

CAS 2004/O/645

AWARD

rendered by

THE COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President : L. Yves **Fortier**, CC, QC, Barrister in Montreal, Canada
Arbitrators : Christopher L. **Campbell**, Esq., Attorney-at-law in Fairfax, United States
Peter **Leaver**, QC, Barrister in London, United Kingdom

Ad hoc Clerk : Stephen L. **Drymer**, Attorney-at-law in Montreal, Canada

In the arbitration between:

UNITED STATES ANTI-DOPING AGENCY

Claimant

Represented by Travis T. Tygart, Esq., Director of Legal Affairs, *United States Anti-Doping Agency*, and by Richard R. Young, Esq. and Matthew S. Barnett, Esq., of the law firm *Holme Roberts & Owen, LLP*.

- and -

TIM MONTGOMERY

Respondent

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I. INTRODUCTION

1. This Award is the culmination of an exhaustive process of briefings and hearings, discussions amongst the parties, and numerous interventions by the Panel.

2. At issue is the charge by the United States Anti-Doping Agency (“USADA”) that Tim Montgomery violated applicable IAAF anti-doping rules, notwithstanding that Mr. Montgomery never tested positive in any in-competition or out-of-competition drug test. As such, the issues raised in this so-called “non-analytical positive” case are, if not wholly novel, certainly not in the nature of issues arising in a typical “adverse analytical finding” (or “analytical positive”) doping case. However, as explained more fully below, and to quote the Panel in the case of *USADA v. Michelle Collins* (another non-analytical positive case that arose in similar circumstances), “the straightforward application of legal principles to essentially undisputed facts leads to a clear resolution of this matter.”

3. USADA seeks a four-year sanction of Tim Montgomery for participating in a wide-ranging doping conspiracy implemented by the Bay Area Laboratory Cooperative (“BALCO”). USADA charges that, for a period of several years, Mr. Montgomery used various performance-enhancing drugs provided by BALCO. As noted, Mr. Montgomery has never had a single drug test found to be a positive doping violation, but USADA’s charges are based, in part, on all of the blood and urine tests at IOC-accredited and non-IOC-accredited laboratories that he has had in recent years. USADA also relies, among other things, on documents seized by the U.S. government from BALCO that have been provided to USADA; statements made by BALCO officials; and other documents.

4. According to USADA, BALCO was involved in a conspiracy the purpose of which was the distribution and use of doping substances and techniques that were either undetectable or difficult to detect in routine drug testing. BALCO is alleged to have distributed several types of banned doping agents to professional athletes in track and field, baseball and football. Among these were tetrahydrogestrinone (“THG”), otherwise known as “the Clear” by BALCO and its users. THG is a designer steroid that could not be identified by routine anti-doping testing until 2003, when a track and field coach provided a sample of it to USADA. It is undisputed that the Clear is a prohibited substance under the IAAF Rules.

5. On 3 September 2003, FBI agents searched BALCO's premises pursuant to search warrants. Approximately twenty-four agents searched BALCO's offices and seized hundreds of documents there and at other locations maintained by BALCO. The agents also seized samples of the Clear and other substances distributed by BALCO. During this raid, agents interviewed the company's President, Victor Conte, and other BALCO officials, who spoke about its activities and its customers. Mr. Conte named fifteen track and field athletes whom he alleged were clients of BALCO, including Mr. Montgomery, as well as other athletes from the NFL and Major League Baseball.

6. Following the BALCO raid, government agents obtained other documents, such as emails, through the use of subpoenas and other law enforcement mechanisms. Additional records were produced and created as part of the Grand Jury investigation, which resulted in the indictment of Mr. Conte, along with several alleged co-conspirators.¹ None of the evidence in this case derives from the Grand Jury proceedings. However, the BALCO documents were obtained by the U.S. Senate, which subsequently provided them to USADA.

7. As will be seen, the Panel's determination of the case against Mr. Montgomery turns on certain statements made by the Respondent himself which make it unnecessary for the Panel to determine whether the mass of other evidence adduced by USADA and derived in large measure from the BALCO documents, is also conclusive of the doping charges brought against him.

8. This Award is also the culmination of a process which saw two separate cases run essentially in parallel. Although the facts alleged in the present case and in the case of *USADA v. Chryste Gaines* differed in their detail, and separate submissions were filed by the parties in each case, both the nature of the charges brought against the Respondents and the substantive and procedural positions adopted by them throughout the period leading up to their respective hearings were so similar as to be virtually indistinguishable. Among other consequences, this meant that, but for the hearings on the merits, and with the consent of all parties, the two cases proceeded in lockstep. This is immediately apparent from a reading of the two Awards, which

¹ Mr. Conte pleaded guilty to several of the charges against him and, in October 2005, was sentenced to four months in prison plus four months of home confinement.

are being rendered simultaneously by the Panels (composed of the same arbitrators) in the two cases.

II. THE PARTIES

9. The Claimant, USADA, is the independent Anti-Doping Agency for Olympic sports in the United States and is responsible for managing the testing and adjudication process for doping control in that country. In that capacity, USADA conducts drug testing and results management for participants in the Olympic movement within the United States.²

10. The Respondent, Tim Montgomery (“**Mr. Montgomery**” or the “**Athlete**”), is an elite and highly successful American track and field athlete. As a sprinter, Mr. Montgomery has won numerous track and field titles, including World Championship and Olympic gold medals, as well as a world record.³

11. On 17 September 2004, The International Association of Athletics Federations (the “**IAAF**”), the international federation responsible for the sport of athletics worldwide, requested permission to appear in the arbitration as a party (i.e., as an intervener). In its request, the IAAF stated that, under IAAF Rules, should the Panel allow it to appear as a party, the Panel’s award “... will be final and binding and no further reference may be made to the CAS” and, further, that “the IAAF is content for this to be the final decision on [the Athlete's] eligibility.” The IAAF’s request was granted by the Panel on 4 October 2004. On 22 October 2004, the IAAF specified that the sole issue in respect of which it might make submissions in the arbitration concerned “the position that may be adopted by the parties in relation to IAAF Rules and their proper construction.” The Panel subsequently declared that “... the IAAF participating in [this case] as described above, the [award] rendered by the Panel shall be final and binding on the IAAF, without possibility of appeal.”⁴ In the event, after

² See: United States Anti-Doping Agency Protocol for Olympic Movement Testing (effective 7 October 2002) (the “USADA Protocol”), Mission Statement and para. 1, Exhibit A to USADA’s Request for Arbitration dated 5 July 2004.

