

# CIRCUMSTANTIAL EVIDENCE IN DOPING CASES

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DEPARTMENT OF LAW  
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# INTRODUCTION



DOPING

1. A Legal Road Map to Doping
2. From Test to the Court of Arbitration for Sport
3. Standards and Burdens of Proof
4. Direct and Indirect Evidence
5. The Legal Basis for Circumstantial Evidence
6. Court of Arbitration for Sport Case Law
7. Closing Remarks

Professor, dr.jur. Jens Ewald, Aarhus University:

- International Sports Law, Agricultural Law, Contract Law, Tort Law, Legal History & Legal Philosophy.
- Chairman of the Board, Anti Doping Danmark 2006-2012.
- Chairman of the Appeals Committee, the Danish Canoe & Kayak Federation 2000-2019.
- Arbitrator, CAS 2015-
- WOG PyeongChang 2018 (CAS ADD)
- Co-Draftsman of the Ethics Code for Danish Competitive Sport (2006)
- The Danish Football Federation Political Commission, 2016-2017
- NOC Ethics Committee 2019-
- Sport:
  - Past: Football and Gymnastics.
  - Present: Kayaking, Biking and Running

# WHAT IS SPORTS LAW?

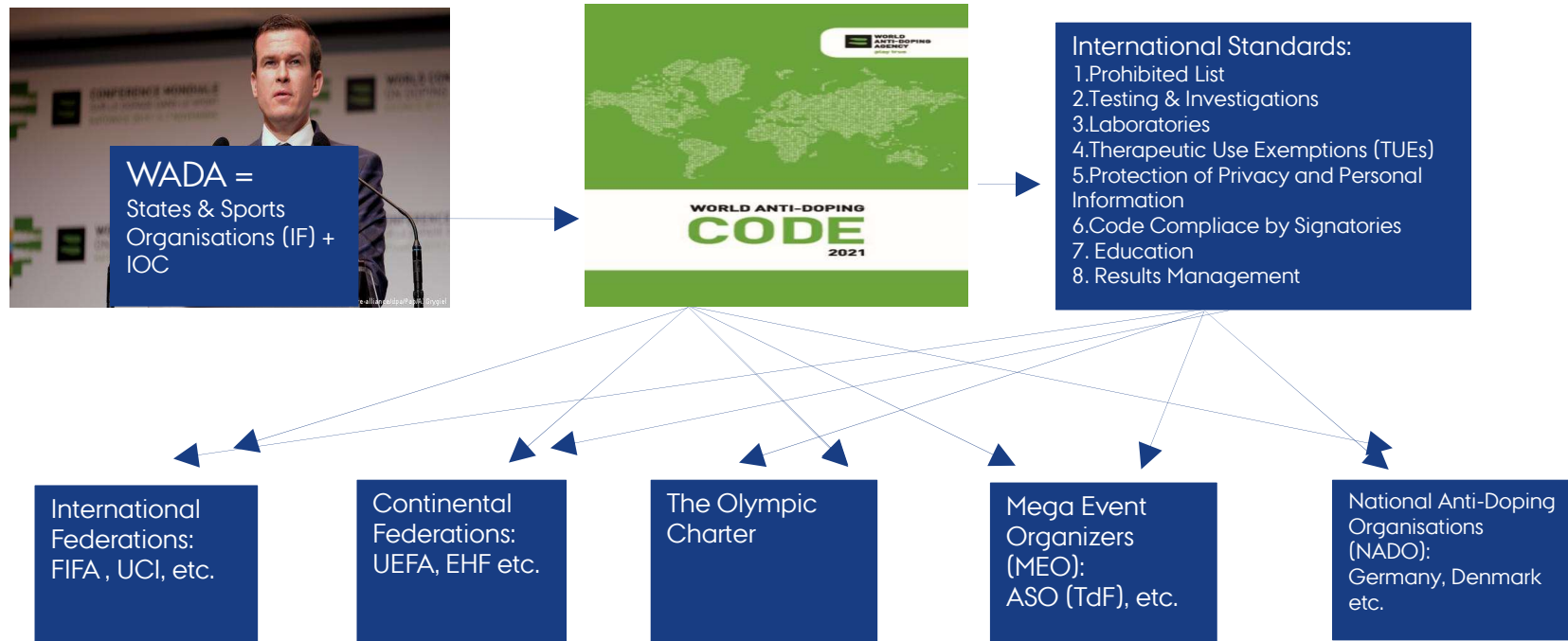
## A PRACTICAL APPROACH

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### The main legal sources:

1. **Lex sportiva:** i) Rules of the Game (e.g. Football Law), ii) Competition Rules (e.g. eligibility rules (e.g. **antidoping rules**), and iii) Club Rules (e.g. rules for membership).
2. **International Conventions & Charters:** The European Sport for All Charter (1975), The Conventions on Spectator Violence and Misbehaviour (1985) UNESCO's International Convention Against Doping in Sport, Article 165 of the EU-Treaty (2009) etc.
3. **Sports related law:** The Criminal Code, Tort Law, Tax Law etc.

# 1. A LEGAL ROAD MAP TO DOPING:



## 2. FROM TEST TO CAS

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### World Anti-Doping Code:

Art. 5: <b>Test</b> IC/OC	Art. 6: Lab. analysis A-Sample	Art. 7.3: Athlete is notified B-Sample Yes/No?	Art. 7.3: B-Sample Analysis Positive/negative?
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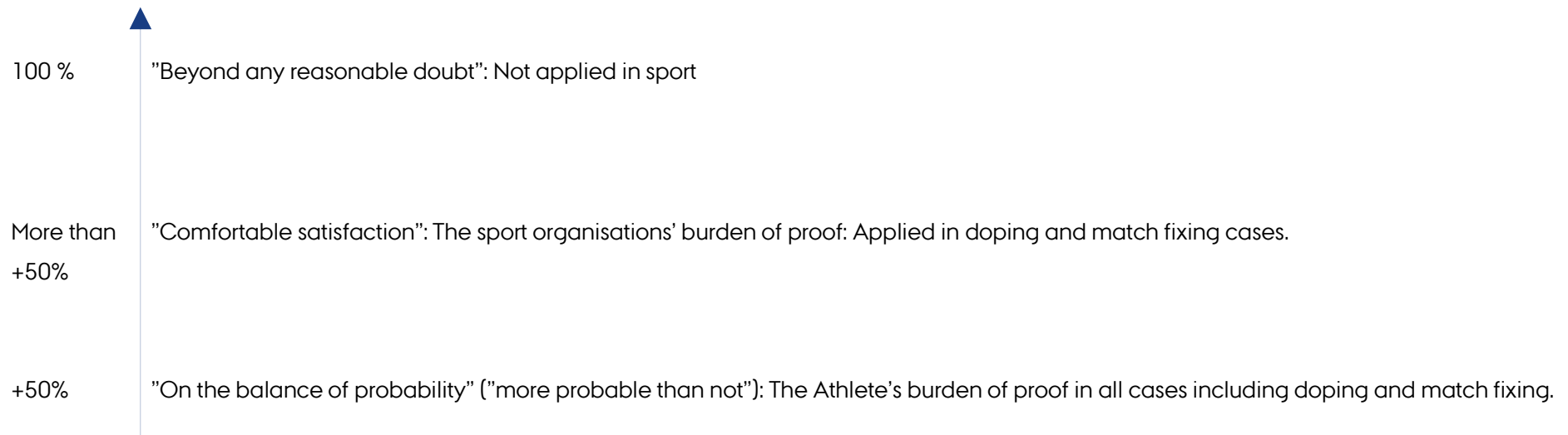
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Art. 7.9: Suspension: Non-specified substance: Mandatory Specified substance: Athlete's choice	Art. 8: Hearing: <b>CAS ADD</b> or IF Sanction/No sanction	Art. 13 Appeal to <b>CAS</b>
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# 3. STANDARDS AND BURDENS OF PROOF

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## 4. DIRECT AND INDIRECT EVIDENCE -IN DOPING CASES

### Direct evidence:

WADC, Article 2.1.2: **Presence** of a Prohibited Substance.

- Doping offenses are most commonly established by **direct evidence**, where a positive analytical result from an accredited laboratory directly shows that an athlete had a prohibited substance in his or her body.



### Indirect evidence (circumstantial evidence):

WADC, Article 3.2: Facts related to anti-doping rule violations may be established by **any reliable means**.

