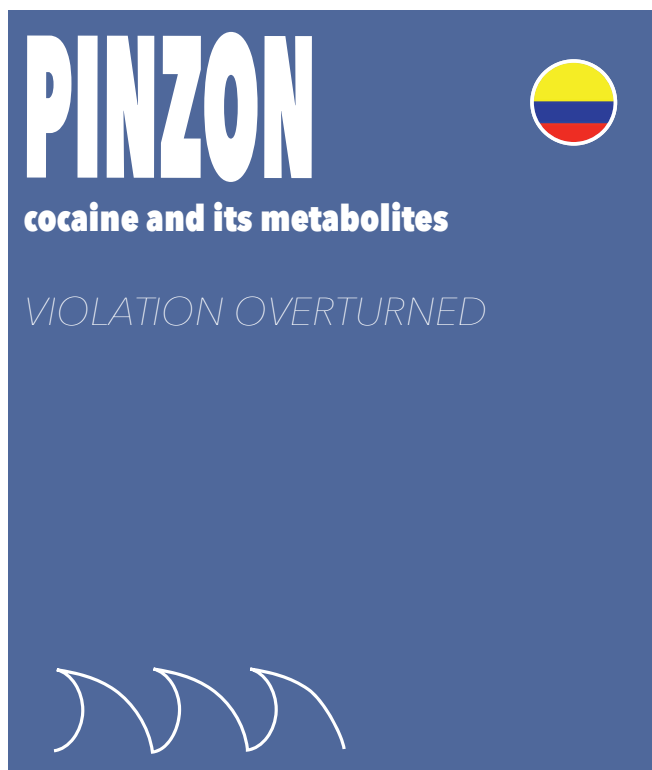


The Pinzon award: When legal presumptions fail under the force of scientific evidence

Omar Andres Pinzon Garcia v. FECNA, CAS 2014/A/3170,

April 7, 2014.



Key words:

International Standard for Testing, International Standard for Laboratories, chain of custody, procedural departures, sample contamination

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This matter demonstrates the limits of a CAS panel's tolerance when it comes to positive findings that are not supported by: (i) sufficient levels of adherence to applicable procedures; or (ii) guarantees of the scientific reliability of the analytical results. In this respect, the decision confirms the *Campbell-Brown v. Jamaican Athletics Administrative Association* (JAAA) award (CAS 2014/A/3487, see our blog entry on the *Cambell-Brown* award) if they wish to impose strict standards on Athletes, ADOs must be equally strict on themselves. Significantly, this CAS decision appears to indicate that - regardless of any concrete procedural departure from the International Standards - an Adverse Analytical Finding can be invalidated if the evidence on the record clearly demonstrates an "inconsistency with biology" of the analytical results,

i.e. if it appears scientifically implausible that the substance detected actually passed through the Athlete's organism.

The Factual Background

Upon providing an In-Competition Sample, the Colombian swimmer Omar Andres Pinzon Garcia ("Omar Pinzon" or "the Swimmer") tested positive for cocaine and its primary (Benzoyllecognine, "BZE") and secondary (Methylecognine, "EME") metabolites. In spite of certain inconsistencies in the Laboratory Documentation Package provided by the Bogota laboratory and the Athlete's denial of ingesting cocaine, the Disciplinary Commission of the Athlete's National Federation found that an anti-doping rule violation was established and imposed the standard two-year period of Ineligibility. The Athlete filed an appeal before the CAS.

The Main Findings of the Award

The Athlete's appeal was primarily based on a claim of innocence, supported by a polygraph test, as well as three lines of argument relating to the lack of scientific reliability of the test results.

The CAS panel accepted all three lines of arguments and found that no anti-doping rule violation had been established to its comfortable satisfaction, emphasizing that each of the three relevant arguments would have been independently sufficient to invalidate the finding of a violation. The following is a summary of the three arguments and the panel's assessment of each:

- *Breaches in the chain of custody:* The external chain-of-custody for the Sample - i.e. the segment of the chain from Sample collection until its arrival to the laboratory - was almost non-existent. There was no documentation with respect to the timing or the manner in which the Sample had been collected and no traceability of the Sample whatsoever until its arrival at the laboratory.

