CASE NOTES AND COMMENTS

"ARE YOU TELLING ME THOSE COMPUTER CHIPS WERE REALLY HEROIN?": A LOOK AT THE THIRD CIRCUIT'S SCOPE OF APPELLATE REVIEW FOR ACCOMPLICE LIABILITY IN CONTROLLED SUBSTANCES CRIMES

I. INTRODUCTION

Imagine that a federal prosecutor receives a call in the middle of the night from DEA agents informing him that the kingpin of the heroin trafficking ring they had been watching has been taken down with an accomplice by an undercover agent posing as a buyer. The prosecutor arrives at the office the next day and meets with the agents to start to prepare the case for trial. It seems like a slam dunk: not only did both suspects hold the suitcase, but the accomplice also drove the car and counted the money that the agent handed him. The prosecutor charges them both under the Comprehensive Drug Abuse Prevention and Control Act of 1970[1] with conspiracy to distribute a controlled substance in violation of 21 U.S.C. § 846,[2] and with aiding and abetting possession by others with intent to distribute a controlled substance in violation of 18 U.S.C. § 2(a)[3] and 21 U.S.C. § 841(a)(1).[4]

After a smooth trial, the jury returns a guilty verdict against both defendants. The prosecutor is satisfied with a job well done, but not elated because there was really nothing novel about this case. Rather, it was a pretty standard drug conspiracy case, complete with surveillance videos and tapes of the transaction. A few months later the prosecutor receives an appellate brief from the second defendant, the accomplice. The brief argues that there was no proof that the defendant knew what was in the suitcase or the aim of the transaction, and even claims that the defendant, who did not testify at trial, thought he was involved in a diamond smuggling ring. This seems outlandish to the prosecutor. The prosecutor's reply brief discusses the jury's reasonable inference of knowledge of the aim of the conspiracy given the evidence that the defendant drove the car,

1. 21 U.S.C. §§ 801–971 (2006).

2. 21 U.S.C. § 846 provides: "Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy." *Id.* § 846.

3. 18 U.S.C. § 2(a) provides: "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." 18 U.S.C. § 2(a) (2006).

4. The Code states that "it shall be unlawful for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." 21 U.S.C. § 841(a)(1).

handled the bag with the heroin, counted the money, and confirmed to the DEA agent that the "stuff" was all there. The Third Circuit decides the case on the briefs, reversing the jury's verdict and finding that the defendant's actions were just as consistent with participation in a conspiracy to smuggle stolen diamonds, as the defendant claimed in his brief. In the opinion, the court references a string of Third Circuit cases cited by the appellant, holding that it made no difference that the appellant carried the suitcase, drove the car, or confirmed "the stuff" was all there since there was no indication he knew what "the stuff" really was.

As odd as this may seem, this is the result in a growing number of controlled substances cases in the Third Circuit, making it increasingly hard for federal prosecutors to sustain certain convictions on appeal. This Comment will explore the line of cases that began and expanded this situation. Part II.A summarizes the controlled substances statutes and their history. Part II.B discusses generally the role of the judge and the jury and the proper standard of review for "sufficiency of evidence" claims on appeal. Part II.C discusses the seminal Third Circuit case in this doctrinal line, cases that have followed, Third Circuit conspiracy and aiding and abetting cases with object offenses other than controlled substances crimes, and finally, similar controlled substances cases from sister circuits. Part III.A discusses the ramifications of the current state of the Third Circuit's aiding and abetting and conspiracy law in the area of controlled substances offenses, particularly the inconsistency with principles of judicial review, inconsistency within the Third Circuit as compared to treatment of allegations of other objects of aiding and abetting and conspiracy, and inconsistency with its sister circuits. Finally, Part III.B explores two possible solutions to this situation: (1) the Third Circuit may reconsider its prior case law on the subject and more faithfully adhere to the proper standard of review, or (2) the court may carve out a narrow exception allowing for an inference of knowledge where the defendant actually exercised control over the controlled substance.

II. OVERVIEW

A. The Controlled Substances Statutes

In bringing federal charges of accomplice liability in drug trafficking crimes, federal prosecutors generally charge defendants using the Comprehensive Drug Abuse Prevention and Control Act of 1970 ("the Act").[5] Congress enacted the Act in order to "deal in a comprehensive fashion with the growing menace of drug abuse in the United States."[6] The Act reflects congressional apprehension that "[d]rug abuse in the United States is a problem of ever-increasing concern, and appears to be approaching epidemic proportions."[7] The sections of the Act with which defendants are most commonly charged are conspiracy to distribute a controlled substance, or conspiracy to possess a controlled substance with intent

5. 21 U.S.C. §§ 801–971.

6. H.R. REP. NO. 91–1444, at 1 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4566, 4567.

7. *Id.* at 6, *reprinted in* 1970 U.S.C.C.A.N. 4566, 4572.

to distribute, in violation of 21 U.S.C. § 846,[8] and distribution of a controlled substance, or possession with intent to distribute, in violation of 21 U.S.C. § 841(a)(1).[9] In addition, accomplices are frequently charged with aiding and abetting a substantive 21 U.S.C. § 841(a)(1) offense, in violation of 18 U.S.C. § 2.[10] As these are criminal statutes, the prosecution must prove guilt beyond a reasonable doubt in order to obtain a guilty verdict. But given the clandestine nature of conspiracy,[11] participation is often permissibly established by circumstantial and indirect evidence.[12]

B. Function of the Jury and Standard of Review on Appeal

The right to a trial by jury in criminal cases is "the lamp that shows that freedom lives."[13] As decreed by both the original Constitution[14] and the Bill of Rights,[15] trial by jury is the bedrock of our system of justice,[16] an essential protection from government oppression.[17] Given the liberty interest at stake in a criminal trial, the jury is required to find guilt beyond a reasonable doubt.[18]

8. The Code states: "Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy." 21 U.S.C. § 846.

9. The Code states that "it shall be unlawful for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." *Id.* § 841(a)(1).

