

THE SUBSTANCES OF ABUSE CATEGORY OF THE WORLD ANTI-DOPING CODE: AN INCREASE IN THE PROPORTIONALITY OF THE CODE

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In December of 2008, the tennis player M. Richard Gasquet injured his shoulder.¹ The following March, he learned about significant inflammation from a MRI scan and decided to withdraw from the Sony Ericson tennis tournament the day before the tournament.² As he was scheduled to play late in the day, Gasquet waited to go through the formal withdrawal process, including doping control tests until the next day.³

That night, but prior to going through doping tests, Gasquet met a woman named Pamela and kissed her.⁴ Gasquet's urine then tested positive for the cocaine metabolite of benzoyllecgonine.⁵ A panel hearing the case determined that the kiss was the most likely cause of Gasquet's positive test.⁶ Gasquet's incident was initially determined to meet the threshold for *No Significant Fault or Negligence*.⁷ However, the International Tennis Federation ("ITF") Anti-Doping Tribunal panel initially hearing the case, which went by the name *Decision in the Case of M. Richard Gasquet*, reduced the penalty from the prescribed *No Significant Fault or Negligence* penalty of two years of ineligibility to the amount of time that Gasquet had sat out from playing while waiting for the case to be adjudicated.⁸

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1. *International Tennis Federation v. Richard Gasquet* (CAS 2009/A/1926) and *WADA v. ITF & Richard Gasquet* (CAS 2009/A/1930) at 2.3.

2. *Id.* at 2.6.

3. *Decision in the Case of M. Richard Gasquet* (International Tennis Federation Anti-Doping Tribunal), Jul. 15, 2009.

4. Daniel Gandert, *Gasquet and the Career-Killing Kiss: A Precedent for No Fault or Negligence*, IASL WORLD CONGRESS 2010 SPORTS LAW: LEX SPORTIVA, NATIONAL SPORTS LAW, AND INTERNATIONAL SPORTS LAW (2010) at 397-398.

5. Daniel Gandert, *Puerta: Applying the Principles of Justice to the World Anti-Doping Code*, SPORTS LAW: 15TH IASL CONGRESS PROCEEDINGS (2010), ed. Jacek Foks.

6. Gandert, *supra* note 4. at 401.

7. *M. Richard Gasquet*, *supra* note 3 at 97.

8. Gandert, *supra* note 5 at 94; *See* 2009 World Anti-Doping Code for the prescribed penalties during the time of Gasquet's competition.

Upon appeal, the Court of Arbitration for Sport (“CAS”) appellate panel determined that Gasquet’s case constituted *No Fault or Negligence*.⁹ As the tribunal needed experts to establish that this type of contamination was possible, it determined that an athlete would not have known about this possibility.¹⁰

Since Gasquet, there have been other cases of athletes testing positive from kissing.¹¹ As the examples in the previous footnote indicate, not all athletes are successful in using this defense.¹² It would not be unforeseeable for athletes to be told that they need to monitor whoever they kiss, just as they need to monitor everything that they eat and drink and are responsible for the actions of those in their inner circle. Fortunately, a change in the World Anti-Doping Code (“WADC”), which is probably the most significant change for this version of the Code, which came into effect in 2021, will likely make it much for difficult for an inadvertent doping offense from a recreational drug such as cocaine to bring about unjust penalties in the future. The new *Substances of Abuse* category of the WADC does a great job of increasing the proportionality of the Code for instances relating to recreational drugs. This article will discuss this, as well as whether there are arguments that it would be more fair for recreational drugs to be taken off the *Prohibited List* altogether.

Pablo Guerrero’s Inadvertent Doping Offence from Coca Leaf Tea

In 2017, following Peru having a draw with Argentina in a qualification match for the Russia 2018 FIFA World Cup, Paolo Guerrero, the captain of the Peruvian football team, tested positive for a metabolite of cocaine.¹³ It was established that this was because the athlete accidentally drank coca leaf tea in the Peruvian na-

9. Gandert, *supra* note 4 at 408. The panel left the original case heard by the ITF Anti-Doping Tribunal undisturbed, meaning that it retains precedential value for reducing a penalty beyond what is permitted by the WADC, when there is a need to do so in order for there to be proportionality. *Id.* at 412.

10. *International Tennis Federation*, *supra* note 1 at 5.31.

11. See Sheryl Ubelacker, ‘Cocaine Kiss’ Not Impossible, But ‘Improbable’: Expert, CBC, <https://www.cbc.ca/sports/olympics/shawn-barber-cocaine-improbable-expert-1.3795015> Oct. 6, 2016, *Sprinter Gil Roberts’ ‘Passionate Kissing’ Defense Upheld by Appeals Court*, https://www.espn.com/olympics/story/_/id/22222268/olympic-sprinter-gil-roberts-passionate-kissing-defense-upheld-appeals-court, ESPN, Jan. 26, 2018, and *Hamlin Banned for Positive Cocaine Test After Kissing Excuse Rejected*, THE GUARDIAN, <https://www.theguardian.com/sport/2020/feb/03/wigan-warriors-gabriel-hamlin-two-year-ban-cocaine-rugby-league> Feb. 3, 2020 for examples of other cases where athletes brought up kissing as a defence for their doping offence.