- Situations will arise where only **circumstantial evidence** points to the commission of a doping offense.



# 5. THE LEGAL BASIS FOR CIRCUMSTANTIAL EVIDENCE

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## WADC Article 3.2. Methods of Establishing Facts and Presumptions

”Facts related to anti-doping rule violations may be established by any reliable means, including admissions [...].”

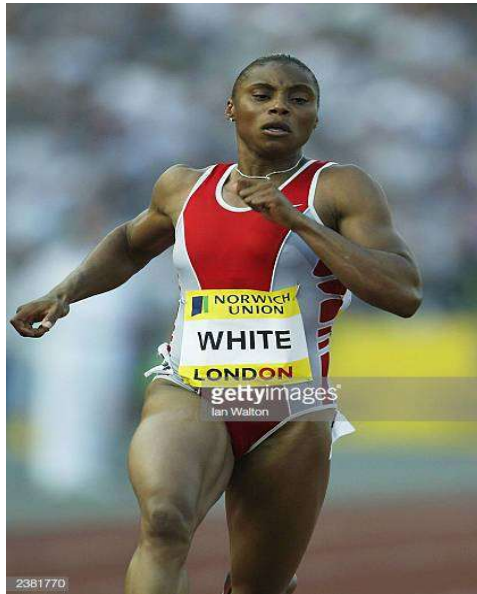
*[“**Comment to Article 3.2:** For example an Anti-Doping Organization may establish an anti-doping rule violation under Article 2.2 [Use or attempted use by an Athlete of a prohibited substance or a prohibited method] based on the Athlete’s admissions, the credible testimony of third Persons, reliable documentary evidence [...].”]*





## 6. CAS CASE LAW:

### 6.1. ATHLETE'S ADMISSION



**The Guardian, 2004:** Kelli White, the American winner of the 100 and 200 metres at the World Championships in Paris last summer, has become the first athlete in history to be banned for a doping offence without having actually tested positive for performance-enhancing drugs.

She is unlikely to be the last American athlete linked to the San Francisco-based Bay Area Laboratory Co-Operative (Balco) to be banned by Usada, who claim to have overwhelming evidence against a number of athletes after documents were passed to them by a US Senate committee.

White is one of 12 American athletes, including the sprinters Marion Jones and Tim Montgomery, who allegedly received steroids from Balco's owner Victor Conte, according to a report by an Internal Revenue Service investigator.

## 6. CAS CASE LAW:

### 6.1. ATHLETE'S ADMISSION

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**On 7 May 2007** Ivan Basso admitted that blood found in doctor Eufemiano Fuentes possession belonged to him (Basso). Ivan Basso was sanctioned with two years of ineligibility (The decision was not appealed to CAS).



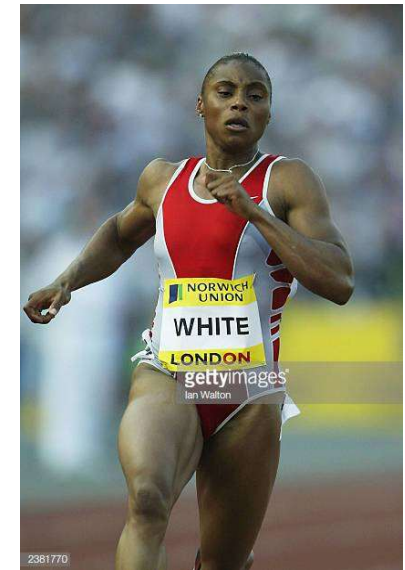
# 6. CAS CASE LAW:

## 6.1. ATHLETE'S ADMISSION TO THIRD PERSON

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*"Moose told Dog, and Dog told Frog, and Frog told Kitty, and Kitty told me."*



## 6. CAS CASE LAW:

### 6.1. ATHLETE'S ADMISSION TO THIRD PERSON

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#### 2. CAS 2004/0/645 USADA v. Montgomery:

"4.The Panel is unanimously of the view that M. in fact admitted his use of prohibited substances to W., as discussed in more detail below, on which basis alone the Panel can and does find him guilty of a doping offence. The Panel does not consider it necessary in the circumstances to analyse and comment on the mass of other evidence against the Athlete. Nevertheless, the Panel does not consider 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."