³ The Panel notes that by letter dated 1 December 2005, counsel of record throughout the arbitration, Mr. Howard L. Jacobs and Ms. Jill A. Benjamin of the law firm *Forgey & Hurrell, LLP*, and Ms. Cristina Arguedas and Ms. Julie Salomon of the law firm *Arguedas, Cassman & Headley*, notified the CAS that they were withdrawing as Mr. Montgomery’s counsel in these proceedings.

⁴ All of this is described in detail in the Panel’s 9 November 2004 correspondence to the parties, discussed further below.

considering the written submissions filed by Claimant and Respondent, the IAAF notified the CAS that it did not intend to make any independent submissions in the arbitration.

12. With the consent of Claimant and Respondent and of the Panel, several third parties were also granted permission by CAS to attend the hearings as “observers”. These were: a representative of the World Anti-Doping Agency (“**WADA**”); John Ruger, the United States Olympic Committee (“**USOC**”) Athlete Ombudsman; and a member of the staff of U.S. Congressman John Conyers, Jr. At the end of the day, Congressman Conyers chose not to send a representative to any of the hearings, WADA attended only the two preliminary hearings held on 15 December 2004 and 21 February 2005, and Mr. Ruger was the sole observer at the hearing on the merits.

III. PROCEDURAL BACKGROUND

A. USADA’s “Charging Letter”

13. On 7 June 2004, USADA informed Respondent that it had received evidence which indicated that Mr. Montgomery was a participant in a doping conspiracy involving various elite athletes and coaches as well as BALCO. On the same date, USADA submitted the matter to its Anti-Doping Review Board (the “**Review Board**”) pursuant to paragraph 9 (a) (i) of the USADA Protocol. In accordance with the provisions of that paragraph, the Athlete also submitted a lengthy and detailed submission on the matter to the Review Board.

14. By letter dated 22 June 2004 (the so-called “**Charging Letter**”), USADA informed Mr. Montgomery that, after consideration of the documents submitted to it by USADA and Mr. Montgomery, and in accordance with paragraph 9 (a) (i) (vi) of the USADA Protocol, the Review Board had determined that there existed “sufficient evidence against you to proceed with the adjudication process as set forth in [the USADA Protocol].”⁵ The charges against Respondent were set out in the Charging Letter, and reiterated in USADA’s Statement of Claim, as follows:

⁵ Para 9 (a) (i) (vi) of the USADA Protocol reads as follows: “The Review Board shall consider the written information submitted to it and shall, by majority vote, make a recommendation to USADA with a copy to the Athlete whether or not there is sufficient evidence of doping to proceed with the adjudication process.”

[A]t this time, and reserving all rights to amend the charge, USADA charges you with violations of the IAAF Anti-Doping Rules. (...) USADA charges that your participation in the Bay Area Laboratory Cooperative ("BALCO") conspiracy, the purpose of which was to trade in doping substances and techniques that were either undetectable or difficult to detect in routine testing, involved your violations of the following IAAF Rules that strictly forbid doping⁶:

- Rule 55.2

The offence of doping takes place when either:

- (i) a prohibited substance is present within an athlete's body tissues or fluids; or
- (ii) an athlete uses or takes advantage of a prohibited technique; or
- (iii) an athlete admits having used or taken advantage of a prohibited substance or a prohibited technique (See also Rule 56).

- Rule 56.3

Any person assisting or inciting others, or admitting having incited or assisted others, to use a prohibited substance, or prohibited techniques, shall have committed a doping offence and shall be subject to sanctions in accordance with Rule 60. If that person is not an athlete, then the Council may, at its discretion, impose an appropriate sanction.

- Rule 56.4

Any person trading, trafficking, distributing or selling any prohibited substance otherwise than in the normal course of a recognised profession or trade shall also have committed a doping offence under these Rules and shall be subject to sanctions in accordance with Rule 60.

- Rule 60.1

For the purpose of these Rules, the following shall be regarded as "doping offences" (see also Rule 55.2):

- (i) the presence in an athlete's body tissues or fluids of a prohibited substance;
- (ii) the use or taking advantage of forbidden techniques;

⁶ The text quoted is from the 2002 IAAF Rules. The version of the rules released in 2000 includes the following variations in language: Rule 60(1)(i) requires 'the finding in an athlete's body' [as opposed to 'the presence in an athlete's body tissues or fluids']; and Rule 60(1)(iii) excludes the phrase 'or having attempted to use.'

(iii) admitting having taken advantage of, or having used, or having attempted to use, a prohibited substance or a prohibited technique;

(...)

(vi) assisting or inciting others to use a prohibited substance or prohibited technique, or admitting having admitted or incited others;

(vii) trading, trafficking, distributing or selling any prohibited substance.

Specifically, the evidence confirms your involvement with the following prohibited substances and prohibited techniques: one or more substances belonging to the prohibited class of "Anabolic Steroids;" Testosterone/Epitestosterone Cream; EPO; Growth Hormone; and Insulin.