12. *See Id.*

13. *José Paolo Guerrero v. FIFA* (CAS 2018/A/5546) and *WADA v. FIFA & José Paolo Guerrero* (CAS 2018/A/5571) at 6-8 and Matt Bonesteel, *Peru Soccer Captain Tests Positive for Cocaine, Will Miss the World Cup*, WASH. POST, <https://www.washingtonpost.com/news/early->

tional team's Visitors' room of a hotel.¹⁴ According to the athlete, he assumed that protocols were in place in both the private dining room for players and the visitors' room.¹⁵ These protocols would have prevented the player from accidentally taking the prohibited substance. Unfortunately, the protocols were in place at the players' dining room but not the Visitors room.¹⁶ Thus, according to testimony, this led the player to believe that the tea that he drank in the dining room was the same as the tea that he drank in the visitors' room, when the tea contained coca leaves, which would lead one to test positive for a cocaine metabolite.¹⁷

Guerrero initially received a one-year suspension, but it was reduced to six months by the FIFA Appeals Committee.¹⁸ Because of the timing of this, it would have presented issues for Guerrero's competing in the FIFA World Cup.¹⁹ Both Guerrero and WADA appealed the sanction to CAS.²⁰ The CAS panel hearing the case refused to apply proportionality outside of the Code and sentenced Guerrero to fourteen months of ineligibility, with six months of the suspension being what Guerrero had already served.²¹ The case was appealed to the Swiss Federal Tribunal ("SFT), which temporarily put a hold on Guerrero's suspension to allow him to compete in the FIFA World Cup.²²

In the SFT's decision, it stated that "The President of the Civil Law Department has taken particular account of the various disadvantages which the 34 year old footballer would suffer should he not attend an event which would crown his football career."²³ The SFT had Guerrero continue with his suspension following

lead/wp/2017/12/08/peru-soccer-captain-tests-positive-for-cocaine-will-miss-the-world-cup/, Dec. 8, 2017.

14. *Guerrero*, *supra* note 13.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. Andy Brown, *Coca Leaf Tea Anyone? The Strange Case of Paolo Guerrero...*, SPORTS INTEGRITY INST., <https://www.sportsintegrityinitiative.com/coca-tea-anyone-the-strange-case-of-paolo-guerrero/>, Apr. 5, 2019.

23. Andy Brown, *Swiss Federal Tribunal Rules FIFA Appeal in Guerrero Case is Inadmissible*, SPORTS INTEGRITY INST., <https://www.sportsintegrityinitiative.com/swiss-federal-tribunal-rules-fifa-appeal-in-guerrero-case-is-inadmissible/#:~:text=The%20Swiss%20Federal%20Tribunal%20has,Guerrero%20remains%20at%2014%20month>, Nov. 29, 2018, Citing Swiss Fed-

the FIFA World Cup.²⁴ Regardless of what the intent of the tribunal was, this was a nice direct way of bringing about a more proportionate penalty for Guerrero's situation than what is prescribed by the WADC. Fortunately, the new *Substances of Abuse* category of the WADC brings about proportionality within the code for many situations similar to that of Guerrero, which will hopefully prevent similar situations of difficulty from occurring in the future.

Proportionality and the WADC

Prior to the introduction of the WADC, it was believed by some arbitrators that the new code would eliminate the need for proportionality to be applied outside of the code.²⁵ Richard McLaren, one of the most renowned experts on doping jurisprudence, stated "that the introduction of the WADA Code will eliminate the application of the doctrine of proportionality in future cases, except as provided for in the WADA Code itself."²⁶

The idea of it becoming the case where proportionality is already incorporated into the WADC and thus does not need to be applied outside of the code is a great goal for drafters of the code and members of institutions that follow the WADC.²⁷ The WADC is imperfect and since its initial implementation, there have been areas in which applying it to an athlete's specific situation brings about a disproportionate outcome.

A CAS panel found a need to apply the principle of proportionality outside of the WADC in the case *Puerta v. ITF*. In this case, the CAS appellate panel believed that Puerta's positive test was a result of his accidentally drinking from the water cup of his wife, who was taking menstrual medicine and that the residue from the menstrual medicine resulted in the positive test.²⁸

This was Puerta's second inadvertent doping offence.²⁹ He had previously

eral Tribunal decision, *Aufschiebende Wirkung für Beschwerde von Paolo Guerrero Gewährt*, (4A_318/2018).

24. Dan Palmer, *Guerrero's Drug Suspension Reinstated by Swiss Federal Tribunal*, INSIDE THE GAMES, <https://www.insidethegames.biz/articles/1069162/guerreros-drug-suspension-reinstated-by-swiss-federal-tribunal>, Aug. 24, 2018.

25. Gandert, *supra* note 4.

26. Richard H. McLaren, *CAS Doping Jurisprudence: What Can We Learn*, 2006 INT'L SPORTS L. REV. 4, Feb. 2006.

27. The author of this article is not making the assertion that they have this goal, but rather that if they do have this goal, it is great that these people have this ideal.

28. See Gandert, *supra* note 4.

29. *Mariano Puerta v./ International Tennis Federation (ITF) (CAS 2006/A/1025)* at 2.8. It was admitted that this description was made up, but the case still holds precedential value. See Daniel

received a suspension for failing to attain a therapeutic use exemption when taking clenbuterol to treat his asthma.³⁰ The panel deciding the case for Puerta's first offence found that the offense was not deliberate and reduced Puerta's penalty from the prescribed penalty of two years of ineligibility down to nine months.³¹

For Puerta's second offense, the CAS appellate panel hearing Puerta's case agreed with the International Tennis Federation ("ITF") Anti-Doping Tribunal, which initially heard the case, that Puerta's case failed to fall into the *No Fault or Negligence* category.³² At the time, the prescribed penalty for a second *No Significant Fault or Negligence Offense* was eight years of ineligibility.³³ Applying the principle of proportionality, the panel hearing the case for Puerta's second doping offense reduced his suspension from eight years of ineligibility to two years of ineligibility.³⁴ Eight years of ineligibility would have effectively ended Puerta's career, which would have been a disproportionate penalty for an athlete with two inadvertent doping offenses.³⁵

This illustrates that the first version of the WADC had areas, such as the penalty for two *No Significant Fault or Negligence* offences, where an arbitrator would need to apply the principle of proportionality outside of the code in order for an athlete to receive a proportionate penalty. For instances where an athlete's second doping offence fell into the *No Significant Fault or Negligence* category, the first version of the WADC did not modify the penalty based upon whether the athlete's first doping offense was a standard offence or constituted *No Significant Fault or Negligence*.³⁶ Further, arbitrators described Puerta's case as falling into a "lacuna" between categories of the code.³⁷

Changes to the 2009 version of the WADC did a better job of incorporating proportionality by bringing about proportionate penalties for athletes with two *No Significant Fault or Negligence* offenses. A chart was introduced to determine the penalty for a second doping offence, where the degree of fault for both the first and second doping offences was factored into determining the athlete's pen-

Gandert, *The Kiss That Kept the Precedent for Proportionality*, SPORTS LAW: LEGAL RESPONSIBILITY IN SPORTS CONTRACTS—ARBITRATION—ETHICAL MANAGEMENT AND COVID 19 (2024), ed. Dimitrios P. Panagiotopoulos for a description of why it remains valid precedent.

