

WHY WADA SHOULD RECLASSIFY COCAINE AS A "SPECIFIED SUBSTANCE" - THE INEQUITABLE CASE OF JOSÉ PAOLO GUERRERO¹

This article puts forward the authors' position that WADA should reclassify cocaine as a "specified substance". Specifically, with regards to the sport of football, it examines:

- The case of José Paolo Guerrero;
- Other Court of Arbitration for Sport (CAS) cases that have wrestled with the sanctioning of footballers with the presence of cocaine in their body (Jobson Leandro Pereira de Oliveira; Brian Fernández; José Enrique Angulo Caicedo; Adrian Mutu); and
- Why WADA should introduce a new category of "substances of abuse" to deal with recreational drug use.

Since the first World Anti-Doping Agency (WADA) Prohibited List was published in March 2004,² the presence of cocaine in an athlete's urine sample has been deemed a more serious offense than the presence of other substances of abuse like cannabinoids or narcotics. While cannabinoids and narcotics have always been classified as "specified substances", or ones less likely to be used as a performance enhancer, cocaine has always been classified as a "non-specified substance", or one more likely to be used as a performance enhancer.³ As a "non-specified substance", cocaine is in the same category as anabolic steroids, testosterone and Human Growth Hormone.⁴ Cocaine is categorized as a non-specified substance despite studies done on the potential effects of cocaine use by athletes have shown repeatedly that cocaine use does not improve performance⁵ and anecdotal evidence from the

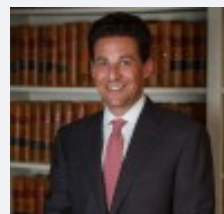
¹ This has been previously published on [LawInSport](#)

² World Anti-Doping Agency Prohibited List (2004).

³ World Anti-Doping Agency Prohibited List (2018), https://www.wada-ama.org/sites/default/files/prohibited_list_2018_en.pdf (last accessed 19 Dec 2018)

⁴ Pursuant to the WADA [Technical Document TD2018MRPL](#), cocaine has a reporting limit of 50 nanograms per milliliter, meaning that the presence of cocaine or its metabolite in an amount under 50 nanograms per milliliter in an athlete's urine is not an anti-doping rule violation.

⁵ *Recreational drug use and sport: Time for a WADA rethink?* Waddington, et al. (2013) at 2.



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jurisprudence that suggests cocaine is not being used by athletes to improve performance.⁶ The classification of cocaine as a non-specified substance has significant consequences. The minimum sanction for a “non-specified” substance, such as cocaine, is 12 months (save for the extremely rare instance where an athlete’s period ineligibility is eliminated because the athlete establishes that he or she bears no fault for the presence of cocaine in their body (i.e. the case of tennis player Richard Gasquet who tested positive for cocaine by kissing a woman).⁷ The minimum 12-month sanction for a cocaine positive (under the No Significant Fault or Negligence provision under the WADA Code (**WADC**)) is in stark contrast to the minimum sanction for a cannabinoids or narcotics positive, which is a warning. Moreover, despite the above noted issues an athlete cannot challenge the classification of cocaine as a “non-specified substance”. Article 4.3.3 of the WADC provides:

4.3.3 WADA’s determination of the Prohibited Substances and Prohibited Methods that will be included on the Prohibited List, **the classification of substances into categories on the Prohibited List**, and the classification of a substance as prohibited at all times or In-Competition only, **is final and shall not be subject to challenge by an Athlete or other Person** based on an argument that the substance or method was not a masking agent or did not have the potential to enhance performance, represent a health risk or violate the spirit of sport.⁸ (emphasis added)

The case of José Paolo Guerrero at the Court of Arbitration for Sport

The CAS Panel that presided over the case of Peruvian football hero José Paolo Guerrero earlier this year noted cocaine’s classification as a non-specified substance and the infallibility of that classification. The Guerrero CAS decision, which banned Mr. Guerrero for 14-months and overturned FIFA’s decision to ban Mr. Guerrero for 6-months (despite accepting that a tea was the source of the cocaine metabolites and that Mr. Guerrero did not intend to enhance his performance) was released on 14 May as Mr. Guerrero was preparing to represent Peru in the World Cup which began a month later:⁹

