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I. INTRODUCTION

In *United States Anti-Doping Agency v. Montgomery*,[1] a Court of Arbitration for Sport (CAS)[2] Tribunal found Olympic track and field gold medalist[3] and former world record holder[4] Tim Montgomery (Montgomery) guilty of doping.[5] The Tribunal

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1. U.S. Anti-Doping Agency v. Montgomery, CAS 2004/0/645 (Ct. of Arb. for Sport Dec. 13, 2005), *available at* http://www.usantidoping.org/what/management/arbitration.aspx (follow "Arbitration Ruling: U.S. Track & Field Athlete Tim Montgomery Receives Suspension for Drug Violation" hyperlink under "2005") [hereinafter *Montgomery, award on merits*]. *Montgomery* was heard and decided concurrently with *U.S. Anti-Doping Agency v. Gaines*, which involved an American female sprinter, Chryste Gaines, who was also found to be guilty of doping by the CAS without ever testing positive for a banned substance. *See* CAS 2004/0/649 (Ct. of Arb. for Sport Dec. 13, 2005), *available at* http://www.usantidoping.org/what/management/arbitration.aspx (follow "Arbitration Ruling: U.S. Track & Field Athlete Chryste Gaines Receives Suspension for Drug Violation" hyperlink under "2005").

2. The CAS is based in Lausanne, Switzerland, but this case and its preliminary hearings were heard in San Francisco and Montreal by a three-member panel comprised of L. Yves Fortier of Montreal, Canada, Christopher Campbell of San Francisco, United States, and Peter Leaver of London, United Kingdom. *Montgomery, award on merits*, CAS 2004/0/645, at 8.

3. Montgomery won a gold medal at the 2000 Olympics in Sydney, Australia as a member of Team USA's 4x100 meter relay. Tim Montgomery–Biography, http://www.usatf.org/athletes/bios/Montgomery_Tim.asp (last visited Sept. 29, 2006).

4. Montgomery set a world record in the 100 meter-dash by running 9.78 seconds on the track in Paris in 2002. *Id.*

5. *Montgomery, award on merits*, CAS 2004/0/645, at 24. Two attorneys for Montgomery, Robert W. McFarland and Amy Morrissey Turk, of the Norfolk, Virginia law firm McGuire Woods LLP, appealed the Tribunal's decision on January 21, 2006 through a letter to the CAS Secretary-General Matthieu Reeb seeking to have it annulled on the grounds that one of the arbitrators had a conflict of interest. *Montgomery's Attorneys Mull Court Action Over Conflict-of-Interest Claim*, THE HERALD-SUN (Durham, N.C.), Jan. 21, 2006, at B3 [hereinafter *Attorneys Mull Court Action*]. Montgomery's lawyers allege that L. Yves Fortier's Montreal law firm, Ogilvy Renault, also represents the Montreal-based World Anti-Doping Agency (WADA). *Id.* Specifically, it is alleged that the clerk working for the Tribunal, Stephen Drymer, Fortier's law firm partner, is the WADA's attorney. *Id.* The letter called the alleged conflict of interest "egregious" and called into question the integrity and impartiality of the proceeding. *Sprinter Appeals Ban*, SPORTAL, Jan. 21, 2006, http://loudytourky.sportal.com.au/othersports.asp?i=news&id=76685 (last visited Sept. 29, 2006). Secretary-General Reeb rejected the appeal, saying it was wrongly directed to the CAS. *Id.* Reeb said Switzerland's highest court, the Swiss Federal Tribunal, is the only body with jurisdiction to consider a CAS decision. *Id.* Montgomery's attorneys indicated that Montgomery is considering such an appeal to Switzerland's highest court, as well as one to the United States Federal Courts. *Id.* If the Tribunal's ruling was overturned, the CAS could opt to try Montgomery again. *Attorneys Mull Court Action, supra.* The appeal of the CAS Tribunal's decision, however, appears to have taken a back seat for Montgomery and his attorneys to more pressing legal problems for the former Olympic champion. Ovidiu Panzariu, *Montgomery Says NO to Fraud Accusations*, SOFTPEDIA NEWS, May 4, 2006, http://news.softpedia.com/news/Montgomery-Says-NO-to-Fraud-Accusations-22756.shtml (last visited Sept. 29, 2006). In April 2006, Montgomery was arrested on charges that he had participated in a

determined, after considering the evidence presented by the United States Anti-Doping Agency (USADA), that Montgomery had taken THG,[6] a prohibited performance-enhancing drug known in colloquial parlance as "the Clear."[7] As punishment, Montgomery was banned from competition for two years, stripped of his on-track achievements dating back to March 2001, and ordered to repay an estimated $1 million in earnings.[8]

Montgomery is an extraordinary case because Montgomery was found guilty of using THG without ever testing positive for the drug in an in-competition or out-of-competition drug test.[9] Thus, the Tribunal's finding dramatically altered the landscape for Olympic athletes who face charges that they took a banned performance-enhancing substance. Historically, the bright line evidentiary rule has required an Olympic athlete to test positive for a banned substance in an officially administered drug test before he or she could be found guilty of doping. The *Montgomery* decision eradicated this rule and established that an athlete could be found guilty of doping without evidence of a positive drug test.

In rendering its verdict, the *Montgomery* Tribunal relied heavily upon *United States Anti-Doping Agency v. Collins*,[10] a December 2004 decision by a North American Court of Arbitration for Sport (NAS) Panel. *Collins* was the only previous instance in which an athlete charged with doping by the USADA had been found guilty without evidence of a positive drug test, known in Olympic circles as an "analytical positive."[11] The CAS is the "Supreme Court" of Olympic issues and the NAS is a lower court subject to CAS review;[12] therefore, the *Collins* Panel's landmark decision did not carry precedential weight worldwide until the *Montgomery* Tribunal reiterated its holding.[13] Now that a CAS Tribunal has provided its stamp of approval to the idea

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multimillion-dollar bank fraud and money-laundering scheme that also involved his coach Steven Riddick. *Ex-World's Fastest Man Busted in Fraud*, CBS NEWS, Apr. 28, 2006, http://www.cbsnews.com/stories/2006/04/28/sportsline/main1560120.shtml [hereinafter *Busted in Fraud*] (last visited Sept. 29, 2006). Montgomery pleaded "not guilty" to the charges before a federal court in Manhattan, New York. Panzariu, *supra*. Specifically, prosecutors have charged that Montgomery was paid $20,000 for depositing nearly $1 million in bogus checks. *Busted in Fraud*, *supra*.

6. THG or "the Clear" is a designer steroid that was undetectable in anti-doping tests until 2003, when a track and field coach provided a sample to the USADA. *Montgomery*, *award on merits*, CAS 2004/0/645, at 1. The steroid was created and distributed to athletes in various sports by San Francisco-based BALCO. *Id.*

7. *Id.*

8. *Id.*; *see also Montgomery Retires in Wake of 2-year Doping Ban*, ABC NEWS, Dec. 14, 2005, http://abcnews.go.com/Sports/ESPNSports/story?id=1407042 [hereinafter *Montgomery Retires*] (last visited Sept. 29, 2006).

9. *Montgomery*, *award on merits*, CAS 2004/0/645, at 1.