15. As regards the sanction for these alleged violations USADA stated as follows in its Charging Letter:

USADA applies the sanctions found in the rules of the relevant International Federations and the USOC Anti-Doping Policies. Therefore, at this time reserving all rights to amend the sanction at a later date, under the Rules of the IAAF, Division III, Rule 60, USADA is seeking the following sanction against you for your doping offense:

- A lifetime period of ineligibility beginning on the date you accept this sanction or the date of the hearing panel's decision;⁷
- The retroactive cancellation of all awards or additions to your trust fund to which you would have been entitled by virtue of your appearance and/or performance at any athletics meeting occurring between February 1, 2000 and the date your period of ineligibility begins, pursuant to Division III, Rule 60.5 of the IAAF Anti-Doping Rules; and,
- A lifetime period of ineligibility beginning on the date you accept this sanction or the date of a hearing panel's decision, from participating in a US Olympic, Pan American Games or Paralympic Games, trials or qualifying events, being a member of any US Olympic, Pan American Games or Paralympic Games team and having access to the training facilities of the United States Olympic Committee ("USOC") Training Centers or other programs and activities of the USOC including, but not limited to, grants, awards or employment pursuant to the USOC Anti-Doping Policies.

⁷ At the final hearing, by which time certain of the charges (in particular the charge of "trafficking") against the Respondent had been dropped, USADA requested that the Panel impose a *four-year* period of ineligibility on Mr. Montgomery.

B. The Decision to Proceed Directly to CAS

16. In response to the Charging Letter, Mr. Montgomery notified USADA on 28 June 2004 that, in conformity with paragraph 9 (b) (iv) of the USADA Protocol, he elected to “bypass the domestic hearing process” described in paragraph 9 (b) (ii) of the USADA Protocol and "proceed directly to a single final hearing before the Court of Arbitration for Sport."⁸

17. The Respondent did not state in his letter, though the Panel considers it significant to note, that paragraph 9 (b) (iv) of the USADA Protocol provides that upon an athlete making such an election, "[t]he CAS decision shall be final and binding on all parties and shall not be subject to further review or appeal."

C. Commencement of the Arbitration and Constitution of the Panel

18. On 5 July 2004, Claimant submitted its Request for Arbitration to the CAS. The Request for Arbitration substantially reprised the allegations set out in USADA's 22 July 2004 Charging Letter, and identified Peter Leaver, QC, barrister, of London, England, as USADA's party-appointed arbitrator.

19. The Request for Arbitration also noted the parties' agreement that, in the event that Mr. Montgomery were to qualify for the US Olympic team for the 2004 Summer Games in Athens the following month, the arbitration proceedings would be expedited.⁹

20. Mr. Montgomery submitted his Answer to USADA's Request for Arbitration on 6 July 2004. In his Answer, the Athlete provided a brief statement of his defence and named Christopher L. Campbell, Esq., attorney-at-law, of San Francisco, U.S.A, as his party-appointed arbitrator.

21. The two party-appointed arbitrators subsequently selected L. Yves Fortier, CC, QC, barrister and solicitor, of Montréal, Canada, to serve as President of the Panel.¹⁰

⁸ Mr. Montgomery's letter of 28 June 2004 is filed as Exhibit B to USADA's Request for Arbitration.

⁹ In the event, Mr. Montgomery did not qualify for the US Olympic team.

¹⁰ The constitution of the Panel was formally notified to the parties by means of an "Order of Procedure" issued by the CAS on 8 September 2004. See below.

22. In due course, the CAS appointed Stephen L. Drymer, barrister and solicitor, of Montréal, Canada, to assist the Panel in the capacity of *ad hoc* clerk.

D. Initial Stage of the Proceedings and the CAS Order of Procedure (August - October 2004)

23. Far from "expediting" matters, as might originally have been their intention, the parties instead proved unable, during the initial stage of the arbitration, to collaborate with each other and the Panel as required to speed matters along. Having observed as much, the Panel acknowledges the unique and complex nature of the issues raised in this case, which no doubt meant that additional time was required for the parties to elucidate (let alone for the Tribunal to determine) the numerous substantive and procedural issues which arose in the course of the proceedings.

24. On 8 September 2004, the CAS issued its standard "Order of Procedure" addressing such matters as the jurisdiction of the CAS, the composition of the Panel, provisions regarding the costs of the arbitration and a statement concerning the confidentiality of the proceedings. The Order of Procedure also established a timetable for the filing of written submissions by the parties in accordance with article R44.1 of the CAS Code of Sports-related Arbitration (the "CAS Code"), leading to a hearing on the merits in San Francisco during the week of 1-5 November 2004. (As discussed below, that timetable quickly proved to be unfeasible and was in due course modified.)

25. The 8 September 2004 Order of Procedure further confirmed that the conduct of the arbitration was governed by articles R38 and following of the CAS Code, that is, by the CAS rules applicable to "Ordinary" (first instance) arbitrations as opposed to "Appeal" arbitrations.

26. The parties subsequently filed their respective written submissions – a Statement of Claim and a Response, together with supporting evidence – as required by the Order of Procedure.

27. As indicated above, the period leading to the planned 1 November 2004 hearing was characterized by an acrimonious flurry of correspondence, requests, objections, accusations and counter-accusations, motions and applications, the overall effect of which ultimately led both parties to request that the November 2004 hearing dates be vacated.

28. Among the procedural decisions and orders that the Panel was called upon to render during this period, several deserve mention.