10. The Code states: "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." 18 U.S.C. § 2(a) (2006).

11. *See* Blumenthal v. United States, 332 U.S. 539, 557 (1947) (reasoning that because successful conspiracy requires secrecy and concealment, conviction may be properly obtained upon sufficient showing of "essential nature of the plan and [the conspirators'] connections with it, without requiring evidence of knowledge of all its details"). The Third Circuit has also followed this formulation in many cases. *See, e.g.*, United States v. Brodie, 403 F.3d 123, 134 (3d Cir. 2005) (stating that given nature of conspiracy, indirect and circumstantial evidence may be only way to establish its existence); United States v. Kapp, 781 F.2d 1008, 1010 (3d Cir. 1986) (noting that establishing conspiracy beyond reasonable doubt may be done totally through circumstantial evidence).

12. Circumstantial evidence is that which "indirectly proves a fact. It is evidence that proves one or more facts from which you could reasonably find or infer the existence of some other fact or facts." MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE THIRD CIRCUIT § 3.03, at 135 (Comm. on Model Criminal Jury Instructions Within the Third Circuit 2009) [hereinafter MODEL CRIMINAL JURY INSTRUCTIONS THIRD CIRCUIT], *available at* http://www.ca3.uscourts.gov/criminaljury/Chap%203%20Oct %202008.pdf.

13. PATRICK DEVLIN, TRIAL BY JURY 164 (1956).

14. *See* U.S. CONST. art. III, § 2, cl. 3 (providing, in relevant part, that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury").

15. *See id.* amend. VI (providing, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury").

16. William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK U. L. REV. 67, 70 (2006).

17. Singer v. United States, 380 U.S. 24, 31 (1965).

18. Chad M. Oldfather, *Appellate Courts, Historical Facts, and the Civil-Criminal Distinction*, 57 VAND. L. REV. 437, 467 (2004).

It is a well-established principle that the jury is the finder of fact, while the judge is the arbiter of the law.[19] This principle has its roots in English common law and has been recognized for almost five hundred years.[20] Given its designation as "fundamental to the American scheme of justice,"[21] especially in criminal cases, judgments of a jury are afforded great weight.[22] When jury verdicts are challenged in criminal cases, it may be on sufficiency of evidence grounds, that is, based on an argument by the defendant that the evidence of guilt was insufficient as a matter of law to permit the jury's finding of guilt beyond a reasonable doubt.[23] In *Jackson v. Virginia*,[24] the Supreme Court held that "the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction" requires the question of "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[25] Given that these appeals are of criminal convictions (the government may not appeal acquittals), on appeal, all of the evidence is to be construed most favorably to the jury's verdict. Accordingly, a reviewing court must refrain from weighing the evidence or the credibility of witnesses.[26] Based on this well-established rule, inferences drawn by the jury are not to be reexamined on appeal unless these inferences are wholly irrational, since an inference innately requires a factual determination.[27] The practical effect of this is that a "court faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution."[28] A primary rationale for this is a general

19. *See* MODEL CRIMINAL JURY INSTRUCTIONS THIRD CIRCUIT, *supra* note 12, § 3.01, at 130 (instructing jury that job of finding facts is theirs and theirs alone and that judge plays no role in fact-finding).

20. *See* Jones v. United States, 526 U.S. 227, 247 n.8 (1999) (recognizing extensive history of principle that juries were finders of fact and judges were "deciders of law").

21. Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

22. Commentators have noted that the power of federal appellate courts to examine juries' factual determinations is ever expanding in civil actions, but this power has not extended to criminal cases. *See, e.g.*, Debra Lyn Bassett, *"I Lost at Trial—In the Court of Appeals!": The Expanding Power of the Federal Appellate Courts to Reexamine Facts*, 38 HOUS. L. REV. 1129, 1131 (2001) (discussing recent Supreme Court decisions granting appellate courts more power to supplant jury verdicts in civil cases); Stephan Landsman, *Appellate Courts and Civil Juries*, 70 U. CIN. L. REV. 873, 898–99 (2002) (noting trend suggesting that reviewing judges subject jury verdicts in civil cases to very severe scrutiny); Suja A. Thomas, *Judicial Modesty and the Jury*, 76 U. COLO. L. REV. 767, 795 (2005) (finding that Supreme Court has been "more generous" in allocating power to criminal juries than to civil juries). However, the parameters of this trend are murky, both in scope and constitutionality. *See* Bassett, *supra*, at 1194 (noting contradiction by Supreme Court of established jurisprudence and subversion of Reexamination Clause present in recent decisions).

23. Jackson v. Virginia, 443 U.S. 307, 318 (1979).

24. 443 U.S. 307 (1979).

25. *Jackson*, 443 U.S. at 318–19.

26. *See id.* at 319 (explaining that standard preserves "factfinder's role as weigher of the evidence").