10. AAA No. 301900065804 (N. Am. Ct. of Arb. for Sport Dec. 9, 2004), *available at* http://www.usantidoping.org/what/management/arbitration.aspx (follow "Former World Champion Collins Receives Eight-Year Suspension for Participation in BALCO Drug Conspiracy" hyperlink under "2004").

11. *Id.* at 1. Michelle Collins, a gold medalist in the 200-meter dash at the 2003 World Indoor Track and Field Championship, was suspended for eight years by the NAS after being found guilty of doping. *Id.* at 7, 29.

12. For an overview of Olympic doping adjudication, see *infra* Table 1.

13. AMERICAN ARBITRATION ASSOCIATION SUPPLEMENTARY PROCEDURES FOR THE ARBITRATION OF OLYMPIC SPORT DOPING DISPUTES R-49A (2004), *available at* http://www.adr.org/sp.asp?id=28627. The pertinent language that allows for appeal of a ruling by the NAS to the CAS is:

that an Olympic athlete can be found guilty of doping without testing positive for a banned substance, a new path to conviction has been paved for Olympic prosecuting agencies like the USADA. The question now becomes: Was *Montgomery* decided correctly? Also, how will it alter the legal landscape and affect future Olympic doping cases?

This Note explains how the CAS and the USADA emerged to become prominent players in the world of Olympic doping jurisprudence. Furthermore, this Note explores the determination made by the World Anti-Doping Agency (WADA) that CAS Olympic doping hearings should be regarded as quasi-criminal with a burden of proof that lies somewhere between the civil and criminal standard.[14] Specifically, the WADA adopted a "comfortable satisfaction of the relevant hearing body" standard in the World Anti-Doping Code (WADC), a prosecutorial burden described as "greater than a mere balance of probability but less than proof beyond a reasonable doubt."[15] Finally, this Note analyzes the *Montgomery* decision by examining the approach used by the CAS Tribunal to determine whether Montgomery was afforded sufficient due process before being found guilty of doping. The case will no doubt carry enormous precedential weight; thus, the right to a fair hearing for future Olympic athletes accused of doping in "non-analytical positive" cases is also at stake.

Ultimately, this Note does not support the Tribunal's decision in *Montgomery* because it wrongly characterized the proceeding as civil instead of quasi-criminal. This error led to a series of missteps that resulted in Montgomery being unfairly penalized because he was not accorded a fair hearing. First, the Tribunal failed to settle on an applicable burden of proof, deciding that it did not matter whether a quasi-criminal or criminal standard was used because, in the Tribunal's words, there is no "great gulf between proof in civil and criminal matters."[16] Next, the Tribunal deemed it appropriate to regard Montgomery's alleged confession alone as sufficient proof of his guilt, something that should never happen in either a criminal or quasi-criminal proceeding. The determination, wholly without precedent, defied the approach taken in *Collins*, in which the Panel required the USADA to present a myriad of corroborating evidence before finding Collins guilty of doping.[17] Finally, the Tribunal wrongly drew an adverse inference from Montgomery's decision not to testify. This conclusion compounded the error made in *Collins*, where the Panel determined that it was proper to draw an adverse inference from an American athlete's decision to invoke the Fifth Amendment and not testify. In sum, the Tribunal's finding in *Montgomery*

> The arbitration award may be appealed to [the] CAS as provided in Annex A of the USADA Protocol . . . . Appeals to [the] CAS filed under these rules shall be heard in the United States. The decisions of [the] CAS shall be final and binding on all parties and shall not be subject to any further review or appeal . . . .

Id. (emphasis omitted).

14. WORLD ANTI-DOPING AGENCY, WORLD ANTI-DOPING CODE 12 (2003), *available at* http://www.wada-ama.org/rtecontent/document/code_v3.pdf [hereinafter WADA ANTI-DOPING CODE].

15. *Id.*

16. *Montgomery, award on merits*, CAS 2004/0/645, at 13 (Ct. of Arb. for Sport Dec. 13, 2005), *available at* http://www.usantidoping.org/what/management/arbitration.aspx (follow "Arbitration Ruling: U.S. Track & Field Athlete Tim Montgomery Receives Suspension for Drug Violation" hyperlink under "2005").

17. *See Collins*, AAA No. 301900065804, at 25.

was incorrect because Montgomery was not afforded the due process appropriate to a quasi-criminal proceeding.

In the haste to clean up Olympic sports and combat the perception that many athletes competing are "dirty," the CAS must carefully consider how the reasoning that led to a guilty verdict in the *Montgomery* case could lead to the unjust conviction of athletes in future non-analytical positive cases. The CAS must establish proper procedural safeguards for this kind of Olympic doping proceeding. In *Montgomery*, the Tribunal failed to establish the right blueprint.

This Note proposes that future CAS Tribunals reconsider the stances the *Montgomery* Tribunal adopted that permit an adverse inference to be drawn from an athlete's decision not to testify, and allow an athlete to be convicted solely on evidence of an alleged confession. Olympic doping proceedings should not be viewed as private civil arbitrations, but rather as private quasi-criminal arbitrations, which afford athletes safeguards that are somewhat analogous to criminal trials. In short, the CAS should adopt standards that will cause its Olympic doping hearings to more closely resemble criminal proceedings than civil ones. A "conviction" in such a setting, while not "criminal" in the literal sense of the word, essentially amounts to one in the world of Olympic sports, and before athletes are labeled "dopers" they should be accorded proper due process.

At stake is the credibility of the still fledgling CAS. The world watches, wondering: can the CAS emerge as a global body with true worldwide respect apt to handle Olympic doping cases with an avowed air of neutrality? If the CAS is seen as nothing more than a shill for prosecuting agencies like the USADA, the current system of Olympic doping jurisprudence is doomed to fail.

II. THE ROAD TO *UNITED STATES ANTI-DOPING AGENCY V. MONTGOMERY*

A. The CAS is Created to Bring Uniformity to Olympic Jurisprudence

The CAS was established in 1983 at a time when much of the jurisprudence surrounding the Olympic movement was uncertain and inconsistent.[18] In founding the CAS, the International Olympic Committee (IOC) hoped to fill a much-needed jurisdictional void in international sports by creating an "ultimate, authoritative and neutral solution to judicial disputes" that would bring uniformity to the Olympic arena.[19] In the more than two decades since the CAS was established, however, it has struggled to become the "Supreme Court" of Olympic sports that the IOC envisioned.

The development of the CAS into a true worldwide, impartial purveyor of justice has been stunted chiefly for two reasons. First, international governing bodies like the International Amateur Athletic Federation (IAAF), which oversees track and field, have been reluctant to surrender the jurisdiction they have historically enjoyed over

18. *Cf.* Richard H. McLaren, *Sports Law Arbitration by CAS: Is it the Same as International Arbitration?*, 29 PEPP. L. REV. 101, 101 (2001) (discussing the emergence of the CAS and comparing it favorably to other bodies that conduct international arbitrations).

