

Golden Gate University School of Law GGU Law Digital Commons

Publications

Faculty Scholarship

12-8-2012

When Can the Baseball Writers For the Hall of Fame Consider Cheating Through PED Use, Or Not?

Wes R. Porter

Golden Gate University School of Law, wporter@ggu.edu

Dan Dressman

Follow this and additional works at: <http://digitalcommons.law.ggu.edu/pubs>

 Part of the [Other Law Commons](#)

Recommended Citation

Porter, Wes R. and Dressman, Dan, "When Can the Baseball Writers For the Hall of Fame Consider Cheating Through PED Use, Or Not?" (2012). *Publications*. Paper 519.

<http://digitalcommons.law.ggu.edu/pubs/519>

This Blog Post is brought to you for free and open access by the Faculty Scholarship at GGU Law Digital Commons. It has been accepted for inclusion in Publications by an authorized administrator of GGU Law Digital Commons. For more information, please contact jfischer@ggu.edu.

When Can The Baseball Writers For The Hall Of Fame Consider Cheating Through PED Use, Or Not?

DEC 8 Posted by [chuckbooth3023](#)

[Follow](#)

Saturday, December 8th, 2012



Follow "ML"

Get every new post to your Inbox.

Join 15,978 other followers

Enter your email address

Sign Up

Powered by [Follow](#)

Barry Bonds once admitted to a Federal Jury that he used PED's. As MLB's ALL-Time HR King with 762 Round-Trippers, will the BBWAA ever consider looking past this and elect him into Cooperstown?—Photo by sportsagent.com

Prof. Wes Reber Porter and Dan Dressman (Special Guest Writers):

[Follow @WRPspdADVOCACY](#) and [Follow @DannyDressman](#)

When the 2013 MLB Hall of Fame Ballot was released this past November, the heated discussion began about which controversial candidates, if any at all, would be inducted into Cooperstown (HOF). While isolated athletes have come up in previous years, this year represents a first real tension between the modern era of baseball – the “steroid era” – and traditional standards for admission into the Hall. The 537 baseball writers are, and should be, entrusted to weigh cheating and use of PEDs against the HOF’s criteria of “character,” “sportsmanship” and “upholding the integrity of the game” (the integrity standards). These writers each will struggle, however, with a preliminary question that falls outside of their expertise: **under which circumstances may a HOF voter consider, at all, a candidate’s connection to cheating and performance-enhancing drugs (PEDs)?**

For each candidate, varying levels of proof or mere suspicion relate to their use of PEDs. [Mark McGwire](#) admitted in a 2010 interview to using PEDs when he broke the Home Run record in 1998. [Rafael Palmeiro](#) was suspended for 10 games in 2005 for failing an MLB administered drug test for steroids. Other candidates faced criminal obstruction charges premised on their use of PEDs – [Barry Bonds](#) was convicted on one count of obstruction but found not guilty on several other charges, while [Roger Clemens](#) was indicted, yet acquitted of perjury. [Sammy Sosa](#) was implicated for steroid use in the Mitchell Report, which was explicitly not to be used criminally, and the New York Times also reported that Sosa was one of 104 players who failed an anonymous drug test for steroids in 2003, before MLB’s formal testing program was implemented. Voters will consider others amidst a cloud of suspicion simply because they played in this era – [Mike Piazza](#) was named in Jeff Pearlman’s book (The Rocket That Fell To The Earth-2009) because he supposedly claimed, off the record to reporters, that he used PEDs and [Jeff Bagwell](#) was close friends with admitted PED user [Ken Caminiti](#).



Roger Clemens won 7 Cy Young Awards with his Career Record of 354-188 (658). He may try to make a comeback in 2013, which if successful, would set back his 5 year BBHOF window all over again. —AP

The voting process is, and will always be, highly subjective and personal to the writer. Yet, for generations, BBWAA voters have, for the most part, followed a consistent formula of evaluating the candidate’s ability and contribution to his team(s) and focusing on his overall statistical achievements. However, this year, and for years to come, numerous HOF voters have gone on the record stating they will afford less weight to the candidates overall statistical achievements, and afford greater weight to how the candidates use of PEDs impacted the “integrity of the game.” For instance, this year, the statistics would ordinarily make some candidates’ inductions a slam dunk; Bonds is the All-Time HR leader and a 7-time MVP; Clemens is a 354 game winner and a 7-time [Cy Young](#) Award winner; and Palmeiro has over 3,000 career hits. More directly intertwined are the four members of the 500 HR club, who are tied to PEDs, on this year’s ballot. Each writer’s decision about what *they consider* as adequate proof of cheating or PED use becomes critical. It could be as, if not more, important than MLB’s revered statistical benchmarks to get into the Hall.



Photo by [rsnalberta.blogspot.com](#)

Consider the following quote BBWAA member and HOF voter Danny Knobler gave to the New York Times in November,

“My feeling is that if I’m voting against you, it’s because I believe there’s a **reasonable likelihood** that you cheated the game. If that’s the case, I don’t want to vote you into the Hall of Fame.”

Knobler’s quotes struck me, not as a sports fan, but as a law professor who teaches the rules of evidence that apply within the court of law. With the continuum discussed above, which examples represent a “reasonable likelihood” of cheating for Knobler? How about each of the 537 writers? On voting day, January 9, 2013, where should Knobler and other BBWAA writers, as a preliminary matter, draw the line for when they can consider a candidate’s cheating or suspected PED use (at all), or not? Without some guidance, it is inevitable that each writer will factor the varying levels of suspicion related to cheating and PED use differently. By analogy, the rules that apply in a court of law can assist the writers with, at least, this threshold question: **can the writers consider the PED use, at all, given what we know now?**

Before a jury decides a case on the merits, the trial judge often makes preliminary determinations about what is appropriate to the jury’s consideration. The rules of evidence guide the judge and govern which information the jury may consider at trial, or not. More specifically, most jurisdictions have a rule governing whether the jury can consider, for a specific purpose, “other crimes, wrongs or acts” of the person on trial (popularly referred to as “bad acts” evidence). Applying the trial judge’s preliminary determinations to this evidentiary rule about bad acts, by analogy, will assist the writers with the continuum of proof and suspicion about cheating and PED use.