30. Puerta, *supra* note 29.

31. *Id.* at 2.10.

32. *Id.* at 5.6 and 11.5.9.

33. See 2003 World Anti-Doping Code, Article 10.5.2.

34. Gandert, *supra* note 5 at 49-50.

35. See Puerta, *supra* note 29 at 11.7.14.

36. See 2003 World Anti-Doping Code, Article 10.5.2.

37. Daniel José Gandert, *The WADA Code: Optimal on Paper*, 2 Md. J. Int'l L. 274 (2017) at 301.

alty.³⁸ This change is an excellent illustration of how the WADC was amended to add proportionality to the WADC so that for cases falling into areas of the code amendment, arbitrators would no longer need to apply the principle of proportionality outside of the code.

Arguments have been made that the precedential value of *Puerta* no longer applies since a different version of the World Anti-Doping Code is now in place, which is more proportionate, and that a later version of the WADC is hostile to the application of proportionality outside of the Code.³⁹ However, *Puerta* still applies as precedent for arbitrators acting outside of the WADC when doing so is needed to bring about a proportionate result because of the ITF Anti-Doping Tribunal case *Decision in the Case of M. Richard Gasquet*.⁴⁰

In this case, which was described at the start of this article, the arbitrators followed *Puerta* in reducing the tennis player's suspension as the prescribed penalty under the WADC would have brought about a disproportionate result despite a new version of the WADC having come into effect.⁴¹ This set the course for not only using *Puerta* as precedent for handling the case of an athlete with two inadvertent doping offenses, where the precedential value was lost with the introduction of the 2009 version of the WADC, but for using the case for its wider precedent, which is that arbitrators can act outside of the WADC when doing so is necessary to bring about a proportionate outcome.⁴²

In doing so, the arbitrators even acted against the specific instructions found in the code. In the *Comment to Articles 10.5.1 and 10.5.2*, it is stated that "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 this Article."⁴³ In *Gasquet*, the arbitrators factored in the fact that it would be difficult for Gasquet to reach the top of the tennis rankings again had the prescribed *No*

38. *Id.* at 302. It should be noted that the chart was taken out of future versions of the WADC; however, the penalties for second doping offenses continued to factor in the athlete's degree of fault for both doping offenses in determining the athlete's penalty. See 2015 World Anti-Doping Code and 2021 World Anti-Doping Code for their penalties for second doping offences.

39. See *Guerrero*, *supra* note 13.

40. See *Gandert*, *supra* note 4 and *Gandert*, *supra* note 5.

41. *Gandert*, *supra* note 5 at 54.

42. Daniel Gandert, *The Kiss That Kept the Precedent for Proportionality*, SPORTS LAW: LEGAL RESPONSIBILITY IN SPORTS CONTRACTS—ARBITRATION—ETHICAL MANAGEMENT AND COVID 19 (2024), ed. Dimitrios P. Panagiotopoulos.

43. 2009 World Anti-Doping Code, Comment to Article 10.5.1 and 10.5.2.

Significant Fault or Negligence penalty been applied to his case.⁴⁴ This goes deliberately against the comment.⁴⁵ This shows that the case also sets precedent for arbitrators to disregard specific instructions of the Code when doing so is needed for there to be a proportionate outcome.⁴⁶

While arbitrators found that Gasquet's case constituted *No Fault or Negligence* once it was appealed, the CAS appellate panel left the ITF Anti-Doping Tribunal case undisturbed.⁴⁷ Since the case is undisturbed, it retains precedential value that one can follow the direction of *Puerta* and apply the principle of proportionality for new versions of the WADC when failing to do so would bring about a disproportionate outcome.⁴⁸ This will remain the case despite the version of the WADC that is in place as long as there are areas where the code is disproportionate.⁴⁹ However, drafters of the code will hopefully continue to add proportionality to areas of the code where it is absent in the future. The addition of the *Substances of Abuse* category is one areas in which proportionality was added to the WADC. This new category will allow arbitrators to impose proportionate penalties for cases of athletes like Guerrero and Gasquet without having to act outside of the Code.

The Content of the Substances of New Substances of Abuse Category

The penalties under the new *Substances of Abuse* category of the WADC are as follows: "If the Athlete can establish that any ingestion or Use occurred Out-of-Competition and was unrelated to sport performance, then the period of Ineligibility shall be three (3) months Ineligibility. In addition, the period of Ineligibility calculated under this Article 10.2.4.1 may be reduced to one (1) month if the Athlete or other Person satisfactorily completes a Substance of Abuse treatment program approved by the Anti-Doping Organization with Results Management responsibility."⁵⁰ This brings about proportionality for cases involving substances of abuse, especially for inadvertent doping cases relating to these substances.

One of the major changes that is brought about through the wording of this new category of the WADC is changes to when an offence relating to substances

44. Gandert, *supra* note 4 at 405.

45. *Id.*

46. *Id.*

47. *International Tennis Federation*, *supra* note 1 at 5.41.