19. *Id.*

matters involving their athletes.[20] Second, the CAS has been hampered by a perception that it is too closely connected to the IOC, the WADA, and the international governing bodies.[21] While the CAS has made great strides toward overcoming the first hurdle by wrestling jurisdiction away from the international governing bodies, the CAS is still struggling to shake the doubts many have about its ability to be neutral.[22] Athletes and their lawyers continue to openly question the objectivity of CAS (and NAS) arbitrators.[23]

B. The IAAF Hands the CAS its Jurisdictional Reigns

In August 2001, the IAAF surrendered jurisdiction over issues arising in the track and field arena to the CAS.[24] The transfer of power gave the CAS and its arbitrators authority to hear doping cases that involved track and field athletes worldwide.[25] At roughly the same time, in 1999 and 2000, respectively, the WADA and the USADA were established to create and enforce a uniform doping code to be used in CAS and NAS hearings.[26] The World Anti-Doping Code (WADC), written by the WADA, was unveiled in 2004, ensuring "for the first time, the rules and regulations governing anti-doping are the same across all sports . . . ."[27] Each governing body, like the IAAF, adopted the WADC in its doping proceedings before the CAS to create uniformity

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20. The IAAF created an arbitration panel in 1982 to handle doping cases internally and remained the final and binding authority over cases involving track and field athletes for nearly two decades. *Id.* at 102.

21. *Cf.* Michael S. Straubel, *Doping Due Process: A Critique of the Doping Control Process in International Sport*, 106 DICK. L. REV. 523, 541 (2002) (describing the CAS prior to 1993, a period when it was funded entirely by the IOC and was based in the IOC's headquarters in Lausanne, Switzerland).

22. Brendan I. Koerner, *Where Do Athletes Go to Court? Why, to the Court of Arbitration for Sport, of Course*, SLATE, July 1, 2004, http://www.slate.com/Default.aspx?id=2103285 (last visited Sept. 29, 2006). Specifically, Koerner writes:

> Though the CAS has been ostensibly independent of the IOC since 1994, there are some athletes who grumble that the court is too biased in favor of the Olympics' management. They point out that many members of the ICAS [International Council of Arbitration for Sport], who select the [CAS] arbitrators, are members of either the IOC or the Association of National Olympic Committees.

Id.

In an effort to make it a truly independent body, the CAS underwent a major reform in 1994 after the Swiss Federal Tribunal opined that it was too closely tied to the IOC. Matthieu Reeb, *The Court of Arbitration for Sport*, http://www.tas-cas.org/en/histoire/histoireA.htm (last visited Sept. 29, 2006). Control of the CAS was transferred from the IOC to the newly created, more independent, ICAS. *Id.* Frank Shorter, Chairman of the USADA from 2000-2003 and a gold (1972) and silver (1976) Olympic medalist in the men's marathon, holds a contrary view when it comes to the independence of the current pool of NAS and CAS arbitrators. Frank Shorter, Op-Ed, *Maintaining Standards is Role of Anti-Doping Agency*, S.F. CHRON., July 30, 2004, at B9. Shorter writes, "[t]he hearing is before an independent panel that is selected from an independent pool of people from North America. It is intentionally set up so that these arbitrators have no connections with [the] USADA, except a willingness to give their time, effort and expertise." *Id.*

23. *See, e.g.*, Koerner, *supra* note 22.

24. Straubel, *supra* note 21, at 560.

25. *See id.*

26. Richard W. Pound, Chairman of the World Anti-Doping Agency, Chairman's Message, http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=237 (last visited Sept. 29, 2006); Straubel, *supra* note 21, at 559 (referring to the "birth" of the USADA on October 1, 2000).

27. *Id.*

across the spectrum of Olympic sports. The American governing bodies, like USA Track and Field (USATF), directed by the United States Olympic Committee (USOC), adopted the WADC and empowered the USADA to become its prosecutorial arm in doping cases before the CAS and the NAS.[28]

As a consequence, the burden of proof was lowered in doping proceedings that implicated track and field athletes.[29] The IAAF (and USATF) had previously maintained a criminal burden of proof in doping hearings, but after the implementation of the WADC prosecuting agencies, like the USADA, had to meet only a quasi-criminal burden to convince a CAS Tribunal that an athlete was guilty of doping.[30] The WADA concluded that a quasi-criminal burden of proof was appropriate after determining that criminal procedural guarantees were not necessary for doping disputes taking place before a private sports governing body.[31] NAS and CAS Tribunals would thus have to be convinced by prosecuting agencies like the USADA only to their "comfortable satisfaction" that a track and field athlete had taken a banned performance-enhancing substance.[32]

C. Quasi-Criminal Standards Are Established for Olympic Doping Cases

The WADA based this determination upon the position taken by Switzerland's highest court, the Swiss Federal Tribunal, as it reviewed a series of CAS decisions in the 1990s.[33] The Swiss Federal Tribunal maintains a unique position of authority in Olympic jurisprudence as the only court with the power to review a CAS decision.[34] The position, adopted by the WADA, is that the "procedural guarantees that international (and national) human rights instruments afford in criminal matters" are not applicable to cases that involve doping sanctions, because such hearings are "private rather than criminal in nature."[35] The WADA accordingly deemed a burden

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28. U.S. Anti-Doping Agency v. Montgomery, CAS 2004/0/645, at 2 (Ct. of Arb. for Sport Feb. 9, 2005), *available at* http://www.usantidoping.org/what/management/arbitration.aspx (follow "Arbitration Ruling: CAS Award on Jurisdiction in Chryste Gaines & Tim Montgomery Proceedings" hyperlink under "2005") [hereinafter *Montgomery, award on jurisdiction*]. *See generally* Straubel, *supra* note 21, at 558-62.

29. *Montgomery, award on merits*, CAS 2004/0/645, at 12 (Ct. of Arb. for Sport Dec. 13, 2005), *available at* http://www.usantidoping.org/what/management/arbitration.aspx (follow "Arbitration Ruling: U.S. Track & Field Athlete Tim Montgomery Receives Suspension for Drug Violation" hyperlink under "2005").

30. *Id.*

31. WORLD ANTI-DOPING AGENCY, LEGAL OPINION ON THE CONFORMITY OF CERTAIN PROVISIONS OF THE DRAFT WORLD ANTI-DOPING CODE WITH COMMONLY ACCEPTED PRINCIPLES OF INTERNATIONAL LAW 19-20 (2003), *available at* http://www.wada-ama.org/rtecontent/document/kaufmann-kohler-full.pdf [hereinafter WADA LEGAL OPINION].

32. WADA ANTI-DOPING CODE, *supra* note 14, at 12.

33. WADA LEGAL OPINION, *supra* note 31, at 19-20.

34. *Id.* at 19-20. *See* Tribunal fédéral suisse [Federal Tribunal] Mar. 15, 1993, 119 Arrêts du Tribunal Fédéral Suisse [Official Digest of Federal Tribunal Judgments] 271 (Switz.) (holding that sanctions by sports federations are private rather than criminal in nature, and that such private law matters cannot be resolved "in the light of notions proper to criminal law"). The *Gundel* case effectively allowed the CAS to become a worldwide player, because Switzerland's highest court formally recognized the legitimacy of its decisions. *See* Stephen A. Kaufman, Note, *Issues in International Sports Arbitration*, 13 B.U. INT'L L.J. 527, 541-42 (1995).

