating shoe contracts, public relations, arranging contracts with physiotherapists, assisting with Powell's family needs, meeting his girlfriends. There was nothing off limits so it was not unusual for him to be involved in the search for a physiotherapist for his client.

9.56 Mr. Doyle recalled placing a call to Dr. William Tulloch who had worked with Powell during his most injury free years. Dr. Tulloch recommended three people including Dr. Carm Stillo but they were all too busy to devote the necessary time. Mr. Doyle stated that they needed someone who could work full time with Powell and who was very motivated to treat him. They were also interested in someone who used Active Release Technique.

9.57 Mr. Doyle testified that he interviewed Mr. Xuereb himself and liked the way that Mr. Xuereb described the therapeutic methods that he used. Mr. Doyle noted that in international track and field circles, there is no one standard certification. He stated that they had been using Carm Stillo for a decade and his recommendation of Mr. Xuereb carried some weight. He recalled that Dr. Stillo said that Mr. Xuereb had "good hands" and was a good physiotherapist.

9.58 Mr. Doyle testified that he did not do any background checks on Chris Xuereb based on the recommendations he had received from people he trusted. He stated that he was not surprised to learn that Mr. Xuereb had recommended that Powell take supplements because Mr. Xuereb had explained to him that Powell's nutritional habits were terrible, that he would skip breakfast and often eat on the fly. Mr. Doyle recalled telling Mr. Xuereb to go ahead and purchase the supplements but that he would have to clear everything with him [Doyle]. Mr. Doyle told Mr. Xuereb to send an invoice and he would pay him.

9.59 Mr. Doyle's recollection was that he agreed to pay for Mr. Xuereb to fly back to Canada to obtain the supplements because Mr. Xuereb had assured him that he had been purchasing supplements at the same location for years and that he trusted the suppliers. Mr. Doyle also testified that Mr. Xuereb reiterated time and time again that he had done the research, that he had other athletes on the same supplements and that there had never been an issue. Mr. Doyle recalled that Powell asked a few times if *"these are okay"*.

9.60 Mr. Doyle gave evidence that he uses the Global DRO cite frequently and that he was not worried about Powell taking the supplements. It was his belief that Powell would have expected to be drug tested at his National Championships.

9.61 Mr. Doyle testified that after learning of the positive test, he immediately suspected that the cause was something that Mr. Xuereb had given to Powell because that was the only thing that had changed in their regimen. Mr. Doyle testified that he called Travis Tygart at USADA to apprise him of the situation. Since this was not a USADA matter, Mr. Tygart put Mr. Doyle in touch with Jack Robertson the lead investigator with WADA. Mr. Doyle recalled wanting to get ahead of the rumours and was subsequently informed by Mr. Robertson that he had a contact with the Italian police who could take some action.

9.62 In concluding his testimony, Mr. Doyle spoke of the devastating impact that this event has had on Powell, including the loss of income from what has become a year-long ban, the hurt that he feels when he hears his client being lumped in with known drug cheaters, and the difference in the mind of the public and meet directors between a three month ban and an eighteen month ban.

c) HFL Sport Science Inc. Report

9.63 The Panel has as an exhibit to these proceedings, the report from HFL Sport Science Laboratory that was prepared for the Jamaica Anti-Doping Disciplinary Panel hearing. HFL Sport Science Inc. (HFL) was contacted by Paul Doyle to analyze a sample of Epiphany D1 for the presence of oxilofrine using a methodology that was based on HFL's accredited methodology for WADA prohibited substances in human supplements. In addition to the sample supplied by Mr. Doyle, Mr. Bellone of HFL purchased an additional sample of the same product over the open market from the Epiphany D1 Website.

9.64 The first sample (72265) was received via Fed Ex from Mr. Doyle on September 30, 2013. The second sample (75285) which was purchased by Mr. Bellone from the Epiphany D1 website, was received via UPS and submitted to the lab on October 14, 2013. The samples were tested and the preliminary screen showed different results for the two samples. Different re-verification procedures were utilized for each sample and the final result was that the portion of the product 72265 tested contained oxilofrine. The portion of the product 75285 tested did not contain oxilofrine.