48. Gandert, *supra* note 4 at 412.

49. Gandert, *supra* note 42.

50. 2021 World Anti-Doping Code, Article 10.4.1.

of abuse is treated as out-of-competition. In normal circumstances under the WADC, an offense is in-competition during “[t]he period commencing at 11:59 p.m. on the day before a Competition in which the Athlete is scheduled to participate through the end of such Competition and the sample process collection process related to such Competition.”⁵¹ Thus, an offense is normally deemed in-competition regardless of whether the use of the prohibited substance takes place outside of the in-competition period as long as the test is related to a competition. This means that if an athlete was to use a substance that is only prohibited in-competition outside of the in-competition period for a purpose not relating to sport but tests positive for it at a test related to a competition, the athlete would receive a doping offence.

Under the new *Substances of Abuse* category of the 2021 WADC, an athlete can have his or her offense treated as an out-of-competition offense, for the purposes of having the penalty mitigated under the category, if he or she “can establish that any ingestion or Use occurred Out-of-Competition” regardless of whether the test takes place related to the competition.⁵² This prevents there from being issues where athletes test positive for *Substances of Abuse* that they used out-of-competition during tests that are considered in-competition. This greatly increases the proportionality and fairness of the WADC in this area.

Substances of Abuse Category as Applied to Gasquet and Guerrero Cases

It is hopeful that the new *Substances of Abuse* category will prevent disproportionate penalties from coming about under the WADC for athletes whose circumstances are similar to those of Gasquet and Guerrero. As mentioned earlier, other cases involving athletes being contaminated through kissing have come about in the years following *Gasquet*,⁵³ and it is likely that this type of contamination will continue. While *Gasquet* brings about precedent for this type of contamination falling into the *No Significant Fault or Negligence* category, which provides the athlete with no period of ineligibility, which is better for the athlete than receiving three months of ineligibility and having a doping offense in his or her record, it is helpful for athletes to remain protected by with an additional area of the WADC as not all of the other kissing cases were decided in a favorable manner to the athletes.⁵⁴ This provides the athlete with one more ground to argue

51. 2021 World Anti-Doping Code, Appendix 1.

52. 2021 World Anti-Doping Code, Article 10.2.4.

53. See Sheryl Ubelacker, *Sprinter Gil Roberts’ ‘Passionate Kissing’ Defense Upheld by Appeals Court, and Hamlin Banned for Positive Cocaine Test After Kissing Excuse Rejected*, *supra* note 11.

54. See *Id.*

should there be an instance where an arbitrator does not find the athlete's case to constitute *No Fault or Negligence*.⁵⁵

It would be great to be able to say that the *Substances of Abuse* category now prevents all athletes who inadvertently ingest cocaine through a kiss from facing a suspension for this type of contamination. Instead, the category only aids athletes who engage in this prior to the in-competition period coming into effect.⁵⁶ This category creates a Cinderella type situation where the athlete needs to complete his or her kiss prior to midnight in order to benefit from this category.

If the athlete ingests the cocaine prior to 11:59 p.m. on the night prior to competition and tests positive during an in-competition test the next day, the athlete's use is considered out-of-competition.⁵⁷ This means that since the usage was unrelated to the athlete's sport performance, the athlete could have the penalty reduced down to three months of ineligibility or one month of ineligibility if he or she elected to undergo a treatment program.⁵⁸ On the other hand, say an athlete in a situation similar to that of Gasquet kissed the woman that brought about the contamination after midnight.⁵⁹ Because the period of in-competition starts at 11:59 p.m. the day before the competition, this kiss, and thus the inadvertent cocaine ingestion from this kiss, would be deemed to have taken place during the in-competition period.⁶⁰ Thus, in this type of situation, the category would not provide grounds for reducing the athlete's penalty. While this would prevent the offense from counting against the athlete in terms of determining whether there are aggravated circumstances for the offense, the athlete would still face the penalty for the occurrence as though the new category was not in place.⁶¹ It is thus even more fortunate that *Gasquet* remains as precedent for athletes in this situation as the *Substances of Abuse* category would not have helped Gasquet mitigate his period of ineligibility if it was in effect during his incident since his kiss is alleged to have happened after midnight.

Even though the new category will not help an athlete in Gasquet's situation, it is likely that the *Substances of Abuse* category will prevent an athlete whose

55. As some of the cases referenced in the previous footnote notice, arbitrators do not always decide in a favorable manner to the athletes in kissing cases, so it is helpful for athletes caught in this type of scenario to have other ways to have their period of ineligibility mitigated.

56. 2021 World Anti-Doping Code, Article 10.2.4.

57. *See Id.*

58. *See Id.*

59. The facts of the *International Tennis Federation* case indicate that the kiss that contaminated Gasquet occurred after midnight. *See International Tennis Federation, supra* note 1 at 2.10-2.13.

60. *See Id.*

61. *See Id.*

circumstances are similar to that of Guerrero from facing a disproportionate penalty. Also, for an athlete who is in a situation like that of Guerrero where the positive test occurs within a similar timeframe from the start of the FIFA World Cup or other major competition, it is likely that the *Substances of Abuse* category for the offence would prevent the penalty from forcing the athlete to miss the competition.