The analogy goes as follows. The baseball writers voting on this year’s class for the HOF are the jurors and, as such, must decide the ultimate issue of induction into the Hall on the merits of the candidate’s statistics (their ability). This year, **if the candidate cheated and used PEDs** (that is, a “bad act” occurred), for the specific purpose of evaluating the HOF’s integrity standards, then the writers will decide if, and to what extent, that information bears on their vote for admission into the Hall.

In a court of law, the trial judge, with his or her legal training and years of experience, would make the preliminary determination when the proof of the “bad act” is sufficient for the jury’s consideration, or not. Our judicial system cannot bog down with many “mini-trials” to determine whether the other act occurred. Instead, the rules permit the judge to uniformly decide – for all jurors – whether a “reasonable juror” could find that the bad act occurred. If yes, then the jury may consider it; if no, then the jury may not consider it – at all.

Based upon the information available to us now, we have decided, as a uniform litmus test for all writers, whether a reasonable voter (a HOF juror) *could* find that the bad act occurred by competent evidence (without the need for dozens of “mini-trials”).

As a preliminary determination, we find that all 537 writers (our HOF jury) **may consider** the fact that a candidate cheated and/or used PEDs under the following circumstances.

1. any candidate that *publicly* admitted to using PEDs (McGwire)
2. any candidate that was convicted of an obstruction charge in a criminal court, based upon a denial about PED use (Bonds)
3. any candidate that failed a MLB drug test after 2004 as part of the MLB Mandatory Drug Testing Program (Palmeiro)

Each writer, for these categories above, then must decide the **weight** he or she will afford to that evidence against the HOF’s integrity standard.

As a preliminary determination, we find that all 537 writers (our HOF jury) **may not consider, at all**, the fact that a candidate cheated and/or used PEDs under the following circumstances.

1. any candidate charged criminally by grand jury (a probable cause finding) with an obstruction charge based upon a denial about PED use, yet not found guilty at trial (Clemens).
2. any candidate merely named in the Mitchell Report, because investigatory agencies have countless investigations that do not materialize into anything, much less indictments (see #1 above). (Sosa) Simply put, an investigation is not itself competent evidence.
3. any candidate that failed an MLB drug test before the Mandatory Drug Testing Program was implemented in 2004 (Sosa again – strike 2?)
4. any candidate who purportedly admitted to PED use off the record or, not publicly, but only according to a third party (Piazza).
5. any candidate merely suspected as using based on appearances or relationships with other admitted PED users (Bagwell).



Rafael Palmeiro had 520 HRs (12th ALL-Time) and 3020 Hits (24th ALL-Time) for his career. Numbers that would be a lock for Cooperstown. However, he was suspended in 2005 for failing a drug test and now may never be inducted into the BBHOF. Photo by [thecubanhistory.com](#)

Some readers of this column will conclude that these imported legal standards may result in some unfairness: the HOF voters’ will properly consider cheating and PED use for McGwire, Bonds, and Palmeiro, likely keeping them out of the Hall; and the voters, despite the information available to them, including their own suspicions, will not consider cheating and PED use for Clemens, Sosa, Piazza and Bagwell, likely clearing their path into the Hall (or, at least, allowing writers to evaluate them on their numbers alone).

I can only add that some candidates, such as Sosa, are not home free. The voters have information independent from the issue discussed above that they should consider against the HOF’s integrity standards. Sosa cheated when he used a corked bat and then offered the public incredible explanations about it. If a candidate claims to have *never* taken PEDs, yet failed a drug test, even before MLB’s formal testing program was implemented, then that too may be considered as the player’s credibility bears on the integrity standards. How about a candidate not implicated in cheating or PED use, yet inappropriately lobbying the voters to consider the insufficient evidence of our latter category during voting? (Can you say jury tampering [Curt Schilling](#)?)

It is doubtful that our proposed standards would cure all defects to the HOF voting system. It is virtually impossible for BBWAA writers, who are fans of baseball, to vote on a purely objective basis. Many lawyers have the similar gripes about bias in jury trials. At least, in making a preliminary ruling on the “admissibility” of a candidates’ purported PED use, this proposal would assure that all voters consider the same information before voting. If voters are considering a candidates’ character and integrity for the HOF, it is imperative that, if not MLB, then the writers themselves take steps to ensure that the HOF voting system also “upholds the integrity of the game.”



Mike Piazza has been linked to and admission (off the record) of using PED's during his career. This will probably not go down favorably with the BBWAA. Mike Piazza hit 427 HRs in his MLB Career (397 as a Catcher) to go along with a .308 Avg and 1335 RBI. Photo by [blog.peacemagazine.com](#)

***** The views and opinions expressed in this report are those of the author and do not necessarily reflect the views of [mlbreports.com](#) *****

A big thank-you goes out to **Professor Ben Porter and Dan Dressman** for preparing today’s featured article at the MLB Reports. It is their hope that this article be re-blogged and distributed as much as humanly possible. Please just make sure that you always give the gentlemen their due credit for a great piece!

Wes Reber Porter teaches evidence and trial advocacy as an Associate Professor of Law and the Director of the Litigation Center at Golden Gate University School of Law in San Francisco, CA.



Dan Dressman is a 2012 Judge Lee Baxter Graduate Fellow in Litigation and former baseball standout in California and for the University of Notre Dame.