9.65 The result of the HFL test was that the portion of sample analyzed for product 72265, the bottle that had been provided by Mr. Doyle, contained oxilofrine, whereas product 75285, the sample that was purchased by Mr. Bellone from the Epiphany D1 website, was negative for oxilofrine.

d) Evidence and Report of Professor Wayne McLaughlin

9.66 Professor Wayne McLaughlin is a Director of the Caritox Laboratory at the University of the West Indies, Kingston, Jamaica. Professor McLaughlin gave evidence at the hearing before the Jamaica Anti-Doping Disciplinary Panel. In his testimony before that Tribunal, he stated that the Certificate of Analysis dated November 8, 2013 reveals that the analysis of Epiphany D1 showed that it contained Methylsynephrine otherwise known as Oxilofrine. He also stated that the Certificate of Analysis dated November 15, 2013 confirms the presence of Oxilofrine in Epiphany D1.

9.67 Professor McLaughlin also stated that Oxilofrine is a drug prescribed for low blood pressure which affects the nervous system directly. He noted that the effect generally is that the heart beat increases and more oxygen goes to the tissues preparing the person for *"fight or flight"*.

9.68 Professor McLaughlin testified that Acacia Rigidula is one of the ingredients in Epiphany D1 and that it does not contain Oxilofrine. He added that Oxilofrine is used by athletes to burn fat quickly; but he does not support the argument that it helps athletes to boost their power-to-weight ratio with more lean muscles and less fat and so increase their speed; it increases cardiac output so that more oxygen is pumped to the cells and to the muscles.

9.69 Professor McLaughlin stated that the concentration of Oxilofrine in the urine samples that was reported by the laboratory in Montreal was too high to be considered a contaminant. He added that contaminants are very low traces, in most cases 6 nanograms.

9.70 Professor McLaughlin also noted that one would not be able to say whether a bottle of Epiphany D1 contains Oxilofrine just by looking at the ingredients on the label. An analytical test would have to be done. He also expressed the view that each batch could be different and he could not give assurance that once a test has been done on the product it could be taken indefinitely.

9.71 Professor McLauglin testified that tests were conducted using two systems – LC-MS/MS (Liquid Chromatography) and GC/MS (Gas Chromatography). He added that the latter is more sensitive and has a wider library of chemicals but is not more accurate. He explained that he did not run a standard in conducting the test in this case because there are approximately 800 different drugs in the LC-MS/MS Library. He noted that if a screen is run and the drug is in the library it would be detected in the unknown sample and he was aware that Oxilofrine was already in the library.

9.72 Professor McLaughlin stated that Oxilofrine is related to Methylsynephrine in that they have the same molecular formula but they are not identical.

9.73 Professor McLaughlin conducted tests on one bottle of Epiphany D1 which was received from Powell's Attorneys. He testified that having done the screen, the library identified Methylsynephrine in the Epiphany D1 tablet. Seven runs were completed and Methylsynephrine was identified in all the runs. He added that controls (known drugs) were run to ensure that the machine was operating properly.

9.74 Professor McLaughlin admitted that Oxilofrine did not appear in the database but added that the synonym was present which is Benzenemethanol. He also admitted that the certificate which he issued showed that his finding was Methylsynephrine, although the reports show his findings as Benzenemethanol, which is the synonym for Oxilofrine.

9.75 Professor McLaughlin also gave evidence in the proceeding before the Jamaica Anti-Doping Disciplinary Panel that he had no concerns with the report and findings of the HFL Sport Science Inc. Laboratory.

9.76 Although Professor McLaughlin opined in his written report that *"the Oxilofrine detected in Powell's urine sample would most likely have originated from the consumption of the supplement Epiphany D1"*, on cross examination he asserted that he is not concluding that the Epiphany D1 which Powell took contained Oxilofrine.

10 MERITS OF THE APPEAL

10.1 The parties are in agreement that the principal issue for the Panel to decide is the appropriate period of ineligibility for Powell's undisputed doping violation. The parties disagree as to whether Powell is entitled to a reduction of the presumptive two-year period of ineligibility.