It can be expected that some may believe that with the *Substances of Abuse* category, there will never be a case similar to *Guerrero* involving coca leaf tea again. Whether this is true or not again depends upon timing. If a player drinks coca leaf tea the day before the game,⁶² believing that is a different type of tea and thus not drinking it in attempt to enhance his or her athletic performance, it would be deemed ingesting the substance out-of-competition and the athlete could have his penalty reduced to one month of ineligibility if he or she undergoes an approved substance abuse treatment program.⁶³ However, if this occurred on the morning of the competition, this would be deemed as the usage taking place in-competition. Thus, the athlete would not be able to get his or her penalty reduced using the *Substances of Abuse* category except for not having the penalty count against the athlete in terms of claiming that there were aggravated circumstances.⁶⁴ In this instance, a situation such as that of Guerrero could occur where the penalties in the WADC would require the player to receive at least one year of ineligibility for being deemed a *No Significant Fault or Negligence* offence.⁶⁵ If the timing of a major event such as the FIFA World Cup was a similar amount of time away from the positive test and adjudication of the penalties as it was for

62. It would be interesting to speculate what would happen if the athlete intentionally drank coca leaf tea the day before the game, knowing that it was coca leaf tea, with the reason for the ingestion being to help his or her adjustment to the altitude. It could be argued that in this case, the athlete is trying to enhance his or her athletic performance, as being better adjusted to high altitude could help one perform better. In this instance, even though the athlete took the substance out-of-competition, because it was deemed to help the athlete's performance, a positive test would not result in the athlete's circumstances falling into the *Substances of Abuse* category. This means that because the test was considered in-competition, the ingestion of the cocaine metabolite from the tea would be deemed in-competition, and the athlete would not be eligible for the *Substances of Abuse* category's penalty mitigation. On the other hand, it could be argued that if it was just to prevent headaches, this was not with the intention of enhancing the athlete's athletic performance. Under this viewpoint, the athlete should still be able to have his or her penalty mitigated by the *Substances of Abuse* category.

63. It is unlikely that the treatment would bring about a benefit to the athlete as an athlete in this situation is extremely unlikely to have a substance abuse problem. However, an athlete in this situation would be likely to prefer going through the training over two more months of ineligibility.

64. See 2021 World Anti-Doping Code, Article 10.2.4.

65. See 2021 World Anti-Doping Code, Article 10.6.

Guerrero's case, this would then cause the athlete to miss the event unless the arbitrator or other decision maker applies proportionality outside of the WADC.

To summarize, since cocaine metabolites were only prohibited in-competition prior to the introduction of the *Substances of Abuse* category, the addition of the category only brings about benefit to athletes whose actions brought cocaine into their body for a reason not relating to their sport, including the inadvertent ingestion, during the out-of-competition period but tested positive during an in-competition period. Athletes whose actions brought cocaine into their body during the out-of-competition period but tested positive during the out-of-competition period were not deemed by the WADC to have a doping violation prior to the *Substances of Abuse* category being introduced, so this category would not bring benefit to these athletes.⁶⁶ As discussed earlier, athletes whose actions brought the cocaine into their body for a purpose not relating to their sport during the in-competition period and tested positive during the in-competition period would not have their penalty mitigated by the *Substances of Abuse* category except that the penalty would not count against the athlete in terms regarding the determination of aggregated violations.⁶⁷ The category only applies to athletes whose use of the substance is deemed not to be related to sport, and there are some instances where the athlete's using the substance for therapeutic use may be able to be interpreted as relating to the sport.⁶⁸ Thus, the category benefits athletes in a more limited amount of circumstances than one would expect. However, for the athletes whose situation falls into the limited set of circumstances where the category mitigates the athlete's penalty, it fixes an area of the WADC that was previously problematic because it brought about disproportionate penalties.

Is More Needed to be Done to Increase Proportionality for Substances of Abuse?

Even though the *Substances of Abuse* category mitigates the period of ineligibility for athletes who test positive following the use of recreational drugs, the category does not take away the "automatic disqualification of the results in the *Competition* which produced the positive *Sample*" for individual athletes.⁶⁹ This means that athletes who test positive from the use of a recreational drug that was

66. See 2018 Prohibited List for indication of how the both cannabis and cocaine are only prohibited in-competition.

67. See 2021 World Anti-Doping Code, Article 10.2.4.

68. This is different from an instance where a Therapeutic Use Exemption has been granted. In the type of situation which is referenced here, an athlete does something such as take coca leaf tea to help with altitude sickness. Even though this is taken for overall wellness, the wellness could improve the athlete's ability to perform, thus making it related to sport.

69. 2021 World Anti-Doping Code, Article 10.10.

used for a purpose not related to sport can still lose their title, gold medal, or qualification into a major event such as the Olympic Games.

This happened to the American sprinter Sha'Carri Richardson in 2021.⁷⁰ Richardson tested positive for THC, which is the primary psychoactive compound of marijuana, during the U.S. Olympic trials.⁷¹ According to Richardson, "she used marijuana after learning that her biological mother had died just a week before the Olympic Trials."⁷² Richardson accepted one month of ineligibility for her offense and participated in a treatment program, which as mentioned earlier, is one of the prescribed penalty options under the *Substances of Abuse* category.⁷³

On its face, it seems that this is a fair and proportionate penalty which came about because of the new *Substances of Abuse* category. If it was not for this category, Richardson's penalty would have likely been much longer. As the ingestion of the marijuana was not by accident, it is doubtful that this would have fallen into the *No Significant Fault or Negligence* category. Thus, the Richardson would have likely received a penalty of at least two years of ineligibility.⁷⁴ Unlike in the cases of Gasquet and Guerrero, Richardson chose to partake in her use of the prohibited substance. However, Article 10.2.3 of the WADC shielded Richardson from having her offence deemed intentional and receiving the four years of ineligibility associated with this. While the category states that "the term 'intentional' is meant to identify those *Athletes* or other *Persons* who engage in conduct which they knew constituted an anti-doping violation or knew that there was a significant risk that there was a substantial risk that the conduct might con-

70. *American Sprinter Sha'Carri Richardson Apologizes for Positive Marijuana Test*, ESPN, https://www.espn.com/olympics/trackandfield/story/_/id/31749534/american-sprinter-shacarri-richardson-apologizes-positive-test, Jun. 2, 2021.

