

**Leveling the Playing Field: Why the USADA Must Adopt a Criminal Burden of
Proof in Anti-Doping Proceedings**

Daniel Dawer

This summer, the Court of Arbitration for Sport (CAS) rejected Floyd Landis' appeal of his suspension for doping at the 2006 Tour de France. The move signaled not only the Court's confidence in the American Arbitration Association's (AAA) ruling on the Landis case, but also its faith in the standard of proof spelled out in the World Anti-Doping Code (WADC). That standard is "comfortable satisfaction," which the Code defines as "greater than a mere balance of probability but less than proof beyond a reasonable doubt."¹ Because a positive drug test alone establishes comfortable satisfaction of guilt, athletes charged with doping offenses are functionally presumed guilty until proven innocent.

The ambiguity of this evidentiary standard threatens athletes' due process rights. In an ordinary criminal proceeding, the defendant receives specific due process protections, including a fair and full trial and discovery. Chief among these protections is the establishment of a clear evidentiary burden for the prosecutor: guilt must be proven beyond a reasonable doubt in order to convict. Though doping cases are disciplinary in nature, the CAS refuses to define them as criminal proceedings, asserting instead that they are "quasi-criminal" and basing their burden of proof on this distinction.

Recent public opinion polls indicate that sports fans remain suspect of attempts to regulate doping in sports. Over half of those surveyed in a July 2008 USA Today/Gallup poll believe that at least some Olympic track and field athletes use performance-enhancing drugs, and one in three believes that at least some Olympic swimmers dope.² Charged with the task of combating this perception and maintaining the credibility of

¹ World Anti-Doping Agency. *World Anti-Doping Code*. (March 2003): 12 p. http://www.wada-ama.org/rtecontent/document/code_v3.pdf

² A.J. Perez. "Poll: Doping Questions Cloud Americans' View of Games." *USA Today*. July 31, 2008 p. http://www.usatoday.com/sports/olympics/beijing/2008-07-31-poll-doping-cover_N.htm

international sports, the World Anti-Doping Agency (WADA) has an incentive to successfully prosecute athletes for doping. But should the push to convict dopers come at the risk of depriving accused athletes of their due process rights?

Citing the heightened expense of prosecuting well-funded athletes, the United States Anti-Doping Agency (USADA) has requested double the federal funding it currently receives. If the USADA plans to continue prosecuting athletes, it must take extra steps to ensure the due process rights of athletes on trial. It is my recommendation that increased federal funding to the USADA be conditioned upon the adoption of a criminal burden of proof in doping proceedings. Adopting a criminal burden of proof would clarify the evidentiary standard for anti-doping cases, help preserve the due process rights of accused athletes, and ultimately lend legitimacy to anti-doping law.

Shifting Burdens of Proof

The state's burden of proving a defendant's guilt beyond a reasonable doubt is a cornerstone of United States criminal jurisprudence. In practice since the foundation of the American judicial system, the standard was not interpreted as an explicit constitutional requirement until 1970, in the case of *In re Winship*. Writing for the majority decision, Justice William Brennan found that proof beyond a reasonable doubt "plays a vital role in the American scheme of criminal procedure" because it reduces "the risk of convictions resting on factual error" and because it "provides concrete substance for the presumption of innocence."³ The standard's importance for the protection of due process cannot be overstated: an evidentiary burden that required anything less would put

³ *In re Winship* 397 U.S. 358 (1970): 363

the defendant at a significant disadvantage since presumption would shift toward guilt in cases where reasonable doubt existed.

The 2004 adoption of the WADC by American sports governing bodies lowered the burden of proof in doping proceedings from a criminal standard to a quasi-criminal standard.⁴ The WADA justified this standard by claiming it was practically impossible to prove an athlete's guilt beyond a reasonable doubt.⁵ A legal opinion on the WADC found that though a presumption of guilt "can lead to some injustice in cases where an athlete is unable to prove an absence of fault or negligence," such a standard "is not only appropriate but also essential in order to pursue an efficient anti-doping policy."⁶ Accordingly, the WADA established a burden of proof "greater than a mere balance of probability but less than proof beyond a reasonable doubt": namely, prosecutors must establish an athlete's guilt "to the comfortable satisfaction of the hearing body."⁷ The standard's ambiguity emerges from a failure to define "comfortable satisfaction." Is it closer to preponderance of evidence—the evidentiary standard in civil proceedings—or closer to beyond reasonable doubt? If anti-doping cases truly are criminal in nature, the CAS's use of a civil standard violates its doctrinal foundations and deprives athletes of the due process rights they deserve.

⁴ Paul Greene. "Case Note: *United States Anti-Doping Agency v. Montgomery*: Paving a New Path to Conviction in Olympic Doping Cases." *Maine Law Review* 59 Me. L. Rev. 149 (2007): 154-155

⁵ The CAS's refusal to apply a criminal burden of proof in doping proceedings had been upheld even before the adoption of the Code. In a landmark decision for anti-doping law, the Swiss Federal Supreme Court ruled in *Gundel v. International Equestrian Federation* that because doping sanctions result from violations of contract, doping proceedings should be regarded as private rather than criminal. In *Xavier v. Union of European Football Associations*, the Swiss Federal Supreme Court went so far as to rule that Swiss constitutional law was inapplicable in sports proceedings because they took place outside the State's jurisdiction.

