



Arbitration CAS 2008/A/1473 Joe Warren v. United States Anti-Doping Agency (USADA), award of 24 July 2008

Panel Mr Graeme Mew (Canada), President; Mr Christopher Campbell (USA); Mr Peter Leaver QC (United Kingdom)

Wrestling

Doping (marijuana)

Presence of a specified substance

Condition of reduction of the ineligibility period based on exceptional circumstances

Condition of reduction of the ineligibility period based on the principles of proportionality

Determination of the applicable sanction for a second violation for the use of a specified substance

- 1. An anti-doping rule violation has been committed when the presence of a “specified substance” at a concentration greater than what is authorised in an athlete’s bodily specimen has been demonstrated.**
- 2. To benefit from a reduced sanction, an athlete can establish the existence of exceptional circumstances. A pre-condition to obtaining a reduced period of ineligibility based on exceptional circumstances is that the appellant must establish how the prohibited substance entered his system. Under the circumstances of a particular case, it is not necessary to require the athlete to establish with precision when the prohibited substance use giving rise to the positive test occurred in order for him to meet his burden of establishing how the substance entered his system. Doubts about when and/or how often the athlete used the substance could, however, have a bearing on the athlete’s credibility generally. In any event, where the medical evidence demonstrates that the athlete was able to differentiate between right and wrong it cannot be accepted that his actions and decisions can be relegated to the category of “no significant fault or negligence” especially when the use of the prohibited substance was neither prescribed nor medically necessary. In this regard, the acute stress the athlete was under can be at best understandable, but not excusable.**
- 3. To benefit from a reduced sanction, an athlete can also persuade the panel that the proportionality principle can and should be applied to reduce the otherwise applicable sanction. However, it is not appropriate to invoke principles of proportionality to vary a sanction which, even though it seems severe in all of the circumstances, is nevertheless in accordance with the rules in force at the time of the infraction, at the time of the hearing before the first instance authority and at the time of the hearing before the CAS panel.**
- 4. If a doping violation involving a specified substance occurs for the second time for the same athlete and if the athlete concerned has not established that he bears No Significant Fault or Negligence, no reduced sanction based on exceptional**

circumstances can be granted. Moreover where there is no basis for departing from the sanctions provided for by the regulations based on the proper application to the principles of proportionality, the minimum penalty is a two year period of ineligibility.

This is an appeal by an athlete who has acknowledged that he committed a second Anti-Doping Rule violation involving a Specified Substance, namely marijuana, in a space of little over one year.

An arbitrator sitting on the North American Court of Arbitration for Sport Panel, administered by the American Arbitration Association (the “Doping Tribunal”) imposed a mandatory sanction of two years ineligibility.

The athlete asserts on appeal that the learned arbitrator misapprehended the evidence and erred in failing to reduce the sanction based on exceptional circumstances and/or application of the principles of proportionality.

The appellant, Joe Warren is a 31-year-old Greco-Roman wrestler, competing in the 60 kg classification. Until he was suspended by the United States Anti-Doping Agency (USADA), he was a U. S. Olympic Training Center resident athlete. He was the 2006 World Champion in his classification and won a gold medal at the 2006 Pan American Championships.

USADA is the National Anti-doping Organisation for the United States of America. Its responsibilities include the management of both In- and Out-of-Competition testing for athletes in the U.S. Olympic Movement including Olympic, Pan American, and Paralympic athletes and the management of the results of such testing, including the prosecution of suspected anti-doping rule violations.

On 10 June 2007 the appellant provided a urine sample as part of the USADA testing programme at the US Pan American World Team Trials.

Upon analysis, it was found that the athlete’s urine sample was positive for the substance Carboxy-THC (“THC”) at a concentration greater than 15 ng/mL.

The appellant agreed that this positive test constituted his second anti-doping rule violation, his first violation for a similar offence having occurred on 15 April 2006.

A hearing was conducted on 3 January 2008 before the Doping Tribunal consisting of Judge James M. Murphy (retired) sitting as a sole arbitrator of the North American Court of Arbitration for Sport Panel. The arbitrator’s award, signed on 14 January 2008 determined as follows:

- a. the appellant committed a doping violation on 10 June 2007;
- b. this was the appellant’s second doping violation;

- c. the sanction shall be a two-year suspension effective from the date of his acceptance of a provisional suspension, namely 23 July 2007;
- d. the administrative fees and expenses of the American Arbitration Association totalling \$750 and the compensation and expenses of the arbitrator totalling \$9,420.90 shall be borne by the United States Olympic Committee;
- e. the parties shall bear their own costs and attorneys' fees

The appellant holds a licence to compete in events sanctioned by the Fédération Internationale des Luttes Associées (FILA) and it was common ground between the parties that, for the purposes of the Anti-Doping Rule violation under consideration, the applicable rules are contained in the *FILA Anti-Doping Regulations* (the "Regulations").

Under Article 2.1 of the Regulations, the presence of a Prohibited Substance or its Metabolites or Markers in a Wrestler's bodily Specimen constitutes an anti-doping rule violation.

By Article 10.3, in the case of specified substances which are particularly susceptible to unintentional anti-doping rule violations because of their general availability in medicinal products or which are less likely to be successfully abused as doping agents, where a Wrestler can establish that the use of such a specified substance was not intended to enhance sport performance, the following periods of Ineligibility apply:

- First violation: one year's Ineligibility
- Second violation: two years' Ineligibility.
- Third violation: Lifetime Ineligibility

Article 10.3 also provides that the athlete shall have the opportunity to establish a basis for eliminating or reducing (in the case of a second or third violation) these sanctions as provided for in Article 10.5 (Elimination or Reduction of Period of Ineligibility Based on Exceptional Circumstances).

Article 10.5.2 provides as follows:

If a Wrestler establishes in an individual case involving such violations that he or she bears No Significant Fault or Negligence, then the period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one-half of the minimum period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this section may be no less than 8 years.

