CAS 2020/A/7528 Christian Coleman v. World Athletics

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President:	Mr James Drake Q.C., Barrister in London, United Kingdom
Arbitrators:	Mr Jeffrey Benz, Attorney-at-Law in Los Angeles, California USA and Barrister in London, United Kingdom
	Mr Ulrich Haas, Professor of Law in Zurich, Switzerland

in the arbitration between

Christian Coleman, United States of America

Represented by Mr Howard L. Jacobs and Ms Katy Freeman, Attorneys-at-Law with the Law Offices of Howard L. Jacobs, Westlake Village, California, USA

Appellant

and

World Athletics, Monaco Cedex

Represented by Mr Ross Wenzel, Attorney-at-Law with Kellerhals Carrard, Lausanne, Switzerland and Mr Tony Jackson, Deputy Head of Case Management, Athletics Integrity Unit, Monaco

Respondent

I. PARTIES

1. Mr Christian Coleman (the "Athlete" or the "Appellant") is an American professional athletics sprinter who competes in the 100m and 200m sprint events. He is the current world champion in the 100m event.

2. World Athletics ("World Athletics" or the "Respondent") is the international governing body for the sport of athletics, recognised as such by the International Olympic Committee. It has its seat and headquarters in Monaco. It is a signatory to the World Anti-Doping Code ("WADC") and in compliance therewith has adopted the World Athletics Anti-Doping Rules, 2019 ("ADR") as supplemented by the World Athletics Anti-Doping Regulations, 2019 (the "Anti-Doping Regulations"). It has also established (i) an "Athletics Integrity Unit" (the "AIU"), the role of which is to protect the integrity of Athletics and which is charged with responsibility for the day-to-day administration of the ADR, and (ii) a disciplinary tribunal (the "AIU Disciplinary Tribunal") to hear Anti-Doping Rule Violations ("ADRVs") under the ADR.

II. FACTUAL BACKGROUND

A. Background Facts

3. The Athlete is 25-years old and is the current men's 100m world champion and the world record holder for the 60m dash. He is a graduate of the University of Tennessee, in Knoxville, Tennessee. He now lives in Lexington, Kentucky. It is common ground that he has been in the World Athletics Registered Testing Pool since 2016 and has received anti-doping training for a number of years (and that he has never returned a positive test).

4. By the Notice of Charge dated 16 June 2020 (the "Notice of Charge"), the Athlete was charged by the AIU, acting on behalf of World Athletics, with an ADRV in violation of ADR Article 2.4 in respect of three Whereabouts Failures within the 12-month period beginning 16 January 2019 as follows:

   a. Missed Test dated 16 January 2019;

   b. Filing Failure in connection with a test attempt on 26 April (effective 1 April 2019); and

   c. Missed Test dated 9 December 2019.

5. The terms 'Whereabouts Failure', 'Missed Test' and 'Filing Failure' (and 'Whereabouts Filing') are all defined terms within the ADR, as follows (see further below):

   a. Whereabouts Failure: a Filing Failure or a Missed Test.

   b. Filing Failure: "*A failure by an Athlete (or a third party to whom the Athlete has delegated the task) to make an accurate and complete Whereabouts Filing that enables the Athlete to be located for Testing at the times and locations set out in*

the Whereabouts Filing or to update the Whereabouts Filing where necessary to ensure it remains accurate and complete ... ."

c. Whereabouts Filing: information provided by or on behalf of an athlete that sets out an athlete's whereabouts during the following quarter.

d. Missed Test: "*A failure by the Athlete to be available for Testing at the location and time specified in the 60-minute time slot identified in his/her Whereabouts Filing for the day in question in accordance with Article I.4 of the International Standard for Testing and Investigations.*"

6. Pursuant to Rule 8.4.3(c) of the ADR, the Athlete denied the ADRV and called upon the AIU Disciplinary Tribunal to determine the charge at a hearing.

B. Proceedings before the AIU Disciplinary Tribunal

7. A hearing took place before the AIU Disciplinary Tribunal on 9 October 2020 (by video-conference). The Athlete was represented by Mr Jacobs (and others) and the AIU was represented by Mr Wenzel (and others).

8. The AIU Disciplinary Tribunal issued its decision on 22 October 2020 (this is the "Appealed Decision"). The AIU Disciplinary Tribunal found that the Athlete had committed an ADRV under Article 2.4 of the ADR and imposed on the Athlete a period of ineligibility of two (2) years, ending 13 May 2022.

III. Proceedings before the Court of Arbitration for Sport

9. On 20 November 2020, the Athlete filed a Statement of Appeal with the Court of Arbitration for Sport ("CAS") with respect to the Appealed Decision in accordance with Article R47 of the Code of Sports-related Arbitration (the "CAS Code"). In his Statement of Appeal, the Athlete nominated Mr Jeffery Benz as arbitrator.

10. On 4 December 2020, the Respondent nominated Prof. Dr Ulrich Haas as arbitrator.

11. On 8 December 2020, the Athlete filed his Appeal Brief in accordance with Article R51 of the CAS Code.

12. On 7 January 2020, the Respondent filed its Answer in accordance with Article R55 of the CAS Code.

13. On 19 January 2021, the CAS Court Office, on behalf of the President of the Appeals Arbitration Division and in accordance with Article R54 of the CAS Code, confirmed the constitution of the Panel as follows:

President: Mr James Drake Q.C., Barrister in London, United Kingdom

Arbitrators: Mr Jeffrey Benz, Attorney-at-Law in Los Angeles, California USA and Barrister in London, United Kingdom

Prof. Dr Ulrich Haas, Professor of Law in Zurich, Switzerland

14. On 11 and 12 February 2021, respectively, the Parties signed and returned the Order of Procedure.

15. On 15 February 2021, a video hearing was held in this matter. The Panel was assisted throughout the hearing by Mr Brent J. Nowicki, Managing Counsel, and joined by the following:

For the Appellant:

- Mr Howard Jacobs (Counsel)
- Ms Katy Freeman (Counsel)
- Mr Emanuel Hudson (Counsel)
- Mr Aaron Mojarras (Intern)
- Mr Christian Coleman (Appellant)

For the Respondent:

- Mr Ross Wenzel (Counsel)
- Mr Tony Jackson (Respondent representative)
- Ms Olympia Karavasili (Respondent representative)

16. The Panel heard from the following witnesses at the hearing, who were examined and cross-examined by counsel and answered various questions put by the Panel:

For the Appellant:

- Mr Christian Coleman (the Athlete)

For the Respondent:

- Mr Raphael Roux (AIU Out-of-Competition Testing Manager)
- Mr Brian George (the Doping Control Officer ("DCO"))

17. The Parties also relied on witness statements from the following people who were not required to give evidence at the hearing on the basis that it was agreed by the Parties that their witness statements would stand as their evidence and be given such weight as the Panel sees fit.

For the Appellant:

- Mr Tim Hall (the Athlete's coach)

For the Respondent:

- Ms Erin Freese (the Blood Collection Assistant ("BCA"))
- Mr Willie Newman (a Doping Control Assistant ("DCO"))

18. At the outset of the hearing, the Parties confirmed that they had no objection to the jurisdiction of CAS or to the constitution of the Panel. At the conclusion of the hearing, the Parties expressly confirmed that their right to be heard had been fully respected.

IV. SUMMARY OF THE PARTIES' EVIDENCE AND SUBMISSIONS

19. The evidence adduced and submissions made by the Parties are summarised below. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, it refers in this Award only to the evidence and submissions it considers necessary to explain its reasoning.

A. The Athlete's Submissions

20. The Athlete makes submissions in respect of both liability and sanction.

21. As to liability, the Athlete's case is this:

a. Pursuant to Annex I.4.3 of the World Anti-Doping Agency's ("WADA") International Standard for Testing and Investigations, 2019 ("ISTI"), the Respondent cannot meet its burden of proving a Missed Test unless it proves both (i) "that during the specified *60-minute time slot, the DCO did what was reasonable in the circumstances*" and (ii) that the Athlete's failure to be available for testing at the specified location during the specified "*60-minute time slot, was at least negligent*".

b. The DCO in this case did not do what was reasonable in the circumstances to locate the Athlete on 9 December 2019 – specifically because the Respondent had instructed the DCO not to call the Athlete thereby precluding the DCO from doing what was reasonable.

c. The alleged Missed Test on 9 December 2019 should be set aside.

d. Once that alleged failure has been set aside there is no ADRV as defined by the ADR because there have not been three Whereabouts Failures within a 12-month period as is required by the ADR.

22. As to sanction, the Athlete submits:

a. Should the Panel decline to set aside the Missed Test of 9 December 2019 and find that an ADVR has been proven in this matter, then the sanction – when considering the totality of the circumstances – should be reduced from two years to one year.

b. The start date of any sanction should in any event be 14 May 2020 (on the basis that this has been agreed by the Parties).

Liability

23. As noted above, the Notice of Charge identified three Whereabouts Failures within the 12-month period beginning 16 January 2019 as follows: (a) a Missed Test dated 16 January 2019; (b) a Filing Failure in connection with a test attempt on 26 April 2019; and (c) a Missed Test dated 9 December 2019. In these proceedings, the Athlete does not contest liability in respect of the first two failures (indeed, liability in respect of these 'offences' is conceded), although it is submitted that the Panel should take into account the facts and circumstances surrounding those earlier failures when considering the appropriate sanction.

24. The Athlete's challenge on liability was therefore limited to the Missed Test of 9 December 2019 and, in support of the submission that that Missed Test should be set aside, the Athlete made the following submissions.

25. As to the facts and circumstances surrounding 9 December 2019, the Athlete submitted that the facts were to be understood as follows:

a. The Athlete submitted his 4th quarter whereabouts location form which indicated that his 60-minute window for testing on for 9 December 2019 was from 7:15pm - 8:15pm at his residential address in Lexington, Kentucky.

b. The Athlete lives in a gated complex in Lexington, Kentucky.

c. On the day of (Monday) 9 December 2019, the Athlete was at track practice between (approximately) 12:00 noon and 3:00pm.

d. After practice, the Athlete went to a café for lunch and then went home, where he showered and "*relaxed briefly leaving his apartment and driving to the Fayette Mall*".

e. The Athlete then went (by car) to the Fayette Mall (on Nicholasville Road, Lexington, Kentucky) in order "*to finish up some last-minute Christmas shopping*". He made purchases at Macy's (a suit), a Dead Sea Products kiosk, and at the Apple Store (the receipt from which shows is time-stamped 7:27pm), before going to Chipotle Mexican Grill (also in the Fayette Mall) to get dinner to go (the payment for which was timed at 7:53:46pm).

f. The Athlete then drove home, parked in the garage and walked into his apartment through the front door.

g. The Athlete did not see any DCO (or anyone at all) outside his front door on the evening of 9 December 2019 upon his arrival. It follows, therefore, that the DCO and BCA were not outside his apartment in the period between (approximately) 8:00 and 8:15pm.

h. The Athlete was home in time to watch the beginning of the Monday night football game between the New York Giants and the Philadelphia Eagles, the broadcast for which began at 8:00pm and the kick-off for which was at 8:15pm (precisely). He estimates that he arrived home between 8:00 and 8:10pm, and in no case later than 8:15pm. He ate his Chipotle dinner while watching the beginning of the game.

i. The Athlete was "*at home for at least a portion of the 60-minute window during which he was not able to hear the DCO knocking or the doorbell ringing from his position on the second floor of the townhouse*".

j. Sometime after the 8.15pm kick-off in the football game, he went to the Walmart Neighborhood Market just down the street from his apartment to buy some Gatorade and snacks for the next and following days. The Walmart receipt is time-stamped 8:22pm on 9 December 2019 but there was ample time to make the trip from home to Walmart and buy these items before 8:22pm.

k. The AIU Disciplinary Tribunal was wrong to conclude that it would have been "*impossible*" for the Athlete to have made this trip from his apartment to the Walmart Neighborhood Market and complete his grocery shopping in seven minutes.

l. In support of the contention that this conclusion was wrong, since the AIU Disciplinary Tribunal hearing the Athlete has recreated this shopping trip on three separate occasions (taking the same route at about the same time of day and making the same purchases as he did in 9 December 2019) (the video-recordings of which were adduced into evidence):

    i. Monday 2 November 2020 at 8:11pm – the trip took 8-10 minutes.

    ii. Monday 16 November 2020 at 8:15pm – the trip took 6-9 minutes.

    iii. Monday 7 December 2020 at 8:15pm – the trip took 8-9 minutes.

m. After the Walmart shopping trip, the Athlete returned home and watched the rest of the football game.

n. The AIU issued an instruction to the DCO not to call the Athlete. As a result of this instruction, the Athlete did not at any time receive a telephone call from the DCO on 9 December 2019. If he had been called, even if he was not yet home, he would have been able to make himself available for testing within the 60-minute time slot.

o. Had the Athlete received a call from the DCO five minutes before the end of the hour window, *"whether he was in his apartment, at Wal-Mart, or on the road there or back, he absolutely would have submitted to a sample collection within the 60-minute window*".

p. The DCO noted that "*There was also a doorbell that was pressed, but we could not hear a ring inside so unclear if it was in operation*". In fact, the doorbell to

the Athlete's apartment was not at the time functioning properly. The Athlete had submitted a work request in respect of the doorbell to building management on 9 November 2019. Maintenance workers informed the Athlete that the circuitry "*sticks*" when it is not in use, and that there was no available solution the building could provide. The Athlete has since 9 December 2019 installed a 'Ring' doorbell to remedy this issue.

26. Against the background of those factual matters, the Athlete makes the following submissions:

a. Under Article 3.1 of the ADR, it is the Respondent who bears the burden of establishing each element of the ADRV charged to "*the comfortable satisfaction of the Independent Tribunal, bearing in mind the seriousness of the allegation that is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt*".

b. It is a matter for the Respondent to show both of the following things (to the standard just noted):

i. One, that during that specified 60-minute time slot, the DCO did what was reasonable in the circumstances.

ii. Two, that the Athlete's failure to be available for testing at the specified location during the specified 60-minute time slot was at least negligent.

c. The Respondent cannot discharge that burden.

27. The Athlete submits that the Respondent cannot show that the DCO did what "*was reasonable in the circumstances on 9 December 2019 to locate the Athlete for testing*" during the allotted hour.

28. In this respect, the Athlete relies on Annex I to ISTI, which is entitled "Code Article 2.4 Whereabouts Requirements" and, in particular, the comment to I.4.3(c) which provides as follows:

"*Once the DCO has arrived at the location specified for the 60-minute time slot, if the Athlete cannot be located immediately then the DCO should remain at that location for whatever time is left of the 60- minute time slot and during that remaining time he/she should do what is reasonable in the circumstances to try to locate the Athlete. See WADA's Guidelines for Implementing an Effective Testing Program for guidance in determining what is reasonable in such circumstances.*

Where an Athlete has not been located despite the DCO's reasonable efforts, and there are only five minutes left within the 60-minute time slot, then as a last resort the DCO may (but does not have to) telephone the Athlete (assuming he/she has provided his/her telephone number in his/her Whereabouts Filing) to see if he/she is at the specified location. If the Athlete answers the DCO's call and is available at (or in the immediate vicinity of) the location for immediate testing (i.e., within the 60 minute time slot), then the DCO should wait for the Athlete and should collect the Sample from him/her as normal. ... If the Athlete answers the DCO's call and is not at the specified location or

in the immediate vicinity, and so cannot make himself/herself available for testing within the 60-minute time slot, the DCO should file an Unsuccessful Attempt Report."

29. The Athlete also relies on the Guidelines for Implementing an Effective Testing Program, October 2014, issued by WADA, for the guidance offered to DCOs in respect of making a reasonable attempt to test an athlete.

"9.2.1 Making a Reasonable Testing Attempt
An unsuccessful attempt to test an Athlete will not amount to a Missed Test unless the ADO on whose behalf the test was attempted can demonstrate to the comfortable satisfaction of the hearing panel that (among other things) the DCO made a reasonable attempt to locate the Athlete for Testing during the 60-minute timeslot specified for the day in question in the Athlete's Whereabouts Filing. What constitutes a reasonable attempt to locate an Athlete for Testing during the 60-minute timeslot cannot be fixed in advance, as it will necessarily depend on the particular circumstances of the case in question, and in particular on the nature of the location chosen by the Athlete for that timeslot.

The only truly universal guideline is that the DCO should use his/her common sense. He/She should ask him/herself: "Given the nature of the location specified by the Athlete, what do I need to do to ensure that if the Athlete is present, he/she will know that a DCO is here to collect a Sample from him/her?"

* * *

If the specified location is the Athlete's house or other place of residence, the DCO should ring any entry bell and knock on the door as soon as he/she arrives. If the Athlete does not answer, the DCO may telephone the Athlete to advise him/her of the attempt in the closing five minutes of the 60-minute period. Such a call is not mandatory however, nor should it be used to invite the Athlete for Testing, but rather to potentially further validate that the Athlete is not present.

Preferably, the DCO should wait somewhere close by (e.g. in his/her car) in a place where he/she can observe the (main) entrance to the residence. He/she should then knock/ring again a short time later (e.g. 15 minutes), and should keep doing so periodically until the end of the 60 minutes. At that point, he/she should try one last time at the end of the 60 minutes before leaving the location and completing an Unsuccessful Attempt Report."

