

# Madrid Court orders release of Operación Puerto evidence

The Spanish Police operation against Doctor Eufemiano Fuentes and his elaborate doping network, Operación Vuelta, has taken another turn. Last week the Provincial Criminal Court of Madrid overturned a lower court decision acquitting Doctor Fuentes and José Ignacio Labarta Barrera of all charges relating to the violation of Spain's public health regulations contained in the Spanish Criminal Code. The decision presents a new opportunity for doping authorities around the world to combat doping. Paolo Torchetti and Enric Ripoll, Sports Lawyer at Ruiz-Huerta & Crespo, seek to unpack and explain the decision, whilst highlighting some of the issues arising from this latest decision in a case which now spans ten years.



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## The Madrid Court ruling

Doctor Fuentes and Labarta, a cycling team director and coach, were charged with 'public health' offences pursuant to the Spanish Criminal Code. Fuentes and Labarta were accused of organising a complex system of blood transfusions whereby athletes would have their blood, at a time when they had high red blood cell counts, stored and later reinjected at the beginning of a competition in order to enhance their performance. The provisions of the Spanish Criminal Code required that the perpetrators deal in 'substances' or 'chemical products' that 'endanger one's health.' The legal dispute centered on whether the transfusion of an athlete's own blood technically qualified as such a 'substance' or 'chemical product' as defined by the relevant statutes. It must be noted that although the words 'substance' and 'chemical product' are a literal translation from Spanish, it is possible that the intention of the statute was to criminalise the sale of certain drugs and medicines.

In April 2013 the Court of First Instance found Fuentes and Labarta guilty of the alleged "public health offences." Fuentes was sentenced to one year imprisonment and was prohibited from practicing as a sports doctor for four years. Labarta was sentenced to four months in jail and suspended for four months as a coach. The Provincial Criminal Court of Madrid, on 14 June, subsequently overturned the Lower Court's decision and acquitted both men. The Provincial Appeal Court based its decision on the basis that a patient's own blood used in a transfusion does not qualify as a 'substance' or 'chemical product' that endangers one's health as defined in the Criminal Code. The Spanish authorities sought to apply an expansive

definition of 'substance' and 'chemical product' that was initially intended to target those dealing in illegal drugs or non-authorized or prohibited medicines.

The Court based its reasoning on the principles embodied in Article 25.1 of the Spanish Constitution which enshrines the fundamental principle that no one can be convicted of an act or omission that did not constitute a criminal offence under the law in force at the time that the act or omission was committed. In the Court's opinion the definitions of 'substance' and 'chemical product' as used in the Criminal Code were overly broad and vague. In this sense the Court looked to Spanish administrative regulations to inject meaning into the terms and concluded that the convictions of Fuentes and Labarta violated their fundamental rights as protected by Spanish law. Informed by these regulations, the Court determined that the terms 'substance' and 'chemicals' were too vague to include a patient's medicine that was otherwise unaltered. This reasoning was a direct rejection of the First Instance Court's findings that explicitly determined that a patient's own blood used in a transfusion satisfies the definitions of 'substance' and 'chemical product'.

The domestic legal implication of this ruling is that the Appeal Court specifically reaffirmed the general principle of legal certainty to a set of regulations that apply to the sporting world. The result of the decision demonstrates that at the time, 2006, Spanish legislation was clearly insufficient to deal with sporting fraud and the perpetration of doping and illegal performance enhancement. As we shall see below, Spanish laws have since been amended and reformed to criminalise such actions at both the professional and amateur level.

### A 10 year saga

Operación Puerto, initiated in 2006, led to a scandal involving the world's most successful cyclists, which resulted in the suspension of athletes, the revocation of sponsorship of Europe's largest cycling teams by major corporations and the resignation of cycling executives. Despite this initial impact on the cycling world, Fuentes and Labarta have been embroiled in this legal battle for 10 years. The length of time elapsing from investigation to acquittal is the direct result of prosecutors being ill equipped with specific laws to criminalise behaviour that they wanted to be prohibited. The imprecise nature of the legislation severely hampered the prosecution's ability to achieve convictions and whose persistence to prosecute under the Criminal Code available to them led to the ineffective and inefficient conduct of criminal proceedings.

The first charges against Fuentes and Labarta brought 10 months after the start of Operación Puerto were initially abandoned as it was determined that there was no violation of the Criminal Code. Days after prosecutors filed an appeal the case was reopened in 2008. The charges were then dropped again for the same reason. Once again the same criminal allegations were reopened in 2009 for a third time. The most recent rendition of the proceedings took 25 hearings in which Fuentes and Labarta were finally convicted in 2013 before being acquitted. The ambiguity and imprecise nature of the criminal provisions, along with the insistence to apply such vague provisions, protracted this dispute and stretched the criminal proceeding on for almost 10 years.