When a Prohibited Substance or its Markers or Metabolites is detected in an Wrestler's Specimen in violation of Article 2.1 (presence of Prohibited Substance), the Wrestler must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility reduced.

The appellant asserts that the Doping Tribunal:

- a. Failed to follow the applicable FILA Regulations;
- b. Failed to follow the Code;
- c. Made improper assumptions in rendering its decision;

- d. Failed to accurately assess the evidence in rendering its decision;
- e. Rendered a sanction that was inconsistent with recent sanctions specified by FILA.

The appellant's brief asserts that the only issue to be determined by the arbitration is the length of sanction and that the sanction imposed by the Doping Tribunal should be reduced on the basis that the appellant bore no significant fault or negligence for his acknowledged anti-doping rule violation and/or that the period of ineligibility prescribed by the Regulations should be reduced through application of the principle that the severity of a penalty must be in proportion with the seriousness of the infringement. The appellant filed his statement of appeal on 4 February 2008 (in accordance with CAS Art R49) and filed his appeal brief on 14 February 2008 (in accordance with Art. R51). On 10 March 2008 the respondent, USADA, filed its answer.

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The background facts are largely uncontroverted. Joe Warren is a native of Grand Rapids, Michigan, where he was a high school wrestling champion. He went on to become an All-American wrestler at the University of Michigan. In 2006 he became only the fifth American to hold the title of World Champion in Greco-Roman wrestling. Over the course of his wrestling career he has enjoyed numerous other honours including, most recently, a gold medal in the World Cup at Antalya, Turkey in February 2007, a gold medal in the U.S. National Championships in Las Vegas in April 2007 and, but for the positive test which is the subject of this appeal, the gold medal at the senior world team trials, Las Vegas in June 2007. He has not lost a wrestling match in four years.

Life has not always been easy for Mr. Warren. He has experienced a number of personal setbacks. Of particular note, in December 1997, while the appellant and his "best friend" and college roommate, Jeff Reese, who was also a wrestler, were losing weight, in preparation for a competition, Mr. Reese collapsed and died. At the time of the incident, the appellant and Mr. Reese were exercising in a sauna, wearing rubber suits. This is a technique employed to lose weight quickly in order to "make weight" for competition classification purposes. This incident apparently affected the appellant profoundly and he claims that, shortly after Mr. Reese's death, he started to smoke marijuana.

With the implementation of the Code, and its adoption by FILA in 2004, the presence of marijuana in an athlete's bodily Specimen in a concentration greater than 15ng/mL became an anti-doping rule violation.

Two features of marijuana that are important to the consideration of this case are that:

- a. As a cannabinoid, marijuana, or THC, is a "Specified Substance", that is, a Prohibited Substance which is particularly susceptible to unintentional anti-doping rule violations because of its general availability in medicinal products or which is less likely to be successfully abused as a doping agent (Article 10.3 of the Regulations); and

- b. Cannabinoids are only screened for in In-Competition testing (that is testing where an athlete is selected for testing in connection with a Specific Competition: the Code, 2007 Prohibited List, S-8).

On 15 April 2006 the athlete provided a urine sample in-competition which tested positive for the presence of cannabinoids above the prescribed limit. He received a three month suspension for that anti-doping rule violation. The suspension was deferred, however, pending completion by the appellant of a USADA anti-doping education programme which the appellant took online.

The appellant has conceded that, until his first positive test in April 2006, he smoked marijuana on a “fairly regular basis”.

Another personal setback was experienced by the appellant in March 2007 when the appellant’s wife ended a pregnancy due to chromosomal abnormalities discovered by her doctors. She was hospitalised for several days and subsequently took a medical leave of absence from work.

Subsequent to his first anti-doping rule violation, the appellant claims that he refrained from smoking marijuana with one exception, namely an episode in May 2007, which led to his second anti-doping rule violation, which is the subject of this appeal.

The evidentiary proceedings before the Doping Tribunal were not transcribed. The following findings are summarised from the arbitrator’s award dated 14 January 2008.

Allan Greenfield, psychotherapist, started working with Mr. Warren in September 2007. His diagnosis is that the appellant suffers Major Depression, unspecified post-traumatic stress disorder, attention-deficit/hyperactivity disorder, predominantly hyperactive-impulsive type (“ADHD”) and Personality Disorder Not Otherwise Specified (NOS).

Mr. Greenfield attributed five events in the appellant’s life to be significant to his psychological conditions:

- a. His use of marijuana which at times has been significant but which was not quantified;
- b. A chaotic pattern of emotional neglect and dishonesty in his home while growing up;
- c. ADHD during childhood;
- d. The death of his roommate and best friend in college; and
- e. The relationship with his wife and the miscarriage that she suffered in March 2007.

As a result of these psychological conditions, Mr. Greenfield expressed the opinion that the appellant was overwhelmed and had no skill set to care for his feelings. He had insomnia which he knew, based on his previous experience, could be overcome by the use of marijuana. He could not care for himself and relied on his wife to care for his problems. However, since she was “crushed” by her miscarriage and was self-medicating, she was unavailable to meet his needs. Mr. Greenfield characterised the appellant’s depression as impairing his judgment to the point that he did not consider the ramifications to his athletic career when he smoked marijuana on one occasion in May 2007.

Mr. Greenfield acknowledged that the appellant's use of marijuana did not remove his responsibility to distinguish between right and wrong.

The Doping Tribunal found that Mr. Greenfield failed to determine, as part of his diagnosis, the appellant's historical pattern of marijuana use, except for the use following his friend's death in 1997.

Mr. Greenfield concluded that the appellant knew that he was putting his athletic career at risk by using marijuana but was unable to control his actions. He acknowledged that the appellant had the capacity to make a different choice and could have used a different "escape mechanism" but the appellant felt that marijuana was his most effective choice to help him.