10.2 In order to prove his entitlement to any reduced period of ineligibility under 10.4 of the JADCO Anti-Doping Rules which incorporates the WADA Code, Powell must establish: 1) how the specified substance (i.e. oxilofrine) entered his body on a balance of probability; and 2) that the specified substance was not intended to enhance his sport performance and he must also produce corroborating evidence in addition to his word which establishes to the comfortable satisfaction of the Panel the absence of an intent to enhance sport performance. If these requirements are satisfied, the Panel will consider Powell's *"degree of fault"* to determine whether the presumptive two-year period of ineligibility should be reduced, and if so, by what period of time.

A. How Specified Substance Entered Powell's Body

10.3 Powell contends that Oxilofrine entered his body after he ingested Epiphany D1 capsules which he had taken as a nutritional supplement following the recommendation of Mr. Xuereb.

On the morning of June 21, 2013, the day in which Powell produced the urine sample which resulted in the adverse analytical finding, he ingested four capsules of Epiphany D1 which he had been taking for just over a month.

10.4 Powell notes that Epiphany D1 was on the list of supplements sent by Mr. Xuereb to Mr. Doyle. In addition, he submits that the Caritox lab at the University of the West Indies tested a sealed bottle of Epiphany D1 taken from the batch that Mr. Xuereb purchased for Powell and Oxilofrine was found in that sample. Powell also notes that a second test was conducted by HFL Sport Science Inc. of Lexington, Kentucky on a bottle of Epiphany D1 which was delivered from the batch bought by Mr. Xuereb for Powell. The sample taken from Powell's supply contained Oxilofrine. Furthermore, Powell states that USADA independently purchased and tested a bottle of Epiphany D1 and found the presence of Oxilofrine in the test sample. Powell maintains that this discovery prompted USADA to post the results on the high-risk list of dietary supplements contained on its website. For these reasons Powell asserts that he has more than established on a balance of probabilities that Epiphany D1 was the source of his positive test for Oxilofrine.

10.5 JADCO contends that Powell has not satisfied his burden of establishing how the Oxilofrine entered his body. JADCO maintains that the claim by Powell that the presence of Oxilofrine emanated from the Epiphany D1 which he had taken is entirely speculative. JADCO further contends that the actual Epiphany D1 supplement taken by Powell was not tested therefore there is no evidence that it was the source of the Oxilofrine.

10.6 JADCO also takes issue with some of the scientific evidence relied on by Powell in submitting that Epiphany D1 was the source of the positive test. JADCO was particularly critical of the tests conducted by Professor McLaughlin at the Caritox Laboratory, arguing that he his analytical techniques were inadequate and that rather than identifying Oxilofrine, he identified Benzenemethanol and Methylsynephrine which are synonyms for Oxilofrine.

10.7 The Panel finds that while the evidence before it suggests that Benzenemethanol may be a synonym for, but not identical to Oxilofrine, Methylsynephrine and Oxilofrine appear to be the same substance with different names. The Panel ruled as inadmissible a letter from Dr. Christine Ayotte of the INRS Laboratory which JADCO sought to use in reply, since she was not identified or called as a witness. But without prejudice to that ruling, the Panel does note that in her letter of February 8, 2014, sent to Mr. Carey Brown, Executive Director of JADCO, Dr. Ayotte uses the words Oxilofrine and Methylsynephrine interchangeably. Her first reference states *"[…] this control did not contain methylsynephrine/oxilofrine"* while a later reference states *"[…] the [HFL] report concluded that Powell's product does contain oxilofrine (methylsynephrine) while the one purchased directly from the website did not"*.

10.8 The Panel finds that even if the conclusion arrived at by the Caritox lab were to be discounted, there remains the evidence of the test results from the HFL Sport Science Inc. lab, as well as the evidence of the testing done by USADA which established that some Epiphany D1 capsules contained Oxilofrine. This evidence in and of itself would be sufficient in the Panel's

view to establish that the Epiphany D1 purchased for Powell was the source of the Oxilofrine which was found in his urine sample.