- On 20 September 2004, the Panel denied two motions brought by USADA, one to compel the giving of consent by Mr. Montgomery for USADA to access certain medical records, and the second to compel Mr. Montgomery to answer certain "requests for admissions". The Panel also addressed a motion by USADA to issue subpoenas to various individuals. In this latter regard, the Panel agreed with USADA's submission that it has the power to issue subpoenas enforceable by United States courts; however, it requested the parties to provide additional briefing concerning the form of such subpoenas taking into account the provisions of article R44.3 of the CAS Code as well as Article 7 of the U.S. *Federal Arbitration Act* and Rule 45 of the U.S. *Federal Rules of Civil Procedure*.
- On 26 September 2004, the Panel signed and issued a "Stipulated Protective Order" negotiated by the parties governing the disclosure of confidential information by USADA to Respondent.
- On 7 October 2004, having considered the parties' submissions on the matter of the subpoenas requested by USADA, the Panel issued subpoenas to five individuals compelling their attendance (and in certain cases requiring the production of specified documents by them) at the 1 November hearing.¹¹
- On 19 October 2004, the Panel denied the parties' request (originally formulated by Respondent and consented to by Claimant), that the hearing on the merits be postponed from 1 November to a date "to be determined." The Panel instead reconfirmed that the hearing would commence on 1 November 2004. The Panel informed the parties that the first issue to be addressed at that hearing would be the determination of an appropriate and detailed schedule for the presentation of the parties' evidence; subsequently, the Panel would receive documents from those witnesses to whom subpoenas will have been issued and thereafter, and subject to any

¹¹ The Panel denied USADA's requests for subpoenas to be issued to various reporters as well as to the Respondent himself.

determinations made with respect to a detailed hearing schedule, the evidentiary phase of the hearing would commence, it is being understood that additional hearing days would also be scheduled.

- On 20 October 2004, the Panel responded to Mr. Montgomery's motion for issuance of subpoenas dated 15 September 2004. As in the case of the subpoenas previously requested by USADA, the Panel granted the Athlete's request by issuing subpoenas to several individuals compelling their attendance and requiring the production of documents by them at the hearing set to commence on 1 November 2004.

29. One further occurrence during this period deserves mention. On 26 October 2004, the parties entered into a "joint stipulation" in which they noted the existence of numerous disagreements regarding "threshold procedural and evidentiary issues, the resolution of which are fundamental to determining the most efficient presentation of [this case]" and acknowledged their inability "to reach any agreement on these procedural and evidentiary issues that would facilitate the orderly and efficient presentation of [this case]." The stipulation further recorded the parties' agreement to vacate the hearing dates during the week of 1 November as well as their agreement regarding a (partial) procedural timetable leading to a hearing to be scheduled at an undetermined date in 2005. The Panel responded to this development by a letter dated 28 October 2004. The Panel expressed its "surprise at this last minute development." It informed the parties that, in the circumstances, the hearing on the merits clearly could not commence on 1 November, yet it nonetheless ordered the parties' legal representatives to meet with the Panel in San Francisco on 1 November "in order to discuss fully all outstanding procedural and evidentiary issues and seek to determine a reasonable calendar for the future conduct of [this arbitration]."

E. First Preliminary Hearing: Procedural Timetable and Related Issues (1 November 2004)

30. A preliminary hearing was accordingly held in San Francisco on 1 November 2004. The outcome of that hearing is described in detail in a letter to the parties dated 9 November

2004, in which the Panel confirmed a series of procedural orders issued orally during the hearing itself.¹²

31. As noted in the Panel's 9 November letter, the hearing "was considered necessary by the Panel in view of what it believed to be insufficient progress made by the parties themselves – as illustrated, for example, in their Joint Stipulation of 26 October 2004 – in establishing a clear timetable for the fair and efficient determination of [this case]." The procedural orders issued on 1 November, and confirmed in writing on 9 November, addressed a series of issues ranging from the re-issuance of subpoenas previously issued at the request of the parties,¹³ the identity of the individuals authorized to participate in the arbitration as observers or interveners, as well as, most importantly, a list of outstanding procedural and evidentiary issues raised by the parties and a detailed timetable for the briefing and hearing of those issues.

F. Second Preliminary Hearing: Jurisdiction of the Panel (15 December 2004)

32. In accordance with the timetable established on 1 November 2004 and confirmed in writing on 9 November, a preliminary hearing was held, in Montreal, on 15 December 2004 on the matter of a Motion brought by the Athlete to dismiss the case on the ground that the CAS lacked jurisdiction.

33. The nature of the parties' submissions and the positions taken by them both in writing and at the hearing are described in the Panel's Award on Jurisdiction dated 9 February 2005. For present purposes it suffices to note that, for the reasons set out in that Award, the Panel dismissed Respondent's Motion and affirmed its jurisdiction in this matter.

G. Third Preliminary Hearing: Evidentiary Issues and Objections (21 February 2005).

34. A further, and final, preliminary hearing was held, in Montreal, on 21 February 2005 for the purpose of hearing the parties' submissions on a variety of evidentiary issues and objections raised by Respondent. Once again, reference is made to the detailed Decision on

¹² It is noted that a court reporter was engaged to record the proceedings of the 1 November 2004 hearing, and that a transcript of those proceedings was provided to the parties and to the CAS.

¹³ None of the individuals to whom subpoenas had been issued in fact appeared at the 1 November hearing and neither party produced any of the documents requested of these individuals.

Evidentiary and Procedural Issues rendered by the Panel on 4 March 2005 in respect of the matters addressed at that hearing.

35. With the Panel's 4 March 2005 Decision, the nature of the allegations against the Respondent was clarified, certain additional submissions were requested of the parties and, in short, the path toward the hearing on the merits was cleared.

36. The Panel's Decision on Evidentiary and Procedural Issues also addressed the question of the standard of proof applicable in the present case, which had been in dispute as between the parties. In view of the importance of the issue the Panel considers it apposite to reproduce the relevant passages of its 4 March 2005 Decision, which are as follows:

Standard of Proof

There is no dispute as to which of the parties, whether Claimant or Respondents, bears the onus of establishing the charges that have been levelled against Mr. Montgomery and Ms. Gaines in these cases. All parties accept that USADA bears the burden of proof in respect of its claims.

There is no such common understanding, however, in respect of the standard of the proof to be made by USADA in order for it to succeed – that is, whether USADA must prove its claims beyond reasonable doubt, as advocated by Respondents, or whether it need only make proof on the balance of probability.