Even though the classification of cocaine as a non-specified substance, in contrast to other plant-based prohibited substances which are classified as specified substances, is open to question, it must be recognized that the criteria for including substances on the WADA Prohibited List (and, implicitly, their classification within it) are the result of

⁶ For example: *ITF v. Gasquet*, CAS 2009/A/1926 & 2009/A/1930 as well as *Canadian Centre for Ethics in Sport v. Shawnacy Barber*, SDRCC DT 16-0249 (2016), both cases involving athletes ingesting cocaine by means of kissing a woman and therefore lacking any element of trying to enhance performance. See also *WADA v./ USADA & Thompson*, CAS 2008/A/1490, in which an 18-year old athlete consumed a small amount of cocaine on a high school graduation party and where the Panel held that there was a “*lack of intention to influence or enhance his performance at the relevant time*”.

⁷ See *ITF v. Gasquet*, CAS 2009/A/1926 & 2009/A/1930. In *Gasquet*, an athlete who tested positive for cocaine had his period ineligibility eliminated pursuant to Article 10.4 of the Code (No Fault or Negligence) because the athlete could not reasonably have known or suspected even with the exercise of utmost caution that he would test positive for cocaine by kissing a woman in a Miami nightclub. See also *Canadian Centre for Ethics in Sport v. Shawnacy Barber*, SDRCC DT 16-0249 (2016) where an athlete who tested positive for trace amounts of cocaine had his period ineligibility eliminated pursuant to Article 10.4 of the Code (No Fault or Negligence) because he ingested the cocaine by way of a “contaminated kiss” with a woman.

⁸ World Anti-Doping Code (2015), <https://www.wada-ama.org/sites/default/files/resources/files/wada-2015-world-anti-doping-code.pdf> (last accessed 19 Dec 2018)

⁹ *José Paolo Guerrero v. FIFA*, CAS 2018/A/5546 (& *WADA v. FIFA & José Paolo Guerrero*, CAS 2018/A/5571) at Paragraph 18, [http://www.tas-](http://www.tas-cas.org/fileadmin/user_upload/CAS_2018.A.5546_CAS_2018.A.5571_Award_FINAL.pdf)

[cas.org/fileadmin/user_upload/CAS_2018.A.5546_CAS_2018.A.5571_Award_FINAL.pdf](http://www.tas-cas.org/fileadmin/user_upload/CAS_2018.A.5546_CAS_2018.A.5571_Award_FINAL.pdf) (last accessed 19 Dec 2018)





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the application of rational criteria (see Article 4.3.1 WADC 2015) and a challenge to either is expressly proscribed (Article 4.3.3). The different classification designedly carries with it different consequences, which the Panel is not free to ignore.¹⁰

The *Guerrero* CAS Panel clearly wrestled with the inequity of cocaine's minimum 12-month sanction but determined in the end that it was required to adhere to the stricture of the WADC and the WADA Prohibited List:

[T]he Panel cannot be tempted to breach the boundaries of the WADC (or FIFA ADR [Anti-Doping Rules]) because their application in a particular case may bear harshly on a particular individual. Legal certainty is an important principle to depart from the WADC would be destructive of it and involve endless debate as to when in future such departure would be warranted. A trickle could thus become a torrent; and the exceptional mutate into the norm.

....

It is in the Panel's view better, indeed necessary, for it to adhere to the WADC. If change is required, that is for a legislative body in the iterative process of review of the WADC, not an adjudicative body which has to apply the *lex lata*, and not some version of the *lex ferenda*.¹¹

While it was not up to the *Guerrero* CAS Panel to determine the "*lex ferenda*" or "the law as it should be"¹² as compared to the "*lex lata*" or "law as it is"¹³ it is up to the WADA and its decision makers to determine the "*lex ferenda*" and whether cocaine's continued classification as a non-specified substance makes any sense.