71. Rob Tornoe, *Sha'Carri Richardson Drug Test: What We Know and Don't Know*, PHILADELPHIA INQUIRER, July 2, 2021; Joe Hernandez, *U.S. Sprinter Sha'Carri Richardson Is Suspended After a Positive Marijuana Test*, NPR, <https://www.npr.org/2021/07/02/1012490073/u-s-sprinter-shacarri-richardson-suspended-after-positive-marijuana-test#:~:text=U.S.%20track%20and%20field%20star,gold%20medal%20in%20the%20event.>, July 2, 2021; See Terrence Ng and Maureen C. Keshock, *Tetrahydrocannabinol (THC)*, Statpearls, National Library of Medicine, at <https://www.ncbi.nlm.nih.gov/books/NBK563174/>, Nov. 12, 2023. for information about THC and its presence in cannabinoids.

72. Hernandez, *supra* note 71.

73. Kevin Draper and Juliet Macur, *Sha'Carri Richardson, a Track Sensation, Tests Positive for Marijuana*, NY TIMES, [HTTPS://WWW.NYTIMES.COM/2021/07/01/SPORTS/OLYMPICS/SHACARRI-RICHARDSON-SUSPENDED-MARIJUANA.HTML](https://www.nytimes.com/2021/07/01/sports/olympics/shacarri-richardson-suspended-marijuana.html) Jul. 6, 2021; Louise Hall, *Social Media Reacts to Sha'Carri Richardson's Olympics Ban: It's Not Like Marijuana is Making You Faster*, INDEPENDENT, <https://www.independent.co.uk/news/world/americas/shacarri-richardson-olympic-ban-reaction-b1877363.html>, Jul. 2, 2024; 2021 World Anti-Doping Code, Article.

74. See 2021 World Anti-Doping Code, Article 10.2.4.

stitute or result in an anti-doping rule violation and substantially disregarded that risk,” the article also provides for some ways that an offense could be deemed unintentional, which would have applied to Richardson’s case.⁷⁵

First, the *2021 Prohibited List* classifies all cannabinoids as *Specified Substances*.⁷⁶ Article 10.2.3 finds that if a *Specified Substance* is used outside of competition, there is a rebuttable presumption that the offence is unintentional.⁷⁷ Even if cannabinoids were not classified as *Specified Substances*, Richardson would also be able to have her offence presumed to be unintentional.⁷⁸ This is because Article 10.2.3 also establishes a presumption that an athlete’s offence is unintentional when the athlete takes a substance that is prohibited in-competition and not out-of-competition but tests positive for the substance during an in-competition test.⁷⁹ As the standard penalty for a standard unintentional doping offence is two years of ineligibility,⁸⁰ Richardson would have likely received this penalty had the *Substances of Abuse* category not been in place. However, for both of these scenarios would required Richardson’s usage to take place out-of-competition.⁸¹ Had she taken the substance during the in-competition, the penalty would be four years of ineligibility.⁸²

Despite the fact that the category’s reducing the penalty for this type of an offence from two years of ineligibility to one month of ineligibility seems proportionate, the category’s not taking away the disqualification of Richardson’s results, which occurred because of the required test, meant that she lost her victory in the Olympic trials which would have allowed her to compete in the Tokyo 2020 Summer Olympic Games in the 100 meter event.⁸³ Thus, because she took marijuana to cope with her biological mother’s unexpected death, Richardson

75. 2021 World Anti-Doping Code, Article 10.2.3.

76. 2021 Prohibited List, World Anti-Doping Agency.

77. 2021 World Anti-Doping Code, Article 10.2.3.

78. This is with the assumption that the cannabinoids were still only prohibited in-competition.

79. 2021 World Anti-Doping Code, Article 10.2.3.

80. 2021 World Anti-Doping Code, Article 10.2.

81. *Id.*

82. *Id.*

83. See Simone Shah and Sean Gregory, *Why Was Sha’Carri Richardson Suspended from the Tokyo Olympics*, TIME, <https://time.com/7007361/why-was-shacarri-richardson-suspended-from-tokyo-olympics/>, Aug. 3, 2024. The Tokyo 2020 Olympic Games took place in 2021 because of the COVID-19 pandemic. See Sana Noor Haq and George Ramsey, *How We Got to the Tokyo Olympics Amid a Global Pandemic*, <https://www.cnn.com/interactive/2021/07/sport/tokyo-olympics-arduous-journey-timeline-spt-intl-cmd/>, 2021.

lost the ability to compete in the Olympics.⁸⁴ There has been argument that it is problematic for an athlete to face this type of situation for “substances that generally aren’t thought of or used as performance enhancers.”⁸⁵

Thus, there are questions about why recreational drugs, such as marijuana, are on the *Prohibited List* if they are not believed to bring about a competitive advantage, and whether for these substances, it is fair and proportionate for this type of offence to cause the athlete’s results to be disqualified. A survey conducted in 2023 found that providers of sports medicine “generally have favorable views toward CBD and cannabis,’ and that most believe marijuana should be removed from the World Anti-Doping Agency’s (WADA) list of prohibited substances.”⁸⁶ In the U.S., the National Basketball Association (“NBA”), Major League Baseball (“MLB”), and National Hockey League (“NHL”) currently have relaxed regulations relating to the substance.⁸⁷ Statistics from WADA indicate that cannabis was among the most frequently reported prohibited substances over the period of between 2003 to 2009.⁸⁸ This indicates that marijuana’s being on the *Prohibited List* is a major issue.

For a substance or method to be on the *Prohibited List*, it must meet two of

84. Draper and Macur, *supra note 73*.

85. Mike Sielski, *Sha’Carri Richardson’s Suspension from the Olympics Shows How Wild, Crazy, and Ridiculous Anti-Doping Rules Can be*, PHILADELPHIA ENQUIRER, Jul. 3, 2021.

86. Ben Adlin, *Sports Medicine Doctors Have ‘Favorable’ Attitudes Toward CBD and Marijuana, Study Finds*, MARIJUANA MOMENT, <https://www.marijuanamoment.net/sports-medicine-doctors-have-favorable-attitudes-toward-cbd-and-marijuana-study-finds/>, Dec. 22, 2023.

