

**The ATP TOUR ANTI-DOPING TRIBUNAL APPEAL OF**  
**MIGUEL GALLARDO VALLES**

**OPINION**

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An ATP Tour Anti-Doping Tribunal {"Tribunal"} consisting of Prof. Richard H. McLaren, Esq., Chair, Dr. Arturo Marti, technical scientific member and Prof. Eduardo Henrique De Rose MD, medical member was formed by Gayle David Bradshaw the Vice President Administrator Rules and Competition, following a Review Board {"RB"} determination that Miguel Gallardo Valles {"the Player"} had a case to answer under the Tennis Anti-Doping Program 2005 {"Anti-Doping Rules"}. Those rules are contained within the ATP 2005 Official Rulebook {"Rules"} at pgs. 143 through 173. The Anti-Doping Rules are designed to maintain the integrity of men's professional tennis and protect the health and rights of all tennis players. The Program includes (i) doping tests in and out of competition, (ii) the imposition of penalties for Doping Offenses, and (iii) support and assistance to players when applicable.

Howard Jacobs, Esq. represented the Player

John MacLennan, Esq. represented the ATP {the "Tour" or the "ATP"}.

In accordance with Anti Doping Rule K. 1. f., the Chairman of the Tribunal convened a telephone conference call with the representatives of the parties on 11 October 2005. In attendance on that call with the Chairman were the above named representatives of the parties. During the course of that conference call, counsel for the Player advised that the Player elected under Rule K. 1. c. to admit to the commission of a Doping Offense. The effect of that admission, made by his counsel, is that the Player accedes to the consequences specified in the notice of 28 September 2005 contained in the letter from Mr. Bradshaw advising that the Player had a case to answer under the Anti-Doping Rules. That notice advised that a sanction of two years Ineligibility from ... *any ATP or Challenger Series event or other activity authorized or organized by the ATP* would apply under the Anti-Doping Rules and may result in suspension under ... *ITF Rules from Grand Slam Tournaments, Davis Cup ties, Futures and Satellite Series Circuit Tournaments*. The notice further advised that if the use involved a Specified Prohibited Substance not intended to enhance performance that a sanction in

a range from a public warning and no period of Ineligibility through to a one-year period of Ineligibility could be applied. The effect of such a sanction would be similar to the two-year sanction.

The admission by the Player meant that a hearing before the full Tribunal was no longer required. Under Anti-Doping Rule K. 1. c. the Chairman issues this decision confirming the commission of the Doping Offense specified in the Notice. After consultation with the other members of the Tribunal, the Chairman of the Tribunal orders by this decision such Consequences as are provided for under the Anti-Doping Rules.

In accordance with Procedural Order No. 1 issued on 19 October 2005 the receipt of the written submissions was completed on 28 October 2005. A conference call was held on 4 November 2005 to listen to the Player's statement and receive oral summations from counsel.

### **BACKGROUND FACTS**

1. The Player is a professional tennis player from Mexico. He is currently a member of the ATP Tour.
2. The ATP is a not-for-profit membership organization composed of male professional tennis players and tournament organizations. The ATP sanctions tennis tournaments and provides league governance and support to its member tournaments and players. Pursuant to this role, the ATP has adopted rules for the conduct of both the tournaments and the players.
3. The Player is an ATP member who competed in an ATP sanctioned Competition. In accordance with Rule B. 1. he is bound by and shall comply with all of the provisions of the Rules including the Anti-Doping Rules. In effect he has agreed to be bound by all the provisions therein and to play by the Rules.
4. The Player provided a urine sample pursuant to the Anti-Doping Rules during the Stella Artois Championships, an ATP sanctioned tournament in London, England on 4 June 2005. By these proceedings and his admission, the Player accepted the analysis of the

Laboratoire de Contrôle du Dopage INRS Institut Armand-Frappier {"the Lab"}, located in Pointe-Claire, Quebec, Canada which is accredited as a World Anti-Doping Agency {"WADA"} laboratory. The Lab Doping Control Report states that the A sample of the Player indicated the presence of *Cannabis: 11-nor-9-carboxy-delta9-tetrahydrocannabinol*, in a concentration measured at 80ng/ml. Analysis of the B sample confirmed the presence of the Prohibited Substance found in the A sample. Cannabis is listed in Appendix 3 (*The 2005 Prohibited List*) at S. 8 Cannabinoids in the Anti-Doping Rules. Cannabis is defined as a Specified Prohibited Substance under those rules.