30. It is submitted by the Athlete that if the DCO were acting reasonably -- in accordance with ISTI and the WADA Guidelines -- he would have telephoned the Athlete at some point in time in the allotted hour in an effort to locate and test the Athlete. The DCO did *not* make that call because he had been expressly instructed not to do so by the AIU. By issuing that instruction and taking away the DCO's ability to telephone the Athlete, the DCO was put in a position where he could not do what was reasonable in the circumstances to locate the Athlete. According to the DCO's evidence before the AIU Disciplinary Tribunal, had he not been instructed not to call the Athlete on 9 December 2019 he would have done so, and it is submitted that the Athlete would, therefore, have been at home for some part of the allotted hour and the test would have been completed.

31. The Athlete invokes materials issued by other International Federations in relation to what is there said about what a DCO should do in order to make a reasonable attempt to locate an athlete (and conduct a test). For example:

    a. The International Tennis Federation's "Out-of-Competition 'Whereabouts' testing protocol for DCOs" provides, inter alia that, "*Where you have made a reasonable attempt ... but have not been able to find the Player, and you cannot see any other way of locating the Player, as a last resort only, five (5) minutes before the end of the 60-minute time slot you* ***shall*** *telephone the Player, first at the location in question (if a number for that location has been provided in the whereabouts filing), and then (if that is unsuccessful) by calling the Player's mobile phone*".

    b. The US Anti-Doping Agency's ("USADA") guidelines entitled "Locating Athletes for Out-of-Competition Testing" provide that "*Within the last five minutes of the Athlete's 60-minute window, if determined the Athlete is still unavailable, the DCO should place a call to the primary number listed on the Athlete's quarterly Whereabouts Filing*".

32. In this respect, the Athlete relies on ITF v. Cornet (SR/Adhocsport/12/2018) and what is said there to the effect that the 'no advance notice' requirement "*needs ... to be administered with common sense and flexibility.*"

33. It is said by the Athlete that, in the circumstances of this case, where the Athlete was not answering the door and where there was some doubt (in the DCO's mind) as to whether or not the doorbell was functioning, then a DCO making a reasonable attempt to locate would have and should have telephoned the Athlete.

34. In circumstances where (a) the Athlete was home for at least a portion of the 60-minute window during which he was not able to hear the DCO knocking or the doorbell ringing from his position on the second floor of the townhouse and/or (b) the Athlete was in any event at all times throughout the 60-minute window within five minutes from his apartment, had he received a phone call from the DCO five minutes prior to the end of the window, he would have submitted to sample collection within the 60-minute window.

Sanction

35. The Athlete contends that, should the challenge to liability fail and the Respondent does satisfy its burden such that the ADRV is sustained, then the applicable sanction should be limited to "*a maximum of 12 months*". In oral submissions, this was put at a maximum of 13 months.

36. The Athlete relies in this respect on Article 10.3.2 of the WADC which provides as follows:

    "*For violations of Article 2.4, the period of Ineligibility shall be two years, subject to reduction down to a minimum of one year, depending on the Athlete's degree of Fault. The flexibility between two years and one year of Ineligibility in this Article is not available to Athletes where a pattern of last-minute whereabouts changes or other*

conduct raises a serious suspicion that the Athlete was trying to avoid being available for Testing."

37. The Athlete submits that, because there was no pattern of last-minute whereabouts changes or other conduct raising a serious suspicion that the Athlete was trying to avoid being available for testing, the determination of the appropriate sanction is therefore to be based on the assessment of the Athlete's degree of fault.

38. As to that, the Athlete relies on the definition of "Fault" in the WADC as follows:

"Fault is any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing an Athlete or other Person's degree of Fault include, for example, the Athlete's ... experience, whether the Athlete ... is a Minor, special considerations such as impairment, the degree of risk that should have been perceived by the Athlete and the level of care and investigation exercised by the Athlete in relation to what should have been the perceived level of risk. In assessing the Athlete's ... degree of Fault, the circumstances considered must be specific and relevant to explain the Athlete's ... departure from the expected standard of behavior. Thus, for example, the fact that an Athlete would lose the opportunity to earn large sums of money during a period of Ineligibility, or the fact that the Athlete only has a short time left in his or her career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of Ineligibility under Article 10.5.1 or 10.5.2."

39. The Athlete relies on USADA v Rollins (AAA No. 01-17-001-3244) which, upon upholding a violation of Article 2.4 of WADC, applied the maximum possible reduction to the sanction pursuant to WADC Article 10.3.2 on the following bases: (a) it was the athlete's first offence after years of frequent testing, both in and out of competition; (b) there was no evidence of avoiding testing, masking drug use, or using drugs; and (c) the athlete had been taken outside her usual routine due to her attendance at celebrations in her honour.

40. For the Athlete, it is said that these factors equally apply here.

    a. The Athlete has a long and frequent history of drug testing and has never had a positive test.

    b. There is no evidence of avoiding testing, masking drug use, or using drugs at all.

    c. For the whereabouts failure on 26 April 2019 the Athlete was "*outside of his usual routine*" as he had travelled to the Drake Relays in order to continue working with his longstanding coach; and that, moreover, he offered to undergo testing at that meeting.

41. Furthermore, it is submitted that, when looking at the issue of fault, the Panel should take into account, particularly when considering the 9 December 2019 test attempt, that it has been the Athlete's "*custom and experience during his extensive drug testing history that a DCO making a test attempt will make a call to him if he cannot otherwise be located, prior to concluding the test attempt*".

42. In this respect the Athlete relies on the following things:

a. The fact that there have only been two "no call" testing attempts made on the Athlete in all his career, one of which was after the 9 December 2019 test attempt.

b. This experience is consistent with that of many other athletes. The Athlete puts forward an analysis of 25 "Unsuccessful Attempt Reports" from other whereabouts cases conducted under the authority of various different anti-doping organisations ("ADOs") collected in the period from 2015 to 2020. It is said that this analysis shows that:

   i. the DCO called the athlete during the 60-minute window in 14 out of 16 of the test attempts conducted in these cases;

   ii. in each of the two instances in which the DCO did not call the athlete during the 60-minute window, an individual at the location placed a call to the athlete and the DCO spoke to the athlete over the telephone;

   iii. in 12 out of 16 of these cases, more than one call was placed in an attempt to locate the Athlete in question;

   iv. the athletes had multiple Filing Failures and/or Missed Tests counted against them; and

   v. in the result, each athlete received some manner of telephone contact from the DCO.

43. On the back of this experience, it is submitted that, despite the fact that a telephone call during the 60-minute window may not be mandatory, it was nevertheless reasonable for the Athlete to expect such a call – and, had the DCO placed such a call to the Athlete on 9 December 2019 the Athlete would have been available at his stated location for the test and a successful test would have been carried out.

44. It is also submitted that the Athlete had numerous negative tests in close proximity to each of his alleged whereabouts failures, demonstrating that he had not doped:

a. With respect to the 16 January 2019 test attempt, the Athlete was tested on 26 December 2018, 14 January 2019, and 28 January 2019 and these tests were negative for any banned substance.

b. With respect to the 26 April 2019 test attempt, the Athlete was tested on 22 March 2019, 8 April 2019, and 29 May 2019 and these tests were negative for any banned substance.

c. With respect to the 9 December 2019 test attempt, the Athlete was tested on 30 October 2019, 25 November 2019, 12 December 2019, 26 December 2019 and 14 January 2019 and those tests were all negative for any banned substance.

45. The final submission in respect of sanction is that the Panel should take account of an athlete's testing history in order to form a view about fault. It is said that, for example, an athlete who is tested out of competition 100 times in 12 months and misses 3 of them

has missed 3% of his or her test attempts, while an athlete who is tested out of competition 4 times in 12 months and misses 3 of them has missed 75% of his or her test attempts. It is submitted by the Athlete that he has been subjected to frequent testing so that if he has three Whereabouts Failures to his name within a 12-month period that is but a small fraction of the times that he has been tested. As put by the Athlete: "*It should therefore not be controversial that an athlete who is frequently tested out of competition has a much higher likelihood of making 3 such mistakes than an athlete who is rarely tested out of competition*".

46. In all, it is submitted by the Athlete that his degree of fault here lies at the "*very lowest end of the scale*" and that, accordingly, the maximum sanction that should be imposed in this case (if any) is 12 months.

The Athlete's Evidence

47. In support of those submissions, the Athlete provided a witness statement and gave oral evidence (and was cross-examined) before the Panel. He also gave a short statement to the Panel at the close of the hearing.

48. By his witness statement, the Athlete describes himself as "*a professional track athlete*". He first began competing in track at the age of five years old and went on to compete for the University of Tennessee. He has competed at the elite level for over four years. He represented the United States in the 2016 Olympic Games in Brazil and currently holds the world indoor record for the 60-meter dash. The Athlete has also represented the United States at the 2017 World Championships, the 2018 World Championships and the 2019 World Championships, where he won the gold medal in the 100m event.

49. The Athlete provided an account of the three whereabouts failures in this case.

50. As to the 16 January 2019 Missed Test, the Athlete says, in summary, as follows:

    a. He has trained under his coach, Mr Hall, since 2014.

    b. Mr Hall was appointed the head coach of the University of Kentucky's Track & Field Team (in Lexington, Kentucky).

    c. After graduating from the University of Tennessee in December 2018, the Athlete moved from Knoxville, Tennessee to Lexington, Kentucky in order to continue training with Mr Hall.

    d. The Athlete had specified a 60-minute slot for testing at his home address (from 08:00am-09:00am at his home address in Lexington.

    e. The DCO attended those premises at that time on 16 January 2019. The Athlete was not at home "*due to changes made to my weightlifting program. I did not challenge this missed test, because I recognized that it was my mistake*".

51. As to the 26 April 2019 Filing Failure, the Athlete says, in summary, as follows.

a. In late April 2019, the Athlete travelled (on a charter flight) to the Drake Relays in Iowa with the University of Kentucky in his capacity as volunteer assistant coach. The decision to go was "*last-minute*". He first learned that he was going on the evening of 23 April 2019, and the flight left on 24 April 2019.

b. He did not update his Whereabouts Filing beforehand because "*it didn't cross my mind, honestly, you know a lot of life going on. I was a year into the game. I was still trying to figure out how to be a professional. That one is on me – my personal fault.*"

c. At approximately 10:10am on 26 April 2019, he received a telephone call from a DCO who said that she was at the location specified by the Athlete in his Whereabouts Filing (namely his Lexington residence) but the Athlete was not.

d. The Athlete told the DCO that he was in Iowa at the Drake Relays and asked if there was any way for him to be tested there. The Athlete assumed that USADA had DCOs at the Drake Relays and he was of the view that it would have been "*very easy*" for USADA to test him there on that day. The DCO told the Athlete that she would "*let USADA know*".

e. The Athlete updated his Whereabouts Filing at approximately 10:13am (either while he was on the call with the DCO or shortly afterwards) via the USADA app on his telephone. He made the following changes:

   i. At 11:13am (Des Moines) on 26 April 2019, he changed his 60-minute time slot for 26 April 2019 (i.e., that same day) from 7:30pm – 8:30pm at the Athlete's residential address in Lexington, Kentucky to 9:00am – 10:00am at "*Drake Relays: 1800 50th St., West Des Moines, Iowa*". (It is apparent that this time slot had in fact passed.)

   ii. At the same time, he changed his overnight location for 26 April 2019 from his residential address in Lexington to "*Drake Relays: 1800 50th St., West Des Moines, Iowa*".

   iii. At 11:14am (Des Moines) on 26 April 2019 he added 27 April 2019 as a travel day with the notation "*Back to Lexington*".

   iv. At 12:38am (Des Moines) on 27 April 2019, he changed his 60-minute time slot for 27 April 2019 to 10:30am to 11:30am at "*Drake Relays: 1800 50th St., West Des Moines, Iowa*".

f. The Athlete explained that he did not intend to change the 60-minute time slot on 26 April 2019 to a time that had already passed. His intention was to update for the following day, 27 April 2019. He did not know that it would allow an update to an earlier time on the same day.

g. The Athlete voluntarily submitted to a drug test through a third-party provider on 3 May 2019, which was negative for any banned substances.

52. As to the 9 December 2019 Missed Test, the Athlete says, in summary, as follows.

a. For 9 December 2019 he had specified in his Whereabouts Filing the 60-minute time slot of 7:15pm-8:15pm. This was his "*normal*" window at that time and he had been tested a number of times during that window.

b. On Monday 9 December 2019, he was at practice in the afternoon, then he came home, took a shower and decided "*to run my errands for the day*". He explained that he "*felt that it was the only way that I was going to be able to get done what I needed to get done. Obviously it was around Christmas time but it was also a busy time for me in terms of everything was coming at me, with the Olympics being the next year and on weekends I was flying to different places to do photo shoots and commercial shoots, and it was a crazy time ... So I felt it was the best time ... to go and do what I had to do. So I went out and obviously I stayed out for longer than anticipated.*"

c. He drove to the Fayette Mall where he bought a suit at Macy's, some skin care products for his mother and sisters "*as part of their Christmas gifts*", had his mobile phone screen protector fixed at the Apple store and then bought a take-out dinner from Chipotle at 7:53pm.

d. He then drove home, and the trip from there to his apartment is "*3 miles, 5-6 minutes at the most*".

e. He accepted that Walmart was on the route home from the Fayette Mall, and that he could have called in there on the way home, but he decided not to do that: "*I was hungry and I knew I just had to get home before my hour window and so, when I thought about it, I just came home, ate the burrito and continued with my day, making sure that I got home before the hour window.*"

f. He "*parked in the garage and entered my home through the front door*". He arrived home between 8:00pm and 8:10pm (according to his witness statement) and "*between 7:58pm and 8:05pm, somewhere in that range*" (according to his oral evidence), and parked his car outside. (He did not park in his garage because his other car was parked in there, and what he said in his statement was a mistake.)

g. When he arrived at his home he did not see the DCO or anyone else standing outside his apartment. He accepted that if they were there he would have seen them and that the lights outside his apartment would have been on so that if anyone was standing there they would have been standing in the light. He agreed that "*it would have been impossible to miss*" the DCO, had he been standing there.

h. He opened the garage door (with a remote device), walked in through the garage door and walked up the stairs to his kitchen/ living room area on the first floor. He turned the television on and sat down at the table and ate his burrito dinner while watching "*the beginning of the Monday night football game between the New York Giants and the Philadelphia Eagles, which started at 8:15pm*".

i. Shortly after the kick-off, he left to go to Walmart. He did not remember exactly when or whether the game was in commercial or what had happened in the game

at the point he left. "*I just watched the kick-off and I saw maybe 30 seconds or a minute of the game*". He said that "*I needed to go to Walmart to get some things for practice the next day. I knew I wanted to watch the game but I still had to go to Walmart to get the things I needed.*"

j. He said that "*I had originally recalled this trip to have taken place later in the evening, but the Wal-Mart receipt has indicated that a purchase was made using my card at 8:22 pm on 9 December 2019. If this receipt is correct, then I believe I may have mixed up the timing of the 9 December 2019 Wal-Mart trip with the trip I had made the previous evening, as receipts indicated that purchase was later at night.*"

k. The following day, he received notice from the Respondent that the DCO had attempted to collect a sample on 9 December 2019.

l. He was tested on 30 October 2019, 25 November 2019, 12 December 2019, 26 December 2019 and 14 January 2019, all of which were negative.

m. He has been "*drug tested more times than I can count, both in and out of competition [and] I cannot ever remember another instance in which I did not receive a phone call from the DCO if I could not be located during a collection attempt. I cannot understand why the DCO would not have contacted me in this instance. At all times during my 60-minute window on 9 December 2019, I was within a 5-minute drive from my home. For at least a portion of that 60-minute window, I was home and in my apartment. Had the DCO called me, even 5 minutes before the end of the 60-minute window, I would absolutely have been able to submit a urine sample within my 60-minute window*".

The Athlete's Requests for Relief

53. In his Appeal Brief, the Athlete requested the following relief:

"*8.1 For all the foregoing reasons, Christian Coleman respectfully requests that CAS rule as follows:*

8.1.1 That the decision of the AIU Disciplinary Panel that Christian Coleman committed an anti-doping rule violation be reversed;

8.1.2 That the two-year period of Ineligibility imposed by the AIU Disciplinary Panel is immediately set aside; and

8.1.3 That, instead, no sanction be imposed on Mr. Coleman.

8.2 Alternatively, if the Panel finds that he has committed an anti-doping rule violation, Mr. Coleman respectfully requests that the Panel limit any sanction imposed upon him to one year.

8.3 Additionally, if the Panel finds that he has committed an anti-doping rule violation, Mr. Coleman respectfully requests that the Panel commence the sanction on 14 May 2020.