In the authors' view, WADA's unfettered authority - which led to the inequitable *Guerrero* decision - also raises an important issue regarding the legitimacy of the anti-doping rules to begin with. In the authors' view, neither Mr. Guerrero - as a professional football player - nor the players' union collectively representing professional football players had a material say in the creation, execution or amendments to the WADC or the FIFA ADR, even though those rules affected his most fundamental (human) rights. This begs the questions: why should unilateral anti-doping rules apply to professional football players? And would the system be more just if the professional football players and their representatives played an active part in crafting the rules?

In the authors' view, without an active role, professional football players - as well as other athletes - will continue to be subject to inequitable sanctions like the 14-months given to José Paolo Guerrero for cocaine. To show how inexplicable this is, if Mr. Guerrero instead had tested positive for another substance of abuse, like a cannabinoid or narcotic (including heroine), he would have received a sanction of less than 3 months instead of 14 months.

And the José Paolo Guerrero decision is not the first at the CAS to raise the issue of cocaine's uniquely harsh treatment by the WADA (and FIFA).

¹⁰ *Id*

¹¹ *Id.* at Paragraph 19.

¹² WashULaw, 'The law as it is, the law as it should be', <https://law.wustl.edu/harris/lexlata/> (last accessed 19 Dec 2018)

¹³ *Id.*





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The Court of Arbitration for Sport has long wrestled with cocaine's classification as a non-specified substance in cases involving football players

In the 2010 case of Brazilian footballer Jobson Leandro Pereira de Oliveira, the CAS Panel sanctioned an athlete for 2-years after he tested positive for cocaine.¹⁴ WADA successfully argued it was irrelevant that an athlete might be addicted to cocaine or whether the drug had performance-enhancing effects since only WADA could decide to re-classify cocaine.¹⁵ While unsuccessful, the player's 2010 plea for a 6-month sanction is worth considering in light of the recent Guerrero Panel's call for a new look at cocaine's classification:

"First, a two-year suspension on this cocaine-addicted Player in treatment is not capable of safeguarding his physical health and mental integrity; on the contrary, it would "undoubtedly endanger his health, and even maybe put his own life at risk". Second, a two-year suspension would not be necessary to uphold and preserve the ethics of sport, to safeguard his and other player's physical health and integrity and to ensure that all competitors have an equal chance. Taking into account the lack of performance enhancing effects of cocaine, imposing a six-month suspension on the Player would be sufficient to reach the aforementioned aims. Third, the constraints from that the Player would suffer as a result of a two-year suspension imposed on him, a cocaine addicted person in treatment, would not be justified by the overall interest in upholding and preserving the ethics of sport, of safeguarding the physical health and mental integrity of players and of ensuring that all competitors have an equal chance".¹⁶

Mr. Oliveira's call in 2010 to consider the health of an athlete who is addicted to cocaine is very prescient since a stated priority in the revision process to the WADC is an emphasis on health as a rationale. As the Summary of Major Proposed Changes for the 2021 WADC explains, "health has been moved to the top of the list of rationales for the Code."¹⁷ Mr. Oliveira's other arguments are, in the authors' view, as equally as persuasive today: that the integrity of competition would not be harmed if cocaine were a "specified substance" since cocaine use does not enhance performance; and that a harsher ban for cocaine cannot be justified by the overall interest in upholding and preserving the ethics of sport since athletes receive lesser bans who knowingly ingest other substances of abuse.

In the 2016 case of Argentine footballer Brian Fernández,¹⁸ the CAS Panel noted that WADA had considered creating a "substances of abuse" category that would have included cocaine and carried with it a sanction range of reprimand to 12-months but that WADA had rejected the proposal:

¹⁴ WADA v. *Jobson Leandro Pereira de Oliveira, CBF and STJD*, CAS 2010/A/2307, https://arbitrationlaw.com/sites/default/files/free_pdfs/cas_2010.a.2307_wada_v_ilpo.pdf (last accessed 19 Dec 2018)

¹⁵ *Id.* at Paragraph 10.