5. In accordance with Procedural Order No. 1 the Player filed a declaration along with the submissions of his counsel on 24 October 2005. By that declaration he advises that prior to June of 2005 he had never tested positive in any doping control procedure. He explained that he attended a post-event party in Germany on 23 May 2005. While at the party he was persuaded to take a small amount of marijuana by smoking. This was the first time in his life that he had ever smoked marijuana. He believes his positive test result was caused by this indiscretion on his part because it is the only time he has ever smoked marijuana. He is concerned about the embarrassment this matter will bring to himself, his family and the sport of tennis and deeply regrets the mistake he has made.
6. At the time of the conference call with counsel on 4 November 2005 the Player provided a statement to the Chairman. He stated that he has been a professional Player since 1999. He has represented Mexico at Davis Cup competitions. He indicated that he had made a serious mistake and he regrets it very much. He emphasised that public reaction in his home state in Mexico will be negative and will hurt both his reputation and his family who are very religious. He regrets his actions and the harm it has brought to tennis and to his family.
7. It is agreed between that parties that the Player has not competed since 29 August 2005. He informed the ATP through his lawyer on 15 September 2005 that he was voluntarily not competing until the results of this decision were known. Therefore, at the time of this decision he has voluntarily imposed upon himself a suspension

approximating two months and has not competed for more than two months.

**Written Submissions on behalf of the Player**

8. The plea here is to impose the minimum sanction set out in Rule M. 3. which is a written warning and reprimand and no period of Ineligibility from future Events, and at a maximum one (1) year's Ineligibility and no further sanction relating to the forfeiture of any medals, titles, computer ranking points or prize money obtained by the Player in the Competition.
9. The Player accepts that Cannabis is a Specified Substance under section M.3 of the ATP Anti-Doping Program and has admitted the offense whilst expressing sincere regret for his actions. The only issue remaining is to determine the appropriate sanction. The ATP has indicated that it believes a 2-month suspension would be appropriate in this case, while the Player submits that the relevant range of the sanction should be 0-2 months suspension.
10. The Player's counsel cites the cases of FINA v. Hunt (May 2005), USADA v. Del Bosco, Acceptance of Sanction (November 2004), USADA v. Edwards, Acceptance of Sanction (October 2004), USADA v. Capel, Acceptance of Sanction (September 2004), USADA v. Williams, Acceptance of Sanction (August 2004), USADA v. Rusan, Acceptance of Sanction (July 2004).
11. The Player submits that the case of *ATP v. Van Gemerden* (May 2005) in which Mr. Van Gemerden tested positive for cannabis, admitted a doping offense, and imposed upon himself a "provisional suspension" upon being informed of a positive test, is nearly identical to the Player's situation. In the *Van Gemerden* case, the Tribunal determined that his self-imposed suspension from play meant that he had *de facto* served more than a two-month sentence and because there was no intent to commit a rule infraction and because of forthright disclosure, Mr. Van Gemerden's period of Ineligibility should be limited to the time he voluntarily served and that the Ineligibility was to end the day following the issuance of the decision. Accordingly, the Player submits that his voluntarily imposed provisional suspension should serve as the required period of

Ineligibility and that the period of Ineligibility should cease November 5, 2005.

12. The Player also submits that his results from ATP tournaments played between June 4, 2005 and the date of the decision should not be disqualified by the application of Rule M.7 of the Anti-Doping Program which provides that all results after the positive sample shall be disqualified upon finding of a doping offense, unless fairness requires otherwise. The Player contends that similar to *ATP v. Oliver* (February 2004), M.7 should not be applied in cases involving the use of Specified Substances not meant to enhance performance, and where subsequent competition results were not affected by the ingestion of the banned substance. Disqualification of the Player's subsequent results is deemed to be inequitable because his use of cannabis was not intended to, and did not, enhance performance and had no subsequent effect on competitions. Moreover, it would be inequitable to disqualify subsequent results considering the three-month delay between the finding of the doping offense and the notification of the player and the Player's voluntary self-imposed suspension from competition immediately upon notification of the offense.