B. Athlete's Intent to Enhance Sport Performance

10.9 JADCO has submitted that Powell has not established on a balance of probability how the Oxilofrine entered his body. Therefore, there is, in their view, no need to consider the second criterion of intent to enhance sport performance.

10.10 Powell having satisfied the first criterion has asked the Panel to find that there could be no intent to enhance performance when he did not know that the substance he was ingesting (Epiphany D1) contained Oxilofrine and did not even know what Oxilofrine was.

10.11 Powell has asked that this Panel follow the reasoning of the CAS Panel in CAS 2010/A/2107, para. 9.17 where it was held that an athlete's lack of knowledge that a product contains a prohibited substance is sufficient evidence to establish to the comfortable satisfaction of the hearing panel that Powell ingesting the product had no intent to enhance his sport performance. In CAS 2010/A/2107 the Panel found that:

"[…] Article 10.4 requires [the athlete] only to prove her ingestion of Oxilofrine was not intended to enhance sport performance. This Construction of Article 10.4 harmonises the clear language in clause one with the differing and ambiguous language of clause two, and is consistent with its explanatory Comment which uses the term "Specified Substance" in proving "examples of the type of objective Circumstances which in combination might lead a hearing panel to be Comfortably satisfied of no performance-enhancing intent".

10.12 Many CAS panels, including the Panel in CAS 2011/A/2645, have reiterated the CAS 2010/A/2107 line of reasoning. Under the CAS 2010/A/2107 rationale Powell could not have ingested Oxilofrine with the intent to enhance his sport performance or mask the use of a performance-enhancing substance given the fact that he had never heard of Oxilofrine prior to his adverse analytical finding and would not therefore have known that Epiphany D1 contained Oxilofrine.

10.13 The Panel in CAS A2/2011 rejected the CAS 2010/A/2107 and CAS 2011/A/2645 approach, finding that an athlete's lack of knowledge that a supplement contains a substance is not enough. The CAS A2/2011 Panel determined that an athlete must produce corroborating evidence sufficient to demonstrate the absence of the athlete's intent to enhance sport performance. A number of CAS panels have followed the approach outlined in CAS A2/2011. At least one CAS Panel, that in CAS 2011/A/2518, has split over the appropriate approach.

10.14 This Panel finds that whichever approach is taken, the result would be the same in this case. Powell denied that his use of Epiphany D1 was designed to enhance performance. He averred that he used it as a breakfast substitute and for general body repair. Powell was not cross-examined on this point, and counsel for JADCO indicated that he would rely on the evidence given by Powell at the first instance Tribunal. The Panel takes the view that where such serious allegations are to be made against an athlete, fairness dictates that they be put to the athlete

directly so that he or she can respond, thus enabling the Panel to assess the reaction to the challenge. The absence of any meaningful cross-examination of Powell removed that opportunity from the Panel.

10.15 In his testimony before the Jamaica Anti-Doping Disciplinary Panel, Powell stated that Mr. Xuereb recommended that he take nutritional supplements since he often missed breakfast. He also testified that his former track club did not have a nutritionist on staff and he did not have his own nutritionist or personal physician.

10.16 In his testimony before the CAS Panel Powell reiterated that he did not take Epiphany D1 to enhance performance, but took it as a nutritional supplement along with a protein shake that Mr. Xuereb made for him. The Panel had the opportunity to hear and observe Powell as he gave his evidence and as did the Jamaica Anti-Doping Disciplinary Panel; this Panel accepts Powell's testimony that there was no intent to enhance performance.

10.17 JADCO argued that Powell has not presented the corroboration required to support his denial of an intent to enhance performance. While his agent's confidence in his integrity might not represent adequate corroboration, the Panel notes that the commentary to the WADA Code Article 10.4 lists examples that are relevant to this matter.

"Examples of the type of objective circumstances which in combination might lead a hearing panel to be comfortably satisfied of no performance-enhancing intent would include the fact that the nature of the Specified Substance or the timing of its ingestion would not have been beneficial to the Athlete; the Athlete's open Use or disclosure of his or her Use of the Specified Substance; and a contemporaneous medical records file substantiating the non sport-related prescription for the Specified Substance. Generally, the greater the potential performance-enhancing benefit, the higher the burden on the Athlete to prove lack of an intent to enhance sport performance".