8.4 That Respondent shall bear all costs of the proceedings including a contribution toward Appellant's legal costs."

B. The Respondent's Submissions

54. The Respondent's submissions are summarised below.

55. As to liability in respect of the alleged Missed Test of 9 December 2019:

a. The 60-minute time slot specified by the Athlete for 9 December 2019 was 7:15-8:15pm at the Athlete's residential premises in Lexington, Kentucky.

b. The DCO attempted to test the Athlete in that time on that date but the Athlete, as a matter of fact, was not home at any time during the 60-minute slot.

c. The DCO did what was reasonable in the circumstances to try and locate the Athlete at that time on that date. The fact that the DCO was instructed not to call the Athlete does not mean that the DCO failed to act reasonably.

d. It follows that the Athlete did commit a Missed Test on 9 December 2019, and that it was his third Whereabouts Failure within 12 months, so that there has been a violation of ADR 2.4.

56. As to sanction, the Respondent's case is that, overall, the Athlete's level of fault for the three Whereabouts Failures "*is high; indeed, it borders on recklessness*" such that there is no basis to depart from the standard two-year sanction for this ADRV.

57. Adding flesh to those bones, the Respondent submitted as follows:

a. The evidence shows that the Athlete was not at his home address (the address specified by the Athlete for testing on that day) during the 60-minute period from 19:15 to 20:15 (the time slot specified by the Athlete for testing on that day).

b. The Athlete appreciated that he was supposed to be physically present during at least some part of the 60-minute slot. He said this in the hearing before the AIU Disciplinary Tribunal: "*You should be available really by both, but they want you to be available in person, you know, when they show up, you're there.*"

c. The evidence of the DCO and BCA (which has remained consistent throughout) is to the effect that they were at the apartment for the full 60 minutes between 7:15 and 8:15, that they knocked efficiently and loudly, but there was no sign of life in the apartment. Moreover, they were positioned immediately outside the Athlete's front door for the entire 60 minutes and at no time did the Athlete return to the apartment within the allotted hour – and there is no doubt that they would have seem him drive up, exit his car and enter his apartment had he done so.

d. By contrast, the Athlete's account as to his movements on that date at that time has been contradictory and inconsistent. He has given contradictory accounts of where he parked when he came home and how he entered the apartment; likewise, he has given contradictory accounts of the timing of his trip to Walmart, first contending that it took place later in the evening only to change his timeline when faced with the Walmart sales receipt showing that he was at that store at 8:22pm.

e. The Respondent submitted that there is authority for the proposition that, as a matter of principle, the evidence of sample collection personnel should be preferred to that of athletes on the basis the former have no reason to lie about or mislead as to the facts, and that it will take very substantial counter-evidence in order to depart from the version of events put forward by a DCO or BCA. The cases relied upon for this submission are: WADA v. Lyudmila Vladimirvma Fedoriva CAS 2016/A/4700; Niksa Dobud v. FINA CAS 2015/A/4163; and WADA v. SAIDS & Ruann Visser CAS 2018/A/5990.

f. The Respondent, therefore, submitted that in this case, where there is any inconsistency between the evidence of the Athlete on the one hand and the DCO and the BCA on the other as to the Athlete's comings and goings, this Panel – as a matter of principle – should accept the latter evidence.

g. In any event, the Respondent submits that the Athlete's own documents – i.e., the sales receipts from the various transactions undertaken by him on that evening – show that he was not at home during any part of the 60-minute window. In particular, it is said that it is neither possible nor credible for the Athlete to have watched the 8:15pm kick-off in the football game between the New York Giants and the Philadelphia Eagles, left the apartment, driven to the local Walmart, and shopped and paid for 17 different grocery items before 8:22pm. All of that could not have, it is submitted, taken place in seven minutes.

h. The more "*realistic*" account of the Athlete's evening is that he completed his shopping at the Fayette Mall with the purchase at 7:53pm of his take-out dinner from Chipotle, left the mall, headed home, but called in to the Wal-Mart Neighborhood Market – which is on the way home – and completed his shopping with the purchase of the 17 grocery items, which he paid for at 8:22pm, with the result that he was not at home by 8:15pm or indeed at any time within the allotted hour.

i. The Respondent also submits that the Athlete's interaction with other DCOs after 9 December 2019 is inconsistent with the case now being put forward by the Athlete. It is first said that on 12 December 2019 the Athlete told the DCO attending on that occasion, Mr Newman, that he, the Athlete, was at home on 9 December 2019 but "*asleep*". It is also said that when the DCO in this case, Mr George, returned to test the Athlete (at the Athlete's apartment) on 9 January 2020, a conversation took place where the DCO said to the Athlete that he, the DCO, attended on 9 December 2019 but that the Athlete was not at home and, in response, rather than contest that suggestion was instead "*pretty quiet*".

j. As a result, it is submitted by the Respondent that the Athlete's primary case that he was – as a matter of fact – at home during some of the 60-minute window on 9 December 2019 is to be rejected.

58. As to the Athlete's submission that there was no Missed Test on 9 December 2019 because the DCO did not act reasonably in failing to call the Athlete during the allotted time-slot, the Respondent advances the following contentions.

a. For the test attempt on 9 December 2019 the DCO was acting pursuant to the AIU's standing DCO Instructions, as amended by the express instruction not to place a phone call to the Athlete on 9 December 2019.

b. The no-call instruction was not a ruse designed to 'catch' the Athlete. It is an instruction that is frequently given by the AIU when it considers it particularly important to collect a sample on an unannounced basis.

c. Mr Newman's evidence is that that no-call instructions were given in approximately 5-10% of testing missions; this was confirmed by Mr Roux.

d. Some ADOs have adopted a no-call instruction into their standing instructions. In other words, calls are not made under any circumstances in any tests: e.g., UKAD.

e. The risks associated with the placing of a call are implicitly recognised in the comment to Article I.4.3(c) ISTI, which requires DCOs to "*make a note of any facts suggesting that there could have been tampering or manipulation of the Athlete's urine or blood in the time that elapsed between the phone call and the Sample collection.*"

f. The Athlete is wrong when he contends that the AIU routinely permits telephone calls to athletes during the 60-minute window. In fact, the DCO Instruction only allow telephone calls in the last five minutes where there are specific indications to the DCO that the athlete is at the location or in the close vicinity (e.g. a light inside, voices in the back yard).

g. In this case, the DCO and the BCA were outside the Athlete's residence for the full 60-minute slot. They saw no indication that the Athlete was inside his property (or in the immediate vicinity). Accordingly, even in the absence of the no-call instruction (which the AIU was perfectly entitled to give), there was no basis under the AIU Standing DCO Instructions to make a call to the Athlete on this occasion.

h. The ISTI and the WADA Guidelines both make clear that (i) calls are not mandatory and (ii) their purpose is not to invite an athlete for testing:

i. The comment to Article I.4.3(c) of ISTI states that "*Where an Athlete has not been located despite the DCO's reasonable efforts, and there are only five minutes left within the 60-minute time slot, then as a last resort the DCO* ***may (but does not have to)*** *telephone the Athlete (assuming*

he/she has provided his/her telephone number in his/her Whereabouts Filing) ***to see if he/she is at the specified location.***" (emphasis added)

ii. The final sentence of the comment to Article I.4.3(c) states in terms that the absence of a telephone call is absolutely discretionary and will not be defence to a Missed Test: "*Because the making of a telephone call is discretionary rather than mandatory, and is left entirely to the absolute discretion of the Sample Collection Authority, proof that a telephone call was made is not a requisite element of a Missed Test, and the lack of a telephone call does not give the Athlete a defence to the assertion of a Missed Test.*" (emphasis added)

iii. The WADA Guidelines include a specific paragraph on the steps that are likely to be reasonable when the "*specified location is the Athlete's house or other place of residence.*" The relevant paragraph states that "*the DCO should ring any entry bell and knock on the door as soon as he/she arrives. If the Athlete does not answer, the DCO* ***may telephone*** *the Athlete to advise him/her of the attempt in the closing five minutes of the 60-minute period.* ***Such a call is not mandatory however, nor should it be used to invite the Athlete for Testing, but rather to potentially further validate that the Athlete is not present.***" (emphasis added)

i. Therefore, even leaving aside the no-call instruction, the call is not mandatory under the ISTI and, in the circumstances where there was no indication that the Athlete was at home, it was not permissible under the AIU DCO Instructions. The ISTI could not be clearer that the absence of a call cannot be used to challenge a Missed Test.

59. The Respondent made the following submissions in relation to sanction:

a. The Athlete is an experienced, international-level athlete who has been providing whereabouts information for the purpose of out-of-competition testing since 2016 and has been subject to doping control since June 2015.

b. The Athlete has also completed several education courses and sessions with USADA, including specifically in relation to whereabouts responsibilities and information.

c. With respect to the 16 January 2019 Missed Test, the Athlete has not put forward anything to explain his failure to be available for testing. The Athlete has merely claimed that he was not at the specified location because of a change in his weightlifting program, but he has produced no corroborative evidence in support. Moreover, on that occasion, when the DCO called the Athlete, he did not pick up the telephone and no voicemail could be left as his voicemail-box was full.

d. With respect to the April 2019 Filing Failure, the Athlete travelled from Kentucky to Iowa for a multi-day trip without updating his Whereabouts Filing. In the result, he did not update his Whereabouts until he had been in Iowa for 2 days, on 26 April 2019, when he received a call from a DCO who was trying to

test him at the location specified by the Athlete for that day (i.e., his home in Lexington, Kentucky). When he did update his Whereabouts for 26 April 2019, the update was made to a time that had already expired.

e. By the time of the 9 December 2019 test attempt, the Athlete was on two Whereabouts Failures and should have been on 'high-alert'. In those circumstances, the Athlete should have made sure that he was at home for all (or even some) of the 60-minute slot on 9 December 2019. He did not do so. Instead, he went out Christmas shopping and, despite knowing that he was obliged to return home within the 60-minute slot, he did not do that but chose to go to Walmart to pick up a number of snacks.

f. The Athlete's clean testing history (in the sense that he has not previously tested positive) and the fact that he may have been tested on many occasions are not relevant to the question of his Fault for the three Whereabouts Failures that make up this specific Article 2.4 ADR violation.

g. The Athlete's "insouciance" to his responsibilities is shown by what took place during the test on 12 December 2019 (at which time he knew that he had been given notice of the Missed Test of 9 December 2019). On this occasion, despite knowing that he should be at the designated location for the 60-minute slot, he arrived only a few minutes before the end of the hour.

h. The Athlete's attitude to his doorbell (which he knew was not working properly) is also indicative of his lackadaisical approach. The Athlete had reported a problem with his doorbell in early November 2019 and was advised by the maintenance team on 11 November 2019 that it sometimes "*sticks*". Yet he took no steps to remedy the problem until much later.

The Respondent's Evidence

60. The Respondent relied on the evidence of Mr George (the DCO), Ms Freese (the BCA), Mr Roux (AIU) and Mr Newman (a DCO). Mr George and Mr Roux gave oral evidence, while Ms Freese and Mr Newman were not required for cross-examination.

Mr George

61. Mr George is an experienced DCO. He has been in the role for approximately 12 years: he told the Panel that he had taken some 50-60,000 athlete samples in his career.

62. He said that he was appointed as the DCO to conduct a test on 9 December 2019. He said also that he "*was informed that there was a specific instruction that no phone calls were to be placed during that test*".

63. The evidence of Mr George in relation to the events of 9 December 2019 may be summarised as follows:

a. The Athlete lives in an apartment complex, which is a gated community.

b. He arrived at the complex "*at around 7:00-7:05*" and Ms Freese was already there.

c. Mr George parked in the off-street parking area (as did Ms Freese). There was a gate in place preventing car access to the apartment complex, which gate required an access code. A woman (whom Mr George believed to be a member of staff) approached him and asked if he required assistance. He said that he was there to see someone but did not have an access code. She pointed out a paved pathway alongside the gate for pedestrian access and instructed him to take that path into the complex. He and Ms Freese did that.

d. Mr George and Ms Freese arrived (on foot) at the Athlete's apartment shortly before 7:15pm. He "*noticed that there were no lights on, that the garage door was closed and that there was no car parked in front of the garage*" and that "*there was no sign of anyone being present*". He "*knocked loud enough so that it could be heard on any of the three levels of the townhouse*" and he agreed that any issue with the doorbell "*would not have prevented the occupant of the townhouse from knowing that he was there*".

e. Mr George's evidence was to the effect that he could not hear the doorbell ringing inside so it was unclear if it was working, but he made "*multiple knocks*" on the door and rang the doorbell every 10 minutes during the entire one-hour period. There was no answer and no sign of anyone in the apartment.

f. The weather "*being good that evening*", Mr George says that he and Ms Freese "*waited right outside of the Athlete's front door, standing directly in front of the door, adjacent to the garage door*". He said that they waited in that location for the "*whole hour*" and during that time there was no sign of any presence in the apartment: "*During the entire hour that we were waiting, there was no activity at the address; no lights came on, I could see no flickering light that might indicate that a TV was on and no one left from or returned to the address.*"

g. He and Ms Freese left the apartment at 8:15pm. He left "*precisely at 8:15*". He was asked whether he was sure it wasn't any earlier than that. He said: "*No, sir. I am a stickler for rules. 8:15 it was and not 8:14. We stood there until it was 8:15.*"

h. Mr George and Ms Freese made their way back to their cars in the carpark area, from where Mr George took a photograph time-stamped at 8:21pm.

i. Mr George then completed an "Unsuccessful Attempt Report" for 9 December 2019 (undated but said to have been completed contemporaneously) which provided the following details of the failed attempt:

    i. The DCO arrived at the Athlete's residential address at 7:15pm and concluded the "*collection attempt*" at 8:15pm.

    ii. The Athlete's apartment community is gated. The DCO parked at the front office of the apartment complex and walked to the Athlete's

apartment. There was no car in front, but it could have been in the (closed) garage.

iii. The DCO made "*multiple loud knocks … every 10 minutes for the entire hour period*".

iv. The DCO also pressed the doorbell (though no indication of how many times) but the DCO could not hear a ring inside so that "*it was unclear if it was in operation*".

v. The DCO remained outside the Athlete's door for the full one hour.

vi. The DCO did not telephone the Athlete "*per client instructions*".

j. He received a no call instruction from the AIU for this test. Most of the testing instructions he receives (from various federations) permit him to call the athlete in the last five-minute period (subject to qualifications) but in this case there was an express no call instruction.

k. He said it was his experience that the "*normal process*" with most international federations was that the DCO was permitted to make a call at the 55-minute mark of the specified hour if the DCO had not yet made contact with the athlete. That may come with further 'qualifications', but that was the normal practice.

l. He said that each of the international federations has its own specific set of instructions. WADA is "*the framework*" for all the testing, but each federation has different instructions, and those instructions are outlined in the 'mission request notes' sent by the federation for any specific testing mission; i.e., instructions are issued in respect of each testing mission, including instructions as to whether, and if so, how a call can be placed.

m. He accepted that if he had called the Athlete at the 55-minute mark and the Athlete answered and made his way to the location (i.e. the Athlete's home) before the end of the 60-minute window, then the DCO could have tested him and that would have been a successful test.

Ms Freese

64. Ms Freese is a BCA and has been working in that role for approximately three years. She is a trained phlebotomist.

65. Ms Freese said that she met Mr George at the premises, she arriving first, and parked her car outside the gated complex. She said that she and Mr George gathered all their equipment, walked through a gate and made their way on foot to the Athlete's apartment, which took about 2-4 minutes.

66. Ms Freese said that Mr George knocked on the Athlete's front door and rang the doorbell beginning at 19:15, and that there was no answer. She said that she and Mr George "*looked upstairs to the windows, but could not see any lights on inside. It did not look like anyone was home*".

67. Ms Freese said that she and Mr George stood "*right outside*" the Athlete's front door for the whole 60-minute slot, during which time Mr George rang the doorbell and knocked on the door "*several times*". According to Ms Freese, "*no one answered*" and "*no one came to the address or left during the time that we were outside the house*".

68. In the result, with no sign of the Athlete, at 8:15pm she and Mr George left the premises and returned to their cars. She said that they left the premises – by which she meant drove away – at some time between 8:20 and 8:25pm.

Mr Roux

69. Mr Roux gave evidence that he is the "*Out-of-competition Manager*" for the AIU and has been in that role since September 2017.

70. Mr Roux explained that the decision to test the Athlete was his and his alone and he did not receive any instruction to do so from elsewhere in the AIU. He said that October to January each year is a key period for out-of-competition testing because it is between the end of the outdoor season and the start of the indoor season. In addition, the Athlete had two previous unsuccessful attempts during this period between seasons, one in Q4 2017 and one in Q1 2018.

71. On this occasion, Mr Roux decided that the test should be attempted at his primary residence (as had been specified in the Whereabouts Filing) on the basis that the Athlete would be more likely to be home, and therefore "*present and available for testing*".

72. To that end, on 3 December 2019, Mr Roux contacted the sample collection agency known as International Doping Tests & Management (or 'IDTM') with an inquiry as to when blood and urine test samples could be taken from the Athlete. It was agreed that the test attempt would be carried out on 9 December 2019. In email correspondence with IDTM in relation to the logistics for the test attempt, Mr Roux said this: "*Test has to be inside TS* [i.e. time slot] *and no phone calls please*". Mr Roux also told IDTM: "*please check carefully the whereabouts as this athlete is difficult to get!*".

73. According to Mr Roux, when the AIU conducts out-of-competition testing on athletes within the specified 60-minute time slot, it is intended that the test is "*totally unannounced to the athlete and the use of a phone call is not permitted save in specific and defined circumstances*". The objective of the AIU testing team is always to collect a sample without any advance notice at all so that there is no period of time after notification during which the athlete is not supervised by the DCO.