¹⁶ *Id.* at 13.

¹⁷ Summary of Major Proposed Changes to the First Draft of the 2021 WADC, <https://www.wada-ama.org/en/resources/the-code/world-anti-doping-code-2021-code-review-summary-of-major-proposed-changes> (last accessed 19 Dec 2018)

¹⁸ *Fédération Internationale de Football Association (FIFA) v. Confederación Sudamericana de Fútbol & Brian Fernández*, CAS 2016/A/4416, <https://jurisprudence.tas-cas.org/Shared%20Documents/4416.pdf> (last accessed 19 Dec 2018)





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“In an initial version of the WADC (version 2.0) both drugs (Cannabinoids and Cocaine) were being treated together as “Substances of Abuse” making it clear that recreational drug use merits “special treatment”. The (draft) provision dealing with “Substances of Abuse” (that provided a sanction in the range of a reprimand up to one year) was criticized by stakeholders in the revision process, in particular because it suggested rehabilitation at the expense of the athlete. Stakeholders feared that requiring an athlete to foot the bill for a rehabilitation program would result in discriminatory treatment among athletes with different financial means. Thus, the original concept of “Substances of Abuse” was dropped in the final version of the WADC with the consequence that the general provisions on fault-related reductions would apply to recreational drug use”.¹⁹

WADA's rejection of the “substances of abuse” concept (and the idea of a 12-month maximum sanction for cocaine) meant that Mr. Fernández was subject to a minimum 12-month sanction. Mr. Fernández was sanctioned for 18-months after he admitted to intentionally using cocaine.²⁰

Another example of the devastating nature of the current cocaine-sanctioning regime was the December 2017 decision involving José Enrique Angulo Caicedo, a 22-year old Ecuadorian football player who tested positive for cocaine. Following an appeal from FIFA against a decision of CONMEBOL to ban him for 12-months, a CAS Panel imposed a 4-year sanction on Mr. Angulo. The CAS Panel found that the explanations provided by Mr. Angulo on how the substance entered his body did not correspond with the scientific evidence in handing out a maximum ban.²¹ Mr. Angulo, who had just been transferred to the Spanish side Granada CF, saw his contract terminated because of the sanction imposed for his use of cocaine. It is not unthinkable that a 4-year suspension in football will end his career.

Obviously, sanctions imposed on players for anti-doping violations have massive consequences. For another example, one glance at the Adrian Mutu saga clearly shows that the consequences can be much more severe for a person than their mere suspension from playing football; in *Mutu*, his use of cocaine not only led to his suspension, but ultimately also to the termination of his employment contract and an award ordering Mutu to compensate Chelsea with an amount of EUR 17 million.

Therefore, it is not difficult to conclude that the consequences of an anti-doping rule violation are far graver than the mere suspension itself. What is more, looking at a “substance of abuse” violation and the fact that the use of said substances can indeed be addictive, it is arguably the worst possible solution to exclude an addicted player from the last bit of order in his life (his work) and prevent him from making a living, whilst not offering him a suitable rehabilitation program in return. In that sense, the argumentation put forward in by the player in the *Jobson Leandro Pereira de Oliveira* case was, in the authors' view, spot on.

Why does WADA continue to classify cocaine as a non-specified substance that gives panels less flexibility when making a sanctioning decision?

¹⁹ *Id.* at Paragraph 16.

²⁰ *Id.* at Paragraph 20.

²¹ Case not published, but CAS media release http://www.tas-cas.org/fileadmin/user_upload/Media_Release_Spanish_5144.pdf (last accessed 19 Dec 2018).