Dr. Dewan, a psychiatrist called by USADA, who consults in substance abuse treatment centres and in hospital and is a sport psychiatrist, reviewed Mr. Greenfield's report. He concluded that Mr. Greenfield's analysis was incomplete. He looked at the psychodynamic conflicts and noted a need for a much greater number of issues to be addressed for a comprehensive psychological diagnosis or workup. His evidence was that in order for an objective diagnosis of the appellant's psychological status to be made, the additional information required would include: family history of substance abuse and depression, a history of the appellant's previous episodes of depression, a comprehensive mental status examination, cognitive examination and objective measurement of depressive states or symptoms existing on an emerging basis.

Dr. Dewan agreed that a properly diagnosed case of Major Depression could impair cognitive ability and functions as well as the ability to tell right from wrong.

Dr. Dewan acknowledged that there was no evidence to suggest that marijuana is a performance enhancing substance for a wrestler.

The arbitrator's award makes no reference to the evidence from Dr. Smith. USADA's designation of witnesses for this appeal, in which Dr. Smith was, until substituted by Dr. Gustafson, to have testified, noted that Dr. Smith would evaluate any testimony or evidence from the appellant or his physicians or experts concerning the metabolism of, and urine clearance times, for marijuana.

The appellant testified that prior to his first positive test in 2006 (which he claimed was the first positive for cannabinoids for a wrestler); he believed use of marijuana among wrestlers and coaches to be common, notwithstanding the introduction of In-Competition testing for cannabinoids in 2004. As a result of his anti-doping rule violation in 2006, he was well aware that a second violation would carry a more severe penalty "*but it was hard to stop because he needed to use it to help him sleep*". He acknowledged using marijuana in late May 2007. Two or three days before the competition at which he provided the sample which led to his second anti-doping rule violation, he had been in a steam room, trying to make weight, and had realised that by smoking marijuana there was the possibility of a positive test result. The Doping Tribunal found that, nevertheless, the appellant made a conscious decision to compete in an international event knowing full well that the gold medalist would be required to submit a urine sample for drug testing. Had he not competed, he would not have tested positive.

Christy Warren testified that the day after the May 2007 incident where he had smoked marijuana again on one occasion, she told her husband that such incidents must not happen again, due to her concern that he might test positive.

The following summarised testimony has been organised by topic, not by order of witness appearance.

The Appellant's Background

Some of the appellant's athletic achievements have already been noted. The evidence given concerning the appellant's background was similar to that recited by the Doping Tribunal. The appellant's lifelong ambition has been to compete in the Olympics. He states that he is likely the only United States athlete capable of qualifying for the 2008 Beijing Olympics in his weight classification (60 kilograms).

The Appellant's Current Suspension

The appellant accepted a provisional suspension, as a result of the adverse analytical finding following the 10 June 2007 sample, on 23 July 2007.

The effect of the athlete's current term of ineligibility of 2 years will result not only in him missing the opportunity to participate in the 2008 Olympics but, also, will cause him to miss the 2009 World Championships in August 2009 because all opportunities to qualify for that tournament would occur while he was still under suspension.

The Appellant's Personal Circumstances

The appellant states that he has faced a number of very personal hardships in his life. Until he started seeing Mr. Greenfield, he did not give a great deal of thought to these personal issues and how much they negatively impacted on his whole life. He says that it took him many years of personal pain and suffering to realise that he needed help. Until he started seeing Mr. Greenfield, the only person he ever discussed his "*very personal and difficult experiences*" with was his wife, Christy.

The appellant testified that during his childhood, he had difficulty sitting still. He was impulsive. He had difficulty with attention, difficulty with organising tasks and had a hard time paying close attention to activities at school. He can remember feeling depressed from quite a young age. He also had issues with self esteem and often felt angry for no apparent reason. The only thing that seemed to help calm those feelings during school was wrestling.

The appellant's father moved out of the family home when the appellant was in the tenth grade. The circumstances of his father's departure were not really discussed in the household but were, upon reflection, significant.

After leaving high school, the appellant attended the University of Michigan, where he continued with his wrestling. His best friend and college roommate was Jeff Reese. As already noted, Mr. Reese died suddenly in December 1997, while he and the appellant were preparing for a wrestling dual meet by exercising in a sauna, wearing rubber suits. Mr. Reese apparently crawled toward the sauna door and collapsed. The appellant testified that he tried to resuscitate Mr. Reese using CPR, but to no avail. Mr. Reese died from kidney failure and a heart malfunction.

The appellant acknowledged, in cross-examination, that his name did not feature in press reports concerning Mr. Reese's death. He stated that, nevertheless, there was considerable media attention and pressure on him and other athletes from the University of Michigan.

The appellant and his wife have been together for over eight years and were married in July 2006. Since October 2002 they have lived in Colorado Springs to further the appellant's wrestling career.

In 2006, Christy Warren became pregnant. However, in late March 2007 she had to end her pregnancy due to chromosomal abnormalities discovered by her doctors. She was hospitalised for several days and thereafter took a medical leave of absence.

Following the loss of their unborn child, both the appellant and his wife were sad. His wife, in particular, was experiencing a sense of hopelessness. According to Dr. Gendel, during this time the appellant was experiencing a state of desperation about emotionally losing his wife.

Mr. Warren has held part-time employment at Home Depot. He works in the department which mixes paint for customers. In 2007 he was averaging approximately 10 hours work per week. However, the amount of time worked would fluctuate with the appellant's competition schedule. He believes that he worked very little during late May and early June of 2007 because of competitions.

The Appellant's Use of Marijuana

The appellant started smoking marijuana very shortly after the death of Mr. Reese. He continued to smoke marijuana "on a fairly regular basis" from 1998 until he tested positive in April 2006. He claims that when he tested positive in 2006, he did not know that it had been recently added to the banned list (as stipulated by the parties, marijuana became a Prohibited Substance on 1 January 2004). The appellant did not challenge the positive test and accepted a warning from USADA for testing positive. He took USADA's online drug education course, which he described as "brief".

After initially stating that he had no knowledge as to what the clearance time might be for THC to eliminate itself from the body after marijuana use, the appellant acknowledged that, during the course of taking the USADA drug education course, he understood that the effects could linger in a person's system for up to one month.