74. Mr Roux referred to DCO Instructions which says the following under the heading "*Locating the Athlete*" (emphasis in original):

> "*Important: Testing for the IAAF is to be conducted on a <u>no-advance notice basis</u> to the athlete. No phone calls should therefore be made to the athlete/ athlete's representative prior to the attempt save when, in exceptional cases, there is a need to arrange a test on an advance notice basis. ...*

If, despite numerous attempts, you have not been able to locate the athlete and that there are indications that the athlete may be in the close vicinity, you may call the athlete no earlier than 5 minutes prior to the end of the one-hour testing slot."

75. According to Mr Roux, when the AIU considers that it is important to collect a sample without any advance notice, an instruction is given to the DCO not to place a call. Such an instruction "*is not unprecedented or even highly unusual*" and he had issued such instruction on "*many occasions*".

76. Mr Roux gave evidence before the Panel. When cross-examined at the hearing, Mr Roux gave evidence of the following additional matters:

a. He said that he issued the no-call instruction on this occasion because of the Athlete's test history and very good performances ("*he is the top athlete*").

b. He gives this no-call instruction in several other countries around the world "*for athletes who have the same pattern*".

c. When asked about his email ("*please check carefully the whereabouts as this athlete is difficult to get!*"), he accepted that in the interim period between 27 April 2019 (i.e. the day after the 26 April 2019 Filing Failure) and 3 December 2019 (the date of his email) the Athlete had been subjected to eight out-of-competition tests and six in-competition tests, all without issue.

d. He accepted that other ADOs, USADA included, have different rules in relation to telephone calls but that the position of the AIU was that there should be no advance notice. He said that the AIU wanted its DCOs to do what is reasonable to reach the Athlete without giving advance notice (including a prior telephone call).

e. He understood, but did not know, that the Athlete had received training in the operation of the Respondent's ADR and in the manner in which testing within the 60-minute slot was to be conducted by the AIU.

f. When asked about the AIU's concern in relation to what an athlete might do if he or she were given five minutes' notice, Mr Roux said this:

"*I have been told that you can do many things to alter your urine or your blood in a few minutes. If I could take one example, he could drink a full bottle of vodka, then we can't do anything with the urine. We have other experiences where you have this kind of thing happening and then the athlete cannot provide a urine sample for hours and which also delays the blood. I have been told by our adviser here that there are many ways to do things – for example, you can take something that is undetectable that will render your urine invalid.*"

Mr Newman

77. Mr Newman is a DCO. He has worked in that role for about 12 years.

78. It is Mr Newman's evidence that he attended the Athlete's premises on 12 December 2019 (i.e. shortly after the date in question) for an unannounced test in the 60-minute slot between 7:15 and 8:15pm.

79. Mr Newman said that he arrived at the premises, knocked on the Athlete's door various times but no one appeared to be at home. At 7:54pm, the Athlete returned home, and parked his car in the space in front of the Athlete's garage. Mr Newman then proceeded with the test, during which, according to Mr Newman, the Athlete mentioned the Missed Test of 9 December and said that "*he was at home, but that he had fallen asleep during the football game, did not hear any door knocks and had not received a phone call*".

The Respondent's Request for Relief

80. In its Answer, the Respondent requested the following relief:

"Based on the foregoing, the AIU, on behalf of World Athletics, requests the Panel to rule as follows:

(1) the appeal is dismissed;

(2) the arbitration costs (if any) are borne by Mr. Coleman;

(3) Mr. Coleman is ordered to pay a contribution to World Athletics' legal and other expenses in connection with the appeal."

V. JURISDICTION

81. Article R47 of the CAS Code provides as follows:

"An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body."

82. Article 1.8 of the ADR provides that "*Within the overall pool of Athletes set out above who are bound by and required to comply with these Anti-Doping Rules, each of the following Athletes shall be considered to be an International-Level Athlete ("International-Level Athlete") for the purposes of these Anti-Doping Rules and therefore the specific provisions in these Anti-Doping Rules applicable to International-Level Athletes shall apply to such Athletes: (a) An Athlete who is in the International Registered Testing Pool ...*".

83. Article 13.1 of the ADR provides that "*Unless specifically stated otherwise, decisions made under these Anti-Doping Rules may be appealed only as set out in this Article 13. Such decisions shall remain in effect while under appeal unless CAS orders otherwise.*"

84. Article 13.2.1 of the ADR also provides, inter alia, that a decision imposing "Consequences" (as defined in the ADR) may be appealed and Article 13.2.2 provides

that "*cases arising involving International-Level Athletes ... may be appealed exclusively to CAS.*"

85. Neither Party objects to the jurisdiction of the CAS to resolve this appeal, and moreover, both Parties expressly consented to the jurisdiction of the CAS when signing the order of procedure. In addition, the Parties fully participated in the proceedings without objection.

86. Accordingly, the Panel confirms that the CAS has jurisdiction to decide this appeal.

VI. ADMISSIBILITY

87. Article R49 of the CAS Code provides as follows:

"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. The Division President shall not initiate a procedure if the statement of appeal is, on its face, late and shall so notify the person who filed the document. When a procedure is initiated, a party may request the Division President or the President of the Panel, if a Panel has been already constituted, to terminate it if the statement of appeal is late. The Division President or the President of the Panel renders her/his decision after considering any submission made by the other parties."

88. Article 13.7.1 of the ADR provides that the "*deadline for filing an appeal to CAS shall be 30 days from the date of receipt of the reasoned decision in question by the appealing party ... Where the appellant is a party other than the IAAF, to be a valid filing under this Article 13.7.1, a copy of the appeal must be filed on the same day with the IAAF. Within 15 days of the deadline for filing the statement of appeal, the appellant shall file his appeal brief with CAS and, within 30 days of receipt of the appeal brief, the respondent shall file his answer with CAS*".

89. The Athlete received the decision of the AIU Disciplinary Tribunal on 22 October 2020 and his Statement of Appeal was filed on 19 November 2020, within the deadline provided for under Article 13.7.1 of the ADR.

90. The Respondent accepts the admissibility of this appeal.

91. In consideration of the foregoing, the Panel confirms that this appeal is admissible.

VII. APPLICABLE LAW

92. Article R58 of the CAS Code provides as follows:

"The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the

rules of law that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision."

93. It is common ground that the rules of law chosen by the parties are those set out in the ADR and the Anti-Doping Regulations, together with the materials to which they refer.

94. In this respect, the following provisions of the ADR (updating references to 'IAAF' to read 'World Athletics') are to be noted:

ARTICLE 13 APPEALS

13.9 Appeal Procedure:

13.9.1 The CAS Code of Sports-related Arbitration, as modified or supplemented herein, shall apply to all appeals filed pursuant to this Article 13.

13.9.2 ...

13.9.3 In all CAS appeals involving World Athletics, the CAS Panel shall be bound by the World Athletics Constitution, Rules and Regulations (including the Anti-Doping Rules and Regulations). In the case of conflict between the CAS rules currently in force and the Constitution, Rules and Regulations, the Constitution, Rules and Regulations shall take precedence.

13.9.4 In all CAS appeals involving World Athletics, the governing law shall be Monegasque law and the appeal shall be conducted in English, unless the parties agree otherwise.

ARTICLE 20 INTERPRETATION

20.1 These Anti-Doping Rules are sport rules governing the conditions under which sport is played. Aimed at enforcing anti-doping principles in a global and harmonized manner, they are distinct in nature from criminal and civil laws, and are not intended to be subject to or limited by any national requirements and legal standards applicable to criminal or civil proceedings. When reviewing the facts and the law of a given case, all courts, arbitral tribunals and other adjudicating bodies should be aware of and respect the distinct nature of these Anti-Doping Rules implementing the Code and the fact that these rules represent the consensus of a broad spectrum of stakeholders around the world as to what is necessary to protect and ensure fair sport.

20.2 These Anti-Doping Rules shall be interpreted in a manner that is consistent with the Code. The Code shall be interpreted as an independent and autonomous text and not by reference to the existing law or statutes of any Signatory or government. The comments annotating various provisions of the Code and the International Standards shall be used to interpret these Anti-Doping Rules.

20.3 Subject to Rule 20.2 above, these Anti-Doping Rules shall be governed by and construed in accordance with Monegasque law.

20.4 The Definitions shall be considered as an integral part of these Anti-Doping Rules. Terms used in these Anti-Doping Rules beginning with capital letters shall have the meaning given to them in the Definitions."

95. It is therefore necessary to set out the salient provisions of the ADR and Anti-Doping Regulations and the rules, regulations and guidance to which they refer.

The WADC

96. The starting point is the WADC, to which the Respondent is a signatory. The WADC describes itself as "*the fundamental and universal document upon which the World Anti-Doping Program is based*". The World Anti-Doping Program is made up of three levels (see the description in Gemmell at [18]):

a. The WADC itself, the provisions of which are "*mandatory in substance*" and must be followed by each ADO and athlete. The Respondent is a signatory to the WADC and as such is obliged to put in place a comprehensive set of anti-doping rules that comply with the requirements of the WADC (and are substantively and substantially identical to the WADC). The Respondent has done this by the implementation of the ADR and by the regulations issued thereunder by the Respondent from time to time, namely the Anti-Doping Regulations. The ADR is mandatory.

b. The International Standards (defined as "*a standard adopted by WADA in support of the [WADC]).* For present purposes, the relevant standard is the "International Standard for Testing and Investigations" (defined above as "ISTI"). It is a mandatory standard, compliance with which "*shall be sufficient to conclude that the procedures addressed by the International Standard were performed properly*".

a. The Models of Best Practice and Guidelines, which are not mandatory but offer technical guidance to sporting organisations and to promote harmonisation in their efforts to ADOs in the implementation of anti-doping programs. The guidelines relevant to this dispute are the "WADA Guidelines" (i.e. the Guidelines for Implementing an Effective Testing Program, October 2014, issued by WADA to provide guidance to ADOs on how to apply the WADC and ISTI).

97. In the result, the hierarchy of rules applicable in this case is as follows: (a) the ADR, (b) the Anti-Doping Regulations, (c) ISTI, and (d) the WADA Guidelines (bearing in mind that these are not mandatory). It is necessary to set them out at some length.

The ADR

98. With respect to the ADR, the following matters and provisions are to be noted:

a. The effective date of the ADR is 1 January 2019 and thus applies to matters in these proceedings.

b. World Athletics has delegated implementation of the ADR to the AIU.

c. By Article 1.7, "*All Athletes ... shall be responsible for knowing what constitutes an Anti-Doping Rule Violation under these Anti-Doping Rules*".

d. The ADR provide for the establishment of the Registered Testing Pool (see definition above).

e. Article 2 of the ADR specifies the circumstances and conduct which constitute ADRVs. For present purposes, it is to be noted that Article 2.4 provides that an ADRV is committed upon: "*Any combination of three Missed Tests ... as defined in* [ISTI], *within a twelve-month period by an Athlete in a Registered Testing Pool*".

f. By virtue of Article 3.1 of the ADR, World Athletics "*shall have the burden of establishing that an Anti-Doping Rule Violation has been committed. The standard of proof shall be whether [World Athletics] has established the commission of the alleged Anti-Doping Rule Violation to the comfortable satisfaction of the hearing panel, bearing in mind the seriousness of the allegation that is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where these Anti-Doping Rules places the burden of proof upon the Athlete or other Person alleged to have committed an Anti-Doping Rule Violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability*".

g. Article 5.2.1 provides that "*Any Athlete who has not retired, including any Athlete serving a period of Ineligibility, may be required to provide a Sample at any time and at any place by the Integrity Unit or any Anti-Doping Organisation with Testing authority over him*".

h. By Article 5.4.1, all testing conducted by (or for) World Athletics must be in "*substantial conformity*" with the ADR and the Anti-Doping Regulations; and by Article 5.1.1 of the ADR, all testing conducted by (or for) World Athletics "*shall be in conformity with the International Standard for Testing and Investigations*".

i. Article 5.7 of the ADR provides inter alia that:

   i. athletes are required to comply with the whereabouts information set forth in Appendix A of the Anti-Doping Regulations (5.7.1); and

   ii. for the purposes of Article 2.4, an athlete's failure to comply with the requirements of Appendix A of the Anti-Doping Regulations shall be deemed a Filing Failure or Missed Test "*where the conditions set forth in [ISTI] for declaring a Filing Failure or Missed Test are met*".

99. Article 10 sets forth the various sanctions applicable to the various different ADRVs. The following provisions are to be noted:

a. The sanction applicable to a violation of Article 2.4 is provided for in Article 10.3.2, which provides that:

"*For an Anti-Doping Rule Violation under Article 2.4 that is the Athlete's first antidoping offence, the period of Ineligibility imposed shall be two years, subject to reduction down to a minimum of one year, depending on the Athlete's degree of Fault. The flexibility between two years and one year of Ineligibility in this Article is not available to Athletes where a pattern of last-minute whereabouts changes or other conduct raises a serious suspicion that the Athlete was trying to avoid being available for Testing.*"

b. For these purposes, "Fault" in the ADR is a defined term:

"Fault is any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing an Athlete or other Person's degree of Fault include, for example, the Athlete's ... experience, whether the Athlete ... is a Minor, special considerations such as impairment, the degree of risk that should have been perceived by the Athlete and the level of care and investigation exercised by the Athlete in relation to what should have been the perceived level of risk. In assessing the Athlete's ... degree of Fault, the circumstances considered must be specific and relevant to explain the Athlete's ... departure from the expected standard of behaviour. Thus, for example, the fact that an Athlete would lose the opportunity to earn large sums of money during a period of Ineligibility, or the fact that the Athlete only has a short time left in his career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of Ineligibility under Article 10.5.1 or 10.5.2."

The Anti-Doping Regulations

100. With respect to the Anti-Doping Regulations, the following matters and provisions are to be noted.

a. The effective date is 1 January 2019, and as such the regulations apply to the matters at issue in these proceedings.

b. By paragraph 1.2, "*All Athletes, Athlete Support Personnel and other Persons should acquaint themselves fully with the Anti-Doping Rules and with these Anti-Doping Regulations. Both the Anti-Doping Rules and these Anti-Doping Regulations are available for viewing on the IAAF and the Athletics Integrity Unit websites*".

c. By paragraph 1.3, "*In accordance with Article 5.2.1 of the Anti-Doping Rules, any Athlete who has not retired, including any Athlete serving a period of Ineligibility, may be required to provide a Sample at any time and place by the IAAF, a Member, an Area Association or any Anti-Doping Organisation with Testing authority over him*".

d. By paragraph 1.10, the Anti-Doping Regulations "*must be followed as far as is reasonably practicable*".

a. By paragraph 2.22, all out-of-competition testing shall be "*No Advance Notice Testing save in exceptional and justifiable circumstances*".

b. "*No Advance Notice Testing*" is defined as "*Sample collection that takes place with no advance warning to the Athlete and where the Athlete is continuously chaperoned from the moment of notification through to Sample provision*".

101. Appended to the Anti-Doping Regulations are a number of appendices speaking to different aspects of anti-doping control, testing and sampling (and the like). For present purposes, the relevant appendix is Appendix A, headed "*Athlete Whereabouts requirements*". It sets forth the requirements on athletes with respect (inter alia) to their whereabouts filings and their availability for testing and the elements that must be proven to sustain a Missed Test.

a. Paragraph 1.1 of Appendix A provides that:

"*An Athlete who is in a Registered Testing Pool ... is required:*

(a) to make quarterly Whereabouts Filings that provide accurate and complete information about the Athlete's whereabouts during the forthcoming quarter, including identifying where he will be living, training and competing during that quarter, and to update those Whereabouts Filings where necessary so that he can be located for Testing during that quarter at the times and locations specified in the relevant Whereabouts Filing (see paragraph 3 of this Appendix below). A failure to do so may be declared a Filing Failure for the purposes of Article 2.4.