10.18 The evidence accepted by the Panel indicates that Oxilofrine is a low grade, mild stimulant with little if any performance-enhancing benefit. Dr. Christiane Ayotte, head of the Laboratory, was quoted in the Toronto Globe and Mail newspaper of July 16, 2013, as saying, *"it's ridiculously easy to detect"* in reference to Oxilofrine. Powell was open about his use of Epiphany D1 even making it available for the Italian Police to seize. Powell gave credible evidence that he used Epiphany D1 as a nutritional supplement.

10.19 While Powell should have listed Epiphany D1 on his doping control form, his failure to do so is but one factor to be considered in determining whether he intended to enhance his performance. The Panel finds that Powell's testimony along with the other corroborating evidence establishes to its comfortable satisfaction that he did not intend to enhance his sport performance by unknowingly ingesting Oxilofrine (or indeed by knowingly ingesting Epiphany D1).

C. Athlete's Degree of Fault

10.20 This in the Panel's view is the key issue. What degree of fault can be attributed to this Athlete? Both parties cited numerous cases many of which had little in common with the present matter. It might be beneficial to repeat what was stated by the Panel in CAS 2011/A/2518, para 9.21:

"[…] the Panel should be very cautious about allowing sanctions decisions in other cases to determine its analysis of the sanction in this case, because each case depends very much on its own particular facts, and it is not always easy from the reports of the case in question to understand why the particular decision on sanction was reached. The Panel should be particularly wary of giving precedent weight to cases in which there was no hearing, but rather, the sanction was the result of agreement between the parties".

10.21 A similar point was raised in CAS 2013/A/3124, where the Panel at paragraphs 12.23 and 12.24 addressed the issue of the utility of citing numerous cases before CAS Panels where fact scenarios will obviously vary:

"In the Panel's view limited assistance can be gained from any previous case in which a tribunal from which an appeal is brought to CAS, simply applies an evaluation of all the circumstances to see whether the criterion of no significant fault or negligence is met. "Each doping case has to be considered as an individual case" (FIFA v. WADA, CAS 2005/C/976/986 at para 78 quoting and endorsing Richard Pound QC then WADA Chairman). Given that the exercise is multi-factorial, it would be highly unlikely that there could be an exact read across from earlier to later cases. If in Case 1 it was held that factors A, B, C and D established no significant Fault or negligence, it would not follow that in Case 2 with only factors A, B, and C or Case 3 with factor A, B, C, D and E the same conclusion would or should be reached, even putting aside the considerations first that the Panel in the latter case would not have the same 'feel' for the factors which in their particular context influenced the earlier Panel(s), secondly that the Panel in the latter case might have, on the factors in the earlier case(s) itself reached a different conclusion; it is axiomatic that reasonable persons can reasonably reach different conclusions on the same set of facts.

In any event while consistency is a virtue, like cases should presumptively be treated alike (FIFA v WADA, [supra] para. 137 – correctness is a greater one. Thus absent any precedent from the Swiss Federal Tribunal this Panel treats earlier cases decided on their facts as providing guidance but not direction, and would encourage a more sparing use of references than advocates sometimes feel constrained to provide, unless of course such cases contain statements of general un-fact specific principle or approach".

10.22 This Panel reiterates that each case must be determined on its own facts and there is little to be gained by counsel citing numerous cases for the Panel's consideration, many of which were resolved without a hearing and many of which turn on facts very different from the situation being considered by this panel. It is therefore rarely useful to cite earlier cases for their results as distinct from their reasoning. This Panel accepts that previous cases can identify certain principles which are material to this appeal, notably the decision in CAS 2013/A/3327, and can indicate what kinds of matter are relevant to the assessment of the degree of fault, and the references included in this award will be confined to those considerations.