87. *See NBA Removes Cannabis from Prohibited Substances List*, NORM, <https://norml.org/news/2023/07/06/nba-removes-cannabis-from-prohibited-substances-list/>, Jul. 6, 2023 for a description of the NBA removing cannabis from the league’s prohibited list, *MLB, MLBPA Agree to Changes to Joint Drug Program*, MLB, <https://www.mlb.com/press-release/press-release-mlb-mlbpa-agree-to-changes-to-joint-drug-program>, Dec. 12, 2019 for a description of how MLB removed the substance list of “Drugs of Abuse” and how treatment for players with issues relating to it will be treated the same way as players who have issues resulting from alcohol-related conduct, and *Can NHL Players Smoke Weed? Exploring the League’s Cannabis Policy*, INHEAL, <https://inheal.com/can-nhl-players-smoke-weed/#:~:text=While%20the%20other%20major%20professional,%2C%20NFL%2C%20and%20the%20MLB>, (accessed Oct. 1, 2024) for a description of how cannabis is not on the league’s prohibited list, however, the league can conduct testing for the substance “If there is reasonable cause about the player’s excessive consumption of the substance; If cannabis use is impairing a player’s performance on the ice.” Upon testing positive for the substance, the player is not automatically disciplined but instead, the issue is referred to the National Hockey League Substance Abuse and Behavioral Health Program. This program provides treatment opportunities, counseling, and education.

88. *WADA Increases Cannabis Threshhold*, Lander & Rogers, LEXOLOGY, <https://www.lexology.com/library/detail.aspx?g=d2accb1e-949f-462e-b513-5a3ec8cabf75>, May 29, 2023.

three criteria.⁸⁹ The first criteria is that the substance or method has the potential to bring about a competitive advantage.⁹⁰ The second criteria is “that the *Use* of the substance or method represents an actual or potential health risk to the *Athlete*.”⁹¹ The third criteria is “that the *Use* of the substance or method violates the spirit of sport.”⁹²

Whether marijuana meets these criteria is questionable. WADA reviewed THC’s status as a prohibited substance following Richardson’s case.⁹³ The institution’s Ethics Expert Advisory Group, determined that marijuana violates the “‘spirit of sport,’ making them unfit role models whose potential impairment could put others at risk.”⁹⁴ One issue with the “spirit of sport” category is that it is broad enough that unfortunately, it can be used as a “catch all,” allowing almost any substance to fall into this category. Additionally, the Ethics Advisory Group stated that marijuana satisfies the second criteria for inclusion on the *Prohibited List* by stating that the substance “can cause physical impairment, as well as possible psychiatric symptoms, and that its use during adolescence can inhibit cognitive development.”⁹⁵ Arguments have also been made in the past indicating that marijuana could provide athletes with an advantage in sport. This includes “an improvement of vision for goalkeepers and muscle relaxation” as well as decreased “anxiety, fear, depression and tension.”⁹⁶ Thus, it has been “suggested that cannabis smoking reduces anxiety, allowing athletes to perform better under pressure and to alleviate stress experienced before and after competition.”⁹⁷ Additionally, a study has indicated that marijuana can help improve oxygenation to one’s tissues.⁹⁸

The threshold for marijuana positive tests was increased from 15ng/mL to

89. 2021 World Anti-Doping Code, Article 4.3.1.

90. 2021 World Anti-Doping Code, Article 4.3.1.1.

91. 2021 World Anti-Doping Code, Article 4.3.1.2.

92. 2021 World Anit-Doping Code, Article 4.3.1.3.

93. *Marijuana Stays on World Anti-Doping Agency Banned Substances List*, NBC SPORTS, <https://www.nbcsports.com/olympics/news/marijuana-doping-list-wada-banned>, Sep. 23, 2024.

94. Kyle Jaeger, *World Anti-Doping Agency Experts Say Marijuana Use Violates the ‘Spirit of Sport’ and Makes Athletes Unfit Role Models*, <https://www.marijuanamoment.net/world-anti-doping-agency-experts-say-marijuana-use-violates-the-spirit-of-sport-and-makes-athletes-unfit-role-models/>, Aug. 23, 2023.

95. *Id.*

96. Marilyn A. Huestis, Irene Mazzoni and Oliver Rabin, *Cannabis in Sport Anti-Doping Perspective*, SPORTS MED, 4(1) 949-966, 2011.

97. *Id.*

98. *Id.*

150 ng/mL in 2013.⁹⁹ One of the reasons for the threshold being increased was that it made passive smokers less likely to test positive for the substance.¹⁰⁰ According to a WADA study, occasional users of the substance who stay away from it for a week before competition are unlikely to test positive for it.¹⁰¹ As the substance is only prohibited in-competition, it is likely that this increased threshold has helped prevent many athletes who took the substance out-of-competition from failing an in-competition test. As not meeting the threshold does not count as a positive test, it means that in addition to the athletes not receiving a period of ineligibility for taking the substance, athletes who do not test positive because of the raised threshold do not have the results of their competition disqualified. This again brings about the issue of timing. If an athlete uses the substance out-of-competition but closer to the date of competition, they can have their results disqualified the way Richardson did but if they use the substance a week earlier, they are unlikely to meet the threshold.

In 2018, Cannabidiol (“CBD”) was taken off the *Prohibited List*.¹⁰² This allowed athletes to use of cannabis’s non-psychoactive component.¹⁰³ There are likely athletes who utilize CBD infused products who benefit from this change.