Following the positive test in April 2006, the appellant stopped using marijuana. He believed that marijuana and associated paraphernalia, which had previously been kept in the home, had been removed.

The appellant and his wife went through a very rough time after the termination of her pregnancy in March 2007. They experienced an inability to discuss their emotions. One day, in late May 2007, realising that they needed to talk to each other, the appellant's wife, without much talking or thought, produced some marijuana and a pipe and they smoked marijuana together. They both testified that this was the first time that the appellant had used marijuana in a little over one year but that it did help the two of them open up and talk. They talked for most of the night about a lot of things, including their unborn child's death and their reactions to it. Both of them felt that, as a result of this one experience, they had been able to reconnect. Christy Warren said that it made her feel somewhat less desperate. The appellant said that he was able to sleep.

Christy Warren immediately (the next day) realised that it had been a mistake to use marijuana because the appellant was still wrestling. She testified that she knew that marijuana was tested for In-

Competition, but it did not occur to her that smoking one time two weeks or so before a competition could cause a positive result. The appellant and his wife deny discussing with each other whether their use of marijuana on that one occasion could cause him to test positive.

Christy Warren did, however, arrange for her husband to see his doctor, Dr. Ravin, because the appellant remained anxious and unable to sleep. The evidentiary record included prescription receipts indicating that Dr. Ravin prescribed medication for the appellant on 29 May 2007. Both the appellant and his wife acknowledged that when they met with Dr. Ravin, neither of them mentioned to Dr. Ravin that the appellant had recently smoked marijuana. It is to be noted that Christy Warren's evidence about the appellant's inability to sleep conflicted with that of the appellant. As is set out in Paragraph 66 above, the appellant told the Panel that the use of marijuana in May 2007 enabled him to sleep.

The appellant is adamant that, prior to the positive test in June 2007, he only used marijuana the one time, and that he did so 12 to 13 days before he was tested.

The Appellant's Decision to Compete on 10 June 2007

During the period April – June 2007, the appellant states that he was under extreme pressure. He was trying to cut weight. He was experiencing sleeplessness. His father had recently lost his job. His uncle had committed suicide. In particular, he was experiencing a real problem communicating with his wife following the loss of their unborn child.

While the appellant realised that he should not have used marijuana on the one occasion in May 2007 that he acknowledges having done so, he did not think about the option of pulling out of the 10 June 2007 tournament that he was entered in.

Two or three days before he competed the appellant had what he described as a "fleeting thought" while he was sitting in a steam room. His thought was "*I smoked – will my urine be positive?*" however he concluded that the marijuana could not still be in his system. The appellant's testimony was that if he had thought that there might still be marijuana in his system, he would not have competed on 10 June 2007.

By the date of competition on 10 June 2007, the appellant claims that he was still dealing with his "internal terror". Notwithstanding this, he was able to give media interviews and give an appearance that he was functioning normally.

The Toxicology Evidence

The only expert in toxicology whose evidence was admitted was Dr. Gustafson. Dr. Gustafson holds the rank of Commander in the United States Navy. His doctoral work dealt with excretion times for marijuana and his thesis was entitled "*Pharmacokinetics and Pharmacodynamics of Oral Delta-9-Tetrahydrocannabinol*".

Dr. Gustafson testified that the average concentration of the three aliquots tested in the appellant's A Sample was a concentration of 50.79 ng/mL. The three aliquots tested in the B Sample yielded an average calculated concentration of 69.50 ng/mL. In his opinion, regardless of the quantity of marijuana ingested, any marijuana use two weeks prior to the provision of a urine sample would be unlikely to produce a calculated concentration of THC at 15 ng/mL (the reporting threshold under the Code) let alone average concentrations of 50.79 ng/mL and 69.50 ng/mL.

On cross-examination, Dr. Gustafson acknowledged that he had no information as to how marijuana had entered the appellant's system and that he did not have information as to strength or quality of the marijuana used. He acknowledged that the potency of the marijuana used would have an impact on the concentration of the metabolite found in a person's urine and how long it takes for the metabolite to excrete. Throughout his testimony Dr. Gustafson maintained the position that even in the case of a heavy marijuana user, he would expect a result below the reporting threshold no more than 5 to 6 days after the last marijuana use.

Dr. Gustafson acknowledged that none of the studies that he was aware of, nor his personal clinical experience, involved subjects who engaged in rapid weight loss by dehydration but felt that rapid weight loss would not have an effect on the excretion rate. However, he acknowledged that his evidence on average excretion rates assumed normal liver and kidney function.

Dr. Gendel is a specialist in psychiatry. He professes no expertise in toxicology. Nevertheless, he said that he did not believe that the concentration of THC found in the appellant's urine was a reliable indicator of when the appellant used marijuana. He acknowledged that some toxicologists might disagree with him but held to the view that such evidence was unreliable.

Given their respective areas of expertise, and despite a careful cross-examination of Dr. Gustafson by the appellant's counsel, we feel bound to prefer the views of Dr. Gustafson to those expressed by Dr. Gendel on the issue of excretion rates of THC.

Psychiatric Evidence

Although the reports from Mr. Greenfield, the psychologist, formed part of the record before the Doping Tribunal and, hence, part of the record before the CAS Tribunal, Mr. Greenfield was not called as a witness and, thus, his evidence was not subjected to cross-examination. We have therefore attached little weight to it.

The evidence of Dr. Gendel was tendered on behalf of the appellant and he was cross-examined by counsel for the respondent. He is certified by the American Board of Psychiatry in neurology in psychiatry, addiction psychiatry and forensic psychiatry. He is currently an associate clinical professor in the department of psychiatry at the University of Colorado Health Sciences Center. He also maintains a private practice.