(b) to specify in his Whereabouts Filing, for each day in the forthcoming quarter, one specific 60-minute time slot where he will be available at a specified location for Testing: (see paragraph 4 of this Appendix below). This does not limit in any way the Athlete's obligation under the Rules to be available for Testing at any time and place upon request by an Anti-Doping Organisation with Testing Authority over him. Nor does it limit his obligation to provide the information specified in paragraph 3 of this Appendix as to his whereabouts outside of that 60-minute time slot. However, if the Athlete is not available for Testing at such location during the 60-minute time slot specified for that day in his Whereabouts Filing, that failure may be declared a Missed Test for the purposes of Article 2.4 [of ADR]."

b. Paragraph 1.2 of Appendix A provides that:

"*Three Whereabouts Failures (which may be any combination of Filing Failures and/or Missed Tests adding up to three in total) by an Athlete within any 12 (twelve) month period amount to an anti-doping rule violation under Article 2.4, irrespective of which Anti-Doping Organisation(s) have declared the Whereabouts Failures in question. The Whereabouts Failures may be a combination of Filing Failures and/or Missed Tests ... .*"

c. Paragraph 1.3 of Appendix A provides that:

"*The 12-month period referred to in Article 2.4 [of the ADR] and paragraph 1.2 above starts to run on the date that an Athlete commits the first Whereabouts Failure being relied upon in support of the allegation of a violation of Article*

2.4. If two more Whereabouts Failures occur during the ensuing 12-month period, then an anti-doping rule violation under Article 2.4 is committed irrespective of any Samples successfully collected from the Athlete during that 12-month period. However, if an Athlete who has committed one Whereabouts Failure does not go on to commit a further two Whereabouts Failures within 12 months of the first, at the end of that 12-month period, the first Whereabouts Failure "expires" for the purposes of Article 2.4 and a new 12-month period begins to run from the date of his next Whereabouts Failure."

d. Paragraph 3 of Appendix A provides that:

"*3.1 On a date specified by the IAAF that is prior to the first day of each quarter (i.e., 1 January, 1 April, 1 July and 1 October), an Athlete in the Registered Testing Pool must file a Whereabouts Filing with the IAAF that contains at least the following information:*

(a) a complete mailing address where correspondence may be sent to the Athlete for formal notice purposes. Any notice or other item mailed to that address will be deemed to have been received by the Athlete five working days after it was deposited in the mail;

(b) details of any impairment of the Athlete that may affect the procedure to be followed in conducting a Sample Collection Session;

(c) specific confirmation of the Athlete's consent to the sharing of his Whereabouts Filing with other Anti-Doping Organisations having Testing authority over him;

(d) for each day during the following quarter, the full address of the place where the Athlete will be staying overnight (e.g. home, temporary lodgings, hotel, etc);
(e) for each day during the following quarter, the name and address of each location where the Athlete will train, work or conduct any other regular activity (e.g. college), as well as the usual time-frames for such regular activities;

(f) the Athlete's Competition schedule for the following quarter, including the name and address of each location where the Athlete is scheduled to compete during the quarter and the date(s) on which he is scheduled to compete at such location(s); and

(g) any other information related to the Athlete's whereabouts as the IAAF may require in order to conduct Testing efficiently and effectively.

3.2 ... the Whereabouts Filing must also include, for each day during the following quarter, one specific 60-minute time slot between 5 a.m. and 11 p.m. each day where the Athlete will be available and accessible for Testing at a specific location.

3.3 ...

3.4 It is the Athlete's responsibility to ensure that he provides all of the information required in a Whereabouts Filing accurately and in sufficient detail to enable any Anti-Doping Organisation wishing to do so to locate the Athlete for Testing on any given day in the quarter at the times and locations specified by the Athlete for that day in the Whereabouts Filing, including but not limited to during the 60-minute time slot specified for that day in the Whereabouts Filing. More specifically, when specifying a location in his Whereabouts Filing (whether in his original quarterly filing or in an update), the Athlete must provide sufficient information to enable the DCO to find the location, to gain access to the location and to find the Athlete at the location. A failure to do so may be pursued as a Filing Failure and/or (if the circumstances so warrant) as evasion of Sample collection under Article 2.3 and/or Tampering or Attempted Tampering with Doping Control under Article 2.5. In any event, the IAAF shall consider Target Testing the Athlete."

e. Paragraph 4 of Appendix A provides that:

"4.1 While Article 5.2.1[of the ADR] specifies that every Athlete may be required to submit to Testing at any time and place upon request by an ADO with Testing Authority over him, in addition, an Athlete in a Registered Testing Pool must specifically be present and available for Testing on any given day in the relevant quarter during the 60-minute time slot specified for that day in his Whereabouts Filing, at the location that the Athlete has specified for that time slot in such filing.

4.2 To ensure fairness to the Athlete, where an unsuccessful attempt has been made to test an Athlete during one of the 60-minute time slots specified in his Whereabouts Filing, any subsequent unsuccessful attempt to test that Athlete (by the IAAF, a Member or another Anti-Doping Organisation) during one of the 60-minute time slots specified in his Whereabouts Filing may only be counted as a Missed Test (or, if the unsuccessful attempt was because the information filed was insufficient to find the Athlete during the time slot, as a Filing Failure) against that Athlete if that subsequent attempt takes place after the Athlete has received notice, in accordance with paragraph 8.3(c) of Chapter 8, of the original unsuccessful attempt.

4.3 A failure to comply with this requirement shall be pursued as an apparent Missed Test. An Athlete may only be declared to have committed a Missed Test where the IAAF (or Member or other responsible Anti-Doping Organisation with results management authority) can establish each of the following:

(a) that when the Athlete was given notice that he had been designated for inclusion in the Registered Testing Pool, he was advised that he would be liable for a Missed Test if he was unavailable for Testing during the 60-minute time slot specified in his Whereabouts Filing at the location specified for that time slot;

(b) that a DCO attempted to test the Athlete on a given day in the quarter, during the 60-minute time slot specified in the Athlete's Whereabouts Filing for that day, by visiting the location specified for that time slot;

(c) that during that specified 60-minute time slot, the DCO did what was reasonable in the circumstances (i.e. given the nature of the specified location) to try to locate the Athlete, short of giving the Athlete any advance notice of the test;

(d) that paragraph 4.2 above does not apply or (if it applies) was complied with; and

(e) that the Athlete's failure to be available for Testing at the specified location during the specified 60-minute time slot was at least negligent. For these purposes, the Athlete will be presumed to have been negligent upon proof of the matters set out at subparagraphs (a) to (d) above. That presumption may only be rebutted by the Athlete establishing that no negligent behaviour on his part caused or contributed to his failure (i) to be available for Testing at such location during such time slot; and (ii) to update his most recent Whereabouts Filing to give notice of a different location where he would instead be available for Testing during a specified 60-minute time slot on the relevant day."

International Standard for Testing and Investigations

102. As noted above, all testing undertaken by or for World Athletics must ("*shall*") be in conformity with the International Standard for Testing and Investigations, 2019, promulgated by WADA (defined above as "ISTI"). ISTI is described as "*a mandatory international standard*" developed as part of the world anti-doping program.

103. By way of overview: Part One of ISTI describes its purpose and objectives (and identifies those articles of the WADC to which the standard is relevant); Part Two sets down the standards to be adhered to when testing athletes; Part Three speaks to the standards that apply in respect of intelligence gathering; and Part Four contains various annexes on various specific matters including, for present purposes, "Annex I, Code Article 2.4, Whereabouts Requirements". (The standard expressly provides that these annexes are to have the same mandatory status as the rest of ISTI.) Various provisions of ISTI are annotated by "*comments*", and by paragraph 3.4.3 of ISTI, such comments "*shall be used to interpret the International Standard*".

104. The following provisions of the body of ISTI are important:

a. Paragraph 5.3.1 provides that "*Save in exceptional and justifiable circumstances, No Advance Notice Testing shall be the method for Sample collection*".

b. "No Advance Notice Testing" is defined to mean "*Sample collection that takes place with no advance warning to the Athlete and where the Athlete is continuously chaperoned from the moment of notification through Sample provision*".

c. "Missed Test" is defined as follows: "*A failure by the Athlete to be available for Testing at the location and time specified in the 60-minute time slot identified in his/her Whereabouts Filing for the day in question, in accordance with Article I.4 of* [ISTI]."

105. ISTI Annex I "*Code Article 2.4, Whereabouts Requirements*" provides the standards that must be applied/ adhered to by any testing authority, including, of course, the Respondent in these proceedings.

106. Article I.1.1 provides (emphasis added):

"***An Athlete who is in a Registered Testing Pool is required***:

a) to make quarterly Whereabouts Filings that provide accurate and complete information about the Athlete's whereabouts during the forthcoming quarter, including identifying where he/she will be living, training and competing during that quarter, and to update those Whereabouts Filings where necessary, so that he/she can be located for Testing during that quarter at the times and locations specified in the relevant Whereabouts Filing, as specified in Article I.3. A failure to do so may be declared a Filing Failure; and

b) ***to specify in his/her Whereabouts Filings, for each day in the forthcoming quarter, one specific 60-minute time slot where he/she will be available at a specific location for Testing, as specified in Article I.4. … [I]f the Athlete is not available for Testing at such location during the 60-minute time slot specified for that day in his/her Whereabouts Filing, that failure may be declared a Missed Test****.*

[Comment to I.1.1(b): ***The purpose of the 60-minute time slot is to strike a balance between the need to locate the Athlete for Testing and the impracticality and unfairness of making Athletes potentially accountable for a Missed Test every time they depart from their previously-declared routine.*** *Anti-Doping Organizations that implemented whereabouts systems in the period up to 2009 reflected that tension in different ways. Some demanded "24/7" whereabouts information, but did not declare a Missed Test if an Athlete was not where he/she had said he/she would be unless (a) he/she could still not report for Testing despite being given notice in the form of a phone call; or (b) the following day he/she was still not where he/she had said he/she would be. Others asked for details of the Athlete's whereabouts for only one hour per day, but held the Athlete fully accountable during that period, which gave each side certainty but limited the Anti-Doping Organization's ability to test the Athlete outside that hour. After extensive consultation with stakeholders with substantial whereabouts experience, the view was taken that the best way to maximize the chances of finding the Athlete at any time, while providing a reasonable and appropriate mitigation of "24/7" Missed Test liability, was to combine the best elements of each system, i.e., requiring disclosure of whereabouts information on a "24/7" basis, while limiting exposure to a Missed Test to a 60-minute time slot.]"*

107. Article I.3.2 provides (emphasis added):

"***Subject to Article I.3.3, the Whereabouts Filing must also include, for each day during the following quarter, one specific 60-minute time slot between 5 a.m. and 11 p.m. each day where the Athlete will be available and accessible for Testing at a specific location.***

[Comment to I.3.2: The Athlete can choose which 60-minute time slot between 5 a.m. and 11 p.m. to use for this purpose, provided that during the time slot in question

he/she is somewhere accessible by the DCO. It could be the Athlete's place of residence, training or Competition, or it could be another location (e.g., work or school). An Athlete is entitled to specify a 60-minute time slot during which he/she will be at a hotel, apartment building, gated community or other location where access to the Athlete is obtained via a front desk, or doorman, or security guard. *In addition, an Athlete may specify a time slot when he/she is taking part in a Team Activity.* ***In either case, however, any failure to be accessible and available for Testing at the specified location during the specified time slot will be a Missed Test.]"***

108. Article I.3.3 provides:

"*As the sole exception to Article I.3.2, if (but only if) there are dates in the relevant quarter in which the Athlete is scheduled to compete in an Event (excluding any Events organized by a Major Event Organization), and the Anti- Doping Organization that put the Athlete into the Registered Testing Pool is satisfied that enough information is available from other sources to find the Athlete for Testing on those dates, then the Anti-Doping Organization that put the Athlete into the Registered Testing Pool may waive the Article I.3.2 requirement to specify a 60-minute time-slot in respect of such dates ("In- Competition Dates"). …*"

109. Article I.3.4 provides (emphasis added):

"***It is the Athlete's responsibility to ensure that he/she provides all of the information required in a Whereabouts Filing accurately and in sufficient detail to enable any Anti-Doping Organization wishing to do so to locate the Athlete for Testing on any given day in the quarter at the times and locations specified by the Athlete in his/her Whereabouts Filing for that day, including but not limited to during the 60-minute time slot specified for that day in the Whereabouts Filing. More specifically, the Athlete must provide sufficient information to enable the DCO to find the location, to gain access to the location, and to find the Athlete at the location. A failure to do so may be pursued as a Filing Failure and/or (if the circumstances so warrant) as evasion of Sample collection under Code Article 2.3, and/or Tampering or Attempted Tampering with Doping Control under Code Article 2.5.*** *In any event, the Anti- Doping Organization shall consider Target Testing of the Athlete.*

[Comment to I.3.4: For example, declarations such as "running in the Black Forest" are insufficient and are likely to result in a Filing Failure. Similarly, specifying a location that the DCO cannot access (e.g., a "restricted-access" building or area) is likely to result in a Filing Failure. The Anti-Doping Organization may be able to determine the insufficiency of the information from the Whereabouts Filing itself, or alternatively it may only discover the insufficiency of the information when it attempts to test the Athlete and is unable to locate him/her. In either case, the matter should be pursued as an apparent Filing Failure, and/or (where the circumstances warrant) as an evasion of Sample collection under Code Article 2.3, and/or as Tampering or Attempting to Tamper with Doping Control under Code Article 2.5.

Where an Athlete does not know precisely what his/her whereabouts will be at all times during the forthcoming quarter, he/she must provide his/her best information, based on where he/she expects to be at the relevant times, and then update that information as necessary in accordance with Article I.3.5.]"

110. Article I.3.5 provides:

"*Where a change in circumstances means that the information in a Whereabouts Filing is no longer accurate or complete as required by Article I.3.4, the Athlete must file an update so that the information on file is again accurate and complete. In particular, the Athlete must always update his/her Whereabouts Filing to reflect any change in any day in the quarter in question (a) in the time or location of the 60-minute time slot specified in Article I.3.2; and/or (b) in the place where he/she is staying overnight. The Athlete must file the update as soon as possible after the circumstances change, and in any event prior to the 60-minute time slot specified in his/her filing for the day in question. A failure to do so may be pursued as a Filing Failure and/or (if the circumstances so warrant) as evasion of Sample collection under Code Article 2.3, and/or Tampering or Attempted Tampering with Doping Control under Code Article 2.5. In any event, the Anti-Doping Organization shall consider Target Testing of the Athlete.*"

111. Article I.4.1 provides (emphasis added):

"Availability for *Testing* I.4.1 **While *Code* Article 5.2 specifies that every *Athlete* must submit to *Testing* at any time and place upon request by an *Anti-Doping Organization* with *Testing* jurisdiction over him/her, in addition an *Athlete* in a *Registered Testing Pool* must specifically be present and available for *Testing* on any given day during the 60-minute time slot specified for that day in his/her Whereabouts Filing, at the location that the *Athlete* has specified for that time slot in such filing**. A Failure to Comply with this requirement shall be pursued as an apparent Missed Test. …

[Comment to I.4.1: For Testing to be effective in deterring and detecting cheating, it should be as unpredictable as possible. Therefore, the intent behind the 60-minute time slot is not to limit Testing to that period, or to create a 'default' period for Testing, but rather:

a) to make it very clear when an unsuccessful attempt to test an Athlete will count as a Missed Test;

b) to guarantee that the Athlete can be found, and a Sample can be collected, at least once per day (which should deter doping, or as a minimum, make it far more difficult);

c) to increase the reliability of the rest of the whereabouts information provided by the Athlete, and so to assist the Anti- Doping Organization in locating the Athlete for Testing outside the 60-minute time slot. The 60-minute time slot "anchors" the Athlete to a certain location for a particular day. Combined with the information that the Athlete must provide as to where he/she is staying overnight, training, competing and conducting other 'regular' activities during that day, the Anti-Doping Organization should be able to locate the Athlete for Testing outside the 60- minute time slot; and

d) to generate useful anti-doping intelligence, e.g., if the Athlete regularly specifies time slots with large gaps between them, and/or changes his time slot and/or location

at the last minute. Such intelligence can be relied upon as a basis for the Target Testing of such Athlete.]"

112. Article I.4.3 provides:

"***An Athlete may only be declared to have committed a Missed Test where the Results Management Authority can establish each of the following:***

a) that when the Athlete was given notice that he/she had been designated for inclusion in a Registered Testing Pool, he/she was advised that he/she would be liable for a Missed Test if he/she was unavailable for Testing during the 60-minute time slot specified in his/her Whereabouts Filing at the location specified for that time slot;

b) ***that a DCO attempted to test the Athlete on a given day in the quarter, during the 60-minute time slot specified in the Athlete's Whereabouts Filing for that day, by visiting the location specified for that time slot;***

c) ***that during that specified 60-minute time slot, the DCO did what was reasonable in the circumstances (i.e. given the nature of the specified location) to try to locate the Athlete, short of giving the Athlete any advance notice of the test;***

d) that Article I.4.2 does not apply or (if it applies) was complied with; and

e) ***that the Athlete's failure to be available for Testing at the specified location during the specified 60-minute time slot was at least negligent****. For these purposes, the Athlete will be presumed to have been negligent upon proof of the matters set out at sub-Articles I.4.3(a) to (d). That presumption may only be rebutted by the Athlete establishing that no negligent behaviour on his/her part caused or contributed to his/her failure (i) to be available for Testing at such location during such time slot and (ii) to update his/her most recent Whereabouts Filing to give notice of a different location where he/she would instead be available for Testing during a specified 60-minute time slot on the relevant day.*

[Comment to I.4.3(b): If the Athlete is not available for Testing at the beginning of the 60-minute time slot, but becomes available for Testing later on in the 60-minute time slot, the DCO should collect the Sample and should not process the attempt as an unsuccessful attempt to test, but should include full details of the delay in availability of the Athlete in the mission report. *Any pattern of behaviour of this type should be investigated as a possible anti-doping rule violation of evading Sample collection under Code Article 2.3 or Code Article 2.5.* ***If an Athlete is not available for Testing during his/her specified 60-minute time slot at the location specified for that time slot for that day, he/she will be liable for a Missed Test even if he/she is located later that day and a Sample is successfully collected from him/her.]***

[Comment to I.4.3(c): Once the DCO has arrived at the location specified for the 60-minute time slot, if the Athlete cannot be located immediately then the DCO should remain at that location for whatever time is left of the 60-minute time slot and during that remaining time he/she should do what is reasonable in the circumstances to try to locate the Athlete. See WADA's Guidelines for Implementing an Effective Testing Program for guidance in determining what is reasonable in such circumstances.