Regardless of how unfair that one may feel that it is that Richardson lost her spot competing in the Olympic Games in the 100-meter event due to her result being disqualified for her marijuana ingestion, it should be understood that because of *Substances of Abuse* category, she still would have been eligible to compete in the 2021 Olympic Games in Tokyo had she qualified through a different route. Because the category allowed Richardson’s ineligibility to be reduced to one month, she was eligible to compete in the Tokyo 2020 Olympic Games as they took place after her penalty was completed.¹⁰⁴ She could have competed in a relay event had the team for the U.S. chosen to select her to compete.¹⁰⁵ Thus, although the *Substances of Abuse* category did not prevent Richardson’s result from being disqualified, the rule opened up another pathway for Richardson to

99. *Summary of Major Modifications and Explanatory Notes*, World Anti-Doping Agency, https://www.wada-ama.org/sites/default/files/2022-09/2023list_explanatory_list_en_final_26_september_2022.pdf, Sept. 26, 2022.

100. *WADA Increases Cannabis Threshold*, *supra* note 88.

101. *Id.*

102. *Summary of Major Modifications and Explanatory Notes*, *supra* note 99.

103. *Id.*

104. Matthew Futterman, *Sha’Carri Richardson, Not Chosen for U.S. Relay, Will Miss Tokyo Olympics*, NY TIMES, <https://www.nytimes.com/2021/07/06/sports/olympics/shacarri-richardson-olympics-team.html#:~:text=150-,Sha'Carri%20Richardson%2C%20Not%20Chosen%20for%20U.S.%20Relay%2C%20Will,decided%20not%20to%20include%20her.>, July 23, 2021.

105. *Id.*

compete in the Olympic Games. The decision for not inviting Richardson to compete in that event was that of her national team and not because she was ineligible to compete in the event.¹⁰⁶ Thus, it made the Code more proportionate as applied to Richardson's case than it would have been had the rule not been in place.

Is The Substances of Abuse Category Too Narrow in Its Inclusion of Substances?

The current *Prohibited List* has four substances listed in the *Substances of Abuse* category: cocaine, ecstasy, heroin, and THC.¹⁰⁷ One may conjecture that these are the most commonly used recreational drugs; however, it is foreseeable that an athlete who uses other drugs that also do not provide any advantage for athletic performance recreationally could be caught in a situation where the penalty for the usage is disproportionate, especially compared to that of athletes with similar actions who use substances which are listed as *Substances of Abuse* in a similar manner. Because of this, an argument could be made that too few substances fall into this category.

The counterargument is that because the *Prohibited List* is updated annually,¹⁰⁸ new substances can be added to the category if it is determined, by those responsible for updating the list, that it would be most fair for the substances to become classified as *Substances of Abuse* in the future. Allowing any substance which is used recreationally that does not provide a competitive advantage to an athlete to

106. The national team decided to give all of the relay spots to other runners prior to Richardson's test results were publicly announced. *Id.* USA Track & Field's Selection Procedures seems to indicate that they likely did not have the ability to force one of the athletes already selected for the relay team to withdraw involuntarily to give the spot to Richardson. *Selection Procedures—2020 Olympic Games—Men and Women's Track & Field*, available at <https://www.flipsnack.com/USATF/2020-olympic-games-selection-procedures-track-field/full-view.html>, Apr. 27, 2021. USA Track & Field "said it would harm its team if it amended its selection rules to make room for Richardson after the conclusion of the trials competition." Futterman, *supra* note 104. This statement gives the implication that despite the rule being in place, USA Track & Field likely had the ability to allow Richardson to compete as it implies that the organization had the ability to change the rules. Regardless of whether the rules could have been changed, it is still the case that Richardson became eligible to compete in the Tokyo 2020 Olympic Games because of the *Substances of Abuse* category and had she been selected to be part of the relay team back when the team was selected, she would have been able to compete in this event at this iteration of the Olympic Games.

107. 2024 Prohibited List. Most of these substances are listed with their scientific names, with the list stating "cocaine, diamorphine (heroin), methylenedioxymethamphetamine (MDMA/"ecstasy"), tetrahydrocannabinol (THC)."

108. *The Prohibited List*, WADA, <https://www.wada-ama.org/en/prohibited-list>, (accessed Oct. 2, 2024).

fall into this category could lead athletes to abuse the category, such as athletes taking substances where the competitive advantage has not been publicly demonstrated yet and claiming that they are using the substance recreationally. Because of this, it makes sense to keep the category as it is and to allow those who revise the *Prohibited List* to make any changes that are needed in the future.

Conclusion

While the WADC serves the important purpose of harmonizing the anti-doping rules across sports organizations,¹⁰⁹ it is far from a perfect document. Since the first version of the code, there have been instances where applying the prescribed penalty under the code to an athlete's case would bring about a disproportionate penalty. Fortunately, the drafters of the code have continued to make changes which have fixed these scenarios. One of the most important changes that accomplished this with the 2021 WADC was the introduction of the *Substances of Abuse* category.

The *Substances of Abuse* category brings proportionality to the instances of athletes who use a recreational drug for a purpose not relating to sport during the out-of-competition period but test positive for the substance during in-competition tests. This new rule can be helpful in bringing proportionality to the situation of athletes such as Paolo Guerrero who accidentally ingested coca leaf tea during the day prior to competition. However, the rule only benefits athletes who ingest the substance prior to the day of competition. When the substance, such as cocaine is only prohibited in-competition, the athlete would have already not faced sanctions for the use of the substance that is picked up during an out-of-competition test. The category also fails to eliminate the disqualification of results that occurs when an athlete ingests this type of a substance.

While the *Substances of Abuse* category is not perfect, it is an important addition to the WADC and is helpful in bringing proportionality to the Code. While there is debate over whether recreational drugs should be prohibited at all, this area of the Code brings about areas where athletes who ingest these substances receive more proportionate penalties. The drafter of the WADC should be commended for adding this category and should be encouraged to continue to find ways to make future versions of the code more proportionate.

109. *International Standards*, WADA, <https://www.wada-ama.org/en/what-we-do/international-standards#:~:text=The%20World%20Anti%2DDoping%20Code,%2C%20non%2Dmandatory%2C%20Guidelines.>, (accessed Oct. 2, 2024).