Dr. Gendel's declaration included a review of Mr. Greenfield's report. Dr. Gendel was generally supportive of the conclusions reached by Mr. Greenfield. His opinion, which was based not only on a review of Mr. Greenfield's report but, also, of the briefs filed on this appeal as well as a 2 ½ hour meeting with the appellant on 11 February 2008, at which formal and informal mental status testing was conducted by him as part of his normal forensic psychiatric evaluation, offered the following diagnosis:

- a. Lifelong depression (Dysthymic Disorder) beginning in childhood with several episodes of major depression;
- b. An extensive history of anxiety disorder including generalised anxiety disorder;
- c. Panic disorder and probable post-traumatic stress disorder (PTSD);
- d. Attention deficit hyperactivity disorder; and
- e. Cognitive impairment/reduced efficiency of cognitive functioning.

Dr. Gendel based his diagnosis of Dysthymic Disorder on the following:

- a. The appellant's reported onset of depression starting in the third grade at school;
- b. The appellant's elements of depressive experience throughout his life without periods of full relief or full remission;
- c. The appellant's self esteem difficulties, concentration difficulties and times of feeling hopeless;

The appellant had experienced a great deal of rage and anger as a child. Dr. Gendel noted that the appellant's success in wrestling was the prime measure by which he had established any self-confidence or self esteem. His diagnosis of episodic major depression was based on "significant periods of increased depression with multiple biovegetative symptoms".

Dr. Gendel's diagnosis of an extensive history of anxiety disorder was based in part on the following:

- a. From an early age the appellant had experienced anxiety in the form of excessive worry, irritability, and difficulty with concentration; and
- b. His post-traumatic stress symptoms included intrusive thoughts and dreams about his best friend's death, times when he was re-experiencing the traumatic event of his friend's death and behaviour in the form of avoiding places related to that traumatic event and restricted range of affect. Symptoms of increased arousal included difficulty sleeping and hypervigilance.

The diagnosis by Dr. Gendel of ADHD was based in part upon the following:

- a. The appellant's reported childhood hyperactivity and irritability that were only managed through wrestling;
- b. The appellant's long history of difficulty in sitting still, impulsivity, difficulty with attention, difficulty with organising tasks and failure to pay close attention to important activities;
- c. The appellant's easy distractibility; and
- d. The appellant's history of having a calming response to stimulant medication.

Dr. Gendel's diagnosis of cognitive impairment/reduced efficiency of cognitive functioning was based upon the cumulative cognitive effects of the foregoing conditions which, he found, were further worsened by the acute stress of the situations that he encountered.

With specific reference to the period April – June 2007, Dr. Gendel was of the opinion that the appellant could see that his wife was in profound distress and that his concern about her and his helplessness to assist her built rapidly into extreme emotional turmoil. In the words of Dr. Gendel, in May 2007:

"Joe Warren saw his world crumbling due to grief about his recent loss and his desperation about [his] wife's increasing envelopment in her distress. He had stopped sleeping, and when he did sleep, he had dreams about his

college room mate's death (post-traumatic symptoms). His wife was struggling terribly after the death of their unborn child".

Dr. Gendel said that he had accepted the appellant's assertion that he had only used marijuana once in May 2007, although he acknowledged that if there was compelling evidence to suggest that he had used marijuana more often, it would undermine the appellant's credibility. Dr. Gendel described the reported one time use of marijuana by the appellant and his wife in May 2007 as an "*abreactive experience*" which enabled the appellant and his wife to reconnect and, in the appellant's eyes, for him to feel more committed to his wife and somewhat less desperate.

According to Dr. Gendel, in the days leading up to and including the 10 June 2007 competition, the appellant was struggling with overwhelming anxiety, night terrors, insomnia and a desperate need to help his wife. He was suffering from "*very substantial psychiatric illnesses*" combined with the fact that his wife appeared to be crumbling in front of him as a result of the termination of her pregnancy. At the same time, the appellant's support network, which was his wife, was unavailable to him. Accordingly, in Dr. Gendel's opinion, the appellant's actions, and the consideration of whether or not he was significantly negligent, can only be analysed in the context of the intense psychiatric issues with which he was dealing.

Dr. Gendel noted that the Doping Tribunal had concluded that the appellant had made a "*calculated decision to take the chance on a possible positive test with full knowledge of the consequences*". It was Dr. Gendel's opinion, based on his background and experience and his conversations with the appellant, that the arbitrator's conclusions would not accurately reflect the mental and emotional state of the appellant in May and June 2007. Of particular importance, according to Dr. Gendel, the appellant's executive functioning was impaired with the result that his ability to adapt to changing situations was impaired. In the case of the appellant, according to Dr. Gendel, this meant that his ability to "*simply decide whether or not to compete*" was impaired. Dr. Gendel acknowledged, however, that he could not go back and measure the degree of cognitive impairment or executive functioning retroactively.

Dr. Naakesh Dewan, psychiatrist, was called as a witness by USADA. He is the president of a company called Advanced Psychiatry, P.A. and of the Center for Mental Health Care Improvement located in Clearwater, Florida. As such, he works with state governments and large insurance companies to disseminate materials on guidelines and best practices in psychiatric evaluations and treatment. He has had a Diploma in psychiatry from the American Board of Psychiatry and Neurology since 1993.

Unlike Dr. Gendel, Dr. Dewan had never examined the appellant. As was the case before the Doping Tribunal, Dr. Dewan was critical of the conclusions reached by Mr. Greenfield, primarily on the basis that he did not have enough information to reach his diagnoses. He was similarly critical of the diagnoses offered by Dr. Gendel.

Dr. Dewan stated that he found it contradictory for the appellant to be enveloped in his wife's distress but, despite being so, to come up with the idea of engaging with her by talking through their problems, while at the same time being impaired in his ability to exercise judgment in respect of his use of marijuana and his subsequent decision to compete.

Dr. Dewan acknowledged that there was no data that he was aware of on the cumulative effect of the several disorders which Dr. Gendel had noted.

Dr. Dewan indicated that the question of whether lifelong depression would have a cumulative cognitive effect, that could affect cognitive impairment, was the subject of ongoing research.

Both Dr. Dewan and USADA conceded that the appellant experienced “acute stress”. Dr. Dewan also confirmed that in his clinical experience, acute stress could lead to things like poor judgment.