5. As mentioned, W. has admitted to doping and has accepted a two-year sanction as a result. Having seen W. 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 W.'s testimony to be wholly credible. [...]

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

# 6. CAS CASE LAW:

## 6.2.CREDIBLE TESTIMONY OF THIRD PERSONS

### **USADA v. Lance Armstrong, Reasoned Decision 10 October 2012:**

”Seven (7) eyewitnesses from 1998 U.S. Postal Service cycling team have provided testimony to USADA regarding doping on the team in 1998. USADA also received testimony from two (2) additional witnesses, Italian professional cyclist Filippo Simeoni and Betsy Andreu, regarding events they witnessed in 1998 that were relevant to USADA’s investigation.”



## 6. CAS CASE LAW:

### 6.3. ANONYMOUS WITNESSES

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#### **CAS 2011/A/2384 & 2386 UCI & WADA v. Alberto Contador:**

“The admission of anonymous witnesses potentially infringes upon both the right to be heard and the right to a fair trial of a party guaranteed by the European Convention of Human Rights and the Swiss Constitution since personal data, record of a witness and the right to ask questions are important elements of information to have in hand when testing the witness’ credibility. However, with respect to anonymous witness statements the Swiss Federal Tribunal stressed that their admission does not necessarily violate the right to a fair trial. According to the Swiss Federal Tribunal, if the applicable procedural code provides for the possibility to prove facts by witness statements, it would infringe the principle of the court’s power to assess the witness statements if a party was prevented from the outset from relying on anonymous witness statements. According to the Swiss Federal Court the right of a party to use anonymous witness statements must be nevertheless subject to strict conditions namely the witness must be concretely facing a risk of retaliations by the party he is testifying against if his identity was known, the witness must be questioned by the court itself which must check his identity and the reliability of his statements; and the witness must be cross-examined through an “audiovisual protection system”.”

# 6. CAS CASE LAW:

## 6.4. RELIABLE DOCUMENTARY EVIDENCE

### THE RUSSIAN DOPING SCANDAL

#### 1. Set-up

- Olympic Games London 2012.
- IAAF World Championships, Moscow 2013.
- Winter Olympic Games Sochi 2014.

#### 2. The McLaren Report (2) as evidence?

- **Part 1:** CAS 2017/0/5039 Anna Pyatykh
- **Part 2:** CAS 2017/A/5379 Alexander Legkov (+38)
- **Part 3:** CAS 2018/0/5712 Ekaterina Galitskaia (+11)



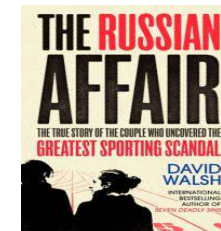
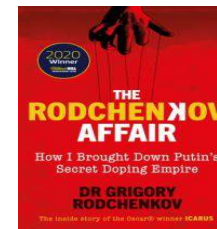
#### Background:

In 2010, an employee at the Russian Anti-Doping Agency (RUSADA), Vitaly Stepanov, began sending information to the WADA alleging that RUSADA was enabling systemic doping in athletics.

In December 2014, ARD aired Seppelt's documentary, *"Geheimsache Doping: Wie Russland seine Sieger macht"* which uncovered alleged Russian state involvement in systematic doping, describing it as "East German-style"

In the documentary Stepanov and his wife Yuliya Stepanova claimed that Russian athletics officials had supplied banned substances in exchange for 5% of an athlete's earnings and had also falsified tests in cooperation with doping control officers. It included conversations that had been secretly recorded by Stepanova, e.g. Russian athlete Mariya Savinova saying that contacts at a Moscow drug-testing laboratory had covered up her doping. Russian long-distance runner Liliya Shobukhova allegedly paid 450,000 euros to cover up her positive doping result. According to the allegations, Dr. Sergei Portugalov of the Institute for Physical Culture, who stands accused of organising state-sponsored doping in the Soviet Union, dating back to the early 1980s, was also involved in the recent Russian doping programme.

The rest is history.....