The athletes' submissions are based on the argument (to quote from Mr. Montgomery's Motion on Burden of Proof, at p. 2) that "the U.S. Supreme Court has held that the burden of proof is a substantive rule [that cannot be applied retroactively]," and on the fact that "[p]rior to March 2004, IAAF Rule 59.6 provided that in all doping hearings, 'the Member shall have the burden of proving, beyond reasonable doubt, that a doping offense has been committed'." As further summarised by the athletes' counsel during the 21-22 February 2005 hearing, given that "that is what the new Rules say, you don't even have to consider the substantive/procedural issue."

As set out in its Statements of Claim, USADA's claims against the athletes for violations of IAAF Rules concern allegations that Respondents engaged in systematic doping "commencing in February 2000" (in Mr. Montgomery's case) and "commencing in September 2000" (as regards Ms. Gaines); and, as noted above, USADA refers specifically to alleged violations of the 2002 IAAF Rules. As of 1 March 2004, the IAAF implemented the provisions of the World Anti-Doping Code in new IAAF Anti-Doping Rules, including the provision (Article 3.1 of the World Anti-Doping Code: "Burdens and Standards of Proof") that "[t]he standard of proof shall be whether the Anti-Doping Organization has established an anti-doping rule violation *to the comfortable satisfaction of the hearing body, bearing mind the seriousness of the allegation which is made.*" (Emphasis added)

USADA, not surprisingly, sees things differently than the Respondents. It acknowledges (at p. 42 of its 9 February 2005 Response Brief) that what it calls “[t]he old ‘beyond reasonable doubt’ standard” was replaced by the IAAF as of 1 March 2004. The crux of USADA’s argument is that “[t]he introduction to the new IAAF Rules state that the new rules ‘shall not be applied retrospectively to doping matters pending at 1 March 2004’; *by negative implication, this introductory statement suggests that the new rules may be applied to doping charges initiated after March 1, 2004.*” (Emphasis added) USADA goes on to challenge the Respondents’ view that the standard of proof is a substantive, as opposed to a procedural, rule; and it refers to U.S. case law as well as CAS precedent in support of the principle that the criminal law standard of proof is inapplicable to these proceedings.

As often becomes evident when the question of standard of proof is debated, the debate looms larger in theory than practice. Counsel for all parties concurred with the views expressed by the members of the Panel during the 21-22 February 2005 hearing to the effect that even if the so-called “lesser”, “civil” standard were to apply – namely, proof on the balance of probability, or, in the specific context in which these cases arise, proof to the *comfortable satisfaction* of the Panel *bearing mind the seriousness of the allegation which is made* (what might be called the “comfortable satisfaction” standard) – an extremely high level of proof would be required to “comfortably satisfy” the Panel that Respondents were guilty of the serious conduct of which they stand accused.

Even under the traditional civil model, there is no absolute standard of proof. Built into the balance of probability standard is a generous degree of flexibility that relates to the seriousness of the allegations to be determined. In all cases the degree of probability must be commensurate with and proportionate to those allegations; the more serious the allegation the higher the degree of probability, or “comfort”, required. That is because, in general, the more serious the allegation the less likely it is that the alleged event occurred and, hence, the stronger the evidence required before the occurrence of the event is demonstrated to be more probable than not. Nor is there necessarily a great gulf between proof in civil and criminal matters. In matters of proof the law looks for probability, not certainty. In some criminal cases, liberty may be involved; in some it may not. In some civil cases – as here – the issues may involve questions of character and reputation and the ability to pursue one’s chosen career that can approach, if not transcend in importance even questions of personal liberty. The gravity of the allegations and the related probability or improbability of their occurrence become in effect part and parcel of the circumstances which must be weighed in deciding whether, on balance, they are true.

Without deciding the matter, the Panel notes that it appears that this is the very sort of approach contemplated by Article 3.1 of the World Anti-Doping Code, which refers to a standard of proof “bearing in mind the seriousness of the allegation which is made” and which further states that “[t]his standard of proof in all cases is greater than a *mere* balance of probability ...” (Emphasis added)

From this perspective, and in view of the nature and gravity of the allegations at issue in these proceedings, there is no practical distinction between the standards of proof advocated by USADA and the Respondents. It makes little, if indeed any, difference whether a “beyond reasonable doubt” or “comfortable satisfaction” standard is applied to determine the claims against the Respondents. This will

become all the more manifest in due course, when the Panel renders its awards on the merits of USADA's claims. Either way, USADA bears the burden of proving, by strong evidence commensurate with the serious claims it makes, that the Respondents committed the doping offences in question.

H. The Hearing on the Merits (6 - 10 June 2005)

37. On 28 April 2005, Claimant filed a motion to postpone the hearing that was scheduled on 6 June 2005. USADA requested that the hearing be postponed until after the conclusion of the BALCO criminal trial so as to ensure, to the extent possible, that Victor Conte (who refused to testify in these proceedings prior to the completion of the BALCO trial) and IRS Agent Jeff Novitzky (whose testimony in these proceedings prior to the BALCO trial was "uncertain") would be available to testify before the Panel. Claimant's Motion was denied, as much for the fact that USADA had long been aware of the possibility that Messrs. Conte and Novitzky might not be available to testify in the arbitration as for the patent unfairness to Respondent that would be caused by any additional delay in the resolution of the charges brought against him.

38. As previously agreed and set out in the Panel's Orders of 1 and 9 November 2004, the hearing on the merits in this case took place in San Francisco during the 5-day period from 6-10 June 2005.