**Written Submissions on behalf of the ATP**

13. Counsel for the ATP submits that the appropriate penalty for the Player in this case is a period of ineligibility of sixty (60) days in addition to the automatic disqualification of points and prize money at the event at which the test occurred.
14. The ATP based its recommendations on the following facts: (i) that the Player has admitted the Doping Offense; (ii) it is his first Doping Offense; (iii) the Player has not required the ATP to incur the costs of a full hearing; and (iv) the Player's use of the prohibited substance was not intended to enhance his performance.
15. Since the Player voluntarily suspended himself from competition upon notification of a positive test result for marijuana on September 15, 2005, the ATP believes that this period of voluntary suspension should be credited against any period of ineligibility imposed by this Tribunal pursuant to Rule M.6.

16. **THE RELEVANT ANTI-DOPING RULES****B. Covered Players and Events**

2. *Any player who enters or participates in a Competition, Event or activity organized, sanctioned or recognized by the ATP, or who is an ATP member or who has an ATP ranking (a “**Player**”) shall be bound by and shall comply with all of the provisions of this Program ... Further, for each calendar year all such players shall, as a condition of entering or participating in any event organized or sanctioned by the ATP, deliver to the ATP a signed consent in the form set out in Appendix 2.*

...

**C. Doping Offenses**

*Doping is defined as the occurrence of one or more of the following (each, a “**Doping Offense**”):*

1. *The presence of a Prohibited Substance or its Metabolites or Markers in a Player’s Specimen, unless the Player establishes that the presence is pursuant to a therapeutic use exemption granted in accordance with Article E.*

...

**K. Due Process**

1. *Commencing proceedings before the Anti-Doping Tribunal*

...

*c. The Participant shall be entitled at any stage to admit that he has committed the Doping Offense(s) specified in the Notice and to accede to the Consequences specified in the Notice. In such circumstances, a hearing before the Anti-Doping Tribunal shall not be required. Instead, the Chairman of the Anti-Doping Tribunal shall promptly issue a decision confirming the commission of the Doping Offense(s) specified in the Notice, and ordering the imposition of such Consequences (including, where this Program specifies a range of possible Consequences, specifying what the Consequences should be in that particular case). Where a range of possible Consequences is specified in the Program, written submissions may be made by or on behalf of the Participant in mitigation at the time of admission of the Doping Offense, and the Chairman of the Anti-Doping Tribunal shall be entitled to take those submissions, as well as any rebuttal submitted by the ATP, into account in determining what Consequences should apply.*

...

#### **L. Automatic Disqualification of Individual Results**

- 1. A Doping Offense committed by a Player in connection with or arising out of an In-Competition test automatically leads to Disqualification of the individual result obtained by the Player involved in that Competition with all resulting consequences, including*

*forfeiture of any medals, titles, computer ranking points and prize money (without deduction for tax) obtained in that Competition.*

...

## **M. Sanctions on Individuals**

### **2. Imposition of Ineligibility for Prohibited Substances and Prohibited Methods**

*Except where the substance at issue is one of the specified substances identified in Article M.3, the period of Ineligibility imposed for a violation of Article C.1 (presence of Prohibited Substance or its Metabolites or Markers), Article C.2 (Use or attempted Use of Prohibited Substance or Prohibited Method) or Article C.6 (Possession of Prohibited Substances and/or Prohibited Methods(s)) shall be:*

*First Offence: Two (2) years' Ineligibility.*

*Second Offence: Lifetime Ineligibility.*

*However, the Participant shall have the opportunity in each case, before a period of Ineligibility is imposed, to establish the basis for eliminating or reducing this sanction as provided in Article M.5*

...

### **3. Lesser Sanction for Specified Substances.**

*The **Prohibited List** may identify specified substances that are*



*particularly susceptible to unintentional anti-doping rules violations because of their general availability in medicinal products or that are less likely to be successfully abused as doping agents (a “Specified Substance”). Where a player can establish that the Use of such a Specified Substance was not intended to enhance sport performance, the period of Ineligibility found in Article M.2 shall be replaced with the following:*

*First offense: At a minimum, a warning and reprimand and no period of Ineligibility from future Events, and at a maximum, one (1) year’s Ineligibility.*

...