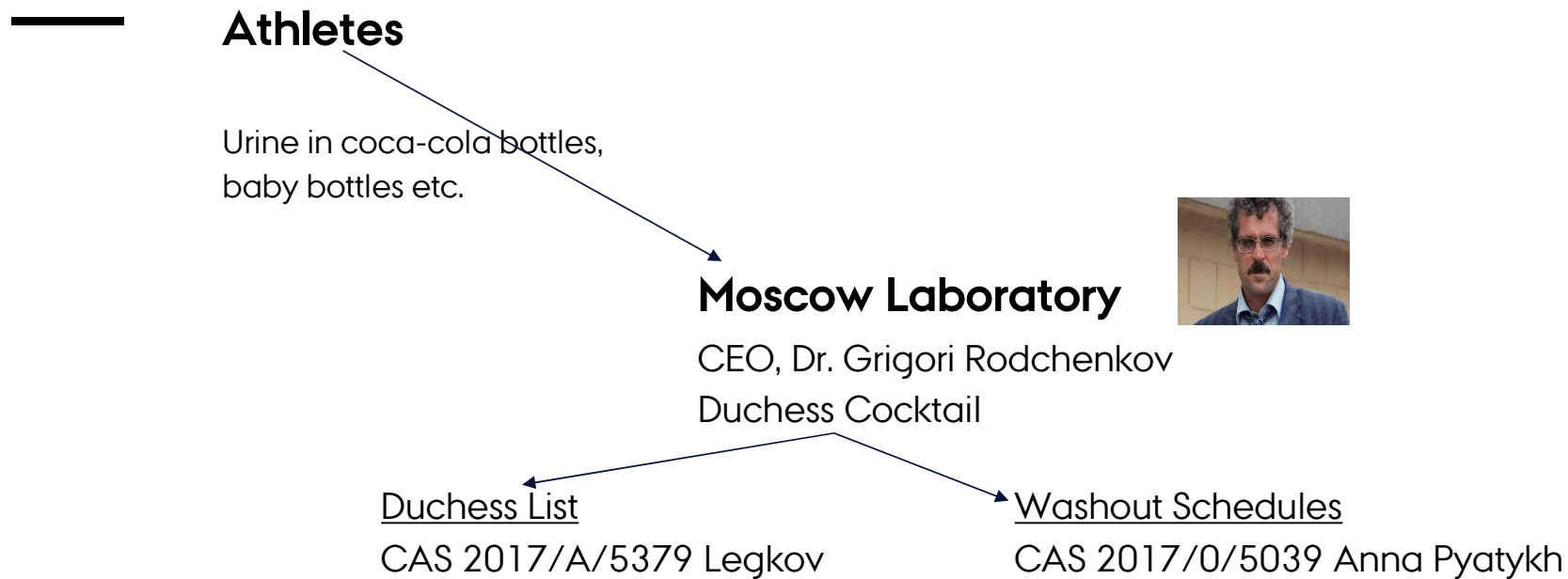


## 6.4. SETUP: LONDON OLYMPIC GAMES 2012: OFFICIAL DOPING TESTS

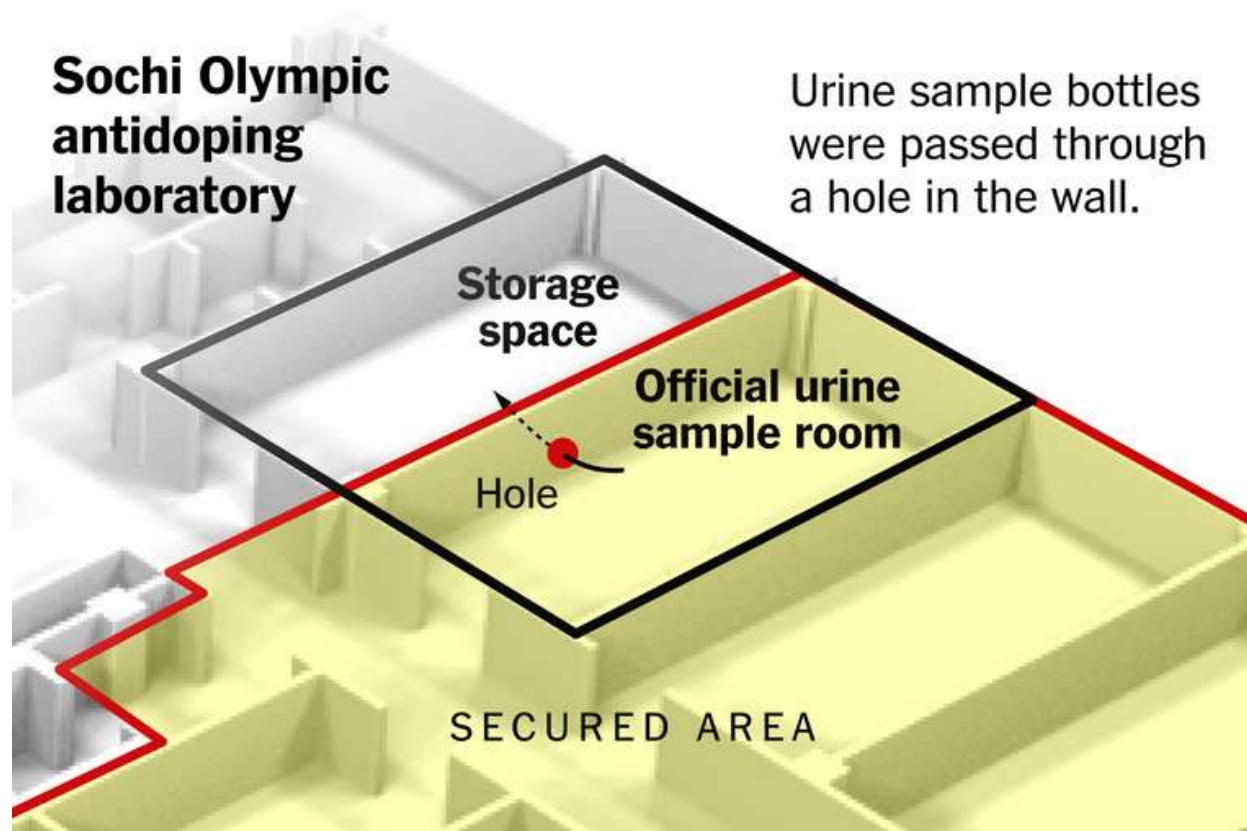




## 6.4. SETUP: MOSCOW, IAAF WC 2013: UNOFFICIAL DOPING TESTS



## 6.4. SETUP: SOCHI WOG 2014



# 6.4. RICHARD MCLAREN, *INDEPENDENT PERSON REPORT 1 OG 2 (IP 1+2)*



## 6.4. PART 1: CAS 2017/O/5039 IAAF V. RUSAF & ANNA PYATYKH

1. Retest of doping sample from 11 th IAAF WC, Osaka 31 August 2007
  - Retest 19 October 2016, positive for DHCMT (anabolic steroid)
2. Anna Pyatykh's name on the Washout Schedule
  - The 2013 Moscow Washout Schedule:

52	A0701 06/07	goes on the heavy scheme !!!	T / E of 10, 3 million oxandrolone., Methenolone 7 million, Mesterolone 600,000, oralturinabol traces!!
53	A0701 17/07	goes on prohormones	T / E 6, oxandrolone (80 000), the rest is hard to see
54	A0701 25/07	parallel offset	T / E 0.5 like clean ..

## 6.4. CAS 2017/O/5039 IAAF V. RUSAF & ANNA PYATYKH (18 AUGUST 2017)

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*Independent Person Report 2* as proof:

Paras. 83-93: “Analysis of the Second IP Report as a Basis for establishing a USE ADRV”:

“91. The Sole Arbitrator finds, however, that the combination and different types of facts provided by the Second IP Report with respect to any individual athlete are circumstantial evidence that can be used to establish an ADRV pursuant to Rule 33.3 of the 2013 IAAF Rules [...]”

92. The Sole Arbitrator bears in mind that whether there is sufficient evidence to demonstrate an ADRV or not must be considered on a case-by-case basis.

93. The Sole Arbitrator will now consider whether there is sufficient evidence in the present case to conclude that the Athlete violated Rule 32.2(b) of the 2013 IAAF Rules.”