10.23 In CAS 2011/A/2645 and CAS 2011/A/2495, CAS Panels rejected the proposition that because an athlete has failed to submit a supplement to laboratory analysis before taking the

same, this by itself establishes that he or she has fallen short of an athlete's duty of care. This Panel respectfully concurs. While the bar for an athlete should not be set too low, equally it should not be set impossibly high. Requiring an athlete to secure a laboratory analysis before taking a supplement as the only means of fully satisfying an athlete's duty of care would be prohibitively expensive, hugely wasteful of time, and, in the end, might possibly be entirely inconclusive given that the ingredients of supplements can vary from batch to batch.

10.24 This Panel also repeats the point made in the commentary to the WADA Code that the consequences for an athlete of suspension from competition or his or her prior clean record are irrelevant to the issue of degree of fault.

10.25 The critical exercise for this Panel is to find such facts as are relevant to fault or lack thereof, and then to evaluate those facts. Counsel for Powell has emphasized the reference in the WADA Code to the need for harmonization of sanctions. The reference in the commentary to Article 10.2 bears repeating: *"Harmonization means that the same rules and criteria are applied to assess the unique facts of each case"*.

10.26 The Panel accepts that sanctions should in principle be consistent (although correctness is more important than consistency). But this means no more than that in cases whose facts are identical (which will almost never be the case), or materially similar, different disciplinary bodies should seek not to come to discrepant decisions outside the limits within which reasonable persons can disagree. This does not mean that such bodies (or a CAS panel) should indulge in any kind of box ticking exercise, when none is required by or provided for in the WADA Code, (or its domestic derivatives).

10.27 In CAS 2013/A/3075, the athlete took a supplement that had a synonym on the label for a specified substance. His brother gave him the supplement telling him it *"could do no harm"*. The Athlete searched the supplement on the Internet, checking the ingredients on various websites and comparing the ingredients to the WADA Prohibited List. After completing his research and satisfying himself that the supplement was safe, the Athlete ingested the product. However, the Athlete missed the fact that one of the listed ingredients was a synonym for the specified substance.

10.28 The Panel in CAS 2013/A/3075 found that the *"the fault* [of the Athlete] *is rather light and not significant"*, reasoning that the athlete could have taken more steps to avoid ingesting a banned substance, but given what he had done, his negligence in not taking those steps was low. As a result, the Panel imposed a five-month sanction.

10.29 In CAS A2/2011, the athlete purchased a supplement at a nutrition store. He examined the ingredients on the label against those identified on a banned list provided by the Australian Sports Anti-Doping Authority. After determining that none of the ingredients were identified on the prohibited list, the athlete ingested the product and subsequently tested positive for methylhexaneamine. The Panel recognized the athlete's efforts but noted that more inquiries could have been made and sanctioned the athlete with a six-month period of ineligibility.

10.30 In CAS 2011/A/2645, the athlete took a prescription recommended by a trusted medical advisor that did not contain any warning of the presence of a banned substance. The product contained a banned substance and the athlete tested positive. The athlete did not consult with his trusted medical advisor immediately prior to using the product. The Panel noted that the athlete could have done more than he did to avoid the ingestion of a banned substance; he could have avoided taking the product at all, he could have tested the product before using it or he could have sought medical advice before taking it. However, the Panel concluded that such additional steps were not reasonable and the athlete was given a warning.

10.31 In CAS 2011/A/2518, the athlete displayed *"a serious lack of due diligence"* when he took a supplement wrapped only in a foil handed to him by a friend at his tennis club. The athlete conducted a 30 to 60 minute search on the internet, which was found to be "insufficient" since he failed to find a list of ingredients, which included the banned substance by name. The athlete had placed considerable reliance on the manufacturer's website which claimed that the supplement was *"approved by the World Anti-Doping Association"*. The CAS panel sanctioned the athlete for a period of eight months.

10.32 Powell argues that his behaviour is most analogous to that of the athletes in CAS 2011/A/2495 and CAS 2011/A/2645 in that while a doctor did not prescribe the Epiphany D1 that he ingested, it was nevertheless given to him by a trusted medical advisor. Powell also maintains that similar to the athletes in CAS 2011/A/2495 and CAS 2011/A/2645, his degree of fault was minimal since the only way in which he could have found the Oxilofrine was to analyze the Epiphany D1 in a lab prior to taking it. Powell submits that this would have been a disproportionately expensive and time consuming precaution that was beyond what was required of him.