27. An inference is defined as a "conclusion reached by considering other facts and deducing a logical consequence from them." BLACK'S LAW DICTIONARY 847 (9th ed. 2009).

28. *Jackson*, 443 U.S. at 326.

acknowledgement that the jury is in a unique position to evaluate the evidence and determine the credibility of witnesses.[29] The Third Circuit has long recognized that "[i]t is clearly within the province of the triers of fact to weigh the evidence and determine the credibility of witnesses,"[30] and in view of a guilty verdict, it is the duty of the appellate court to "consider the facts in a light most favorable to the government."[31] The Third Circuit further recognizes that an inference drawn by the jury need not be the only one possible,[32] and that the "government's proof need not exclude every possible hypothesis of innocence."[33]

While *Jackson* has been criticized as imprecise,[34] possibly opening the door to virtually limitless appellate review of trial evidence,[35] in practice most appellate courts, including the Third Circuit,[36] apply it as a highly deferential standard,[37] construing all reasonable inferences in favor of the jury's verdict.[38] In particular, the Supreme Court has held that "[p]articipation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a development and a collocation of circumstances."[39] In light of this deference, observers note that appellate courts rarely reverse convictions on sufficiency grounds.[40]

The Supreme Court explained that the deferential standard of review of sufficiency of evidence is essential for preservation of the jury's fundamental role, stating:

> Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be

29. Kelly Kunsch, *Standard of Review (State and Federal): A Primer*, 18 SEATTLE U. L. REV. 11, 20 (1994).

30. United States v. Migliorino, 238 F.2d 7, 10 (3d Cir. 1956).

31. *Id.*; *see also* United States v. Aguilar, 843 F.2d 155, 157 (3d Cir. 1988) (noting prohibition on appellate court weighing evidence adduced at trial, and explaining that court must instead consider whether verdict was supported by substantial evidence weighed in light most favorable to prosecution); Gov't of V.I. v. Williams, 739 F.2d 936, 940 (3d Cir. 1984) (giving benefit of evidentiary inferences to jury's verdict); United States v. De Cavalcante, 440 F.2d 1264, 1273 (3d Cir.1971) (finding government entitled to have evidence construed most favorably to jury's verdict to sustain conviction).

32. United States v. Iafelice, 978 F.2d 92, 97 n.3 (3d Cir. 1992).

33. United States v. Ozcelik, 527 F.3d 88, 94 (3d Cir. 2008) (quoting United States v. Bala, 236 F.3d 87, 94 (2d Cir. 2000)).

34. *See, e.g.*, Oldfather, *supra* note 18, at 477 (describing logic in *Jackson* as lacking limits).

35. *Id.* at 477–78.

36. See *supra* notes 30–33 and accompanying text for a discussion of the Third Circuit's standard of appellate review.

37. Oldfather, *supra* note 18, at 478 (describing *Jackson* standard as "a highly deferential standard in the pantheon of appellate standards of review" (internal quotation marks omitted) (quoting 2 STEVEN A. CHILDRESS & MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW § 9-2 (2d ed. 1992))).

38. *See, e.g.*, Glasser v. United States, 315 U.S. 60, 80 (1942) (stating that court must sustain jury verdict if supported by substantial evidence and that, in case at bar, "jury could infer the existence of a conspiracy").

39. *Id.* (internal quotation marks omitted).

40. *See* Jon O. Newman, *Beyond "Reasonable Doubt,"* 68 N.Y.U. L. REV. 979, 989 (1993) (noting that appellate courts rarely overturn convictions on grounds of insufficient evidence).

> considered in the light most favorable to the prosecution. The criterion thus impinges upon "jury" discretion only to the extent necessary to guarantee the fundamental protection of due process of law.[41]

C. The Third Circuit's Approach to Aiding and Abetting and Conspiracy Under the Act

Notwithstanding the deferential standard for appellate review of a jury verdict, the Third Circuit has seemingly strayed, in a limited area of convictions, from the faithful application of this test.

1. *United States v. Wexler*

In October 1984, a U.S. Customs Service drug-sniffing dog detected hashish in a thirty-two crate shipment of Mercedes-Benz parts, which had originated in Bombay, India and was en route to Quality Traders in Media, Pennsylvania.[42] Government agents proceeded to open the crates and ultimately discovered 750 pounds of hashish worth $1.8 million.[43] The government then arranged for a controlled delivery of the crates by undercover agents to Quality Traders, where the crates were accepted by a co-conspirator, Fred Kornblith.[44] Kornblith later decided to cooperate and testified at trial that he had accepted the crates and had rented a yellow Ryder truck to transport the hashish at the direction of another defendant, Louis Samuels.[45] Samuels had told Kornblith that he was going to cover Kornblith by conducting countersurveillance.[46]

While Kornblith was loading the truck, the government agents surveilling Quality Traders "noted in particular a white Ford Sedan which was driving by the surveillance area at about five miles per hour."[47] The sedan contained three occupants, each visibly "looking around until the driver made eye contact with the surveillance agents."[48] The car then sped away, "with one of the occupants watching the agents until the car was out of sight."[49] After checking the license plates of the sedan, the agents ascertained that the defendant, Robert Wexler, had rented it the day before, and later identified Wexler as the driver.[50]