## 6.4. CAS 2017/O/5039 IAAF V. RUSAF & ANNA PYATYKH (18 AUGUST 2017)

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“101. The Sole Arbitrator notes that the Athlete has denied being part of the Washout Schedule as she had *“always been tested officially, strictly in accordance with WADA Code and IAAF Anti-Doping Regulations & Rules”* and that she had *“never in all my life have I provided the unofficial urine samples”*. The Sole Arbitrator observes that the Athlete offered no explanation neither in her written submissions nor at the hearing why her name ended up in the Washout Schedule nor did she challenge the credibility of the Second IP Report. It follows that, the Sole Arbitrator finds the Athlete’s denial to be unsubstantiated and not credible. The Sole Arbitrator finds it to be convincingly established by the IAAF that it is in fact the Athlete’s name in the Washout Schedule.

102. As to the Washout Schedule, the Sole Arbitrator finds that it cannot be read in isolation from the rest of the IP Report. Rather the Washout Schedule must be read in the context of the IP Report as a whole. Notwithstanding, the Sole Arbitrator holds that the Washout Schedule is a strong indication that the Athlete used the Prohibited Substances, viz. oxandrolone, metenolone and mesterolone. The Sole Arbitrator observes that “T/E ratio” is commonly used and referred to in WADA documents, i.e. WADA Technical Document TD 2004EAAS, for measuring the production and ratio of Testosterone to Epitestosterone (the T/E ratio). The Sole Arbitrator therefore agrees with the IAAF’s reading that the declining T/E ratio level from 10 to 0.5 supports the assertion that the Athlete used the Prohibited Substances to prepare for the 2013 IAAF World Championships in Moscow. The latter is furthermore supported by the proximity between the dates mentioned in the Washout Schedule and the Athlete’s participation in the 2013 IAAF World Championships in Moscow.

103. Based on the above, the Sole Arbitrator finds that the Athlete violated Rule 32.2(b) of the 2013 IAAF Rules.”

## 6.4. PART 2: CAS 2017/A/5379 ALEXANDER LEGKOV (+38) FIRST CASE ON THE 'DUCHESS LIST'

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IOC charges against Alexander Legkov:

1. He was mentioned on the Duchess List = He took the Duchess Cocktail.

- Probative value of the Duchess List?

(2. He provided urine in unofficial bottles for the urine bank.

3. He provided his 'test code' in order to have his urine tests swapped with clean urine from the urine bank.)

## 6.4. CAS 2017/A/5379 ALEXANDER LEGKOV (+38) FIRST CASE ON THE 'DUCHESS LIST'

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“749. In respect of the Duchess List and the Duchess Cocktail, the Panel accepts that the components of the Duchess Cocktail, i.e. oxandrolone, metenolone and trenbolone, were all prohibited substances listed under S1 of the 2014 WADA Prohibited List and that the consumption of the Duchess Cocktail by the Athlete would thus have constituted an ADRV under Article 2.2 of the WADC. The critical question, therefore, is whether the Panel can be comfortably satisfied that the Athlete actually took the Duchess Cocktail.

750. Dr. Rodchenkov described the Duchess List as an index of protected athletes who consumed the Duchess Cocktail. In considering whether the Duchess List proves the commission of an ADRV under Article 2.2 of the WADC by the Athlete, the Panel considers it significant that Dr. Rodchenkov admitted in his oral testimony that he had never observed any athlete on the Duchess List actually taking the Duchess Cocktail. Indeed, no other witness who testified before the Panel claimed to have actually seen the Athlete consume the Duchess Cocktail or any other prohibited substance during the Sochi Games.”



## 6.4. CAS 2017/A/5379 ALEXANDER LEGKOV (+38) FIRST CASE ON THE 'DUCHESS LIST'

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751. Furthermore, the Panel notes that the probative value of the Duchess List is further diminished by the fact that some of the Sochi Appellants, for example members of the female ice hockey team, did not appear on the Duchess List, but were nonetheless alleged to have benefited from the doping and sample-swapping scheme on an ad hoc basis. The fact that not all of the Sochi Appellants appear on the Duchess List demonstrates that, even on the IOC's case, the Duchess List is not suggested to be a fully comprehensive contemporaneous reflection of athletes' alleged involvement in doping practices.

[...]

753. Finally, the Panel notes that Prof. McLaren testified that Dr. Rodchenkov during his interview with him stated that "most" of the "protected athletes" were on doping programmes, and that it was therefore "reasonable to assume" that not all "protected athletes" were on doping programmes. Prof. McLaren was unable to identify which of the athletes were, and which were not, on doping programmes. If taken at face value, this statement makes it impossible for the Panel to determine whether the Athlete was, or was not, one of the athletes on the doping programme.