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Article 4.2.2 of the WADC explains that all prohibited substances are classified as “specified substances” except for substances in the classes of anabolic agents and hormones along with stimulants deemed to be “non-specified” on the Prohibited List.²² According to WADA, “[t]he purpose of the sub-classifications of “Specified” or “Non-Specified” on the Prohibited List is to recognize that it is possible for a substance to enter an athlete’s body inadvertently, and therefore allow a tribunal more flexibility when making a sanctioning decision”.²³

No actual guidance exists, however, on why WADA considers cocaine to be a “non-specified” substance that allows panels less flexibility when making a sanctioning decision. After all, it is possible for cocaine to enter an athlete’s body inadvertently and, in fact, the *Guerrero* Panel found that Mr. Guerrero inadvertently ingested cocaine metabolites while drinking tea in Peru. By the same logic, cannabinoids and narcotics should also be non-specified since intentional use of those substances is likely in most cases.

Still, when the 2019 Prohibited List goes into effect on January 1st, cocaine will remain a non-specified substance that carries with it a minimum 12-month sanction. The next opportunity to reclassify cocaine as a “specified substance” will be the 2020 Prohibited List. WADA’s annual revision process for 2020 will begin with an initial meeting in January and conclude with the publication of the 2020 Prohibited List on 1 October 2019. Between January and October, 2019, WADA’s [Prohibited List Expert Group](#)²⁴ will provide a list of recommended changes to the Prohibited List to WADA’s [Health, Medical and Research Committee](#)²⁵ who will ultimately make recommendations to the WADA Executive Committee during its September 2019 meeting on the changes to the 2020 Prohibited List.

WADA must reclassify cocaine so that it is no longer a “non-specified substance”

In the authors’ opinion, given the *Guerrero* Panel’s open questioning of the classification of cocaine as a non-specified substance, the WADA Prohibited List Expert Group should take a hard look at the current classification of cocaine and ask itself why cocaine continues to be classified as a drug that carries with it an inequitably harsh sanction.

In the authors’ view, it is difficult to establish what actually has been gained with the 14-month suspension of Mr. Guerrero and with the suspensions of athletes for the use of cocaine in general. Indeed, it is hard to find any “winners” in the *Guerrero* case: the national team of Peru could not initially call up Mr. Guerrero for the FIFA World Cup in Russia and had to rely on upon an appeal to the Swiss Federal Tribunal to permit Mr. Guerrero to play;²⁶ Mr. Guerrero’s current

²² World Anti-Doping Code (2015) at 31.

²³ Prohibited List Q&A, <https://www.wada-ama.org/en/questions-answers/prohibited-list-qa#item-387> (last accessed 18 Dec 2018)

²⁴ WADA’s Prohibited List Expert Group, <https://www.wada-ama.org/en/prohibited-list-expert-group> (the members of WADA’s Prohibited List Expert Group are: Audrey KINAHAN (Chair) Ireland, Martin BIDLINGMAIER, Germany, Richard BUDGETT, United Kingdom/Switzerland, Michael CULLER, USA, Peter HARCOURT, Australia, Thomas J. HUDZIK, USA, Marilyn HUESTIS, USA, Olaf SCHUMACHER, Germany, Lawrence SPRIET, Canada, Mark STUART, UK, Justice TETTEY, Ghana/UK, Mario THEVIS, Germany, Nick WEBBORN, UK).

²⁵ WADA’s Health, Medical and Research Committee <https://www.wada-ama.org/en/who-we-are/governance/health-medical-research-committee> (the members of WADA’s [Health, Medical and Research Committee](#) are: Ugur ERDENER (Chair)

Turkey, Alessia DI GIANFRANCESCO, Italy, Lena EKSTROM, Sweden, Lars ENGBRETSSEN, Norway, David HANDELSMAN, Australia, Margo MOUNTJOY, Canada, Aya NAKITANDA, Uganda, Maria ORBETZOVA, Bulgaria, Toni PASCUAL, Spain, Orlando REYES, Colombia, Christian STRASBURGER, Germany, Hidenori SUZUKI, Japan, Ye TIAN, China, Fabio PIGOZZI (observer - FIMS Representative), Italy, Christiane Ayotte (observer - WAADS representative), Canada).