The evidence at trial also showed that after Kornblith dropped the truck off at a Dunkin' Donuts and switched keys with Samuels, Wexler was seen in the parking lot talking to Samuels.[51] Samuels then moved the truck to another location, and "a white Ford Sedan, driven by a man who fit Wexler's description, stopped

41. Jackson v. Virginia, 443 U.S. 307, 319 (1979) (footnote omitted).
42. United States v. Wexler, 838 F.2d 88, 89 (3d Cir. 1988).
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Wexler*, 838 F.2d at 89.
48. *Id.*
49. *Id.* at 89–90.
50. *Id.* at 90.
51. *Id.*

by it momentarily," after which "the driver [got] out to talk" to an occupant of another car.[52] Wexler was also seen "talking on a public phone" at the location of the truck, talking to Samuels in the same location, and constantly looking at the truck's location.[53] Later, Samuels and Wexler were seen in a white car together, "conducting what appeared to be continued counter-surveillance activities."[54] At the time of their arrests, Wexler was driving the white car with Samuels as the only passenger.[55] Further, the keys to the rented Ryder truck were in Samuels's possession, as well as a citizens' band ("CB") radio purchased near Wexler's home; the receipt for the radio showed that it was purchased using a false name and address.[56] Wexler was charged with conspiracy to distribute hashish, in violation of 21 U.S.C. § 846, and with aiding and abetting possession by others of over ten kilograms of hashish with intent to distribute, in violation of 18 U.S.C. § 2 and 21 U.S.C. § 841(a)(1).[57] After a trial, a jury convicted Wexler.[58]

Wexler appealed, challenging the sufficiency of the evidence to prove that he had the knowledge and intent necessary to support a conviction for aiding and abetting and conspiracy charges.[59] In an opinion written by Judge Dolores Sloviter, the Third Circuit accepted Wexler's argument and reversed based on insufficient evidence to uphold either conviction.[60] The court reasoned that without "any evidence that Wexler knew that a controlled substance was couched behind the doors of the Ryder truck" the convictions for both conspiracy and aiding and abetting could not stand.[61] Throughout the opinion the court picked apart each "permissible inference" drawn by the jury, finding that the record was lacking "'the totality of evidence from which a reasonable juror could logically infer' that Wexler had knowledge of the object of the conspiracy."[62]

Even though the court concluded that the evidence showed that it was more likely than not that Wexler suspected, if not knew, that there was some form of contraband in the truck he was watching, it reasoned that

> these permissible inferences do not support a holding that the government met its burden to prove beyond a reasonable doubt that Wexler knew this was a conspiracy to transport hashish or even another controlled substance. The evidence is just as consistent, for example, with a conspiracy to transport stolen goods, an entirely different crime.[63]

52. *Wexler*, 838 F.2d at 90.

53. *Id.*

54. *Id.*

55. *Id.* Samuels and another codefendant fled after the indictment and were never tried. *Id.*

56. *Wexler*, 838 F.2d at 90.

57. *Id.* See *supra* Part II.A for a discussion of the applicable statutes.

58. *Wexler*, 838 F.2d at 90.

59. *Id.*

60. *Id.* at 89, 92.

61. *Id.* at 91–92.

62. *Id.* at 92 (quoting United States v. Coleman, 811 F.2d 804, 808 (3d Cir. 1987)).

63. *Wexler*, 838 F.2d at 92. The decision in *Wexler* followed that in *United States v. Cooper*, 567 F.2d 252 (3d Cir. 1977), which involved more innocuous facts. There, the evidence suggested that the defendant rode in a truck from Colorado to Pennsylvania and shared a hotel room with the driver, but

2. *Wexler*'s Aftermath

Despite an acknowledgement that "conspiracy may be proven entirely by circumstantial evidence,"[64] the Third Circuit's reliance on *Wexler* has, in essence, consistently led to a conclusion that absent direct evidence of the conspirator's or accomplice's knowledge of the specific illegal aim of a venture involving controlled substances, a jury conviction under the federal drug statutes cannot stand.

Thus, the court in *United States v. Salmon*[65] stretched the holding of *Wexler*, finding that performing surveillance, speaking to co-conspirators, and possessing surveillance equipment were insufficient to sustain a conviction under *Wexler*, even assuming constructive possession.[66] In 1998, the decision in *United States v. Idowu*[67] illustrated the extent to which the Third Circuit's controlled substances jurisprudence had traveled from the highly deferential standard required on appeal. There, the defendant Idowu and another man met with an undercover informant who was purporting to sell kilograms of heroin.[68] While Idowu did not negotiate the transaction, he carried a bag containing $18,000 in cash, and presented the bag to the putative buyer, stating that he had checked the money himself and that it was all there.[69] The men then went to the informant's car, where Idowu removed a suitcase which agents had placed in the car and which contained heroin hidden in the lining.[70] The court recounted that Idowu unzipped the black suitcase and, upon seeing nothing inside, told his confederate, "They didn't pack this thing."[71] The informant tried to reassure the men "by explaining that something was concealed in the frame of the suitcase."[72] Moments later, the arrest took place.[73] The divided appellate panel, however, determined that this evidence was insufficient to permit a jury to conclude that Idowu knew the nature of the contraband which he and his

there was no evidence that the defendant knew about the controlled substances secreted in the truck's padlocked compartment and no evidence that illegal plans were discussed by the men. *Id.* at 254. The appellate court held that there was "no evidence suggesting guilty knowledge or participation" of the passenger. *Id.* at 255.

64. *Wexler*, 838 F.2d at 90.