754. In the circumstances, unlike the IOC DC, the Panel does not consider that the mere fact of the Athlete's presence on the Duchess List is sufficient for the Panel to be comfortably satisfied that the Athlete used a prohibited substance during the Sochi Games."

## 6.4. MEDIA RESPONSE: DAGBLADET (NORWAY) (TAGEBLATT)



«**IKKE** minst er det høyeste domssystemet selv i trøbbel. Selv før begrunnelsen for de individuelle sakene foreligger, er det lett å se at CAS i denne saken snakker med to tunger. Det er ikke mange måneder siden to ulike juryer gikk igjennom den samme problemstillingen om individuelt juridisk ansvar for statlig dopsvindel, bare for å komme til en motsatt konklusjon. Dengang godkjente CAS bevismaterialet til den canadiske jusprofessoren Richard McLaren også når det gjaldt individuelle saker.

Dette skjedde først i den fellende dommen mot den russiske tresteghopperen Anna Pyatykh. Her slo den erfarne danske CAS-dommeren Jens Evald fast at bare det å stå på lista over de utvalgte stjernene som fikk den spesielle statlige dopblandingen; den såkalte «Hertuginnen», kunne være nok for å bli dømt.»

## 6.4. PART 3: CAS 2018/0/5712 EKATERINA GALITSKAIA (+ 11) THE ONLY EVIDENCE: "WASHOUT SCHEDULE"

### London 2012 Olympic Games:

- 1. Official doping test: Negative.
- 2. Washout Schedule:
  - 15 juli 2012: DMT 100,000
  - 21 juli 2012: DMT traces

### Moskva IAAF WC 2013:

#### Washout schedule:

#### 28 juni 2013:

- Methasterone (a lot)
- Trenbolone (a lot)
- Boldenone (5 ng/ml)
- 1-testosterone (3 ng/ml)
- Oxabolone;and
- Norandrosterone (4 ng/ml)

#### 6 juli 2013

- Methastorone metabolite (900.000 a lot)

#### 14 juli 2013

- Methasterone metabolite (170 000 a lot)
- T/E 0.1

#### 26. juli 2013

- Methasterone metabolite 70 000
- 4-OH-Testosterone 25 ng/ml; and
- T/E 0.1.

## 6.4. CAS 2018/0/5712 EKATERINA GALITSKAIA (+ 11) THE ONLY EVIDENCE: "WASHOUT SCHEDULE"

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147. The Sole Arbitrator notes that according to the IP and unlike the Duchess List the purpose with the Washout Schedules were to monitor athletes using prohibited substances to keep track of the athletes who were tested. According to the IP and unlike the Duchess List all athletes on the Washout Schedules used prohibited substances.

148. On this background, the Sole Arbitrator finds that an athlete's presence on a Washout Schedule is a strong indication that the athlete used a prohibited substance.

149. However, in order to come to the conclusion that the Athlete committed an ADRV, the Sole Arbitrator finds that the mere fact that an athlete appears on a Washout Schedule must be supported by other, different and external elements pointing in the same direction.

150. The Sole Arbitrator bears in mind that whether there is sufficient evidence to establish that the Athlete in the present case has violated Rule 32.2(b) of the IAAF Rules must be considered individually.

## 6.4. STATUS ON THE 12 CAS CASES ON THE WASHOUT SCHEDULES

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5 cases were appealed to CAS (Appeals Division)

All cases confirmed that the Washout Schedule is circumstantial evidence:

- In some of the 5 cases the sanction was reduced, e.g. CAS 2019/A/6167 (from 4 to 3 years).

# 7. CLOSING REMARKS

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1. Important to bear in mind that the anti-doping organisations do not have the same investigative power as law enforcements have.

2. CAS case law seems to indicate a cautious (as opposed to a lenient) approach to accept circumstantial evidence in doping cases.

3. The importance of coherent CAS case law in doping cases:

- WADC: Overarching Code:
  - Predictability
  - Equality before the law
  - Avoid unnecessary arbitration cases

# THANK YOU FOR YOUR ATTENTION

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