⁶ Gabrielle Kaufmann-Kohler and Giorgio Malinverni. *Legal Opinion on the Conformity of Certain Provisions of the Draft World Anti-Doping Code with Commonly Accepted Principles of International Law*. (2003): 41-42 p. <http://www.wada-ama.org/rtecontent/document/kaufmann-kohler-full.pdf>

⁷ *World Anti-Doping Code* 12

Vencill v. USADA: the Problem of Strict Liability

By justifying the quasi-criminal burden of proof as a necessary tool for convicting doping athletes, the WADA ignores the impossible burden it places on defendants. The WADC clarifies that “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,” effectively imposing a standard of strict liability on accused athletes.⁸ To demonstrate an athlete’s guilt, the prosecuting agency need only present evidence of a positive drug test. Unintentional ingestion of a prohibited substance in no way exonerates the athlete.

The CAS’s decision in *Vencill v. USADA* demonstrates the problems with applying a strict liability standard to doping cases. Kicker Vencill, an American swimmer, tested positive for 19-norandrosterone in an out-of-competition drug test administered by the USADA. Maintaining his innocence, Vencill had his nutritional supplements tested even though none of them, according to their labels, contained a banned substance. The test’s results showed a multivitamin Vencill took had been tainted with three different banned steroid precursors.⁹ Even in light of this evidence, the CAS dismissed Vencill’s claim, pointing to a provision in the WADC that holds athletes responsible for “a positive test resulting from a mislabeled or contaminated vitamin or nutritional supplement”¹⁰ and reprimanded Vencill for ignoring the potential risks associated with taking nutritional supplements.

If intent has no bearing on guilt, then the athlete’s options for legal recourse diminish significantly. Because a single positive test result shifts presumption against the

⁸ *World Anti-Doping Code* 8

⁹ Jessica Foschi. “A Constant Battle: The Evolving Challenges in the International Fight Against Doping in Sport.” *Duke Journal of Comparative & International Law*. 16 *Duke J. Comp. & Int’l. L.* 457 (2006): 465-66

¹⁰ *World Anti-Doping Code* 31

defendant regardless of culpability, athletes can refute doping charges only by questioning the methodology of the doping test itself. The quasi-criminal standard of “comfortable satisfaction” makes this process nearly impossible—for even if the defendant demonstrates legitimate reason to doubt a test’s result, the athlete can still be convicted. That WADA labs refuse to publicize a standard testing procedure for detecting banned substances or criteria for concluding positively further complicates the athlete’s ability to present an adequate defense.¹¹ In effect, an athlete’s only hope for exoneration after a positive test result is an indisputable demonstration of scientific error.

USADA v. Montgomery: the Emergence of Non-Analytical Positives

The 2003 Bay Area Laboratory Co-Operative (BALCO) scandal ushered in an aggressive new round of anti-doping measures. Perhaps in an effort to combat the negative publicity the scandal generated, the USADA began prosecuting athletes involved with BALCO based on “non-analytical positives,” or evidence of banned substance use without evidence of a positive drug test. In *USADA v. Collins* the CAS established a precedent for convicting athletes on non-analytical positives when it found track and field athlete Michelle Collins guilty of doping based on a significant amount of corroborating evidence.¹² Following its successful prosecution of Collins, the USADA turned to Tim Montgomery, another well-known track and field athlete with ties to BALCO. Lacking a positive drug test, the USADA sought to prosecute Montgomery, like Collins, on non-analytical positive evidence.

The CAS decision in *USADA v. Montgomery* represented a major rollback of due

¹¹ Donald Berry. “The Science of Doping.” *Nature* 454. (August, 2008): 693

¹² *USADA v. Michelle Collins* American Arbitration Association No. 30 190 00658 04 (2004)

process protections in doping proceedings. Disregarding the quasi-criminal burden of proof outlined in the WADC, the Court found that there is not “necessarily a great gulf between proof in civil and criminal matters,”¹³ effectively collapsing the distinction between mere balance of probability and proof beyond reasonable doubt. The Court ultimately based its decision in *Montgomery* on its interpretation of this evidentiary standard, as it convicted Montgomery on neither a positive drug test nor substantial corroborating evidence (as it had in *Collins*), but rather on Montgomery’s alleged confession to Kelli White that he had used a banned substance. Breaking from the precedent it set in *Collins*, the CAS panel ruled that this confession alone—without further evidence—was sufficient to meet the burden of proof it set forth.

Adopting a Criminal Burden of Proof

Vencill v. USADA and *USADA v. Montgomery* demonstrate the due process violations that result from the application of an ambiguous burden of proof. By prosecuting athletes on a standard of comfortable satisfaction, the USADA shifts presumption in doping hearings towards guilt and severely limits accused athletes’ options for legal recourse. Maintaining this standard will undoubtedly lead to more convictions of doping athletes, but will also result in the conviction of innocent athletes who cannot adequately contest the doping charges brought against them. Only by adopting a criminal burden of proof for doping proceedings can the USADA ensure the evidentiary clarity necessary to protect athletes’ due process rights.

¹³ *USADA v. Tim Montgomery* CAS 2004/O/645 (2004): 13 p. <http://www.rdes.it/Montgomery.pdf>

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