35. *Id.* at 19.

of proof that "is greater than a mere balance of probability but less than proof beyond a reasonable doubt" most appropriate for CAS doping hearings.[36]

A leading scholar on the CAS, Professor Michael Straubel,[37] opines that the unstated rationale behind this decision was a desire to combat the image that athletes taking performance-enhancing drugs were hijacking the Olympic movement.[38] Straubel points to a series of doping scandals that threatened to taint the public's impression of Olympic sports and seriously curtail Olympic sponsorship money in the late 1990s.[39] Most notable among these was the indignity of the 1998 Tour de France, when several cyclists tested positive for banned substances.[40] Straubel cautions that athletes accused of doping must be accorded fair hearings for the CAS to demonstrate that it is indeed a neutral third party uninfluenced by the Olympic establishment.[41]

Straubel has suggested that the burden of proof in doping cases "should be more like that used in criminal cases."[42] The CAS needs to clearly define, writes Straubel, precisely where the comfortable satisfaction standard falls between the criminal and civil standards of proof.[43] The question remains, writes Straubel, "[i]s proof to a comfortable satisfaction closer to proof beyond a reasonable doubt because doping cases are at the least quasi-criminal in nature? Or, is proof to a comfortable satisfaction closer to the preponderance of the evidence standard because doping cases are private in nature?"[44]

D. The USADA Emerges as the Prosecuting Arm of the USOC

The USADA has not lost a single case since it began prosecuting American Olympic athletes for alleged doping violations in 2002.[45] Until December 2004, and

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36. WADA ANTI-DOPING CODE, *supra* note 14, at 12.

37. Michael S. Straubel is an Associate Professor at Valparaiso University School of Law and Valparaiso's Head Cross Country and Assistant Track Coach. In addition, Straubel is the Director of the Sports Law Clinic at Valparaiso that provides free legal help to athletes, coaches, and others involved in amateur sports. The clinic is currently representing Olympic and amateur athletes in cases involving doping, eligibility, and immigration issues. *See* http://www.valpo.edu/law/sportsclinic/legalclinic.html (last visited Sept. 29, 2006).

38. Straubel, *supra* note 21, at 555.

39. *Id.*

40. *Id.*

41. *Id.* at 525-26.

42. Michael S. Straubel, *Enhancing the Performance of the Doping Court: How the Court of Arbitration for Sport Can Do Its Job Better*, 36 LOY. U. CHI. L.J. 1203, 1272 (2005).

43. *Id.* at 1268-69.

44. *Id.* Legal scholars believe that the Australian Supreme Court, searching for the appropriate standard to be used in a divorce proceeding, may have been the first to utilize the "comfortable satisfaction" standard of proof. *Id.* at 1266-67. Interestingly, the Australian courts have deemed it inappropriate to use the comfortable satisfaction standard in criminal or quasi-criminal cases, perhaps a signal that it is not the proper standard to be used in doping cases. *Id.* at 1267.

45. Telephone Interview with Michael S. Straubel, Associate Professor, Valparaiso Univ. Sch. of Law and Head Cross Country Coach and Assistant Track Coach, Valparaiso Univ., in Valparaiso, Ind. (Mar. 10, 2006). *See generally* http://www.usantidoping.org/what/management/arbitration.aspx (listing all of the arbitration rulings involving the USADA as prosecuting authority since 2002). The USADA's authority to prosecute athletes and compel them to submit to mandatory binding arbitration comes from the USOC and its bylaws. *See Montgomery, award on jurisdiction*, CAS 2004/0/645, at 6 (Ct. of Arb. for Sport Feb. 9, 2005), *available at* http://www.usantidoping.org/what/management/arbitration.aspx (follow "Arbitration

the finding by an NAS Panel that Michelle Collins was guilty of doping in a "non-analytical positive" case, each of the USADA's victories followed the traditional script.[46] An athlete would test positive for a banned substance in an in-competition or out-of-competition drug test, and be charged by the USADA with a doping violation. The athlete would then be tried before an NAS or CAS Tribunal who, after considering evidence of the positive drug test, would invariably find the athlete guilty as charged. These cases presented straightforward evidentiary issues for Tribunals because an analytical positive, under the strict liability standard followed by the NAS and the CAS, would alone provide sufficient evidence of the athlete's guilt.[47] The NAS has, in fact, established that the USADA "need only show the presence of a prohibited substance in an athlete's sample to prove a doping offense."[48]

The case against Michelle Collins marked an aggressive new chapter in the USADA's pursuit of prohibited drug use by American Olympic athletes. In *Collins*, the USADA sought for the first time to sanction an athlete who had never tested positive for a banned substance in an in-competition or out-of-competition drug test.[49] Thus, the NAS Tribunal that heard *Collins* was presented with a landmark evidentiary question: how could the USADA demonstrate there was sufficient evidence to prove its case without evidence of a positive drug test? In its opinion, the three-member panel acknowledged the ground breaking nature of the case when it wrote, the "USADA seeks for the first time to sanction an athlete [Michelle Collins] who has not tested positive in any of her in-competition or out-of-competition drug tests. Thus . . .

Ruling: CAS Award on Jurisdiction in Chryste Gaines & Tim Montgomery Proceedings" hyperlink under "2005"). The USOC has jurisdiction over all American Olympic athletes through the Amateur Sports Act (ASA), passed by Congress in 1978. *See* Melissa R. Bitting, Comment, *Mandatory Binding Arbitration For Olympic Athletes: Is the Process Better Or Worse For "Job Security"?*, 25 FLA. ST. U. L. REV. 655, 657, 672 (1998) (critiquing the mandatory arbitration process, and calling on the CAS to "protect the rights of the athletes and to address the need for fair and efficient resolution of disputes."). In the ASA, Congress gave the USOC "exclusive jurisdiction . . . over all matters pertaining to the participation of the United States in the Olympic Games." *Id.* at 657. A clause in the contract that athletes sign to represent the United States in Olympic competitions compels them to submit to mandatory binding arbitration before either the NAS or the CAS. *Montgomery, award on jurisdiction*, CAS 2004/0/645, at 6. This clause, which keeps doping cases out of the federal courts, was upheld by the United States Court of Appeals for the Seventh Circuit in *Slaney v. International Amateur Athletic Federation*. 244 F.3d 580 (7th Cir. 2001). In *Slaney*, the court held that "Slaney participated in a valid arbitration . . . [that] we are obligated to recognize. Thus, the issue decided in that arbitration cannot be relitigated . . . . [T]he district court correctly determined that it lacked subject-matter jurisdiction." *Id.* at 601; *see also* Jacobs v. USA Track and Field, 374 F.3d 85 (2d Cir. 2004) (reiterating the USADA's authority by finding that the USADA's rules were valid in doping cases brought before the NAS and by upholding the district court's ruling that it lacked jurisdiction). *See generally* Federal Arbitration Act, 9 U.S.C. § 4 (2005) (giving the federal courts the power to uphold all valid arbitrations that the two sides agree to submit to in advance).

46. U.S. Anti-Doping Agency v. Collins, AAA No. 301900065804, at 1 (N. Am. Ct. of Arb. for Sport Dec. 9, 2004), *available at* http://www.usantidoping.org/what/management/arbitration.aspx (follow "Former World Champion Collins Receives Eight-Year Suspension for Participation in BALCO Drug Conspiracy" hyperlink under "2004").