65. 944 F.2d 1106 (3d Cir. 1991).

66. *Salmon*, 944 F.2d at 1114–15. Constructive possession is defined as "[c]ontrol or dominion over a property without actual possession or custody of it." BLACK'S LAW DICTIONARY, *supra* note 27, at 1282. In *Salmon*, one of the defendants, Washington, delivered drugs to an undercover detective. *Salmon*, 944 F.2d at 1111–12. The court found that the evidence was insufficient to establish the guilt of defendant Fitzpatrick, despite evidence suggesting that Fitzpatrick brought the bag containing drugs to the scene in the trunk of his car. *Id.* at 1112–15. In contrast, the court affirmed the conviction of another defendant, Salmon, who was pointed out by Washington as the supplier of the drugs. *Id.* at 1115.

67. 157 F.3d 265 (3d Cir. 1998).

68. *Idowu*, 157 F.3d. at 267.

69. *Id.*

70. *Id.* at 267–68.

71. *Id.* at 268 (internal quotation marks omitted).

72. *Id.*

73. *Idowu*, 157 F.3d at 268.

associate had endeavored to buy.[74] The majority stated that it was possible that the offense involved other contraband, "such as stolen jewels or computer chips or currency."[75]

A 2004 case, *United States v. Cartwright*,[76] again illustrated the sharp divergence between the highly deferential standard of review required on appeal by both Supreme Court and Third Circuit precedent[77] and the Third Circuit's actual practice. In this case, in the reverse of the situation presented in *Idowu*, the defendant and his principal allegedly possessed drugs which they attempted to sell to an informant.[78] The defendant walked and conversed with his associate, who was carrying a bag with three kilograms of cocaine, then the defendant, armed with a loaded gun and holding a two-way paging device, took up a lookout position 90–100 feet away from the site of the planned transaction.[79] Once again, a divided panel of the Third Circuit acknowledged that the proof established that the defendant aimed to further an illegal endeavor, but declared the evidence insufficient to prove that the defendant knew the nature of the contraband involved.[80]

Various opinions have relied on Judge Sloviter's analogy that the evidence in *Wexler* was "just as consistent . . . with a conspiracy to transport stolen goods, an entirely different crime,"[81] invoking it in a variety of situations, such as where the defendant handled a suitcase filled with heroin.[82] In *United States v. Iafelice,*[83] however, the Third Circuit appeared to give more deference to the jury's verdict than it had in *Wexler*. In *Iafelice*, the evidence showed that the defendant drove and owned the car which was used to take a codefendant to a drug transaction.[84] The evidence also showed that the defendant himself probably popped the trunk of the car from the inside after the codefendant got out of the car.[85] Finally, the defendant may have made a telephone call to a codefendant's beeper while the codefendant was in the middle of his drug transaction.[86] The appellate court held that in "viewing the facts in the light most favorable to the government a reasonable jury could have found beyond a reasonable doubt that [the defendant]

74. *Id.* at 270.

75. *Id.* at 266, 268.

76. 359 F.3d 281 (3d Cir. 2004).

77. See *supra* Part II.B for a discussion of precedential opinions articulating the appropriate standard of review on appeal.

78. *Cartwright*, 359 F.3d at 283–85.

79. *Id.*

80. *Id.* at 289–90.

81. United States v. Wexler, 838 F.2d 88, 92 (3d Cir. 1988).

82. *See* United States v. Idowu, 157 F.3d 265, 267–68 (3d Cir. 1998) (finding that carrying suitcase filled with heroin was not sufficient to prove knowledge of participation in drug transaction as "wide variety of contraband items . . . including stolen jewelry, laundered money, stolen computer chips, and counterfeiting plates" could have been in suitcase).

83. 978 F.2d 92 (3d Cir. 1992).

84. *Iafelice*, 978 F.2d at 97.

85. *Id.*

86. *Id.* at 94.

knowingly possessed drugs with the intent to distribute them."[87] The court therefore reversed the district court's grant of a motion for judgment of acquittal and reinstated the jury conviction.[88] The court noted that the facts of *Iafelice* were substantially similar to those in *Wexler*[89] and *Salmon*,[90] which the court stated were "close cases."[91] However, the court noted two facts in particular that distinguished the case: "(1) the presence and use of a beeper and telephone during the drug transaction, and (2) the undisputed presence of the drugs in Iafelice's car."[92] Although, for the court, the use of communications equipment was notable,[93] the biggest distinction, it stated, was "Iafelice's ownership and operation of the vehicle used to transport the drugs."[94]

Based on the court's reasoning in *Iafelice*, the Third Circuit appeared to carve out a narrow exception for circumstantial evidence where the defendant has "dominion and control" over the articles in which controlled substances are found.[95] The prior cases may be distinguished on this ground—in *Wexler*, the defendant was never seen approaching or viewing the contents of the truck he surveilled,[96] and in *Idowu*, the defendant arrived at the scene with money, not drugs.[97] However, in 2006 the Third Circuit declined to apply this reasoning in such a situation. In *United States v. Zavala*,[98] the defendant mailed a package containing 1,300 grams of methamphetamine to a fictitious addressee using a fictitious name and return address.[99] On appeal, the Third Circuit essentially

87. *Id.* at 98.

88. *Id.*

89. See *supra* Part II.C.1 for the facts of *Wexler*.

90. See *supra* note 66 and accompanying text for the facts of *Salmon*.

91. *Iafelice*, 978 F.2d at 96.