39. At the hearing, the Panel heard oral argument from both parties. It also heard the evidence of the following witnesses:

For USADA

- Dr Larry Bowers, USADA's Senior Manager Director, who testified regarding the evidence discovered during the BALCO investigation as well as regarding Mr. Montgomery's blood and urine testing;
- IRS Agent Jeff Novitzky, who gave evidence regarding the BALCO investigation and the documents discovered in the course of that investigation;

- Ms. Kelli White, a former elite American athlete who has admitted to doping with the assistance of BALCO, who testified regarding an alleged admission made to her by Mr. Montgomery;
- Dr Hans Geyer, an expert who testified with respect to Respondent's urine test results;
- Dr Richard Clark, an expert called to analyze Mr. Montgomery's urine test results submitted by USADA; and
- Dr Michael Sawka, an expert called by USADA to give evidence regarding Mr. Montgomery's blood test results.

For Respondent

- Dr. David Black, President and Laboratory Director of Aegis Sciences Corp. and Aegis Analytical Laboratories, who provided expert evidence regarding the analytical laboratory data (blood and urine tests) produced by USADA; and
- Dr. James Stray-Gundersen, an expert who testified regarding the blood testing results for Mr. Montgomery produced by USADA.

40. Although Mr. Montgomery's counsel cross-examined each of the witnesses produced by USADA, the Athlete called no fact witnesses of his own nor did he himself give evidence.

IV. THE CASE AGAINST MR. MONTGOMERY

I. Applicable IAAF Rules

41. As set out in USADA's Charging Letter and Statement of Claim, the charges brought against the Respondent concern alleged offences under IAAF Rules 55.2, 56.3, 56.4, and 60.1 (reproduced in full in paragraph 14 above). As noted, these charges are brought under the 2002 edition of the IAAF Rules (IAAF Official Handbook 2002-2003), which are applicable.

42. Notwithstanding the breadth of the charges brought against Mr. Montgomery – comprising the *presence, use* and *admission* of use of prohibited substances or techniques (Rules 55.2 and 60.1), *assisting* and *inciting* others to do so (Rules 56.3 and 60.1), and *trafficking* in prohibited substances (Rules 56.4 and 60.1) – it became increasingly apparent in the course of the proceedings, that the thrust of USADA's case concerns allegations of the use of prohibited substances and techniques (including alleged admissions of use and evidence of the presence of prohibited substances in the Athlete's body) as opposed to the "assisting or inciting" and "trafficking" charges. Ultimately, these charges were dropped by USADA.

J. USADA's 7 Types of Evidence

43. As presented by USADA at the hearing, the evidence of doping by Mr. Montgomery consisted of what Claimant referred to as 7 types of evidence:

- (1) Blood test results from a Mexican laboratory in February 2000 which allegedly show Mr. Montgomery's testosterone level doubling in the course of one day;
- (2) Documents extracted from the files seized from BALCO which, according to USADA, "individually or when linked together established Montgomery's doping";
- (3) Evidence of the suppression and rebound of endogenous steroids in Respondent's urine, as shown in a table depicting test results reported by IOC-accredited and BALCO Laboratories on 56 occasions between March 1999 and September 2004;
- (4) Alleged abnormal blood test results on 5 occasions between November 2000 and July 2001;
- (5) Respondent's alleged admission to Kelli White that he had used a prohibited substance known colloquially as the "Clear";
- (6) So-called admissions against interest, which implicated Mr. Montgomery, made by the President of BALCO, Victor Conte, in interviews with investigative authorities as well as the media; and

- (7) Reports in the San Francisco Chronicle supposedly based on secret grand jury testimony by Mr. Montgomery in which he admits to using various prohibited substances.

44. All of the foregoing evidence was challenged by the Respondent. This includes the reliability and veracity of statements regarding Mr. Montgomery contained both in statements that may have been made by Victor Conte and in documents found in his files, the propriety of the Panel considering newspaper reports allegedly derived from secret Grand Jury testimony, the credibility of Ms. White's testimony before the Panel in this arbitration and, significantly, the authenticity, reliability, interpretation and weight of test results conducted by non-IOC-accredited labs as well as the overall interpretation of the numerous blood and urine test results for Mr. Montgomery.

45. The Panel has wrestled with the question whether, in the circumstances, it should address in this Award each element of USADA's case against Mr. Montgomery, including each of what USADA calls its "7 types of evidence" of doping by the Athlete. On balance, the Panel has determined not to do so for the simple reason that it is unnecessary. This is because the Panel is unanimously of the view that Mr. Montgomery in fact admitted his use of prohibited substances to Ms. White, as discussed in more detail below, on which basis alone the Panel can and does find him guilty of a doping offence. The fact that the Panel does not consider it necessary in the circumstances to analyse and comment on the mass of other evidence against the Athlete, however, is not to be taken as an indication that it considers that such other evidence could not demonstrate that the Respondent is guilty of doping. Doping offences can be proved by a variety of means; and this is nowhere more true than in "non-analytical positive" cases such as the present.

K. Kelli White's Testimony

46. As mentioned, Ms. White has admitted to doping and has accepted a two-year sanction as a result. Having seen Ms. White and heard her testimony, including in response to questions put to her by counsel and the Panel, the members of the Panel do not doubt the veracity of her evidence. She answered all questions, including in relation to her own record of doping, in a forthright, honest and reasonable manner. She neither exaggerated nor sought to play down any aspect of her evidence. Clearly an intelligent woman, she impressed the

Panel with her candour as well as her dispassionate approach to the issues raised in her testimony and regarding which she was questioned by counsel and members of the Panel. In sum, the Panel finds Ms. White's testimony to be wholly credible.

47. According Ms. White's evidence, in March 2001, while at an international meet in Portugal (no exact date was provided by the witness) she and Mr. Montgomery had "a small discussion about whether or not the Clear made our calves tight." Mr. Montgomery asked Ms. White, "Does it make your calves tight?" Ms. White responded in the affirmative. Mr. Montgomery, still in her presence, then placed a telephone call to someone who may or may not have been Mr. Conte (Ms. White believes that it was Mr. Conte) to whom he relayed the information that "she said that it makes her calves tight too". According to Ms. White, there was not the slightest doubt as to the substance about which she and Mr. Montgomery were speaking and which they both acknowledged had the effect of making their calves tight: they were talking about the Clear.