LAW

Jurisdiction of the Court of Arbitration for Sport

1. The appellant was tested in accordance with the USADA Protocol for Olympic Movement Testing. The hearing before the arbitrator was conducted pursuant to the American Arbitration Association Supplementary Procedures for the Arbitration of Olympic Sport Doping Disputes (the “Procedures”). Pursuant to R-49A of the Procedures, which incorporates the mandatory Articles on Appeals from the World Anti-Doping Code (the “Code”), in cases arising from competition at an International Event or in cases involving International-Level Athletes (such as the appellant), a decision by an Anti-Doping Organisation that an anti-doping rule violation has been committed may be appealed exclusively to the Court of Arbitration for Sport (CAS).

Law Applicable

2. Article 18.2 of the Regulations provides that, subject to Article 18.5 the Regulations shall be interpreted as an independent and autonomous text and not by reference to existing law or statutes. Article 18.5 provides that the Regulations shall be interpreted in a manner that is consistent with applicable provisions of the Code.

Discussion

3. The appellant has acknowledged committing an anti-doping violation for which the minimum penalty is a two year period of ineligibility unless he can establish the existence of exceptional circumstances or persuade the panel that the proportionality principle can and should be applied in this case to reduced the otherwise applicable sanction.
4. The appellant accepts that he cannot establish that there was “No Fault or Negligence” on his part. He therefore relies on Article 10.5.2 of the Regulations which permits the Panel to reduce

the otherwise applicable period of Ineligibility by up to one half on the basis that there was “No Significant Fault or Negligence”¹.

5. A pre-condition to obtaining a reduced period of Ineligibility based on exceptional circumstances is that the appellant must also establish how the Prohibited Substance entered his system.
6. While we accept that the cause of the appellant’s positive test was his use of marijuana, the evidence of Dr. Gustafson, which was not effectively undermined, renders it improbable that the positive test was the result of the appellant’s use of marijuana on one occasion 12 to 13 days prior to being tested. It follows that the appellant is either mistaken as to when his one-time use of marijuana prior to being tested occurred (although he has little room to manoeuvre in this regard as the evidence of both the athlete and his wife was that the marijuana smoking incident occurred before the athlete went to see Dr. Ravin and the indication, from the prescription receipts filed, is that the consultation with Dr. Ravin occurred no later than 29 May 2007) or the appellant in fact smoked marijuana more than once in the period leading up to the 10 June 2007 test date.
7. Having concluded that we cannot accept the appellant’s evidence as to when and/or how many times he consumed marijuana, we considered what effect that would have on the appellant’s ability to establish how the Prohibited Substance entered his system.
8. In our view, it is not necessary in the circumstances of this particular case to require the athlete to establish with precision when the marijuana use giving rise to his positive test occurred in order for him to meet his burden of establishing how the THC entered his system. Doubts about when and/or how often the appellant used marijuana could, however, have a bearing on the appellant’s credibility generally.
9. On the issue of whether, on a balance of probability, the appellant has demonstrated that he bore “No Significant Fault or Negligence”, we accept the appellant’s submission that his particular circumstances, including the state of his mental health at the time of his use of marijuana and his subsequent positive test, are relevant to our evaluation.

¹ In evaluating whether an athlete has established that he or she bears “No Significant Fault or Negligence, we note the commentary to Article 10.5 of the WADA Code, which provides:

“To illustrate the operation of Article 10.5, an example where No Fault or Negligence would result in the total elimination of a sanction is where an Athlete could prove that, despite all due care, he or she was sabotaged by a competitor. Conversely, a sanction could not be completely eliminated on the basis of No Fault or Negligence in the following circumstances: (a) a positive test resulting from a mislabeled or contaminated vitamin or nutritional supplement (Athletes are responsible for what they ingest (Article 2.1.1) and have been warned against the possibility of supplement contamination); (b) the administration of a prohibited substance by the Athlete’s personal physician or trainer without disclosure to the Athlete (Athletes are responsible for their choice of medical personnel and for advising medical personnel that they cannot be given any prohibited substance); and (c) sabotage of the Athlete’s food or drink by a spouse, coach or other person within the Athlete’s circle of associates (Athletes are responsible for what they ingest and for the conduct of those persons to whom they entrust access to their food and drinks). However, depending on the unique facts of a particular case, any of the referenced illustrations could result in a reduced sanction based on No Significant Fault or Negligence. (For example, reduction may well be appropriate in illustration (a) if the Athlete clearly establishes that the cause of the positive test was contamination in a common multiple vitamin purchased from a source with no connection to Prohibited Substances and the Athlete exercised care in not taking other nutritional supplements)”.