92. *Id.*

93. The court reasoned that "use of the beeper to communicate . . . during the drug transaction provides some additional support for the inference that Iafelice knew he was involved in a drug transaction in view of the frequency with which beepers are used in the drug trade." *Id.* at 97.

94. *Id.*

95. The court noted that "[o]wnership and operation of the car are highly relevant facts that could reasonably have been considered by a jury in evaluating [the defendant's] knowledge of, and dominion and control over, the drugs." *Id.* Based on Iafelice's "dominion and control" of his car, "the jury's inference that Iafelice had constructive possession of the heroin is supported by a logical and convincing connection between the facts established and the conclusion inferred." *Iafelice*, 978 F.2d at 97 (internal quotation marks omitted).

96. See *supra* Part II.C.1 for a discussion of the *Wexler* facts.

97. See *supra* notes 68–73 and accompanying text for a discussion of the *Idowu* facts. In an analogous situation, akin to the finding that the operator of a car is presumed to know the nature of its contents, the Third Circuit in *Jackson v. Byrd* found sufficient evidence to show the defendant's constructive possession of cocaine found in the rear bedroom of an apartment for which she was the sole lessee, even though the defendant's brother used the rear bedroom, on the basis that the defendant had access to the entire apartment. 105 F.3d 145, 148–49 (3d Cir. 1997).

98. 190 F. App'x 131 (3d Cir. 2006).

99. *Zavala*, 190 F. App'x at 132. When questioned about mailing the package, the defendant claimed that it contained toys for his nephews, and claimed to have forgotten writing the mailing label. *Id.* at 132–33. At trial, a handwriting expert confirmed the label as bearing the defendant's handwriting. *Id.* at 133.

ignored the government's argument that Zavala's constructive possession of the package containing the drugs allowed a reasonable inference of knowledge under *Iafelice*.[100] Instead, the court found that subsequent cases such as *Cartwright*, *United States v. Thomas*,[101] and *Idowu* compelled a finding of innocence,[102] and dismissed *Iafelice* as inapplicable.[103]

The *Wexler* line of cases continues to cause reversals of convictions in the district courts;[104] however, the Third Circuit recently appeared to diverge from the *Wexler* line of precedent, suggesting that the judges of the court are not unanimous in their embrace of the *Wexler* line.[105] In *United States v. Reyeros*,[106] the defendants

100. *See* Brief for Appellee United States of America at 23–26, *Zavala*, 190 F. App'x 131 (No. 04-1776) (arguing that defendant fell under authority of *Iafelice* with respect to establishing reasonable inference of possession).

101. 114 F.3d 403 (3d Cir. 1997). In *Thomas*, Petersen arranged for a courier to travel from the Virgin Islands to Atlanta with a suitcase filled with twenty-four kilograms of cocaine. *Id.* at 404. He instructed the courier to leave the suitcase in an airport hotel room and to leave the key to the room at the front desk in an envelope addressed to "Cousin Melvin Smith." *Id.* The courier was apprehended and cooperated with the authorities. *Id.* Upon learning of the plan, agents left an empty suitcase in the hotel room, the courier called Petersen to report that she had arrived, and defendant Thomas soon appeared at the hotel and obtained the room key. *Id.* He possessed "a 9mm pistol registered to him, a pager, a cellular phone, a Virgin Islands driver's license, the envelope with 'Cousin Melvin Smith' written on it, and the room key." *Thomas*, 114 F.3d at 404. Thomas stated, however, "that he went to the room because a person named Cliff had offered him $500.00 to check on a bag at the hotel, but that he knew nothing about a cocaine deal." *Id.* 404–05. The Third Circuit determined that there was sufficient evidence to prove Thomas's role in an illegal venture, but no evidence that he knew of the nature of the substance involved. *Id.* at 405. The court reversed the conviction. *Id.* at 406.

102. *Zavala*, 190 F. App'x at 136.

103. *Id.* at 136–37. Oddly, the court dismissed *Iafelice* as inapplicable since it was a constructive possession case on appeal, and did not even discuss why *Iafelice* is inapplicable to whether Zavala constructively possessed the package. *Id.* at 136 n.5. The panel simply restated the facts and decision of *Iafelice* before dismissing the evidence before the court as too circumstantial to support an inference of guilt. *Id.* at 136–37.

104. *See, e.g.*, United States v. Boria, No. 07-151-02, 2008 WL 2047887, at *11–12 (E.D. Pa. May 13, 2008) (entering judgment of acquittal after jury convicted defendant of drug offenses, holding there was insufficient evidence of knowledge of specific nature of cargo where facts showed defendant entered tractor-trailer which contained 100 kilograms of cocaine in order to direct it to location where it would be unloaded); United States v. Carbo, No. 05-418-3, 2007 WL 2323126, at *29 (E.D. Pa. Aug. 10, 2007) (vacating honest services fraud conviction of defendant who gave concealed cash payments to public official, finding insufficient proof that defendant was aware of official's failure to report payments as required by state law), *rev'd*, 572 F.3d 112, (3d Cir. 2009). The government also appealed to the Third Circuit in *Boria*. *See* Docketing Letter re: USA v. Ruben Boria at 1, United States v. Boria, No. 08-2550 (3d Cir. June 5, 2008) (informing parties that government's appeal had been docketed).