10.33 Powell acknowledges that he could have done more than he did to avoid the ingestion of a banned substance. He could have avoided taking the product at all, or he could have sought medical advice before taking it or he could even have tested the product before using it. But he argues that such steps were deemed not to be reasonable in CAS 2011/A/2645 and are therefore not reasonable in the present circumstances when assessing his degree of fault.

10.34 The Panel takes issue with Powell's submission that his case is analogous to those in which a trusted medical advisor had recommended use of the supplement that contained the prohibited substance. An examination of Chris Xuereb's qualifications suggests that in no way could he be considered *"a trusted medical advisor"*. Mr. Xuereb is not a doctor in Ontario, Canada. He is not registered as a chiropractor in Ontario. He is not a registered massage therapist in Ontario. According to an article from the Globe and Mail newspaper of July 16, 2013, *"he is not registered with the province's college of physiotherapists, the self-regulating body that ensures people who hold themselves out as physiotherapists have passed the necessary competency test and have at least an undergraduate degree"*.

10.35 The fact that Mr. Xuereb was reputed to *"have good hands"* by a chiropractor, Dr. Carmine Stillo, does not bestow upon him a designation as a trusted medical advisor for purposes of

distributing supplements and that is one significant distinguishing point between this case and that of CAS 2011/A/2645.

10.36 In his testimony before the Jamaica Anti-Doping Disciplinary Panel, Powell stated that he had never attended any seminar on doping, and had never heard of any such seminars being conducted in Jamaica or abroad. Nevertheless, he confirmed his awareness that as an athlete it is his personal duty to ensure that no prohibited substance enters his body, that he is responsible for anything that enters his body and that ultimately it is his personal responsibility and not that of his coach or trainer.

10.37 Powell has been an international level competitor for more than a decade. Although he maintains that his level of education regarding doping issues is minimal, as a world class sprinter who is registered with the IAAF testing pool, it would be incumbent upon him to at the very least be aware of the risk of supplement use. The IAAF has published an advisory note on the risks associated with supplement use which should be mandatory reading for all IAAF competitors. The advisory note states:

"It remains the IAAF's primary position that athletes do not need to use supplements. And the strong advice is that they should not do so. Elite-level performance and results can be achieved simply through the application of a concerted, focused nutritional regime, conducive to the life of an international athlete.

If nevertheless, athletes decide to take supplements, they do so at their own risk, and should always ensure that they exercise caution and judgment in the products that they use.

Historically, and currently, many supplements have proven to contain or to be contaminated with, substances that are prohibited under both IAAF Rules and the WADA Prohibited List.

According to the principle of 'strict liability', "athletes are solely responsible for what is in their body at all times". As such, athletes must take all steps to verify the ingredients of any medicines and supplements that they choose to take, including talking to their doctors and using any resources made available by Anti-Doping Organizations.

And athletes should never purchase supplements from non-reputable sources. Online resources may be able to help in identifying reputable sources, but they cannot check all supplements, and it is well-known that product ingredients vary from country-to-country, and even from batch-to-batch. If in any doubt, the message is 'do not take it".

10.38 Powell in this case put far too much trust in the recommendation of someone who lacked any professional qualifications. Powell did not question whether Mr. Xuereb had any experience, let alone qualifications as a nutritionist as distinct from a physiotherapist. While the Panel accepts that it would be unreasonable to expect an athlete to go to the lengths of having each batch of a supplement tested before use, there are other less onerous steps that could be taken, such as making a direct inquiry to the manufacturer and seeking a written guarantee that the product is free of any substances on the WADA Prohibited List or asking if the manufacturer makes any products that do contain prohibited substances at the plant where the supplement is produced.

10.39 Powell in this case made no check into the credentials of the person recommending the supplement to him. He put his trust in someone that he had known for only a few weeks. Powell made no check with the manufacturers of the supplement. In fact, although Powell was billed for the cost of the supplement, he had no knowledge of where the supplement was purchased other than the statement from Mr. Xuereb that the supplement was purchased from a trusted source in Canada that Mr. Xuereb had been doing business with for some time. Powell did not seek the advice of professionally qualified doctors. He did not seek the advice of his own track club coach.