10. Although Dr. Gendel believed that the appellant's mental state in late May and early June of 2007 impaired the appellant's ability to make rational decisions, he also acknowledged that the pressures faced by the appellant did not amount to diminished responsibility (in the criminal law sense). The appellant was still capable of distinguishing between right and wrong. Dr. Gendel felt, however, that the appellant was "*programmed to wrestle and win*" and that during the relevant period he was in a mode that unless there was a real danger – which he seemingly failed to apprehend – he would wrestle. It was Dr. Gendel's opinion that although the appellant might have had the capacity to realise that it was wrong for him to smoke marijuana and that the appellant was also capable of making a determination whether or not to compete, it had never occurred to the appellant that it might be inadvisable for him to do so. Dr. Dewan challenged this conclusion. Dr Gendel's evidence is in conflict with the appellant's evidence.
11. Significantly, Dr. Gendel acknowledged that it would make a difference to his assessment of the appellant's credibility if the appellant had, in fact, used marijuana more than once shortly before being tested in June 2007. Given our acceptance of Dr. Gustafson's evidence, the foundation for Dr. Gendel's assessment is somewhat compromised.
12. The comments of the Tribunal in CAS 2007/A/1252 have a resonance with Mr. Warren's case. The appellant in CAS 2007/A/1252 was clearly under a lot of pressure to complete his project at the time he used amphetamine. The appellant's circumstances, on the other hand, were the result of a combination of life events and stresses.
13. It may well be that Mr. Warren was, to use lay language, crashing and burning at the time that he used marijuana in May 2007 and that he remained in that state too when he competed (even though he could easily have avoided trouble by not competing). While he was, at times, evidently able to put on a "game face", we are inclined to accept that in reality he was going through a turbulent time in his personal and emotional life.
14. Ultimately, while we are sympathetic to the appellant's circumstances and accept that he was under a great deal of stress at the time, we have difficulty reconciling the evidence of impaired decision making with what actually happened. The fact is that in the two weeks leading up to the competition on 10 June 2007, the appellant prepared by training and cutting weight. He worked. He gave media interviews. The medical evidence is that he was able to differentiate between right and wrong. Furthermore, our sympathies for the appellant are somewhat lessened by the likelihood that his evidence concerning when, and possibly how many times, he used marijuana in May 2007, was inaccurate.
15. The Panel is aware of the decision in *USADA v. Barney Reed* (AAA No. 30 190 000548 07 (21 May 2008)) in respect of which we understand that an appeal to CAS is now pending. There an athlete's use of medically prescribed marijuana to deal with a "serious medical condition", resulting in an adverse analytical finding during in-competition testing, was held to be not significantly negligent. The athlete had previously discontinued his use of medical marijuana 15 days before competing so that the marijuana could pass through his system before he competed. On the occasion in question, however, he had discontinued his marijuana use just nine days

before competition due to difficulty with sleeping (which the marijuana helped) and it was thought that this had resulted in the positive test. The tribunal discounted the effect of the athlete's failure to obtain a therapeutic use exemption because it found the athlete had not been actively educated about the TUE programme. Taking into account the totality of the circumstances, the tribunal in the *Reed* case concluded that there had not been "significant" fault or negligence. What would otherwise have been a two year sanction was therefore reduced to 15 months.

16. While we make no comment on the correctness or otherwise of the decision in *Reed*, taking into account the totality of the circumstances in this case, we cannot accept that the quality of appellant's actions and decisions can be relegated to the category of "no significant fault or negligence". By his own admission, if he had thought there was marijuana in his system on 10 June 2007, he would not have competed. The appellant competed because he did not think that the marijuana would still be in his system. The appellant's use of marijuana was neither prescribed nor medically necessary. It was at best understandable, but not excusable, due to the acute stress the appellant was under.
16. We therefore conclude that we cannot reduce the sanction imposed on the appellant on the basis of exceptional circumstances.
17. It has become commonplace in cases heard by Doping Tribunals for proportionality to be argued as a basis for reducing an otherwise applicable sanction. As has been pointed out in many cases, the provisions of the Code already factor in the principle of proportionality². However, in CAS 2006/A/1025 the Panel stated:

"... in all but the very rare case, the WADC imposes a regime that, in the Panel's view, provides a just and proportionate sanction, and one in which, by giving the athlete the opportunity to prove either "No Fault or Negligence" or "No Significant Fault or Negligence", the particular circumstances of an individual case can be properly taken into account.

But the problem with any "one size fits all" solution is that there are inevitably going to be instances in which the one size does not fit all. The Panel makes no apology for repeating its view that the WADC works admirably in all but the very rare case. It is, however, in the very rare case that the imposition of the WADC sanction will produce a result that is neither just nor proportionate.

...

But what is a CAS Panel to do in such a case? In the Panel's view, the answer is clear, albeit not without problems and difficulties. Any sanction must be just and proportionate. If it is not, the sanction may be challenged. The Panel has concluded, therefore, that in those very rare cases in which Articles 10.5.1 and 10.5.2 of the WADC do not provide a just and proportionate sanction, i.e., when there is a gap or lacuna in the WADC, that gap or lacuna must be filled by the Panel. That gap or lacuna, which the Panel very much hopes will be filled when the WADC is revised in light of experience in 2007, is to be filled by the Panel applying the overarching principle of justice and proportionality on which all systems of law, and the WADC itself, is based".

² See for example CAS 2004/A/690.

18. The Panel in CAS 2006/A/1025 emphasised that it was not holding that there existed a general discretion to impose a sanction considered appropriate by the Panel, notwithstanding the express provisions of the Code. The Panel in CAS 2006/A/1025 was unable to conceive of any circumstance in which the principle of proportionality could be applied if the athlete concerned had committed a serious drug offence or an offence where there was a suggestion of a performance enhancing effect.
19. The Panel in CAS 2006/A/1025 referred to the decision in CAS 2005/A/830 in which the Panel in that case recognised that a mere “*uncomfortable feeling*” alone that a one year penalty was not an appropriate sanction could not itself justify a reduction. Nevertheless, despite the lengths to which the Panel in CAS 2006/A/1025 went to make it as clear as possible that its decision did not involve the exercise of a general discretion, there has seemingly been an increased incidence of cases in which Panels are asked to consider applying proportionality principles.
20. The Panel in CAS 2007/A/1252, having declined to reduce the athlete’s sanction based on “No Significant Fault or Negligence”, noted that the anti-doping rules applied inequitably in cases such as CAS 2007/A/1252 where the athlete committed a first violation, recognised it, explained his behaviour, regretted it, suspended himself voluntarily, accepted the renunciation of his world championship title (even though his anti-doping test results had been negative during that competition) and had taken steps to make amends. Notwithstanding all of these things, the athlete would have to have imposed on him the same sanction (2 years for his first violation) as an athlete who refused to admit to have taken stronger doping products intentionally over a long period of time and who had protested the clear results of those tests. Indeed, the circumstances of the infraction, according to the Panel, made the athlete’s negligence very plausible.
21. The Panel in CAS 2007/A/1252 went on to note (as did the Panel in CAS 2006/A/1025) that changes in the World Anti-Doping Code were pending and that such changes would probably result in a more satisfactory system of sanctions.
22. Ultimately, the Panel in CAS 2007/A/1252 concluded that although the athlete’s negligence had been significant, it was possible for one to easily comprehend how the regrettable event had come about and this, when viewed with all of the other circumstances, made the CAS 2007/A/1252 case exceptional and rendered disproportionate a period of ineligibility of two years. In the result, the Panel reduced the period of ineligibility to 18 months.
23. Since the pronouncement of the decisions in CAS 2006/A/1025 and CAS 2007/A/1252, the World Anti-Doping Code has, indeed, been revised, with the revisions set to take effect on 1 January 2009. Under Article 10.7 of the 2009 Code, the penalty for a second anti-doping rule violation where both violations involve specified substances under Article 10.5 of the 2009 Code, will be in a range of one to four years. The criterion for determining the precise sanction appears to be the athlete’s degree of fault (see Article 10.4).
24. Although the 2009 Code contains transition provisions, these provisions do not apply to cases decided before the new Code comes into force. Had the 2009 Code already come into effect,