47. The CAS has adopted a "pure strict liability" standard for cases that involve a positive drug test. Straubel, *supra* note 42, at 1262. Under this standard, "any question of fault, intent, or negligence is irrelevant: an athlete may not avoid a sanction by showing an absence of fault." *Id.*

48. *Id.* at 1265.

49. *Collins*, AAA No. 301900065804, at 1.

the case involves issues that have not previously had to be decided by Arbitral Tribunals."[50] The Panel, however, did not regard the novel nature of the proceeding as a bar to conviction, finding that "the straightforward application of legal principles" led to a clear resolution of the matter.[51]

The Panel applied the criminal standard of proof when considering the evidence presented by the USADA because Collins's alleged doping offenses occurred prior to the IAAF's adoption of the WADC's quasi-criminal standard.[52] The burden of proof rested with the USADA to "show that Collins intentionally used a prohibited substance or technique."[53] The Panel determined that the USADA had met its burden of proof by presenting a variety of convincing evidence.[54] This evidence included: (1) email exchanges between Collins and Victor Conte, President of the San Francisco-based Bay Area Laboratory Cooperative (BALCO), which specifically mentioned her use of banned substances; (2) documents seized from BALCO labeled "Michelle Collins" that contained shorthand for the banned substances THG and EPO; (3) expert testimony of the USADA doctors whose analysis of Collins's blood and urine test results led the doctors to the conclusion that she was doping; and (4) testimony by Kelli White that Conte told her directly, among other things, that Collins was using EPO and THG.[55] By basing its finding of guilt on a substantial amount of corroborating evidence, the *Collins* Panel established the proper blueprint for this new "non-analytical positive" category of cases.

Seemingly aware of the precedential nature of the opinion it was crafting, the *Collins* Panel addressed one other key procedural issue: was it proper to draw an adverse inference from an athlete's decision not to testify?[56] The Panel determined that it was indeed proper for a Tribunal to "draw certain adverse inferences" against an American athlete who invokes the Fifth Amendment because Olympic doping proceedings are "civil" in nature.[57] This conclusion was based primarily upon the Tribunal's interpretation of *Baxter v. Palmigiano*,[58] where the United States Supreme Court held that the "Fifth Amendment does not forbid adverse inferences against parties in civil actions . . . ."[59]

The *Collins* Panel failed to note, however, that the *Baxter* holding also established that an adverse inference could not be drawn in a criminal case, where the judge and prosecutor were prohibited from suggesting that the defendant's silence was tantamount to evidence of guilt.[60] Skirting this part of the *Baxter* holding, the *Collins* Panel found that an adverse inference could be drawn against an American athlete

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50. *Id.*
51. *Id.*
52. *Id.* at 11-12.
53. *Id.* at 12.
54. *Id.* at 25.
55. *Id.* at 25-27.
56. *Id.* at 14.
57. *Id.*
58. 425 U.S. 308 (1976).
59. *Id.* at 318 (allowing an adverse inference to be drawn in civil actions when a witness refuses "to testify in response to probative evidence offered against them"); *see Collins*, AAA No. 301900065804, at 14-15; *see also* Sanders v. Gardner, 7 F. Supp. 2d 151, 164 (E.D.N.Y. 1998) (allowing an arbitral panel to draw an adverse inference from a witness's refusal to testify).
60. Baxter v. Palmigiano, 425 U.S. at 318-19.

because doping proceedings were "civil arbitrations."[61] This characterization, however, would appear to be at odds with both the criminal burden of proof used in *Collins* and the WADA's determination that doping cases should be regarded as quasi-criminal, with a burden of proof that is "greater than a mere balance of probability."[62]

Buoyed by the outcome in *Collins*, the USADA next sought to prosecute Tim Montgomery for alleged doping violations in the highest profile "non-analytical positive" case yet. Montgomery would become arguably the most visible name in track and field to be labeled a "doper" since Ben Johnson was stripped of a gold medal and world record in the 100-meter dash at the 1988 Olympics.[63] The key difference is that Johnson tested positive for a banned substance in an in-competition drug test, while Montgomery never tested positive for a banned substance in an in-competition or out-of-competition drug test.

III. THE *UNITED STATES ANTI-DOPING AGENCY V. MONTGOMERY* DECISION

In *Montgomery*, the USADA informed Tim Montgomery through a June 7, 2004 letter that it had received evidence indicating his participation "in a doping conspiracy involving various elite athletes and coaches as well as BALCO."[64] In a follow-up letter, the USADA told Montgomery that it was formally charging him with violations of track and field's anti-doping rules: "[The] USADA charges that your participation in the [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 . . . IAAF Rules that strictly forbid doping."[65] Specifically,

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61. *Collins*, AAA No. 301900065804, at 14.

62. WADA ANTI-DOPING CODE, *supra* note 14, at 12.

63. Frank Litsky, *Montgomery is Suspended 2 Years for Steroid Use*, N.Y. TIMES, Dec. 14, 2005, at D3. Ben Johnson was stripped of an Olympic gold medal at the 1988 Olympics in Seoul, South Korea after dashing to a world record time of 9.79 seconds in the 100 meter-dash. *Id.* Johnson tested positive for the anabolic steroid, stanozolol, in the post-race drug test. *Id.*

64. *Montgomery, award on merits*, CAS 2004/0/645, at 4 (Ct. of Arb. for Sport Dec. 13, 2005), *available at* http://www.usantidoping.org/what/management/arbitration.aspx (follow "Arbitration Ruling: U.S. Track & Field Athlete Tim Montgomery Receives Suspension for Drug Violation" hyperlink under "2005").

65. *Id.* at 5. Montgomery was accused of violating the following IAAF rules:

> *Rule 55.2*—The offen[s]e 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 . . . .
>
> *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 offen[s]e and shall be subject to sanctions in accordance with Rule 60. . . .
>
> *Rule 56.4*—Any person trading, trafficking, distributing or selling any prohibited substance otherwise than in the normal course of a recogni[z]ed profession or trade shall also have committed a doping offen[s]e 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 offen[s]es" . . . (i) the presence in an athlete's body tissues or fluids of a prohibited substance; (ii) the use or taking advantage of forbidden techniques; (iii) admitting having taken advantage of, or having used, or having attempted to use, a prohibited substance or a prohibited technique . . . .

Id. at 5-6.

Montgomery was told that the evidence confirmed his use of Anabolic Steroids, Testosterone/Epitestosterone Cream, EPO, Growth Hormone, and Insulin.[66]

The USADA initially told Montgomery that, as punishment, it would seek to sanction him with a lifetime ban from competition.[67] The agency, however, would later lower its proposed sanction to a four-year period of ineligibility.[68] The USADA also sought to retroactively expunge his on-track achievements dating back to February 2000,[69] and recoup the money he had earned during the same period.[70]

In response to the charges levied against him, Montgomery notified the USADA on June 28, 2004 that he would elect to bypass the NAS and proceed directly to the CAS for a final, binding, non-appealable hearing pursuant to his rights under USATF rules.[71] The USADA then submitted its request for arbitration to the CAS on July 5, 2004, identifying Peter Leaver, barrister of London, England, as its party-appointed arbitrator.[72] Montgomery submitted his answer to the USADA's arbitration request the next day, providing a brief statement of his defense and naming San Francisco attorney Christopher Campbell as his party-appointed arbitrator.[73] The two party-appointed arbitrators then chose L. Yves Fortier, barrister of Montreal, Canada, to serve as President of the Arbitral Tribunal.[74]

Three preliminary hearings were held prior to the final hearing on the merits.[75] First, on November 1, 2004, the Tribunal convened with the parties to establish a timetable which called for a second preliminary hearing to be held in Montreal on December 15, 2004, to resolve the question of whether the CAS had jurisdiction.[76] At the second hearing, Montgomery submitted a motion to dismiss that contended the CAS lacked jurisdiction and argued the USADA lacked authority to bring the case.[77] Montgomery argued that only USATF, as the agency that governed track and field in

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66. *Id.* at 6.