²⁶ In the end, Mr. Guerrero was able to play during the FIFA World Cup following an appeal to the Swiss Federal Tribunal after the court temporarily stayed the sanction given the obvious unfairness of the situation.





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club in Brazil cannot use the player's services, the fans are prevented from seeing Mr. Guerrero feature; and, Mr. Guerrero himself is not able to practice his job for 14 months. Moreover, no anti-doping protection or deterrent effect is achieved given that the CAS Panel recognized that Mr. Guerrero did not intend to enhance his performance and that, thus, the integrity of competitions was not at risk in any manner. The latter point is probably best illustrated by the [letter](#) sent by the captains of France, Australia and Denmark – the competitors of Peru during the FIFA World Cup – requesting FIFA to allow Mr. Guerrero to partake in the tournament.²⁷ Hence, not even “football”, the anti-doping movement or the competitors of Mr. Guerrero were “winners” since no benefit was gained by either Mr. Guerrero or his team that would have been prevented through a suspension.

Apart from a variety of other amendments, the 2021 WADC should, in the authors' opinion, be revised to include a “substance of abuse” category that includes cocaine. At the least, this “substance of abuse” category should create a new sanctioning regime establishing a range of sanctions, starting from a warning, up to a short and equitable suspension, for the ingestion of cocaine depending on the circumstances of each particular case. As far as it concerns professional football, the foregoing would also be in line with the agreed principle of “individual case management” as agreed between FIFA and FIFPro in 2017.

However, ideally, the authors believe WADA should create a “substance of abuse” category that follows the lead of the NHL/NHLPA collectively bargained substance abuse program where an athlete who tests positive for a substance of abuse would not even commit an anti-doping rule violation, but rather be sent to a rehabilitation program for substance abuse and behavioral health to deter future abuse. Such a program would initially not lead to any suspension or income-loss provided that the player would follow the rehabilitation program. The creation of a bold WADA “substance of abuse” program would be in keeping with its new emphasis on health as a rationale for the WADC.

The WADA committee charged with drafting the final version of the 2021 Code has [proposed](#) a “substance of abuse” category that seemingly seeks to address the “cocaine issue”. While it would ultimately be up to the WADA Prohibited List Expert Group to decide that cocaine is a “substance of abuse”, the current sanctioning regime for cocaine is recognized as a problem, which is at least a start, as is the proposal that there be a three month period of ineligibility for substances of abuse that could be reduced even further for athletes who complete a rehabilitation program. However, WADA's proposed method to deal with the “cocaine issue” is still based on the premise that “cocaine can clearly have a performance enhancing effect when used in competition”.²⁸ As previously mentioned, the idea that cocaine enhances performance is far from settled scientifically. Moreover, as currently proposed, the burden would be on the athlete to prove that the use of a substance of abuse was unrelated to sport performance and therefore “did not enhance” that athlete's performance. Unless the athlete can prove this, the normal sanctioning regime that Mr. Guerrero was subject to would still apply. And just because a substance of abuse category is proposed in the drafting process does not mean it will end up in the final version of the 2021 Code. As the *Fernández* CAS Panel noted, prior attempts to create a substances of abuse category have failed.

In the authors' view, even if this proposal is adopted as part of the 2021 Code, unless WADA does something to address cocaine's classification as a “non-specified substance” more inequitable sanctions like the 14-month sanction imposed on Mr. Guerrero will undoubtedly lie

²⁷ 'Rivals want Paolo Guerrero at world cup', [fifpro.org](https://fifpro.org/news/rivals-want-paolo-guerrero-at-world-cup/en/), 21 May 2018, last accessed 19 Dec 2018, <https://fifpro.org/news/rivals-want-paolo-guerrero-at-world-cup/en/>

²⁸ Summary of Major Proposed Changes to the First Draft of the 2021 WADC (second draft following the first consultation phase), https://www.wada-ama.org/sites/default/files/resources/files/code_major_changes.pdf (last accessed 19 Dec 2018)





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ahead in the future. It is high time for the “*lex lata*” to match the “*lex ferenda*” on this issue.