10.40 The Panel recognizes however, on the other side of the balance sheet, that Powell did take a number of significant steps to minimize any risk associated with the taking of Epiphany D1. He spent six hours over a two-day period researching the ingredients of Epiphany D1 and the other supplements that were purchased for him by Mr. Xuereb. He checked both on the Epiphany D1 website, and on the Google search engine. Powell stated that he searched each ingredient in turn and the information received was compared with the WADA Prohibited List.

10.41 Powell testified that he "googled" Acacia Rigidula which is one of the listed ingredients of Epiphany D1, however he did not see the article entitled *"Acacia Rigidula – avoiding the ban"*. The Panel finds that, although further research might have taken Powell to an examination of the forty separate alkaloids including Amphetamine, and Ephedrine which are prohibited substances contained in Acacia Rigidula, short of a laboratory test he could not have identified Oxilofrine as one of its ingredients.

10.42 The Panel finds that in all the circumstances, factually and legally, the eighteen-month period of ineligibility imposed by the Jamaica Anti-Doping Disciplinary Panel was excessive; and, with all the reservations it has already articulated about comparable cases, so far outside the broad run of cases as to excite a sense that an injustice has been done. The Panel regards the Jamaica Anti-Doping Disciplinary Panel's reliance on CAS 2010/A/2107 and CAS 2005/A/847 (which they referred to but did not analyse) to justify a sanction of that length as unwarranted. While this Panel might not tinker with a well-reasoned decision of a disciplinary body with which it agreed (*see* CAS 2010/A/2283 para. 14.36), this Panel has no inhibition on exercising its *de novo* powers to the full in this case.

10.43 Given the length of time that Mr Powell has been suspended from competition, any period of ineligibility under twelve months would allow him a prompt return to competition, so that the figure the Panel selects, if lower than that, would be significant only, if at all, on the perception of the public and of meet directors as to his culpability. In the Panel's view by reference to the specific facts of this case, which are listed above, it considers a period of six months ineligibility to be sufficient. This Athlete is not, in the vernacular often used by the media, *"a drug cheat"*, but he did fall short, of the high standards imposed on an athlete to exercise utmost caution, to avoid even inadvertent ingestion of a prohibited substance. The Panel would wish this case at least to serve as a further warning to all involved in sports subject to the WADA Code not to repose undue trust in others and to use due care when deciding to ingest supplements.

D. Disqualification of Competition Results

10.44 Article 10.8 of the WADA Code provides that, in addition to the automatic disqualification of competition results that produced the athlete's positive sample, *"*[…] *all other competitive results obtained from the date a positive Sample was collected (whether In Competition or Out-of-Competition)* […] *through the commencement of any Provisional Suspension or Ineligibility period, shall, unless fairness requires otherwise, be Disqualified with all of the resulting Consequences including forfeiture of any medals, points and prizes".*

10.45 The Panel finds that fairness would not require otherwise, and therefore disqualifies all of Powell's athletics competition results from June 21, 2013, the date of his sample collection, through the date of the last race which he competed in before accepting his Provisional Suspension, August 13, 2013.

10.46 In summary, the Panel concludes that:

(a) The eighteen-month period of ineligibility imposed by the Jamaica Anti-Doping Disciplinary Panel should be set aside and replaced with a period of ineligibility of six (6) months;

(b) The period of ineligibility commenced on June 21, 2013 and ended on December 20, 2013.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The Appeal filed by Mr Asafa Powell against the decision of the Jamaica Anti-Doping Disciplinary Panel dated 10 April 2014 is partially upheld.
2. The decision of the Jamaica Anti-Doping Disciplinary Panel dated 10 April 2014 is set aside and replaced with the following:

   Mr Asafa Powell is sanctioned with a period of ineligibility of six (6) months, commencing on 21 June 2013.
3. All sporting results obtained by Mr Asafa Powell from 21 June 2013 up to the date of the expiring of the period of ineligibilty shall be invalidated.
4. (…).
5. (…).
6. All other or further requests or motions for relief are dismissed.