105. In *United States v. Carpio-Sanchez*, as a tour bus arrived in Allentown, Pennsylvania containing 238 kilograms of cocaine hidden in a secret compartment, the defendant procured a warehouse in which to unload the cargo. 300 F. App'x 177, 178 (3d Cir. 2008). He then met with others involved in the scheme, showing them the route to the warehouse and also helping them to buy the tools needed to access the secret compartment. *Id.* When the bus arrived at the warehouse and was unloaded inside, the defendant stood outside, apparently keeping watch. *Id.* at 179. He entered the warehouse after the drugs were taken away, when the secret compartment in the bus was being reassembled. *Id.* On appeal, the panel found the evidence sufficient to support a finding of the defendant's specific knowledge of the drugs, and distinguished the rulings in *Cartwright*, *Idowu*, *Thomas*, and *Wexler*. *Id.* at 180–81. The court relied on *Iafelice*, stating that the defendant's ownership

were two brothers charged with participating in a conspiracy to import cocaine into the United States.[107] They argued that although the evidence supported the conclusion that they were involved in a conspiracy, it did not show that they knew the specific purpose of the conspiracy, which was to import drugs.[108] One defendant was an inspector for the United States Customs Service.[109] His brother had approached an individual for help locating an American company through which he could import 400 to 500 kilograms of cocaine into the United States, explaining that his brother was a U.S. Customs Service inspector, and that he would be able to arrange for the containers of drugs to enter the United States without being inspected.[110] Further, the brother also explained that the shipment needed to contain at least 500 kilograms because of the risks involved, and that his Customs Service inspector brother insisted on having such a quantity in order to use his Customs position.[111] The conspirators had planned to ship the cocaine hidden in containers of bananas, but the crime was never consummated because the conspirators were unable to obtain the cocaine.[112]

The Third Circuit affirmed the conviction, finding sufficient evidence to allow a jury to conclude that each defendant knew the purpose of the conspiracy.[113] The court held that the jury could credit the defendant's statement that his brother insisted on a quantity of 500 kilograms, and could also reasonably infer that the Customs Service inspector "would ask his own brother . . . the nature of the contraband for which he was putting his Customs career at risk."[114] Further, the court stated that because the Customs Service inspector was to receive a percentage of the value of any cocaine imported, the jury could reasonably infer that the Customs Service inspector "would want to know the nature of the contraband so that he could understand the expected payoff."[115]

3. The Third Circuit's Approach to Conspiracy / Aiding and Abetting in Non-drug Cases

The Third Circuit's approach to examining the sufficiency of the evidence for conspiracy / aiding and abetting is markedly more deferential in its non-drug cases.

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of the car in *Iafelice* "was the 'crucial additional fact' that 'truly distinguish[ed] his case from the more limited facts of *Wexler*.'" *Carpio-Sanchez*, 300 F. App'x at 180 (quoting United States v. Iafelice, 978 F.2d 92, 97 (3d Cir. 1992)). The court continued: "Carpio-Sanchez's leasing of and control over the warehouse used to receive and transfer drugs provide similar essential evidence demonstrating his guilty knowledge." *Id.* at 180–81.

106. 537 F.3d 270 (3d Cir. 2008).

107. *Reyeros*, 537 F.3d at 274.

108. *Id.* at 277.

109. *Id.* at 274.

110. *Id.* at 275.

111. *Id.* at 276.

112. *Reyeros*, 537 F.3d at 276.

113. *Id.* at 279.

114. *Id.* at 279 n.12.

115. *Id.*

A clear example is *United States v. Brodie*,[116] where a jury convicted the defendant of violating the American Cuban embargo by conspiring to trade with Cuba, but the district court granted his motion for judgment of acquittal on the grounds that there was insufficient evidence of his knowledge of the conspiracy.[117] On the government's appeal, the Third Circuit first noted that most of the government's evidence focused on the "accomplishment of particular illegal acts" by the two other defendants, not on the defendant's participation in the conspiracy.[118] Instead, the government's case against the defendant revolved around "six key pieces of circumstantial evidence."[119] The court meticulously analyzed each of the six pieces of evidence, construing them to favor finding knowledge. Analyzing the first piece, "basic company structure," for instance, the court found an inference of the defendant's knowledge reasonable given that the sales to Cuba were highly lucrative for the company of which the defendant was the president, and given the defendant's active communication with his brothers, who were co-owners of the company.[120] Second, the court found reasonable an inference of guilt based on the defendant's instruction to an employee that no future invoices should contain any reference to Cuba, and the defendant's subsequent feigned ignorance to an auditor who found such an invoice.[121] Evidence also established that the employee who generally conducted the Cuban sales received a very favorable performance rating and a promotion,[122] which the court said allowed a reasonable inference that the defendant knew of the sales and sought to reward them.[123] The court also found an inference of concealment of wrongdoing reasonable based on evidence showing that employees used "the Caribbean," "the island," and "that island" as code words for Cuba,[124] records directing products to be shipped from the U.K.,[125] and records of telephone calls to personnel associated with the company asking them not to mention sales to Cuba if questioned by the government.[126] In its evaluation, the *Brodie* court stated that "one should not miss the forest for the trees. The inferences against the Defendant urged by the government depend for their reasonableness on viewing the evidence as a whole."[127] The court vacated the

116. 403 F.3d 123 (3d Cir. 2005).

117. *Brodie*, 403 F.3d at 126.

