

# World Anti-Doping Code: Not Guerrero's (World) Cup of Tea

Article By:

Sports & Entertainment - Squire Patton Boggs

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The 2018 FIFA World Cup, which kicked off today in Moscow, will be Paolo Guerrero's first.

He is the captain of Peru's football team and it will be the country's first World Cup in 36 years. Yet for months it was feared that Guerrero would not be able to play due to his 14-month ban for testing positive for the metabolite benzoylecgonine, found in cocaine.

## World Anti-Doping Code

Cocaine is included in the World Anti-Doping Agency's (WADA) 2017 [Prohibited List under the class S6 Substances](#) and it is prohibited in competition, not out of competition. It is a stimulant frequently associated with recreation rather than performance enhancement, and when athletes test positive, their stories typically recount their night out. Sometimes the cocaine enters their system through unexpected circumstances such as a [kiss with a stranger who has taken the drug](#).

Testing positive for cocaine in competition and a resulting breach of the WADC can result in a four-year ban under Article 10.2 of the Code if it can be established that the anti-doping rule violation was intentional. This means the athlete engaged in conduct which he/she *"knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk."* If not intentional, the period of ineligibility will be two years under Article 10.2.2.

Yet the period of ineligibility can be eliminated if Article 10.4 of the Code is satisfied, being the athlete establishes *"that he or she bears No Fault or Negligence."* This is defined as the athlete *"establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or been administered the Prohibited Substance or Prohibited Method or otherwise violated an anti-doping rule."*

If this is not satisfied, under Article 10.5 the athlete can instead claim a reduction of their period of ineligibility if he or she establishes "No Significant Fault or Negligence". This is defined as the athlete *"establishing that his or her Fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the anti-doping rule violation."*

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## The CAS

The CAS have historically adopted a strict interpretation of the Code in relation to cocaine and anti-doping. Although based upon the 2009 WADC, a good example of the CAS's strict approach is [WADA v Swiss Olympic Association & Simon Daubney CAS 2008/A/1515](#).

Here a professional sailor tested positive for cocaine. The case went to the CAS where Daubney claimed that cocaine was put in a spiked drink by some fans. He undertook a polygraph test to show that he had never willingly used cocaine (although this was excluded by the panel as per se evidence under Swiss law). However the panel concluded he had failed both the 'No Fault or Negligence' test and the 'No Significant Fault or Negligence' test.

In the judgment, it was said that as:

*“an experienced athlete, he could not ignore that he should pay attention to what he was drinking and from whom he got the drinks, which he did not...his departure from the required duty of caution (“utmost caution”) and his fault is even greater as he went in a very hostile bar and, therefore, accepted to expose himself to the malevolence of any fan.”*

A two-year ban was given, being the maximum under the 2009 WADC.

## Guerrero's Story

In December 2017, the FIFA Disciplinary Committee suspended Guerrero for one year following a test conducted after Peru's match against Argentina in October 2017. The positive test was also a violation of Article 6 of the [FIFA Anti-Doping Regulations](#) and as such, contravened Article 63 of the [FIFA Disciplinary Code](#), resulting in a suspension from all types of matches as per Article 29 of the FIFA Anti-Doping Regulations. This included the World Cup.

Guerrero appealed and the FIFA Appeals Committee partially upheld his appeal, reducing his ban to six months. In reaching this decision, they considered the degree of fault of the player which was limited because the quantities of the substance found was so small, his lawyer argued he could not have consumed cocaine but drank tea prepared in a kettle that had previously contained coca leaves.

WADA appealed this decision and the CAS increased the ban to 14 months. They thought it an *“appropriate sanction ... in light of Mr Guerrero's degree of fault.”*

## Appeal to the Swiss Federal Court

In May 2018, a Supreme Court judge granted an interim order to freeze Guerrero's 14-month ban therefore allowing him to play in the World Cup. It puts the ban on hold until consideration of Guerrero's case later in the Swiss Federal Court. In reaching her decision, the judge acknowledged how the player benefitted from *“a rare surge of solidarity”* to support his case.

[Lloris, Jedinak and Kjaer wrote a joint letter to FIFA](#) asking the governing body to let him play in the World Cup and [protests took place on the streets of Lima, Peru](#). The judge also spoke of the possible negative effect upon Guerrero's teammates as being deprived of their *“emblematic”* captain.

## WADA's Role

Given the proliferation of doping scandals in sport, anti-doping rules clearly must focus on catching those using prohibited substances to enhance performance. Are WADA's limited resources best-spent penalising athletes like Guerrero with such a small amount of the substance in their systems that they cannot have voluntarily administered the drug? Is it for WADA to regulate athletes' private lives by penalising them for a drug still in their system after a night out and not for performance related reasons?

WADA are currently reviewing the Code and published its second review phase last week. In the [document](#) summarising the proposed changes, it recognised the following:

*“The general rule has been that if a substance appears in an athlete’s sample in an in-competition test it is an adverse analytical finding, it doesn’t matter when the substance was taken. The consequences of this approach have become increasingly problematic as WADA accredited laboratories have developed the ability to detect evermore minute quantities of prohibited substances in an athlete’s urine in in-competition samples. In some cases these substances were obviously used out-of-competition and could not possibly have had an in-competition effect. To address this problem, the WADA List Committee is considering reporting thresholds for certain substances which are prohibited in-competition only but which may appear in trace amounts in in-competition tests.”*

*Isabelle Sadler contributed to this article.*

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