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Commentary

- *Breaches in the chain of custody, cont'd.*: The CAS panel found that the Sample was unaccounted for during a three-day time period, which represented a clear breach of the WADA Technical Document on the chain of custody (TD2009LCOC). This breach also made it impossible to unequivocally link the Sample to the swimmer, nor to obtain vital information regarding Testing which could have either supported or detracted from the Swimmer's claims. The internal chain of custody at the laboratory was also found to be insufficient and in breach of TD2009LCOC. The respondent National Federation provided no evidence that these breaches did not cause the Adverse Analytical Finding.
- *No production of the Standard Operating Procedure ("SOP")*: Deficiencies and other unexplained aspects of the Laboratory Documentation Package with respect to the screening for the primary metabolite BZE raised doubts as to whether the laboratory had complied with its own SOP. In spite of requests by the CAS panel for production of the relevant SOP, the documents were never made available. The panel found that the Athlete was truthful when he said he did not use cocaine the day of the Testing (or ever) (see further below). In combination with the laboratory's unwillingness to cooperate, this finding led the panel to consider that there was a real possibility that the laboratory did not follow its SOP, in which case so that it could no longer benefit from the presumption of compliance with the International Standard for Laboratories. As the National Federation respondent did not appear at the proceedings nor submit a timely answer brief in response to the alleged departures, it did not discharge its burden to show that these deficiencies did not cause the Adverse Analytical Finding.
- *Inconsistency with biology*: The Athlete directly challenged the Adverse Analytical Finding by arguing that the results, especially the concentration ratios between the parent drug cocaine and the metabolites, were inconsistent with an ingestion of cocaine by a human organism. Relying on an excretion study published in a scientific journal and comparing it with the respective concentrations of the parent drug and the metabolite detected in the Athlete's Sample, the CAS panel found that, based on the scientific evidence before it, no known biological excretion pattern could possibly account for the ratios detected in the Athlete's Sample. This finding suggested that it was virtually impossible for the findings to have originated in the injection or other human absorption of cocaine. The CAS panel considered that this was a further ground for setting aside the decision, since, given the evidence available, "the lab result can only be explained by lab error, manipulation of the sample or adulteration of the sample."

The "Inconsistency with Biology" Argument

Under the WADC regime, the standard anti-doping rule violation for Presence of a Prohibited Substance depends on the sole Adverse Analytical Finding reported by a WADA-accredited laboratory, as necessary and sufficient evidence (Article 2.1 of the WADC). The only explicit way in the WADA Code to question the cause/s of the Adverse Analytical Finding is to establish a concrete material departure from applicable procedures at some point of the doping control process (Articles 3.2.1 & 3.2.2 of the WADC).

The findings in the *Pinzon* award, however, open the door to a defense by the Athlete that the reported presence of the substance in the Sample cannot possibly have originated from the ingestion of a substance, even if no specific procedural departure(s) can be identified. The findings of the *Pinzon* award can certainly be partly explained by the extraordinary circumstances of the case, especially the fact that the CAS panel's assessment of each issue was aggravated by the accumulation of the flaws, inconsistencies and unresponsiveness of the National Federation respondent on important aspects of the doping control process. Nevertheless, the reasoning regarding the "inconsistency with biology" in the award could be perceived as a sign that CAS panels might become increasingly receptive to challenges addressing the causes of the Adverse Analytical Finding, irrespective of the boundaries that the WADC purports to impose on this type of reassessment. This conclusion is supported by the explicit statement in the award that the "inconsistency with biology" argument would have been in and of itself sufficient to set aside the decision under appeal.

Towards a Generalized Use of Polygraph Evidence?

Following in the trend of other recent CAS awards (see the *Contador* award CAS 2011/A/2384 and the *Campbell-Brown* award CAS 2014/A/3487, the panel did not question the admissibility of the polygraph evidence filed by the Athlete, and even mentioned that such evidence was "of some value to conclude that the Athlete is telling the truth" when explaining that he had never willingly used cocaine.

In this case, the CAS panel was admittedly considerably influenced by the unwillingness of the National Federation respondent and the relevant laboratory to cooperate in answering the important scientific issues raised by the defense. Looking specifically at the *Contador*, *Campbell-Brown*, and *Pinzon* cases, CAS panels seem hesitant to place a defined measure of weight with regard to polygraph evidence as a support for declarations made by Athletes. However, the ready acceptance of the admissibility of such evidence and at least tentatively supportive evaluation in these CAS awards may lead to mounting pressure felt by Athletes to submit to examinations of this kind, in order not to appear as lacking credibility.

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