Where an Athlete has not been located despite the DCO's reasonable efforts, and there are only five minutes left within the 60-minute time slot, then as a last resort the DCO may (but does not have to) telephone the Athlete (assuming he/she has provided his/her telephone number in his/her Whereabouts Filing) to see if he/she is at the specified location. If the Athlete answers the DCO's call and is available at (or in the immediate vicinity of) the location for immediate testing (i.e., within the 60 minute time slot), then the DCO should wait for the Athlete and should collect the Sample from him/her as normal. However, the DCO should also make a careful note of all the circumstances, so that it can be decided if any further investigation should be conducted. In particular, the DCO should make a note of any facts suggesting that there could have been tampering or manipulation of the Athlete's urine or blood in the time that elapsed between the phone call and the Sample collection. If the Athlete answers the DCO's call and is not at the specified location or in the immediate vicinity, and so cannot make himself/herself available for testing within the 60-minute time slot, the DCO should file an Unsuccessful Attempt Report.

Because the making of a telephone call is discretionary rather than mandatory, and is left entirely to the absolute discretion of the Sample Collection Authority, proof that a telephone call was made is not a requisite element of a Missed Test, and the lack of a telephone call does not give the Athlete a defence to the assertion of a Missed Test.]"

113. Article I.6.4 provides:

"*In all cases ...:*

(a) each Athlete in a Registered Testing Pool remains ultimately responsible at all times for making accurate and complete Whereabouts Filings, whether he/she makes each filing personally or delegates the task to a third party. ...

b) such Athlete remains personally responsible at all times for ensuring he/she is available for Testing at the whereabouts declared on his/her Whereabouts Filings. ..."

The WADA Guidelines for Implementing an Effective Testing Program

114. The WADA Guidelines provide (non-mandatory) guidance generally as to the constituent elements of a viable testing programme and in particular in respect of how a DCO should carry out his or her responsibilities. The above-noted Comment to ISTI Annexe I.4.3(c) cross-refers to the WADA Guidelines for guidance "*in determining what is reasonable on the part of a DCO in the circumstances to try to locate the Athlete*".

115. Under the heading "*9.2.1 Making a Reasonable Testing Attempt*", this is said (with emphasis added):

"***An unsuccessful attempt to test an Athlete will not amount to a Missed Test unless the ADO on whose behalf the test was attempted can demonstrate to the comfortable satisfaction of the hearing panel that (among other things) the DCO made a reasonable attempt to locate the Athlete for Testing during the 60-minute timeslot specified for the day in question in the Athlete's Whereabouts Filing.***

What constitutes a reasonable attempt to locate an Athlete for Testing during the 60-minute timeslot cannot be fixed in advance, as it will necessarily depend on the particular circumstances of the case in question, and in particular on the nature of the location chosen by the Athlete for that timeslot.

The only truly universal guideline is that the DCO should use his/her common sense. He/She should ask him/herself: "Given the nature of the location specified by the Athlete, what do I need to do to ensure that if the Athlete is present, he/she will know that a DCO is here to collect a Sample from him/her?"

In this context, the DCO should bear in mind the requirement to avoid insofar as possible giving the Athlete advance notice of Testing that might provide an opportunity for Tampering or evasion or other improper conduct.

In certain circumstances, a degree of advance notice may simply be unavoidable. For example, an Athlete may live or train at a location where access is controlled by security personnel who will not permit access to anyone without first speaking to the Athlete or (for example) a team official.

This in itself is neither improper nor suspicious, but the DCO should be especially vigilant in such cases of any other circumstances which may be suspicious (such as a long delay between the security guard contacting the Athlete or team official and the DCO being given access to the Athlete). In this case, the DCO should provide a full report of such suspicious circumstances and should consider requiring the Athlete to give a second Sample.

The DCO does not necessarily have to be present at the location specified for the 60-minute time-slot from the beginning of the sixty minutes specified in order for the attempt to be reasonable. However, once he/she arrives at the location the DCO should remain at that location for whatever time is left of the 60-minute timeslot, ***and the DCO should ensure that he/she allows sufficient time to make a reasonable attempt to locate the Athlete during that remaining time****.*

For example, if the location specified is a sports center, and the Athlete has said he/she will be in either the gym or the pool or the changing room, then the Athlete may need to check each of those possible places, and so it is likely that more time will be required to make a proper attempt than if the location specified is the Athlete's house.

[Comment: The DCO should stay at the specified location for the remainder of the 60-minute timeslot even if he/she receives apparently reliable information that the Athlete will not be at the location during the 60-minute timeslot (e.g. because he/she is out of the country). This is to avoid any subsequent argument that the information received was in fact wrong and the Athlete turned up at the location after the DCO had left.]

If the specified location is the Athlete's house or other place of residence, the DCO should ring any entry bell and knock on the door as soon as he/she arrives. If the Athlete does not answer, the DCO may telephone the Athlete to advise him/her of the attempt in the closing five minutes of the 60-minute period. Such a call is not mandatory however, nor should it be used to invite the Athlete for Testing, but rather to potentially further validate that the Athlete is not present.

[Comment: If the Athlete merely specifies the sports center, and the number of potential locations within the sports center make it difficult for the DCO to find the Athlete within the 60-minute timeslot, the Athlete risks a Missed Test.]

Preferably, the DCO should wait somewhere close by (e.g. in his/her car) in a place where he/she can observe the (main) entrance to the residence. He/she should then knock/ring again a short time later (e.g. 15 minutes), and should keep doing so periodically until the end of the 60 minutes. At that point, he/she should try one last time at the end of the 60 minutes before leaving the location and completing an Unsuccessful Attempt Report.

If the DCO is told that the Athlete is not present at the specified location but can be found in an alternative location not far away, then the DCO should record this information (including the name, number and relationship to the Athlete of the person providing the information), but the DCO should not leave the specified location to go to try to find the Athlete, in case the Athlete is trying to get back to the specified location and the DCO misses him/her in transit.

Instead, the DCO should remain at the specified location for the remainder of the 60-minute timeslot. Thereafter, he/she is entitled to go to the alternative location (if so instructed by the ADO) to see if the Athlete can be located there for Testing. Even if that Athlete is located for Testing at the alternative location, however, and a Sample is collected, the Athlete is still liable for an apparent Missed Test and so the DCO should also provide an Unsuccessful Attempt Report to the ADO.

If the specified location for the 60-minute time-slot is a sports complex, it is the Athlete's responsibility to specify where in the complex he/she can be located. If the Athlete specifies a time when he/she knows he/she might be in one of several places within the location (e.g. the gym, or the treatment room, or the changing room), he/she should name each of them in the Whereabouts Filing, and the DCO should visit each of the places named, in turn.

In such circumstances, the Athlete takes the risk that the DCO might miss him/her in transit, in which case the DCO should file an Unsuccessful Attempt Report and the Athlete may have a Missed Test declared against him/her.

If the Athlete only specifies the sports complex for his/her 60-minute time-slot, and does not specify where in the sports complex he/she will be during the 60-minute timeslot, the DCO should make reasonable attempts to check each of the locations where the Athlete may be within the complex, but if notwithstanding those attempts the Athlete cannot be found then the DCO should file an Unsuccessful Attempt Report and the Athlete may have a Missed Test declared against him/her.

If there is a Public Address (PA) system at the venue, the DCO should consider asking for an announcement to be made, telling the Athlete to report to a particular meeting point, but without announcing the reason for the request. If necessary, that announcement could then be repeated at regular intervals for the remainder of the 60-minute timeslot.

Whatever the location specified, it may be appropriate for the DCO to speak to people he/she encounters during the attempt to see if they can assist in locating the Athlete. If so, the DCO should try to get the names and positions (e.g. neighbour, coach, receptionist) of the people with whom he/she speaks, for recording (along with relevant details of the conversations) on the Unsuccessful Attempt Report. The DCO should not identify the purpose of his/her visit, unless necessary for safety or security reasons.

The DCO should note any circumstances he/she observes during his/her attempt to test the Athlete that could be relevant.

For example, if the attempt is made at the Athlete's home, and no one answers the door, the DCO should note whether or not there are any lights on in the house, or if he/she notices any movement in the house. If there is a car in the driveway, the DCO might note the make/colour/licence plate number, and check whether the engine hood is warm, indicating that the car has been used recently. It is up to the DCO to gather such anti-doping intelligence as may be useful to the ADO. This information should be included in the Unsuccessful Attempt Report.

If the DCO locates the Athlete and is able to collect a Sample from him/her, but has suspicions of possible manipulation or Tampering, the DCO may require the Athlete to provide a second Sample (and further Samples if necessary) after the first. An example might be circumstances where it appears that the Athlete knew of the DCO's presence at the specified location early in the hour, but the Athlete did not make himself/herself available for Testing until late in the hour.

If the DCO is unable to locate the Athlete during the 60-minute timeslot, he/she should complete and submit an Unsuccessful Attempt Form to the ADO that ordered the mission as soon as possible, and in any event no more than three working days after the attempt.

The DCO should provide a detailed account in the Unsuccessful Attempt Report of exactly what he/she did during the 60-minute timeslot to try to find the Athlete. For example, if the attempt was at the Athlete's home, the DCO should note when and how many times he knocked on the door, where he/she waited in between attempts, etc). The DCO should specify exactly where he/she went, for how long, what he/she did, who he/she spoke to about where the Athlete might be (including the names of the people involved, and what was said."

VIII. MERITS

116. The Athlete appeals against the decision of the AIU Disciplinary Tribunal dated 22 October 2020. There is an appeal on liability and on sanction.

A. Liability

117. By way of preliminary matters, a number of things are common ground:

a. Article 2.4 of the ADR provides that an ADRV is committed upon: "*Any combination of three Missed Tests and/or Filing Failures, as defined in* [ISTI], *within a twelve-month period by an Athlete in a Registered Testing Pool*".

b. In this appeal, there is no challenge by the Athlete in respect of the Missed Test of 16 January 2019 or the Filing Failure of 26 April 2019; the challenge is limited to the Missed Test of 9 December 2019. It follows that, if the Missed Test of 9 December 2019 is sustained, then there will be three Missed Tests and/or Filing Failures within a 12-month period and an ADRV will have been committed. The Panel is therefore concerned, with respect to liability at least, solely with the question whether there was a Missed Test on 9 December 2019.

c. The Respondent bears the burden of establishing that an ADRV has been committed, and the standard of proof is whether the Respondent has established the ADRV to the comfortable satisfaction of the Panel, bearing in mind the seriousness of the allegation that is made.

d. In the event that an ADRV is sustained, ADR Article 10.3.2 provides that, because this is the Athlete's first anti-doping offence the period of ineligibility shall be two years, subject to a reduction down to a minimum of one year "*depending on the Athlete's degree of Fault*".

e. It is common ground that, pursuant to Appendix A of the Anti-Doping Regulations, the Athlete was required to do the following things:

i. He was required to make quarterly Whereabouts Filings that provided accurate and complete information about his whereabouts during the forthcoming quarter including identifying where he would be living, training and competing during that quarter so that he could be located for testing during that quarter at the times and locations specified.

ii. He was required to specify in the Whereabouts Filing for each day in the forthcoming quarter one specific 60-minute slot between 05:00 and 23.00 hours where he would be available at a specific location for testing (and if he did not so make himself available such location during the 60-minute time slot specified then that may be declared as a Missed Test).

118. As to the latter obligation, the Athlete appears to have been under the impression that it was sufficient to discharge his duty under Appendix A of the Anti-Doping Regulations and ISTI Annex I.3.2 if he were at the specified location at the same time as the DCO and that it was enough for him to be nearby his specified location and rely on the fact that he could return to the location within short order if notified of the need for a test.

119. In the Panel's view, properly understood, the requirement that an athlete must be available at a specific location for testing for a 60-minute period imposes a requirement on the athlete to be physically present at the specified location during the 60-minute period that has been specified by him or her. It is not enough that the athlete be nearby, such that he or she can get to the specified location if asked to do so within the 60-minute period. It is instead an obligation to be physically at the specified location, and to be accessible and available for testing at that specified location during the specified time.

120. This is reinforced by:

a. Anti-Doping Regulations, Appendix A, paragraph 3.2 to the effect that the athlete must be "*available and accessible*" at the specified location in one specific 60-minute time slot.

b. Anti-Doping Regulations, Appendix A, paragraph 3.4 which requires the athlete "*to provide sufficient information to enable the DCO to find the location, to gain access to the location and to find the athlete at the location*".

c. ISTI Annex I.3.2, pursuant to which an athlete is required to provide one specific 60-minute slot between 05:00 and 23.00 hours each day where "*the athlete will be available and accessible for Testing at a specific location*".

a. The comment to ISTI Annex I.3.2 which says *"The 60-minute time slot "anchors" the Athlete to a certain location for a particular day"* and thus makes plain that the requirement to provide a 60-minute window each day is to provide a guarantee that the athlete can be found at that certain location and that a sample can be collected then and there, and also to anchor the athlete to that certain location at one time in the day for the purposes not just of testing in the specified window but to make it easier to locate the athlete for testing outside the window as well.

121. It is, therefore, the Panel's view that the Athlete was required to be at his residential address and available to be tested there during the period specified by the Athlete on 9 December 2019, viz., between 7:15 and 8:15pm on the evening of 9 December 2019.

122. In any event, pursuant to the Appendix A of the Anti-Doping Regulations (para 3.8) and ISTI Annex I (I.3.6), it is a matter for the Respondent to prove the constituent elements of an ADRV. The Respondent must establish (the burden on it) each of the following things in order to sustain a charge of a Missed Test:

a. One, that when the Athlete was given notice that he had been designated for inclusion in the Registered Testing Pool, he was advised that he would be liable for a Missed Test if he was unavailable for Testing during the 60-minute time slot specified in his Whereabouts Filing at the location specified for that time slot. It appears to be common ground that this element was satisfied.

b. Two, that a DCO attempted to test the Athlete by visiting the Athlete's residential premises in Lexington, Kentucky on 9 December 2019 between 7:15 and 8:15pm, that being the location and time specified by the Athlete in his Whereabouts Filing for that day. Likewise, it is common ground that the DCO did so, although on the Athlete's primary case it is suggested that the DCO left before the end of the 60-Minute period.

c. Three, that during that specified 60-minute time slot, the DCO did what was reasonable in the circumstances (given the nature of the specified location) to try to locate the Athlete, short of giving the Athlete any advance notice of the test. This is the essential dispute in this case.

d. Four, that the Athlete has been given notice of the earlier unsuccessful attempts at testing the Athlete (i.e. in January and April 2019) in accordance with the requirements of paragraph 4.2. It is common ground here that such notice has been given.

e. Five, that the Athlete's failure to be available for testing at the specified location (i.e. his apartment) on 9 December 2019 during the specified 60-minute time slot was at least negligent; and, for these purposes, there is a rebuttable presumption that the Athlete has been negligent upon proof of the matters set out at subparagraphs (a) to (d) above. This presumption is rebuttable by the

> Athlete if he can establish that any failure on his part (i) to be available for testing between 7:15 and 8:15pm on that day at his apartment and (ii) to update his Whereabouts Filing to give notice of a different location where he would be available for testing during a specified 60-minute time slot on that day was not caused (or contributed to) by his negligence.

123. The elements put in issue by the Athlete are the third and fifth, as set forth in the prior paragraph. It is common ground that no issue arises with respect to first, second or fourth issues identified in the prior paragraph.

124. As to the third issue, the Parties are divided in that the Athlete says that the Respondent has not discharged its burden in this respect, while the Respondent says that DCO did what was reasonable in the circumstances to try to locate the Athlete, short of giving the Athlete any advance notice of the test. Indeed, the Athlete says, positively, that the DCO did not do so.

125. As to the fifth issue, the primary case on the part of the Athlete is that there was no failure on his part to be available for testing at his apartment on 9 December 2019; to the contrary, he was there from approximately 8:00 until shortly after 8:15pm, and the DCO was not.

126. Accordingly, these are the issues in these proceedings in relation to liability:

a. One, on 9 December 2019 did the DCO do what was reasonable in the circumstances to try to locate the Athlete, short of giving the Athlete any advance notice of the test?

b. Two, did the Athlete fail to be available for testing at his apartment on 9 December 2019 during the specified 60-minute time slot?

c. Three, if so, was that failure "at least negligent"?

127. In order to decide these questions, it is necessary for the Panel to form a view as to what took place on the evening of 9 December 2019. On this question, the Panel has read and heard the evidence of the Athlete himself and the DCO, Mr George, and has read and considered the witness statement of the BCA, Ms Freese. The Panel has also had regard to the evidence given by these witnesses at the hearing before the AIU Disciplinary Tribunal.

128. The starting point is that, by his Whereabouts Filing for the 4th quarter 2019, the Athlete gave notice that he was available for testing on 9 December 2019 for the 60-minute period from 7:15pm - 8:15pm at his residential address in Lexington, Kentucky.