Facing this obvious legal vacuum the public health provisions of the Spanish Criminal Code have since been amended. In February 2007,



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the 'facilitation' of 'substances aimed to enhance athletes' performance [by] increasing their capabilities, putting in danger their own health' was criminalised. It is likely that had these regulations been in force at the time, Fuentes and Labarta would have been convicted. In addition Spanish law has extended further protections to amateur athletes in the form of changes implemented in March 2015 in which it became illegal 'to prescribe, provide, dispense, supply, administer or facilitate non-competitive sportspeople, non-federated athletes, substances or prohibited pharmacological groups, without therapeutic justification, and non-regulatory methods for increasing their physical capabilities or to modify the results of competitions, tamper with documents, or manufacture substances.' A conviction further to that new law imposes a sentence of a minimum of six months to a maximum of six years imprisonment.

As Spanish law has been clarified since the beginning of Operación Puerto, it is possible that Fuentes and Labarta would have been convicted had these versions of the statutes been applicable at the time. Although the doping industry is always attempting to find new ways to stay several steps ahead of the authorities, it appears that the Spanish authorities now have the legal tools at their disposal to combat such doping networks. The criminalisation attached to actions to 'enhance athletes' performance by increasing their capabilities' is sufficiently broad to include the transfusion of blood, but not so vague as to be found outside of the Spanish constitution as there is a clear set of prohibited substances. In effect, the criminalisation of 'cheating' is a welcomed event. At this point in time, although it is possible that

athletes will continue to cheat, it is unlikely that another Operación Puerto with all its legal difficulties will occur again. Spain has suffered growing pains and the legislature has reacted positively in attempting to promote the protection of athletes' health.

Ultimately it must be noted that, in the author's humble opinion, it is unlikely that further Spanish criminal prosecutions will come out of Operación Puerto. The Appeal Court has been decisive in its ruling that the successful convictions of Fuentes and Labarta would be unconstitutional, and that those persons were selling such procedures for commercial benefit, unlike the athletes involved.

### Next steps for the World Anti-Doping Agency and other federations

The Courts also had to deal with the issue as to what should be done with the bags of blood that were seized during the investigation. The First Instance Court rejected the Spanish Anti-Doping Agency's request to hand over the 211 bags with samples of blood plasma and red cell concentrate and ordered that the evidence be destroyed. That decision was appealed by the Spanish Anti-Doping Agency, the Union Cycliste Internationale ('UCI'), the Italian National Olympic Committee ('CONI'), the World Anti-Doping Agency ('WADA') and by the prosecution.

On appeal the Provincial Criminal Court of Madrid ruled that the confiscated evidence be delivered to the Royal Spanish Cycling Federation ('RFEC'), WADA, the UCI and CONI. The Court declared that the purpose of the order is to direct "(a)ttention to the aim pursued to fight against doping, which undermines the essential ethical value of sport, which is fair play to prevent

competition on equal terms.” The Court also cited the importance of a deterring effect where there is a “danger that other athletes may be tempted to take drugs and a negative social message is issued to the effect that the end justifies any means.”

Since this decision both the UCI and WADA have publicly stated that it is their intention to work with the Spanish Anti-Doping Agency and explore whatever legal options the various organisations have at their disposal. However, this pursuit for justice does have several legal hurdles. Firstly, many of the athletes have retired and unless they are involved in the international sporting pyramid in another capacity, WADA and other federations have no real legal mechanism to sanction their behaviour.

In addition, Article 17 of the WADA Code requires that an anti-doping rule violation proceeding must be commenced ‘within ten years from the date the violation is asserted to have occurred.’ This too is a significant legal hurdle in attempting to open new proceedings within sports bodies with the use of this evidence. The federations, however, are not without options where there is a real possibility to argue that the 10 year limit is inapplicable due to force majeure. The Court of Arbitration for Sport (‘CAS’) has explained that force majeure is an event which leads to non-performance “due to causes which are outside the control of the parties and which could not be avoided by exercise of due care” where “the unforeseen event must also have been unavoidable in the sense that the party seeking to be excused from performing could not have prevented it.” Finally CAS has specified that “force

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majeure is not intended to excuse any possible negligence or lack of diligence from a party, and is not applicable in cases where a party does not take reasonable steps or specific precautions to prevent or limit the effects of the external interference.” This is a significant legal hurdle. WADA and the other organisations would have to successfully argue that the delay to the proceedings was outside of their control and that they were diligent in the pursuit of the evidence as they were active parties to the proceedings attempting to recover the evidence.

Ultimately both decisions are final and cannot be appealed. Whether WADA, the UCI or any other organisation has the legal authority to release the names of the athletes linked to Operación Puerto without a proceeding or applicable sanction is debatable. Whatever the outcome, it is probable that the legal road paved by Operación Puerto is not over as the fight to combat doping in sport and to protect clean sport appears to be never ending.

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