48. It is essential to note that this evidence of what USADA claims constitutes a direct admission of Mr. Montgomery's guilt, is uncontroverted.

49. Counsel for Respondent may have questioned Ms. White's motives in offering her testimony concerning Mr. Montgomery's use of the Clear and, more generally, his relationship with BALCO. They may have sought (without success) to impugn her honesty and to draw attention to the witness' own history of involvement with BALCO and her efforts to conceal that involvement. However, the Panel has already declared its finding with respect to Ms. White's credibility as a witness in these proceedings and its view that she is telling the truth.

50. What counsel for Mr. Montgomery did not do was in any way undermine Ms. White's evidence regarding her conversation with Mr. Montgomery in March 2001. The evidence of that conversation, which the Panel considers to be clear and compelling, thus stands uncontroverted. It is also, as indicated above, sufficient in and of itself to find Respondent guilty of doping.

L. Mr. Montgomery's Decision Not to Testify

51. Of course, as noted by USADA's counsel during closing argument: "It would be a real different issue if Tim Montgomery took the stand and said '*no, no, when I said "it" I meant*

something else'." It might indeed have affected the Panel's appreciation of Ms. White's evidence had Respondent chosen to provide the Panel with a different explanation of their March 2001 conversation or had he denied that the conversation took place as described by the witness. The fact remains that he did not.

52. The Respondent's decision not to testify at his hearing did not come as a surprise. Indeed, the decision had been communicated to USADA and the Panel by Mr. Montgomery's counsel early in the proceedings. Nor is there any dispute as to Respondent's right to decide not to testify. It is common ground that Mr. Montgomery was fully within his rights to testify in his own defence, or not, as he saw fit. Where the parties differ, however, is with respect to the question (on which extensive pre-hearing submissions and authorities were filed and arguments were made during the hearing) whether the Panel has the authority to draw an adverse inference from Mr. Montgomery's decision not to testify in the arbitration; and, if it does have the power to do so, whether such an inference should be drawn in this case.

53. On 17 September 2005, the Panel advised the parties that, having considered their written and oral arguments and the legal authorities filed by them for and against the drawing of an adverse inference, and after deliberation, it found that "it does have the right and power to draw an adverse inference from Mr. Montgomery's refusal to testify. More particularly, it may draw adverse inferences in respect of allegations regarding which USADA has presented evidence that would normally call for a Response from the Respondent himself, and not merely from his experts or counsel." The Panel further informed the parties that it had not yet determined whether it would draw any such inferences and that its deliberations had been suspended so as to allow Respondent the opportunity to reconsider, in the circumstances, his decision not to testify.¹⁴

¹⁴ As explained in the Panel's 17 September letter, this somewhat unusual procedure was considered necessary and appropriate in the circumstances, so as to preserve the procedural harmony as between Mr. Montgomery's and Ms. Gaines' cases. As the Panel explained to the parties (and as USADA was well aware, in its capacity as the Claimant in the Gaines arbitration), because of the different manner in which events at her hearing unfolded, Ms. Gaines had had the opportunity to address the question whether, in the event that the Panel were to find that it may draw adverse inferences from her refusal to testify, she would wish to be so informed in order to be able to reconsider her decision. Ms. Gaines' answer was "No". The same opportunity for Mr. Montgomery to address this question had not arisen during his hearing the month before.

54. It is noted that in the case of *USADA v. Michelle Collins* the Arbitral Tribunal found that it "may draw certain adverse inferences" from the Respondent's refusal to testify, though "there is no rule obligating a Tribunal to draw an adverse inference." Indeed, the Tribunal went on to hold that "no adverse inference is necessary" given that the weight of the evidence "is already adverse to Collins so no further adverse inference need be drawn".

55. The situation is similar in the present case. Mr. Montgomery has been provided every conceivable opportunity to provide an exculpatory explanation of his own statements evidencing his guilt. He has had ample opportunity to deny ever making such statements. But because he has not offered any evidence of his own concerning his admission to Ms. White of his use of the Clear, the Panel can only rely on the testimony of Ms. White. That testimony is more than merely adverse to Mr. Montgomery; it is fatal to his case. In the circumstances, faced with uncontroverted evidence of such a direct and compelling nature, there is simply no need for any additional inference to be drawn from the Respondent's refusal to testify. The evidence alone is sufficient to convict.

V. DECISION

M. The Doping Offence

56. In its 4 March 2005 Decision on Evidentiary and Procedural Issues, the Panel observed that "it makes little, if indeed any difference, whether a 'beyond reasonable doubt' or 'comfortable satisfaction' standard is applied to determine the claims against the [Respondent] ... Either way, USADA bears the burden of proving, by strong evidence commensurate with the serious claims it makes that the [Respondent] committed the doping offences in question."

57. USADA has met this standard. The Panel has no doubt in this case, and is more than comfortably satisfied, that Mr. Montgomery committed the doping offence in question. It has been presented with strong, indeed uncontroverted, evidence of doping by Mr. Montgomery, in the form of an admission contained in his statements made to Ms. White and to others while in her presence. On this basis, the Tribunal finds Respondent guilty of a doping offence. In particular, the Panel finds Mr. Montgomery guilty of the offence of admitting having used a prohibited substance under IAAF Rules 55.2(iii) and 60.1(iii).

N. The Sanction

58. By way of sanction, USADA commenced this case by informing Mr. Montgomery that it intended to request, and indeed it requested from the Panel, “a lifetime period of ineligibility beginning on the date you accept this sanction or the date of the hearing panel’s decision.”¹⁵ It subsequently amended this request (including as a consequence of its withdrawal of the “trafficking” allegations against Respondent) and, at the close of the hearing, requested a four-year period of ineligibility.