129. The Athlete lives in a gated community. There is an off-street parking area for non-residents. There is a gate across the roadway into the complex, which gate requires an access code. To the side of the gate is a footpath that allows access to pedestrians on foot. There is no gate across that footpath.

130. The evidence of Mr George is that on 9 December 2019 he arrived at the premises "*at around 7:00-7:05*" and that Ms Freese was already there. Mr George and Ms Freese

parked in the visitor parking area outside the gate. Mr George asked someone he understood to be a staff member of the residential complex (who had approached him) about getting access and he was told that, if he did not have a code to the gate, he would have to take the footpath alongside the gate. The DCO and BCA did that and made their way to the Athlete's apartment on foot, noticing when they arrived that the apartment was dark and there was no car parked in front of the (closed) garage at the ground floor beneath or adjacent to the living area of the Athlete's apartment.

131. According to Mr George and Ms Freese, Mr George knocked on the front door of the Athlete's apartment and rang the doorbell at 7:15pm. Mr George's evidence was to the effect that he could not hear the doorbell ringing inside so it was unclear to him if it was working, but he made "*multiple knocks*" on the door and rang the doorbell every 10 minutes during the entire one-hour period. It was, in fact, put to Mr George in cross-examination that he "*knocked loud enough so that it could be heard on any of the three levels of the townhouse*", with which he agreed, and that any issue with the doorbell "*would not have prevented the occupant of the townhouse from knowing that he* [the DCO] *was there*", with which he also agreed.

132. Mr George and Ms Freese both gave evidence that there was no answer and no sign of anyone inside the apartment. The officers remained standing outside the apartment. It is their evidence that they left at 8:15pm and at no time did they see any sign of the Athlete. They made their way back to their cars in the parking area, from where Mr George took a photograph time-stamped at 8:21pm. (It would of course have been a relatively easy matter for the DCO (or the BCA) to render certain the times at which they arrived and left the apartment by the simple device of a time-stamped photograph on arrival and departure. No explanation was put forward as to why this was not done, nor why it is not part and parcel of every testing attempt.)

133. Mr George and Ms Freese gave clear and consistent evidence that they were at the Athlete's premises for the entire 60-minute period from 7:15 to 8:15pm on 9 December 2019.

134. The DCO completed an "Unsuccessful Attempt Report" for 9 December 2019 (undated but said to have been completed contemporaneously) which corroborated his evidence.

135. The Athlete's evidence is that he went by car to the Fayette Mall (on Nicholasville Road, Lexington, Kentucky near his apartment) on the late afternoon/ evening of 9 December 2019 (he could not recall when he left home for this trip) in order to finish up his Christmas shopping and "*to run my errands for the day*". It appears that the Athlete was keen to complete his Christmas shopping ahead of time because it was an extraordinarily busy period for him.

136. He says that he made purchases at Macy's, a Dead Sea Beauty Products kiosk (the receipt is time-stamped 7:13pm), and at the Apple Store (the receipt is time-stamped 7:27pm), before going to Chipotle Mexican Grill (also in the Fayette Mall) to get dinner to go (the receipt is time-stamped at 7:53:46pm). He then went home, which trip he says took "*5-6 minutes at the most*" and he arrived home "*between 7:58pm and 8:05pm, somewhere in that range*", and parked his car outside.

137. According to the evidence of the Athlete, he did not see anyone standing outside his apartment and he said that, if the DCO and BCA were there, he would have seen them. Indeed, he agreed that "*it would have been impossible to miss*" the DCO, had he been standing there.

138. The Athlete opened the garage door, walked through, and made his way upstairs into the apartment. He turned on the television to the Monday night NFL football game, and sat down at his table and ate his dinner from Chipotle. He says that he saw the pre-match build-up and the kick-off and that, shortly after the kick-off, he decided to head out to his local Walmart deli to get some supplies for training for the next and subsequent days. He is not entirely certain when he left, but it was shortly after the kick-off.

139. He drove from his apartment to Walmart, parked, made his way around the store buying 16 or 17 items, then paid for them via the self-service scanner. The transaction was completed at 8:22pm and he drove home.

140. The Athlete says therefore that he was home during the 60-minute slot, albeit not for all of it, and that the DCO was not at his premises.

141. The Panel is faced with a stark conflict in the evidence between the Athlete on the one hand and the DCO and BCA on the other. By its written submissions, the Respondent contended that, where there is a conflict between the evidence of a DCO and an athlete there is, in effect, a presumption in favour of the DCO evidence, rebuttable only by cogent evidence on the part of the athlete. The Respondent, rightly, did not press that position at the hearing. It is in the Panel's view entirely misconceived and does not in any event accord with the authorities relied upon by the Respondent. The position must be, as the Respondent came to accept, that it is a matter for the Panel to form a view on the evidence and to weigh it according to its context and circumstances.

142. Having read and heard the evidence, the Panel does not accept the Athlete's evidence on this issue. The Panel is of the clear view that the evidence of the DCO and the BCA is to be preferred. There is no reason at all not to accept the evidence of the officers that they were at the Athlete's premises for the 60-minute time slot from 7:15 to 8:15pm on 9 December 2019. By contrast, the Panel finds the Athlete's account wholly implausible. In the Panel's view, it is wholly implausible that the Athlete arrived home when he says that he did only to leave very shortly thereafter to go shopping for various items at Walmart, and that his account that he left the apartment, drove to Walmart and bought 16 or 17 grocery items all inside seven minutes is not to be believed. The Walmart trip had some life when it was said (incorrectly) that the trip to Walmart took place later that evening at around 10:00pm. But as soon as the Walmart transaction was clocked at 8:22pm, the Athlete's story became untenable.

143. The ready and plausible explanation for the various movements on this evening is that the Athlete did in fact stop into Walmart on his way home from the Fayette Mall and that he did not make it home until sometime after 8:22pm, i.e., outside his 60-minute window.

144. There are other difficulties with the Athlete's evidence, in that the account of what took place appears to have taken various forms over time. Ready examples are:

a. When the Walmart transaction first came to light, it was explained away as irrelevant because it took place at 10:00pm that night. It was only when the Walmart receipt entered the fray with its time-stamp of 8:22pm did the story change to a short, quick trip after 8:15pm, with the obvious difficulty that, for his account to hold up, the Athlete had to be at his apartment at 8:15pm but at Walmart at 8:22pm.

b. The Athlete's Appeal complained that the Athlete was at home for at least some of the 60-minute window, "*during which he was not able to hear the DCO knocking or the doorbell ringing from his position on the second floor of the townhouse*". By contrast, it was put to Mr George in cross-examination that he, Mr George, "*knocked loud enough so that it could be heard on any of the three levels of the townhouse*" and he agreed that any issue with the doorbell "*would not have prevented the occupant of the townhouse from knowing that he was there*". This suggested that it came to be accepted on behalf of the Athlete that, if the Athlete were home, he would have heard the DCO knocking on the door.

145. In the result, the Panel finds, as a matter of fact, that there was no evidence supporting any claim that the Athlete was at the location identified by him at any time during the 60-minute slot specified by him for testing on 9 December, 2019.

146. As noted, to sustain a charge of a Missed Test, the Respondent must show that this failure on the part of the Athlete to be available for testing at the specified location on 9 December 2019 during the specified 60-minute time slot was "*at least negligent*". Put another way, there is no strict liability here but, rather, there must be a measure of negligence – a lack of due care – in respect of the Athlete's failure before the Athlete can be held liable. The Panel notes that this standard is separate, and different, from the standard of "significant fault" that applies under the WADC and its implementing legislation in determining whether there should be a reduction of a sanction.

147. The Panel is of the clear view that the Athlete's failure in this respect was negligent. In the Panel's view the Athlete did not take sufficient care to ensure that he was available at the location during the specified time on that day. The Panel has found that he was absent for the entire 60-minute period. But even on the Athlete's own case, he decided to make a shopping trip to the mall rather than remain at home for the entire period. It is obvious that the Athlete took, and was prepared to take, a risk that he would not be back in time if a test attempt was made that evening during his self-designated time period.

148. The Panel also notes that the Athlete accepted that he was required to be available in person at his specified location; not nearby, but at the location. Moreover, on 9 December 2019 the Athlete was sitting on two Whereabouts Failures. He must have known that a third would give rise to an ADRV, with a potential period of ineligibility of two years (the Panel is confident in its view that he was aware of this risk because he had been charged with three missed tests previously by USADA, though they later withdrew their charge upon closer review of the relevant rules). The Athlete nevertheless decided to spend his time shopping at Fayette Mall, with all of the attendant risk in so doing. To take that risk was careless.

149. The sole remaining question on liability is, therefore: did the DCO do what was reasonable in all the circumstances to try to locate the Athlete at the specified location?

150. By way of generality, it is important to note that the right question to be asked is whether or not, on 9 December 2019, Mr George did what was reasonable in all the circumstances to try to locate the Athlete at the specified location to collect a sample. It is not, as has sometimes been said by the Athlete, whether the DCO did what was reasonable in the circumstances to collect a sample from the Athlete.

151. This is obvious when one looks at the common-sense question to be asked by a DCO as set forth in the ISTI Guidelines -- "*Given the nature of the location specified by the Athlete, what do I need to do to ensure that if the Athlete is present, he/she will know that a DCO is here to collect a Sample from him/her?*"

152. Thus, the question is: taking into account (a) the three-level townhouse specified by the Athlete and (b) the time of day specified by the Athlete, 7:15-8:15pm, what did Mr George need to do to ensure that if the Athlete was at home the Athlete would know that Mr George was there to collect a sample?

153. It is submitted by the Athlete that, had he received a call from the DCO five minutes before the end of the hour window, "*whether he was in his apartment, at Wal-Mart, or on the road there or back, he absolutely would have submitted to a sample collection within the 60-minute window*".

154. There are two immediate difficulties for the Athlete. The first is that he was not at home, as the Panel has found. The second is it has been conceded by the Athlete that if the DCO knocked on the door loudly enough and often enough, anybody inside the home would know someone was at the door. It follows that if he were at home then he would have known that Mr George was there, so that it also follows that Mr George did what was reasonable in all the circumstances to try to locate the Athlete at the specified location.

155. The Athlete contends that, even so, it was incumbent on Mr George to call the Athlete at some point in time during the window on the basis that, if he were not at home, he could have made his way home to be tested and that the failure on the part of Mr George to call him meant that there was no reasonable attempt on the part of Mr George to locate the Athlete on 9 December 2019.

156. The fatal flaw in the Athlete's argument is that it fails to appreciate that the common-sense question to be posed by the DCO, set forth above, is founded on the premise that the athlete in question is present at the specified location (or in the immediate vicinity). As the Panel has concluded above, this means what it says: the athlete is required to be present at the location specified by him or her and not somewhere else, even if that somewhere else is a five-minute drive away.

157. In this respect, the Athlete relies on Annex I to ISTI, which is entitled "Code Article 2.4 Whereabouts Requirements" and, in particular, the comment to Annex I.4.3(c). These are set out above in full and upon the WADA Guidelines.

158. Both the ISTI and the WADA Guidelines make clear that: (a) telephone calls on the part of a DCO are not mandatory but discretionary; (b) the purpose of a call to the athlete is not to invite the athlete for testing but to verify whether or not the athlete is at the specified location; and (c) it is not necessary for an ADO to prove that the DCO made a call in order to sustain a Missed Test (more particularly in order to prove that a DCO did what was reasonable to try to locate the athlete at the specified location) and the absence of a call is not available as a defence to a charge of Missed Test (on the same basis), when they provide in pertinent part as follows:

a. The comment to Article I.4.3(c) of ISTI states that "*Where an Athlete has not been located despite the DCO's reasonable efforts, and there are only five minutes left within the 60-minute time slot, then as a last resort the DCO* ***may (but does not have to)*** *telephone the Athlete (assuming he/she has provided his/her telephone number in his/her Whereabouts Filing)* ***to see if he/she is at the specified location.***" (emphasis added).

b. The final sentence of the comment to Article I.4.3(c) states in terms that the absence of a telephone call is absolutely discretionary and will not be defence to a Missed Test: "*Because the making of a telephone call is discretionary rather than mandatory, and is left entirely to the absolute discretion of the Sample Collection Authority, proof that a telephone call was made is not a requisite element of a Missed Test, and the* ***lack of a telephone call does not give the Athlete a defence to the assertion of a Missed Test.***" (emphasis added)

c. The WADA Guidelines include a specific paragraph on the steps that are likely to be reasonable when the "*specified location is the Athlete's house or other place of residence*". The relevant paragraph states that "*the DCO should ring any entry bell and knock on the door as soon as he/she arrives. If the Athlete does not answer, the DCO* ***may telephone*** *the Athlete to advise him/her of the attempt in the closing five minutes of the 60-minute period.* ***Such a call is not mandatory however, nor should it be used to invite the Athlete for Testing, but rather to potentially further validate that the Athlete is not present.***" (emphasis added).

159. The Athlete also invokes materials issued by other International Federations and ADOs in relation to what they say said about what a DCO should do in order to make a reasonable attempt to locate an athlete (and conduct a test) under their jurisdiction. Reliance is placed on the following:

a. The International Tennis Federation's "Out-of-Competition 'Whereabouts' testing protocol for DCOs" provides, inter alia, that, "*Where you have made a reasonable attempt ... but have not been able to find the Player, and you cannot see any other way of locating the Player, as a last resort only, five (5) minutes before the end of the 60-minute time slot you* ***shall*** *telephone the Player, first at the location in question (if a number for that location has been provided in the whereabouts filing), and then (if that is unsuccessful) by calling the Player's mobile phone*".

b. USADA's guidelines, entitled "Locating Athletes for Out-of-Competition Testing", provide that "*Within the last five minutes of the Athlete's 60-minute*

window, if determined the Athlete is still unavailable, the DCO should place a call to the primary number listed on the Athlete's quarterly Whereabouts Filing".

160. The difficulty for the Athlete is that these rules on testing are immaterial to this dispute, at least with respect to the question of what was required by the DCO on this occasion in this case. As explained by Mr George, the WADC (plus ISTI) provide the framework for anti-doping testing but each federation/ADO is free to construct its own rules so long as those rules are compliant with the WADC. It follows that it was entirely a matter for the AIU, as the entity requesting the test in question, to design its rules as it saw fit (assuming compliant), and to adopt its own position on the making of calls by the DCO.

161. Having said that, the Panel does accept that the different regimes, adopted by the AIU on the one hand, and USADA and others on the other hand, must give rise to uncertainty in the mind of any athlete as to what is required on any given occasion for the athlete to comply. It is not for the Panel, of course, but it is obvious that the more harmonisation there is across the various international regimes, the very much better it would be for everyone with an interest in these matters. It is not a matter, however, that bears on liability; instead it is to be brought to account when having regard to sanction and degree of fault. The Panel returns to this aspect below.

162. The Athlete relies on ITF v. Cornet (SR/Adhocsport/12/2018) and what is said there that the 'no advance notice testing' rule should be administered flexibly. Cornet is, however, a very different case on the facts and it is certainly not authority for the proposition that a call should be made in every instance where the DCO cannot locate the athlete. That case does however assist the Panel by drawing attention to the following matters of general application:

a. Out-of-competition testing is an important element of the WADC and the general rule of no advance notification to the athlete is the "*central element*" of that regime.

b. While whereabouts requirements are onerous on athletes, they are necessary in order (1) to facilitate no advance notification out-of-competition testing, and (2) to allow athletes to claim with credibility that they are subject to testing at any time so that the public can have confidence that the athletes are clean.

c. The definition of 'no advance notice' is clear – it requires that the athlete is continuously chaperoned from the moment of notification through to sample provision and that the chaperone be in sight of the athlete at all times.

d. If a call is placed by the DCO then it follows that the athlete does have notice and is not in the chaperone's sight at all times.

163. As noted, the only criticism of the DCO here that remained in issue on this appeal is that the DCO did not make a telephone call to the Athlete. In the Panel's view, that criticism is misplaced. As is made plain by the ADR, the Anti-Doping Regulations, ISTI and the WADA Guidelines, there is no requirement on the part of a DCO to place a telephone call, and it is entirely a matter for the discretion of the ADO. Here, the ADO took the view that the test should be without notice of any sort, something perfectly

permissible under the Respondent's rules. In any event, the stated purpose is not to call the athlete in – as would have been the case here because the Athlete was not at the specified location – but as a tool for the DCO when there is no apparent sign of the athlete at the location as a means to confirm, as a last resort, that the athlete is not there.

164. In the result, the Panel is of the clear view that, on 9 December 2019, the DCO did do what was reasonable in all the circumstances, given the nature of the residential premises and the time of day, to try to locate the Athlete at his home in Lexington, Kentucky. On the evening of 9 December 2019, the DCO knocked on the door and rang the bell in such a manner, as is accepted by the Athlete, that if anyone were home at the time they would have been made aware that the DCO was there. The Panel is more than satisfied that, had the Athlete been at home, the attempts made by the DCO on the night in question would have been perfectly adequate to let the Athlete know that someone was at the door. Had he been at home and answered the door, the test could have been conducted without issue.

165. Accordingly, the Panel finds that the Respondent has established, to the comfortable satisfaction of the Panel, that each of the ingredients of an ADRV has been proved.