67. *Id.* For an Olympian like Montgomery, a four-year ban is tantamount to a lifetime ban. The USADA was essentially seeking to end Montgomery's career.

68. *Id.* at n.7.

69. Below are some of Montgomery's on-track achievements since February 2000 that the USADA sought to retroactively cancel: (1) Montgomery's gold medal performance at the 2000 Olympics in Sydney, Australia as a member of Team USA's 4x100 meter relay; (2) a gold medal earned as the anchor leg for Team USA's 4x100 meter relay at the 2001 World Outdoor Championships; (3) silver medals won in the 100 meter-dash at the 2001 World Outdoor Championships (where he ran 9.85 seconds) and the 60 meter-dash at the World Indoor Championships (where he ran 6.46 seconds); (4) his world record setting run of 9.78 seconds in the 100 meter-dash at the 2002 IAAF Grand Prix Final in Paris and subsequent ranking as the world's top sprinter for 2002 by *Track & Field News*; and (5) his overall 2002 Grand Prix title. Tim Montgomery–Biography, http://www.usatf.org/athletes/bios/Montgomery_Tim.asp (last visited Sept. 29, 2006).

70. *Montgomery, award on merits*, CAS 2004/0/645, at 6. Montgomery commanded an average of $40,000 to appear at a meet after setting the world record in 2002. *Montgomery Retires*, *supra* note 8. IAAF rules allow for subsidiary governing bodies, like USATF, to seek the repayment of appearance and prize money from athletes banned for doping violations. *Id.*

71. *Montgomery, award on merits*, CAS 2004/0/645, at 7.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 10-11.

76. *Id.* at 11.

77. *Id.*

the United States, could charge him with a doping offense in a case where there was no evidence of a positive drug test.[78] The Tribunal dismissed Montgomery's motion, affirming both the CAS's jurisdiction over the matter and the power of the USADA to charge an athlete in a "non-analytical positive" case.[79] The three-member panel determined that "[the USADA's] responsibility extends beyond 'drug testing' and covers all cases of alleged doping violations. It possessed, and possesses, full authority to prosecute these cases."[80]

A final preliminary hearing was held before the Tribunal in Montreal on February 21, 2005, to address the question of the applicable burden of proof.[81] Montgomery argued that it should be the IAAF's long standing criminal standard, while the USADA argued that it should be the IAAF's newly adopted quasi-criminal standard.[82] The disagreement stemmed from the IAAF's March 2004 decision to lower its burden of proof in doping cases against track and field athletes by adopting the WADC's "comfortable satisfaction" standard.[83] In the end, the Tribunal sidestepped the issue by holding that "the debate [over differing standards of proof] looms larger in theory than practice[,]" reasoning:

> [T]here [is not] necessarily a great gulf between proof in civil and criminal matters. . . . It makes little, if indeed any, difference whether a "beyond [a] reasonable doubt" or "comfortable satisfaction" standard is applied . . . . Either way, USADA bears the burden of proving, by strong evidence commensurate with the serious claims it makes, that [Montgomery] committed the doping offen[s]es in question.[84]

The Tribunal heard the merits in San Francisco from June 6th to 10th 2005.[85] Both parties made oral arguments to the three-member panel and presented evidence through witness testimony.[86]

As the prosecuting agency, the USADA argued that Montgomery was guilty of the alleged doping offenses by presenting seven types of evidence: (1) February 2000 blood test results analyzed in a Mexican lab that allegedly showed Montgomery's testosterone level had doubled over the course of one day; (2) BALCO documents seized by the government; (3) test results reported by IOC-accredited and BALCO laboratories showing evidence of steroids in Montgomery's urine on fifty-six occasions between March 1999 and September 2004; (4) allegedly abnormal blood tests on five occasions between November 2000 and July 2001; (5) Montgomery's alleged admission to fellow American track athlete Kelli White that he had "used a prohibited substance known colloquially as 'the Clear'"; (6) statements made by BALCO

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78. *Montgomery, award on jurisdiction*, CAS 2004/0/645, at 5 (Ct. of Arb. for Sport Feb. 9, 2005), *available at* http://www.usantidoping.org/what/management/arbitration.aspx (follow "Arbitration Ruling: CAS Award on Jurisdiction in Chryste Gaines & Tim Montgomery Proceedings" hyperlink under "2005").

79. *Id.* at 9.

80. *Id.*

81. *Montgomery, award on merits*, CAS 2004/0/645, at 11-12.

82. *Id.* at 12-13.

83. *Id.* at 12; *see also* WADA ANTI-DOPING CODE, *supra* note 14, at 12-13 (outlining the burdens and standards of proof for Olympic sport doping cases under the WADC).

84. *Montgomery, award on merits*, CAS 2004/0/645, at 13-14.

85. *Id.* at 14.

86. *Id.*

President Victor Conte to investigative authorities and the media that alluded to Montgomery's involvement in the BALCO drug scandal; and (7) *San Francisco Chronicle* stories reporting that Montgomery had admitted to using various prohibited substances when he appeared before a grand jury.[87]

In response, Montgomery argued that the evidence presented by the USADA was unreliable and untruthful.[88] Specifically, Montgomery challenged the statements made by Victor Conte and Kelli White, and the results of the blood and urine tests analyzed by non-IOC labs.[89]

In the end, the Tribunal deemed it unnecessary to determine the veracity of each type of evidence presented because it found that Montgomery's alleged confession to Kelli White alone was sufficiently compelling to find him guilty of doping.[90] The Tribunal reasoned that "[d]oping offen[s]es can be proved by a variety of means; and this is nowhere more true than in 'non-analytical positive' cases such as the present."[91] The Tribunal, apparently applying a criminal and quasi-criminal burden of proof concurrently to the evidence reasoned it "ha[d] no doubt in this case, and [was] more than comfortably satisfied that Mr. Montgomery committed the doping offen[s]e in question."[92]

The Tribunal found White's testimony so compelling because she had previously admitted to doping herself and willingly accepted a two-year ban from competition.[93] The Tribunal believed White to be "honest," "intelligent," "dispassionate," and "wholly credible."[94] For the Tribunal, the critical component of White's testimony was

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87. *Id.* at 16-17. The USADA dropped all charges against Montgomery during the course of the proceeding except for the allegation that he had violated IAAF Rule 55.2, which allows for sanctions to be brought against an athlete who admits to having used a prohibited substance. The USADA focused its case on this charge after it became apparent that it would be futile to attempt to prove that Montgomery had violated the IAAF Rules that prohibit an athlete from "assisting or inciting" and "trafficking" in banned substances. *Id.* at 16.