59. USADA request is based on IAAF Rule 60.2 (a) (i), which provides that for a first offence under Rule 60.1(iii) (which includes the offence of admitting having used a prohibited substance) an athlete shall be ineligible “for a minimum of two years from the date of the hearing at which it is decided that a Doping Offence has taken place.”

60. In the circumstances, the Panel finds that Mr. Montgomery's admission of his use of prohibited substances merits a period of ineligibility under IAAF Rules of two years.

61. This period of ineligibility shall commence to run as of 6 June 2005, being the first day of Mr. Montgomery's hearing. The Panel is of the view that this date of commencement of the sanction is fair and appropriate in the particular circumstances of this case in view of the numerous delays in the hearing process unattributable to the Athlete, including as a result of the agreement of all parties that Mr. Montgomery's and Ms. Gaines' cases should be run in tandem. Although this agreement entailed significant efficiencies overall, and doubtless permitted the two cases to be heard and decided (by the same Panel) more quickly than if they had been conducted sequentially, it inevitably meant that there would be some additional delay before either case could be heard.¹⁶

62. In addition to the two-year sanction already discussed, the Panel orders the retroactive cancellation of all of Mr. Montgomery's results, rankings, awards and winnings as of 31 March 2001 (as noted above, Ms. White did testify as to the exact date during the month of March, 2001 on which Mr. Montgomery admitted his use of the Clear, and the Panel thus

¹⁵ Quoted from USADA's Charging Letter : see above.

¹⁶ The agreement to maintain what the Panel has had occasion to refer to as the "procedural harmony" between the two cases also meant that the decision in the first of the two cases to be heard – which, as agreed between the parties would be Mr. Montgomery's case – would be issued by the Panel at the same time as its decision in the second case.

considers it reasonable that the last day of the month in question be selected for this purpose). In this regard, IAAF Rule 60.5 provides: "Where an athlete has been declared ineligible he shall not be entitled to any award or addition to his trust fund to which he would have been entitled by virtue of his appearance and/or performance at the athletics meeting at which the doping offence took place, or at any subsequent meetings."

VI. CONCLUSION

63. In its introduction to the present Award, the Panel described the relative novelty of this case, in which USADA sought to prove a doping offence in the absence of any "adverse analytical finding". It must also be noted that this case can be distinguished from those of other elite track athletes involved with BALCO, such as Ms. White, Alvin Harrison and Regina Jacobs, who admitted their guilt to USADA in the context of anti-doping proceedings.

64. The Panel would add, in conclusion, that there is no reason to believe that the world of sport has seen the last of this sort of "no adverse analytical finding" case. It must constantly be borne in mind, as noted above, that doping offences can be proved by a variety of means. In this regard, the Panel concurs with the observation expressed in the Comitato Olimpico Nazionale Italiano ("CONI") matter, that "in anti-doping proceedings other than those deriving from positive testing, sports authorities do not have an easy task in discharging the burden of proving that an anti-doping rule violation has occurred, as no presumption applies." However, the Panel also concurs wholeheartedly with the exhortation of the CONI Panel, which wrote as follows in the concluding passage of its Award, a declaration that this Panel adopts as its own:

In any event, the undeniable circumstance that the conviction for doping offences is more difficult when the evidence is other than positive testing must not prevent the sports authorities from prosecuting such offences, as already remarked, with the outmost earnestness and eagerness, using any available method of investigation. In the end, it will be up to the adjudicating body having jurisdiction over the matter – which, according Article 8 of the WADC, must always be a "fair and impartial hearing body" – to determine case by case whether the standard of proof of Article 3.1 of the WADC has been met and the burden of proof has been discharged, or not, by the prosecuting sports authority.

VII. COSTS

65. The issue of costs is dealt with in paragraph 12 of the 8 September 2004 CAS Order of Procedure as follows, in terms that neither party has asked the Panel to disturb:

12.1 In accordance with art. 64 of the Code and with art. 9 b (iv) of the USADA Protocol, the costs of this arbitration will be borne by USADA.

12.2 Each party is responsible for the fees and costs of its lawyer and such costs as arise from the appearance of witnesses whose hearing has been requested.

VIII. PUBLICATION OF THE AWARD

66. In accordance with clause 13 of the Order of Procedure dated 8 September 2004, the award and a press release setting forth the outcome of the proceedings shall be made public by the CAS.

ON THESE GROUNDS

The Panel unanimously finds and orders as follows:

1. Respondent is guilty of the offence of admitting having used a prohibited substance under IAAF Rules 55.2(iii) and 60.1(iii);
2. The following sanctions shall be imposed on Respondent:
 - a. A period of ineligibility under IAAF Rules for two years commencing as of 6 June 2005, including his ineligibility from participating in U.S. Olympic, Pan American or Paralympic Games, trials or qualifying events, being a member of any U.S. Olympic, Pan American or Paralympic Games team and having access to the training facilities of the United States Olympic Committee (“USOC”) Training Centers or other programs and activities of the USOC including, but not limited to, grants, awards, or employment pursuant to the USOC Anti-Doping Policies;
 - b. The retroactive cancellation of all awards or additions to Respondent’s trust fund to which he would have been entitled by virtue of his appearance and/or performance at any athletics meeting occurring between 31 March 2001 and the date of this Award;
3. The costs of the arbitration, to be determined and notified to the parties by the Secretary General of the CAS in accordance with article R 64.4 of the CAS Code, shall be borne by USADA;
4. Each party shall bear all of its own costs, including the fees and expenses of its lawyers and witnesses;
5. This Award deals definitively with all charges brought against Respondent by Claimant in this arbitration. All charges not expressly dealt with herein are dismissed.

Lausanne, 13 December 2005

THE COURT OF ARBITRATION FOR SPORT

L. Yves Fortier, CC, QC
President of the Panel

Christopher Campbell
Arbitrator

Peter Leaver QC
Arbitrator

Stephen Drymer
Ad hoc Clerk