Sanction

166. The Athlete also appeals the sanction imposed by the AIU Disciplinary Tribunal.

167. The Parties' submissions on sanction are set out above at some length. In précis, the Athlete submits that his degree of fault here is at the low end of the spectrum so that a sanction closer 12 months is appropriate, while the Respondent submits that the Athlete's degree of fault is at the high end and that there is no reason here to reduce the two-year sanction.

168. The following general matters are common ground between the Parties:

a. Article 10.3.2 provides that the period of ineligibility is two years subject to reduction down to a minimum of one year, depending on the Athlete's "*degree of Fault*".

b. This 'flexibility' is available to the Panel here as there is no suggestion that there has been a pattern of last-minute whereabouts changes or that other conduct raises a serious suspicion that the Athlete was trying to avoid being available for testing.

c. When assessing the Athlete's degree of fault in this case, the Panel should take into account the circumstances surrounding all three 'offences' (i.e., the Missed Test of 16 January 2019, the Filing Failure of 26 April 2019 and the Missed Test of 9 December 2019).

d. "Fault" is a defined term in the WADC and the ADR. It is defined in both as "*any breach of duty or any lack of care appropriate to a particular situation*".

e. The ADR (within the definition of "fault") identifies a number of factors that are to be taken into account by a tribunal in considering an athlete's degree of breach

of duty. These are by way of example and are plainly neither exhaustive nor intended to be so. The example factors are:

i. the athlete's experience;

ii. whether the athlete is a minor;

iii. any special considerations such as impairment;

iv. the degree of risk that should have been perceived by the athlete; and

v. the level of care and investigation exercised by the athlete in relation to what should have been the perceived level of risk.

f. The definition of "fault" also provides guidance by saying that the circumstances to be taken into account when assessing fault "*must be specific and relevant to explain the Athlete's ... departure from the expected standard of behaviour*". Matters not of this character are to be ignored. As a result, "*for example, the fact that an Athlete would lose the opportunity to earn large sums of money during a period of Ineligibility, or the fact that the Athlete only has a short time left in his or her career, or the timing of the sporting calendar*" are not to be taken into account.

169. As noted, fault means "*any breach of duty or any lack of care appropriate to a particular situation*". The duties on an athlete are set forth in the ADR, the Anti-Doping Regulations and in Annex I to ISTI.

170. The Panel notes the following express duties:

a. ADR Article 1.7: "*All Athletes ... shall be responsible for knowing what constitutes an Anti-Doping Rule Violation under these Anti-Doping Rules... .*"

b. Paragraph 1.1 of Appendix A to the Anti-Doping Regulations:

"*An Athlete who is in a Registered Testing Pool ... is required:*

(a) to make quarterly Whereabouts Filings that provide accurate and complete information about the Athlete's whereabouts during the forthcoming quarter, including identifying where he will be living, training and competing during that quarter, and to update those Whereabouts Filings where necessary so that he can be located for Testing during that quarter at the times and locations specified in the relevant Whereabouts Filing (see paragraph 3 of this Appendix below). A failure to do so may be declared a Filing Failure for the purposes of Article 2.4.

(b) to specify in his Whereabouts Filing, for each day in the forthcoming quarter, one specific 60-minute time slot where he will be available at a specified location for Testing: (see paragraph 4 of this Appendix below). This does not limit in any way the Athlete's obligation under the Rules to be available for Testing at any time and place upon request by an Anti-Doping Organisation

with Testing Authority over him. Nor does it limit his obligation to provide the information specified in paragraph 3 of this Appendix as to his whereabouts outside of that 60-minute time slot. However, if the Athlete is not available for Testing at such location during the 60-minute time slot specified for that day in his Whereabouts Filing, that failure may be declared a Missed Test for the purposes of Article 2.4 [of ADR]."

c. ISTI Annex I Article I.1.1:

"*An Athlete who is in a Registered Testing Pool is required:*

a) to make quarterly Whereabouts Filings that provide accurate and complete information about the Athlete's whereabouts during the forthcoming quarter, including identifying where he/she will be living, training and competing during that quarter, and to update those Whereabouts Filings where necessary, so that he/she can be located for Testing during that quarter at the times and locations specified in the relevant Whereabouts Filing, as specified in Article I.3. A failure to do so may be declared a Filing Failure; and

b) to specify in his/her Whereabouts Filings, for each day in the forthcoming quarter, one specific 60-minute time slot where he/she will be available at a specific location for Testing, as specified in Article I.4. ... [I]f the Athlete is not available for Testing at such location during the 60-minute time slot specified for that day in his/her Whereabouts Filing, that failure may be declared a Missed Test."

d. ISTI Annex I Article I.3.4: "*It is the Athlete's responsibility to ensure that he provides all of the information required in a Whereabouts Filing accurately and in sufficient detail to enable any Anti-Doping Organization . . . to locate the Athlete for Testing on any given day in the quarter at the times and locations specified by the Athlete in his Whereabouts Filing for that day, including . . . the 60-minute time slot. . . ..*" The comment to that Article provides that "*Where an Athlete does not know precisely what his whereabouts will be at all times during the forthcoming quarter, he must provide his best information, based on where he expects to be at the relevant times, and then update that information as necessary ... .*"

e. ISTI Annex I Article I.6.4: "*In all cases ...: (a) each Athlete in a Registered Testing Pool remains ultimately responsible at all times for making accurate and complete Whereabouts Filings, whether he/she makes each filing personally or delegates the task to a third party. ... and b) such Athlete remains personally responsible at all times for ensuring he/she is available for Testing at the whereabouts declared on his/her Whereabouts Filings. ...*"

171. If it were necessary to summarise these various duties as they apply to the Athlete (an international level athlete in the Registered Testing Pool), it could fairly be said that the Athlete was under a duty to inform himself of what amounts to an ADRV under the ADR (and with that to understand the Whereabout requirements), to provide accurate and up-to-date whereabouts information at all times, and to make himself available for testing each day in the 60-minute window specified by him and at the place specified

by him. In this respect, the Panel agrees with what was said in USADA v Rollins (AAA No. 01-17-001-3244 at [7.7]) that "*We find that the level of care that is expected from a person such as [the Athlete] is at the very least the athlete's compliance with the rules requiring accurate whereabouts information, and the athlete's being available for testing where she has declared she would be in her Whereabouts Filing*".

172. As the Panel has concluded, certainly the failure on the Athlete's part to be at his apartment during the specified hour on 9 December 2019 was negligent; put another way, there has in this case been a breach by the Athlete of his duty of care, and therefore a departure by him from the standard of behaviour expected of him. In accordance with the guidance (within the definition of "fault") in the ADR on assessing fault, the task for the Panel is to take account of all specific and relevant matters that go to explain that departure by the Athlete.

173. As noted, it is common ground that this task is to be undertaken in respect of each of the three incidents that go to make up the ADRV. Having said that, because the focus before this Panel was almost exclusively upon the facts, matters and circumstances surrounding the events of 9 December 2019, the Panel is not in any position to form a considered view of those earlier incidents, and these are put to one side.

174. What then are the specific and relevant matters that go to explain the Athlete's departure from the expected standard of behaviour in respect of the Missed Test of 9 December 2019? When one focuses upon this question, it is a relatively straightforward exercise of weighing in the balance such specific matters, both for and against.

175. The Athlete first relies on Rollins and submits that, as there, the Panel should take into account: (a) that it was the Athlete's first offence after years of frequent testing, both in and out of competition; (b) that there was no evidence of the Athlete seeking to avoid testing, masking drug use, or using drugs or otherwise seeking to evade doping controls; and (c) the fact that the Athlete has been subjected to frequent testing so that if he has three Whereabouts Failures to his name within a 12-month period that is but a small fraction of the times that he has been tested.

176. The Panel acknowledges that this is the Athlete's first offence and that, despite being subjected to frequent testing, there is no evidence of the Athlete seeking to avoid being tested, or masking drug use, or using drugs or otherwise seeking to evade doping controls. Indeed, the Panel would go so far as to say that all of the evidence in this case suggests that, to the contrary, the Athlete is a clean athlete and there is no room for suggestion otherwise.

177. But none of these matters is a specific matter that provides any measure of explanation as to the Athlete's departure from the standard of behaviour expected of him on 9 December 2019 and, for that reason, these matters are not to be brought to account in assessing the Athlete's degree of fault in relation to the 9 December 2019 Missed Test.

178. The Athlete next submits that the Panel should take into account that it has been the Athlete's "*custom and experience during his extensive drug testing history that a DCO making a test attempt will make a call to him if he cannot otherwise be located, prior to concluding the test attempt*". In this respect the Athlete relies on the following arguments:

a. The fact that there have only been two "no call" testing attempts made on the Athlete in his career, the other of which was after the 9 December 2019 test attempt.

b. It is said that this experience is consistent with that of many other athletes. The Athlete puts forward an analysis of 25 "Unsuccessful Attempt Reports" from other whereabouts cases conducted under the authority of various different ADOs from 2015 to 2020. It is said that this analysis shows that:

   i. the DCO called the athlete during the 60-minute window in 14 out of 16 of the test attempts conducted in these cases;

   ii. in each of the two instances in which the DCO did not call the athlete during the 60-minute window, an individual at the location placed a call to the athlete and the DCO spoke to the athlete over the telephone;

   iii. in 12 out of 16 of these cases, more than one call was placed in an attempt to locate the athlete in question;

   iv. the athletes had multiple Filing Failures and/or Missed Tests counted against them; and

   v. in the result, each athlete received some manner of telephone contact from the DCO.

179. On the back of this experience, it is submitted that, despite the fact that a telephone call during the 60-minute window may not be mandatory, it was nevertheless reasonable for the Athlete to expect such a call – and, had the DCO placed such a call to the Athlete on 9 December 2019, the Athlete would have been available at his stated location for the sample collection and a successful sample collection would have been conducted.

180. The Panel accepts this submission in part. The Panel accepts that it is right to take account of the Athlete's own particular experience in this respect because it is fair to say that such experience had an influence on the Athlete's decision on 9 December 2019 to be away from home during the specified time slot – and is therefore a matter that is both specific and relevant to explain the Athlete's conduct on 9 December 2019.

181. The Athlete's particular experience was as follows. First, in the long history of testing performed on the Athlete, he had received on numerous occasions a call from the DCO during the 60-minute time slot and never before 9 December 2019 had there been a no-call instruction: indeed, there have only been two "no call" testing attempts made on the Athlete in his entire career, one on 9 December 2019 and one after 9 December 2019. Second, while the Respondent was keen to stress that the Athlete had received a considerable amount of training in whereabouts matters, closer examination of the training material in fact suggests that the training received by the Athlete reinforced the practice of a DCO placing a call before the expiry of the 60-minute slot.

182. In this respect, the Panel notes the following:

a. All of the training material in evidence relates to training by USADA and not by the Respondent. As an aside, when asked whether the Respondent had provided training to the Athlete on the Respondent's doping control process, Mr Roux's answer was that he had "*no idea*".

b. USADA's guidelines (entitled "Locating Athletes for Out-of-Competition Testing") in fact provide that a DCO should call an athlete at the 55-minute mark of the hour if the athlete has not yet been found: "*Within the last five minutes of the Athlete's 60-minute window, if determined the Athlete is still unavailable, the DCO should place a call to the primary number listed on the Athlete's quarterly Whereabouts Filing.*"

c. The training material expressly noted that a telephone call would be made in the last five minutes. This was said in relation to notification for those athletes in an international testing pool (i.e., the Athlete): "*Phone call made to athlete in last five minutes of 60-minute time slot. The phone call is for confirming unavailability of athlete, not to locate athlete for testing.*"

183. On balance, therefore, the Panel is prepared to take these matters into account as providing some explanation for the Athlete's conduct on 9 December 2019.

184. For its part, the Respondent submits that, by the time 9 December 2019 came around, whatever had happened in the past, the Athlete was sitting on two Whereabouts Failures and he should have been on "high-alert". The Panel agrees. There is no doubt that the Athlete should have been acutely aware of the fact that he was on two out of three strikes and that the consequences of a third were dire. Quite plainly, he should have taken every step within his control to ensure that a third Whereabouts Failure did not happen. It is right to weigh that in the balance when assessing the Athlete's degree of fault in respect of the incident on 9 December 2019.

185. Accordingly, it is a matter for the Panel to form a view of the appropriate sanction when each of these matters is brought to account. The Panel could find no cases setting forth a standard for assessing fault in these matters, though there are myriad outcomes and facts and circumstances.

186. In Cilic v International Tennis Federation CAS 2013/A/3327 and CAS 2013/A/3335, in a case that was not concerned with whereabouts matters and with a period of ineligibility of 0-24 months, the CAS panel calibrated "Significant Fault" according to three levels as "significant" (16-24 months, with a midpoint of 20 months), "normal" (8-16 months, with a midpoint of 12 months) and "light" 0-8 months, with a midpoint of 4 months).

187. That is a helpful guide, though the calibration would necessarily be different here in light of the different possible period of ineligibility of 12-24 months; thus (albeit using slightly different labels) the following levels of fault would correspond to whereabouts cases: "high" (20-24 months, with a midpoint of 22 months), "medium" (16-20 months, with a midpoint of 18 months), and "low" 12-16 months, with a midpoint of 14 months).

188. The most important factors for the Panel in this context are as follows:

a. One, as the Panel has now found, the Athlete was not at home during the 60-minute time slot on 9 December 2019, as he should have been, and he saw fit to take a risk that a DCO would call for testing that evening. The Panel is not concerned here with an emergency or unforeseen outing of some sort (an urgent trip to the doctor, for example), or a family situation or crisis, but instead with a leisurely outing to the local shopping mall which could readily have been done at a different time. Nor is the Panel here concerned with a frustrated attempt to return home during the 60-minute window. By contrast, it seems that the Athlete either chose not to make it home in time or let time run away on him; either way it was careless in the extreme.

b. Two, as noted, the Athlete should have been on 'high-alert' on the evening of 9 December 2019, given the two strikes against him. The fact that he was not is impossible to understand.

c. Three, whatever the formal position under the Respondent's rules and regulations relating to the making of a telephone call, right up until the evening of 9 December 2019 the practice deployed when testing the Athlete more often than not included, when a DCO could not immediately locate the Athlete, a telephone call to the Athlete -- and this practice was expressly underscored by the very training materials used by USADA in training the Athlete on his whereabouts obligations (and relied upon by the Respondent for establishing that the Athlete had received ample education about his whereabouts-related obligations). For the evening of 9 December 2019, the evidence is that, had he not been instructed not to call, the DCO would have called the Athlete and that, had the Athlete been called, he would have been able to return to his apartment during the 60-minute window and a test would have been concluded.

189. On balance, there is enough here, in the Panel's view, to shift the Athlete's degree of fault away from the highest end of the spectrum. There is a very high responsibility on all athletes (including the Athlete) to comply with the whereabouts requirements at all times but, at the same time, there is an equally high responsibility on the Respondent here (and on any federation) to ensure that the rules with which the athletes must comply are clear in both word and application in order to ensure that the doping control programme does not become arbitrary and capricious.

190. In the result, the Panel takes the view that, upon taking into account the specific and relevant factors which go to explain the Athlete's departure from the standard of behaviour expected of him in respect of his conduct on 9 December 2019, the Athlete's degree of fault falls to be characterised as "medium", i.e. within the 16-20 months band, with a midpoint of 18 months.

191. The Panel, therefore, partially upholds the appeal and reduces the period of ineligibility from 24 months to 18 months.

IX. COSTS

192. This appeal is brought against a disciplinary decision issued by an international sports-body. Therefore, according to Article R65.1 and 65.2 of the CAS Code, the proceedings

are free of charge, except for the court office fee, which the Athlete has already paid and is retained by the CAS.

193. The CAS Code provides the following in relation to legal and other costs:

Article R65.3: "*Each party shall pay for the costs of its own witnesses, experts and interpreters. In the arbitral award, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the complexity and the outcome of the proceedings, as well as the conduct and financial resources of the parties.*"

194. In consideration of the outcome of this procedure, highlighting the collegiality, cooperation and courtesy of the Parties and Counsel and noting the streamlined fashion by which this appeal was heard and determined, the Panel considers that the Athlete shall pay CHF 4,000 to the Respondent as a contribution to its legal and other costs.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Mr Christian Coleman against World Athletics on 19 November 2002 is partly upheld.

2. The decision of the AIU Disciplinary Tribunal on 22 October 2020 is set aside and replaced as follows:

   Mr Christian Coleman has committed an Anti-Doping Rule Violation under Article 2.4 of the World Athletics Anti-Doping Rules and shall serve a period of ineligibility of eighteen (18) months as from 14 May 2020.

3. The award is pronounced without costs, except for the Court Office fee of CHF 1,000 (one thousand Swiss Francs) paid by Mr Christian Coleman, which is retained by the CAS.

4. Mr Christian Coleman is ordered to pay World Athletics a total amount of CHF 4,000 (four thousand Swiss Francs) as contribution towards the expenses incurred in connection with these arbitration proceedings.

5. All other motions or prayers for relief are dismissed.

Seat of arbitration: Lausanne, Switzerland
Date: 15 April 2021

THE COURT OF ARBITRATION FOR SPORT

James Drake QC
President of the Panel

Jeffrey G. Benz
Arbitrator

Prof. Ulrich Haas
Arbitrator