Article 25.2 would have permitted us to apply the principle of *lex mitior* (which, in the context of anti-doping rules, would enable an athlete found to have committed an anti-doping offence to benefit from new Code provisions, assumed to be less severe, even when the events in question occurred before the new Code into force). However, the new Code also contains the following provision which could ultimately offer an opportunity to the appellant:

“25.3 Application to Decisions Rendered Prior to Code Amendments.

With respect to cases where a final decision finding an anti-doping rule violation has been rendered prior to the Effective Date, but the Athlete or other Person is still serving the period of Ineligibility as of the Effective Date, the Athlete or other Person may apply to the Anti-Doping Organization which had results management responsibility for the anti-doping rule violation to consider a reduction in the period or Ineligibility in light of the 2007 Code Amendments. Such application must be made before the period of Ineligibility has expired. The decision rendered by the Anti-Doping Organization may be appealed pursuant to Article 13.2. The 2007 Code Amendments shall have no application to any anti-doping rule violation case where a final decision finding and anti-doping rule violation has been rendered and the period of Ineligibility has expired”.

25. We do not read the 2007 Code amendments as permitting us to prospectively adjust a sanction. To do so would be to usurp the jurisdiction which the anti-doping organisation which had results management responsibility for the original infraction is given under Article 25.3 of the 2009 Code. Nor do we consider it appropriate to invoke principles of proportionality to vary a sanction which, even though it seems severe to us in all of the circumstances, is nevertheless in accordance with the rules in force at the time of the infraction, at the time of the hearing before the Doping Tribunal and at the time of the hearing this appeal and the release of this award.
26. Nevertheless, a dispute resolution process such as this one typically has amongst its goals, whether expressed or implied, the just, most expeditious and least expensive resolution of the dispute. With that in mind, and having regard to the fact that under Article 25.3 of the 2009 Code, the appellant’s route for seeking a reduction of the outstanding balance of his period of ineligibility would take him back to USADA with a further right of appeal to CAS, we believe it appropriate that we indicate now how we would have approached the issue of sanction had the 2009 Code already been in force.
27. We would have regarded the degree of fault on the part of the athlete as suggestive of a sanction towards the lower end of the prescribed range of one to four years. We would have regarded a period of ineligibility of 18 months from the date of the appellant’s acceptance of a provisional suspension (23 July 2007) as appropriate. Leaving the sanction at two years would have the practical effect of rendering the appellant unable to compete in the 2009 World Championships: a two-year period of ineligibility in this case would be effectively a three-year period of ineligibility. Given the appellant’s age, this could be effectively a lifetime ban. We should add that this view is based on the evidence before us at this hearing. As and when the appellant makes a further application to USADA, the evidence and the circumstances may have changed. Our views in this regard are, accordingly, not intended to have any juridical effect and are provided by way of guidance only.
28. Under Art. R57 the Panel has full power to review the facts and the law and to conduct a full evidentiary hearing: effectively, a hearing *de novo*. This does not mean, however, that the findings

of the Doping Tribunal are not entitled to deference. In this regard, we note that the case before us was somewhat different to the case before the Doping Tribunal. In particular, the Doping Tribunal did not have the benefit of Dr. Gendel's testimony. Accordingly, the Panel has, for the most part, approached this matter afresh, while remaining cognisant of the evidence considered, and finding made, by the Doping Tribunal.

29. To the extent that it is appropriate or necessary to specify an applicable system of law, the domicile of FILA is Switzerland and, accordingly, Swiss law would apply. The seat of this arbitration is Lausanne, Switzerland (CAS Art. 28). By direction of the president of the Panel, the hearing of this appeal took place in New York, NY, United States of America, on 7 May 2008.
30. We have, in summary, concluded as follows:
 - a. The appellant has committed an anti-doping rule violation, namely, the presence in his Bodily Specimen of Carboxy-THC at a concentration greater than 15 ng/mL;
 - b. Carboxy-THC is a cannabinoid and, as such, a "specified substance" for the purposes of Article 10.3 of the Regulations;
 - c. This violation is the appellant's second anti-doping rule violation, the first such violation having involved the same Prohibited Substance and having occurred in April 2006;
 - d. The violation arises from the appellant's use of marijuana prior to the test which gave rise to the positive finding noted above;
 - e. The appellant has not established that he bears No Significant Fault or Negligence for this anti-doping rule violation and, as such, the Tribunal declines on that basis to set a reduced sanction based on exceptional circumstances under Article 10.5.2 of the Regulations;
 - f. There is no basis for departing from the sanctions provided for by the Regulations based on the proper application to the principles of proportionality;
 - g. The appeal is, accordingly, dismissed;
 - h. (...).

The Court of Arbitration for Sport rules:

1. The appeal filed at the Court of Arbitration for Sport by Mr Joe Warren on 2 February 2008, against the United States Anti-Doping Agency, is dismissed.
2. The period of ineligibility of 2 years from 23 July 2007, imposed by the Doping Tribunal on Mr Warren, is confirmed.
- (...)
5. All other prayers for relief are dismissed.