**7. Disqualification of Results in Competitions Subsequent to Sample Collection**

*In addition to the automatic Disqualification, pursuant to Article L, of the results in the Competition that produced the positive Sample, all other competitive results obtained from the date a positive Sample was collected (whether In-Competition or Out-of-Competition) or other Doping Offense occurred through to the date of commencement of any Ineligibility period shall, unless fairness requires otherwise, be Disqualified with all of the resulting consequences, including forfeiture of any medals, titles, computer ranking points and prize money (without deduction for tax).*

...

## 8. Commencement of *Consequences*

Any *Consequences* set out in the decision of an *Anti-Doping Tribunal* shall come into force and effect on the date the decision is issued, save that:

c) The period of *Ineligibility* shall start on the date that the decision is issued, provided that:

i) any period during which the Player demonstrates he has voluntarily foregone participation in Competitions shall be credited against the total period of *Ineligibility* to be served.

## APPENDIX THREE

### THE PROHIBITED LIST

<b>SUBSTANCES AND METHODS PROHIBITED IN-COMPETITION</b>
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### PROHIBITED SUBSTANCES

<b>SPECIFIED SUBSTANCES</b>
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“Specified Substances” are listed below:

Stimulants: ephedrine, L-methylamphetamine, methylephedrine,  
Cannabinoids.

### REASONS

17. A Doping Offense has been established under Anti-Doping Rule C. 1. by virtue of the admission made pursuant to Rule K. 1. c. It is so found by this Tribunal.

18. The Player committed a Doping Offense pursuant to an *In-Competition* test. Under Rule L. 1. of the Anti-Doping Rules, this leads to the automatic *Disqualification* of the individual results obtained by the Player in that competition. The Player must forfeit any medals, titles computer ranking points and prize money {without deduction of tax} obtained in that *Competition*. This Tribunal finds that the automatic Disqualification applies in this case.
19. Marijuana, a Cannabinoid is a prohibited substance listed in Appendix 3 (*The 2005 Prohibited List*) at S. 8 in the Anti-Doping Rules. It is also a Specified Substance under the same Appendix. Under Rule M. 3 the sanction for a first offense is at a minimum a warning and reprimand and at a maximum one (1) year's *Ineligibility*.
20. Under Rule M.3, a lesser sanction is applicable when a player establishes that his use of the substance "*was not intended to enhance sports performance*". The Player contends and submits, and the ATP agrees, that the substance was not intended to enhance his performance. There is no other evidence to establish that it may have been performance enhancing. Therefore, I find that the use of Marijuana was not intended to enhance performance, thereby bringing Rule M. 3. into play.
21. The Player, at a post-tournament party in Ettingen, Germany on 23 May 2005, succumbed to peer pressure and smoked a small amount of Marijuana, an action that he quickly came to regret. The Player hails from a very religious region of Mexico where knowledge of his positive test result would greatly embarrass both himself and his family. It was the Player's first, and to date only, use of the substance.
22. In spite of his remorse and the fact that his use of Cannabis was not intended to be performance enhancing, Rule C. 1. a. places upon the Player a personal duty to ensure that no *Prohibited Substance* enters his body. That personal duty is not lessened by the fact that the player suffered a temporary lapse in judgment no matter how understandable that might be.
23. The Player is responsible for his positive result and has accepted that responsibility by admitting his indiscretion. He has no history of anti-

doping issues. Indeed, in the past he has demonstrated care and attention to the Anti-Doping Rules and the programme of the ATP. His positive test stems from a lapse in judgement for which he accepts responsibility and expresses sincere regret. Furthermore, he stepped forward and admitted his rule violation and voluntarily did not compete and did not insist on going through the Anti-Doping Tribunal procedure, permitting instead this expedited and less costly process.