88. *Id.* at 17.

89. *Id.*

90. *Id.* The *Montgomery* Tribunal noted that this decision should in no way be interpreted to mean that the rest of the evidence presented by the USADA was not credible. The Panel stated, "the fact that [we do] not consider it necessary in the circumstances to analy[z]e 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." *Id.*

91. *Id.*

92. *Id.* at 20.

93. *Id.* at 17.

94. *Id.* at 17-18. Kelli White voluntarily testified before the Congressional Committee on Government Reform less than a week after testifying at the Montgomery hearing to help in the effort to rid sports of doping. *See Eradicating Steroid Use, Part IV: Examining the Use of Steroids by Young Women to Enhance Athletic Performance and Body Image: Hearing Before the H. Comm. on Gov't Reform*, 109th Cong. (2005) (testimony of Ms. Kelli White, former world champion sprinter), *available at* http://reform.house.gov/GovReform/Hearings/EventSingle.aspx?EventID=28694 (follow "Testimony of Ms. Kelli White" hyperlink). In relevant part White's testimony was:

> In March of 2003, I made a choice that I will forever regret.... At that time, I began taking EPO, the clear (or THG), the cream and other stimulants. I remained on this program over the course of four months, and with the help of Mr. Conte, I was able to pass [seventeen] drug tests both in and out of competition while utilizing these prohibited performance enhancing substances.

Id.

her recounting of a conversation she had had with Montgomery in March 2001 while at a track meet in Portugal.[95] According to White, Montgomery asked her, "[d]oes [the Clear] make your calves tight?"[96] After White had said yes, Montgomery, according to White, made a phone call to someone White believed was Mr. Conte to whom Montgomery relayed the information that White had said the Clear made her calves tight too.[97] According to White, she had no doubt in her mind that she and Montgomery were talking about a banned performance-enhancing drug.[98]

The Tribunal's decision to rely so heavily on Ms. White's testimony was also influenced by Montgomery's decision to invoke the Fifth Amendment and not testify. The Tribunal determined that it was proper to "draw an adverse inference from Mr. Montgomery's refusal to testify" despite arguments by Montgomery that such an inference was not permitted.[99] The Tribunal reasoned:

> It might indeed have affected [our] 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. . . . 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.[100]

Ultimately, the Tribunal found Montgomery guilty of violating IAAF anti-doping rules 55.2(iii) and 60.1(iii).[101] As punishment, Montgomery was banned from competition for a period of two years commencing on June 6, 2005.[102] Also, the Tribunal stripped Montgomery of his on-track achievements dating back to March 2001 and ordered him to repay an estimated $1 million in earnings.[103] Among the

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95. *Montgomery, award on merits*, CAS 2004/0/645, at 18.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 19. Specifically, the Panel believed that it was entitled to draw an adverse inference in this instance because the "USADA ha[d] presented evidence that would normally call for a Response from Respondent himself, and no[t] merely from his experts or counsel." *Id.*

100. *Id.* at 19-20. Montgomery told Reuters after the decision had been rendered that he had never knowingly taken a banned substance. *Montgomery Retires*, *supra* note 8. Montgomery told Reuters that the CAS had misconstrued White's testimony and maintained that White had told the Panel that she had been the one to say "[the Clear] made me tight." *Id.* Montgomery's lawyer, Howard Jacobs, told the same version of events in the wake of the decision. Jacobs told the French news agency Agence France-Presse that the Tribunal "took what [White] said and contorted it to say [that] there was an admission. What she testified [to] was that she asked him if the [C]lear made his calves tight. White never testified that 'Tim told me the [C]lear made his calves tight.'" Litsky, *supra* note 63. Since the transcript of the hearing and the briefs submitted by both sides are confidential, what actually transpired remains open to speculation.

101. *Montgomery, award on merits*, CAS 2004/0/645, at 20.

102. *Id.* at 21.

103. *Id.* at 21-22. The panel estimated that March 31, 2001, was the date upon which Montgomery admitted his use of the Clear to White. *Id.* The $1 million lost earnings estimate was made by Svein Arne Hansen, the Director of the Golden League meet in Oslo, Norway. *Montgomery Retires*, *supra* note 8.

records expunged was Montgomery's world record run of 9.78 seconds set in the 100-meter dash in 2002.[104]

In its conclusion, the Tribunal left little doubt that future CAS Panels would take the same approach to "non-analytical positive" cases by allowing a prosecuting agency, like the USADA, to meet its burden of proof in a variety of ways.[105] The Tribunal embraced the philosophy of the Italian National Olympic Committee, which in a declaration wrote, "it will be up to the adjudicating body having jurisdiction . . . 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."[106]

IV. *UNITED STATES ANTI-DOPING AGENCY V. MONTGOMERY* WAS WRONGLY DECIDED

The CAS Tribunal's decision to declare Montgomery guilty of doping was incorrect because it prematurely ended his career, expunged his name from the record books, and ordered him to repay nearly $1 million in earnings without first granting him the due process appropriate to a quasi-criminal proceeding. The Tribunal made three critical errors en route to its unfortunate pronouncement. First, the Panel failed to announce the applicable standard of proof, determining that there was not a "great gulf between proof in civil and criminal matters."[107] Next, the Panel deemed it appropriate to convict Montgomery solely on evidence of his alleged confession.[108] Finally, the Panel wrongly labeled the proceeding "civil" and determined that it was proper to draw an adverse inference from Montgomery's decision to invoke the Fifth Amendment and not testify.[109]

First, the Tribunal erred when it concluded that a prosecutor's evidentiary burden in a criminal case is not distinguishable from the evidentiary burden required of the parties in a civil case. This conclusion is highly problematic. How could the Tribunal say that there is no difference between a criminal and civil standard of proof? A criminal proceeding is altogether different in its makeup, placing the burden entirely on the prosecutor to present evidence to a degree that is far more certain than in a civil matter. The Panel's analysis is further flawed because Olympic doping proceedings do not even have a civil burden of proof, they have a quasi-criminal one that lies somewhere between the civil and criminal standards.

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104. *Montgomery Retires*, *supra* note 8. Montgomery retired at the age of 30 on December 14, 2005; the day after the Tribunal handed down its verdict. *Id.* Montgomery has made it clear he will not return the prize money saying, "I deserve every bit of it. . . . If I had tested positive, I would give every penny back. . . . But someone telling them I told them something—come on, this is not high school. They were playing games with my life." *Athletics: Banned U.S. Sprinter Vows to Keep His Prize Money*, INT'L HERALD TRIB., Dec. 16, 2005, *available at* http://www.iht.com/articles/2005/12/16/sports/run.php. It remains to be seen whether the USADA and the IAAF will try to enforce the judgment against Montgomery and go after his earnings in a subsequent proceeding.

105. *Montgomery, award on merits*, CAS 2004/0/645, at 22.

106. *Id.*

107. *Id.* at 13.

108. *Id.* at 17.

109. *Id.* at 20.