24. The Rule in M. 3. provides for a possible range of sanctions. I find that the Player has been honest and conducted himself with integrity and respect of the Anti-Doping Program of the ATP except for one momentary lapse. The conduct involved here does reflect carelessness. Furthermore, the Player would have known at the time of commission of the offense that Marijuana is a Prohibited Substance under the ATP Anti-Doping Rules. However, his conduct in violating his personal duty imposed by the Anti-Doping Rules is not of a significant or flagrant nature. This is a clear case of an otherwise conscientious and respectful Player making a poor decision, but for which he readily admits his guilt and expresses sincere regret. The Player's actions constitute conduct for which there ought to be some sanction but not at the full end of the range.
25. The Player in this case will suffer the social stigma of his conduct within his family and home community. That stigma is potentially in many ways more significant than any sanction that I may impose. The Player voluntarily ceased playing and notified the ATP of his action on the 15th of September 2005. Under Rule M. 8. I am entitled to take this voluntary action into account. Therefore, I deem the period of Ineligibility to commence on that date. On account of the Player's decision not to play tennis from September 15<sup>th</sup> onwards, he was unable to register for an ATP Challenger tournament which he won last year. As last year's champion, the Player would very much like to defend his title this year. However, his voluntary actions precluded him from registering for this tournament scheduled for Pueblo, Mexico on 14 November 2005. The only way he may now play in that tournament is to play in a qualifying tournament for which registration must be made by 11 November 2005 at the absolute latest. Whether he is able to play at Pueblo at all will depend upon his results in a qualifier tournament beginning November 12. In order to give him this limited chance to be at Pueblo, I must cease the period of

Ineligibility earlier than the two months suggested in the brief of the ATP. Thus, the Player has put himself voluntarily in real jeopardy of not being able to play in this Challenger tournament, which is extremely important to him. I would normally consider that a period of Ineligibility should be a full two months as submitted in the ATP brief. However, having heard the Player explain himself to me and in recognition of his voluntary actions to his substantial detriment and being cognisant of the social stigma for him associated with this entire matter, I determine the appropriate sanction under Rule M. 3 ought to be a period of Ineligibility for the time served to the date of this award. Therefore, the period of Ineligibility will cease the day following the receipt of this award, which will approximate a two-month suspension, but in any event will cease not later than 10 November 2005.

26. The Player's actions were a one-time infraction of the Rules. There was no performance enhancing effect and no repeat conduct or continuing effect in subsequent tournaments. That being the case, there is absolutely no reason why this Player should have any subsequent competitive results following sample collection impacted by his Doping Offense. Under the provisions of Rule M. 7 I find that fairness demands that no other competitive results after sample collection should be disqualified. The Tribunal so orders.
27. For all the foregoing reasons the circumstances of this case require that some sanction be applied to the conduct of the Player. The Tribunal selects a time served from September 15 2005 to the day after the receipt of this Decision but in any event no later than Nov 10<sup>th</sup> as the period of Ineligibility being the most appropriate in this case.

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**DECISION**

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The Tribunal makes the following orders based upon the foregoing grounds and discussion in the above opinion.

1. The Player under Rule K. 1. c. admitted a First Doping Offense thereby establishing the Doping Offense defined in Rule C 1. The Doping Offense involved the use of a Specified Substance Cannabinoids referred to in S. 8. of Appendix Three "*The 2005 Prohibited List*".
2. Rule L. 1. disqualifies the results obtained at the Stella Artois Championships in London, England on 5 June 2005. Any medals, titles, computer ranking points and prize money (without reduction for tax) obtained at the Competition are forfeited. The commencement of the foregoing Consequences is to be effective in accordance with Rule M. 8.
3. Under Rule M. 3. the period of Ineligibility otherwise applicable is determined to be time served to date of this Decision. In accordance with Rule M. 8. c. i. this suspension shall be deemed to commence on 15 September 2005 and cease on the day after this decision is dated but in any event not later than 10 November 2005.
4. Under Rule M. 7. fairness dictates that there is to be no Disqualification of results from the time of sample collection until the commencement of the period of Ineligibility on 15 September 2005.

DATED THIS 8<sup>th</sup> DAY of November 2005.



Prof. Richard H. McLaren, C.Arb  
(Chairman)

SIGNED AT: Barrister and Solicitor  
London, Ontario, CANADA