Next, the Tribunal went wrong when it determined that evidence of Montgomery's alleged confession alone, conveyed through third party witness testimony, was sufficient evidence for the USADA to prove his guilt. The decision is entirely without precedent, and is wholly inconsistent with the reasoning set forth by the NAS Panel in *Collins*, where the USADA was required to present a myriad of corroborating evidence to meet its burden of proof in the first of its kind non-analytical positive case.[110] The *Collins* Panel wrote, "[n]one of this evidence by itself would be sufficient to find doping, but [as a whole] it is consistent with the charges [made by USADA]."[111] The Tribunal in *Montgomery* seemed to conveniently ignore this part of the decision in *Collins* when it reasoned that Montgomery's alleged confession was alone sufficient evidence to prove that he was guilty of doping.[112]

The Tribunal's determination would even appear to run counter to the WADA's conception of how a CAS Olympic doping hearing should proceed. The WADA proclaimed that doping hearings should amount to more than a civil proceeding when it established a standard of proof in the WADC that "is greater than a mere balance of probability but less than proof beyond a reasonable doubt."[113] Such a burden of proof would seem to indicate that the WADA envisioned a hearing in a non-analytical positive case where strong corroborating evidence of an athlete's guilt was required of an agency before that athlete was found to be a "doper."

Finally, the *Montgomery* Tribunal blundered by drawing an adverse inference from Montgomery's decision not to testify, compounding the error made by the *Collins* Panel. The *Collins* Panel concluded that it was appropriate to draw an adverse inference in an Olympic doping proceeding, basing its decision primarily on the United States Supreme Court's holding in *Baxter*.[114] The *Baxter* Court, however, only allowed an adverse inference to be drawn in a civil case, and explicitly established that one could not be drawn in a criminal case where a judge and prosecutor were not permitted to suggest that the defendant's silence was tantamount to evidence of guilt.[115] By declaring it proper to draw an adverse inference in a quasi-criminal proceeding, the *Collins* Panel and the *Montgomery* Tribunal stretched the *Baxter* holding beyond its intended use. The *Montgomery* Tribunal justified its use of *Baxter* by characterizing Olympic doping proceedings as civil throughout its opinion, but the stark truth combats this contention: Olympic doping proceedings before the CAS by any measure are not civil—they are quasi-criminal. Admittedly, there is no guideline for the procedural safeguards that should exist in quasi-criminal proceedings; however, there should be a distinct line drawn that separates them from civil proceedings. The drawing of an adverse inference should not be permitted in any hearing that exceeds the firmly established parameters of a civil proceeding.

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110. *See* U.S. Anti-Doping Agency v. Collins, AAA No. 301900065804, at 25 (N. Am. Ct. of Arb. for Sport Dec. 9, 2004), *available at* http://www.usantidoping.org/what/management/arbitration.aspx (follow "Former World Champion Collins Receives Eight-Year Suspension for Participation in BALCO Drug Conspiracy" hyperlink under "2004").

111. *Id.*

112. *Montgomery, award on merits*, CAS 2004/0/645, at 20.

113. WADA ANTI-DOPING CODE, *supra* note 14, at 12.

114. *Collins*, AAA No. 301900065804, at 14-15.

115. Baxter v. Palmigiano, 425 U.S. 308, 318-19 (1976).

A different approach by the *Montgomery* Tribunal may well have concluded with a finding of guilt, while affording Montgomery a fair hearing with appropriate due process. The USADA presented evidence that the Tribunal did not even consider.[116] A determination based upon the full body of evidence presented would have been a far wiser path to take. Such a finding would have been consistent with the *Collins* Panel's correct determination that an agency must present a variety of substantiating evidence to prove an athlete's guilt in non-analytical positive cases. It would also have allowed the Tribunal to avoid its problematic conclusion that it was on firm footing to draw an adverse inference from Montgomery's decision not to testify. This alternate path would have allowed the Tribunal to establish a far better precedent for future non-analytical positive cases. Instead, as things currently stand, an American athlete can have an adverse inference drawn from his or her decision not to testify, and be found guilty of doping solely on evidence of his or her alleged confession.

V. CONCLUSION

The Tribunal presiding over *Montgomery* clearly struggled with the uncharted waters of a "non-analytical positive" case en route to its creation of a regrettable procedural blueprint. Future CAS Tribunals should contemplate the following suggestions as a way to rectify the outcome. First, CAS Tribunals should consider adopting a criminal burden of proof in non-analytical positive cases because evidence of an athlete's guilt in these matters is not straightforward as it is in doping cases that involve an analytical positive. Next, in keeping with this criminal standard, CAS Tribunals should follow the *Collins* model and require an agency like the USADA to present substantial varied evidence to prove an athlete's guilt in non-analytical positive cases. Finally, CAS Tribunals should stop referring to Olympic doping proceedings as "civil" and abandon the determination that it is proper to draw an adverse inference from an American athlete's decision not to testify. *Baxter* does not establish that an adverse inference can be drawn in a quasi-criminal proceeding; rather, it allows one to be drawn in a civil proceeding, and explicitly does not allow one to be drawn in a criminal one. The WADA has determined that Olympic doping hearings amount to more than a civil proceeding, and future CAS Tribunals need to recognize this and acknowledge that the *Montgomery* Tribunal and the *Collins* Panel erred by misusing the holding in *Baxter*.

If future CAS Tribunals do not implement such changes, and instead stay the present course in non-analytical positive cases, the CAS will continue to be plagued by doubts and rumblings from athletes and their lawyers that it more closely resembles a "kangaroo court" than the impartial purveyor of jurisprudence it purports to be.[117] The perception that athletes are not being given a fair day in court can only persist for so long before the current system that governs Olympic doping cases fails as an experiment.

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116. *See Montgomery, award on merits*, CAS 2004/0/645, at 17.

117. *See, e.g.*, Straubel, *supra* note 42, at 1203. Marion Jones, a three-time gold medalist at the 2000 Sydney Olympics (and former girlfriend of Tim Montgomery), referred to the CAS as a "kangaroo court" after facing allegations, but never charges, that she was doping in the lead up to the 2004 Athens Olympics. *Id.*

Table 1
Overview of Olympic Doping Adjudication

	Name	Acronym	Standard of Proof	Comments
Tribunals	Court of Arbitration for Sport	CAS	•Standard of Proof: "Comfortable Satisfaction" that the Quasi-Criminal standard has been met.	•May draw adverse inference should Defendant not testify on own behalf. •Consider doping cases to be civil rather than criminal in nature.
	North American Court of Arbitration for Sport	NAS	•Standard of Proof: "Comfortable Satisfaction" that the Quasi-Criminal standard has been met.	•NAS decisions are subject to CAS review.
Prosecutorial Agency	United States Anti-Doping Agency	USADA	•Standard of Proof: "Quasi-Criminal" burden.	•Burden of proof greater than a mere balance of probability but less than proof beyond a reasonable doubt.
Rule-Making Body	World Anti-Doping Agency	WADA	•Created the "Comfortable Satisfaction" standard of proof in the WADC.	•Wrote World Anti-Doping Code (WADC) to create uniformity in doping cases; adopted by Olympic governing bodies. •Monitors compliance with the WADC and facilitates anti-doping efforts worldwide. •Declared doping cases to be Quasi-Criminal in nature.