118. *Id.* at 135.

119. *Id.* This evidence consisted of:

> (1) the basic company structure; (2) the "billing instruction," and series of events related to [a company audit]; (3) the "our friends in the Caribbean" speech; (4) [an employee's] 1995 performance review; (5) the pervasive use of "code words" for Cuba by employees of [a company]; and (6) several post-investigation events.

Id. at 135.

120. *Id.* at 150–51.

121. *Brodie*, 403 F.3d at 136–38, 151–52.

122. *Id.* at 143–44.

123. *Id.* at 155.

124. *Id.* at 144.

125. *Id.* at 157–58.

126. *Brodie*, 403 F.3d at 156.

127. *Id.* at 150.

judgment of acquittal, holding that even though the case against the defendant rested "entirely on circumstantial evidence . . . each of the interconnected inferences urged by the government is reasonable on the evidence as a whole."[128]

Another example of the court's deferential review of convictions in non-drug cases is *United States v. Kemp*.[129] There, the jury found that a businessman, Hawkins, aided and abetted the corruption of the City Treasurer of Philadelphia, Kemp, by acting as a conduit in passing at least one $5,000 bribe from a Philadelphia attorney to Kemp through Hawkins's accounts.[130] Hawkins, citing many of the drug cases discussed here, argued that he was entitled to a judgment of acquittal because it was possible that his actions were consistent with abetting other uncharged crimes, including tax fraud, money laundering, and narcotics trafficking, and thus the government failed to prove his specific knowledge of the charged purpose of the scheme: to deprive the public of Kemp's honest services.[131] The Third Circuit rejected this argument, holding that

> the government's theory specifically accounts for Kemp's position as a public official in a way that Hawkins's other proposed crimes do not, which differentiates this case from *Wexler*. As we have explained, "[t]here is no requirement . . . that the inference drawn by the jury be the only inference possible or that the government's evidence foreclose every possible innocent explanation."[132]

4. Treatment of Conspiracy / Aiding and Abetting Controlled Substances Crimes in Other Circuits

Cases from other circuits demonstrate that the Third Circuit is enigmatic in its willingness to overturn jury verdicts in conspiracy and aiding and abetting controlled substances cases based on sufficiency of evidence challenges. In other circuits, appellate courts uphold convictions based on the jury's permissive inference of knowledge based on "the exercise of control over the vehicle in which the illegal drugs are concealed."[133] Additionally, where the defendant has actually handled the package containing the drugs, courts have deemed the evidence sufficient to support a conviction on the theory that the jury's inference of knowledge is reasonable because the defendant has exercised dominion over the

128. *Id.* at 158.

129. 500 F.3d 257 (3d Cir. 2007).

130. *Kemp*, 500 F.3d at 293.

131. *Id.* at 292–93.

132. *Id.* at 293 (quoting United States v. Iafelice, 978 F.2d 92, 97 n.3 (3d Cir. 1992)).

133. United States v. Resio-Trejo, 45 F.3d 907, 911 (5th Cir. 1995); *see also* United States v. Olivo-Infante, 938 F.2d 1406, 1409 (1st Cir. 1991) (reasoning that since drivers generally exercise dominion and control over vehicles driven, permissive inference of knowing possession logically follows); United States v. Levario, 877 F.2d 1483, 1485–86 (10th Cir. 1989) (noting permissibility of inference that drivers know about illicit substances contained in their vehicles), *abrogated on other grounds by* Gozlon-Peretz v. United States, 498 U.S. 395, 403–07 (1991); United States v. Laughman, 618 F.2d 1067, 1076 (4th Cir. 1980) (applying inference that vehicle driver is aware of massive amount of marijuana in vehicle).

drugs and has been involved in transporting them.[134] The Fifth Circuit has required more, demanding additional circumstantial evidence[135] "that is suspicious in nature or demonstrates guilty knowledge."[136]

Many circuits also recognize that guilty knowledge may be "proven by circumstantial evidence alone" because "it frequently cannot be proven in any other way."[137] For example, in *United States v. Ortiz*,[138] the First Circuit held that the evidence was sufficient to sustain a conviction under 21 U.S.C. §§ 841 and 846.[139] After examining the evidence,[140] and even acknowledging that "plausible competing inferences exist,"[141] the court discussed and accepted the inferences likely drawn by the jury.[142]

Similar results have followed in other circuits, particularly where the evidence showed that the defendant acted as a lookout.[143] Generally, these cases

134. *See, e.g.*, United States v. Johnson, 57 F.3d 968, 971–73 (10th Cir. 1995) (holding jury's inference of intent and knowledge was sufficient where defendant mailed package containing cocaine using false name and nonexistent address); United States v. Castro-Lara, 970 F.2d 976, 981 (1st Cir. 1992) (allowing jury's inference of guilty knowledge despite defendant's testimony that he believed bag he carried off of plane contained auto parts, not cocaine); United States v. Zafiro, 945 F.2d 881, 887–88 (7th Cir. 1991) (finding evidence of cocaine stashed in defendant's house was sufficient to support conviction); United States v. Hillison, 733 F.2d 692, 698 (9th Cir. 1984) (finding that mailing package containing cocaine was sufficient to support conviction); United States v. Raffo, 587 F.2d 199, 200–01 (5th Cir. 1979) (holding that evidence was sufficient to support conviction where defendant handled bag containing cocaine).

135. *See* United States v. Moreno, 185 F.3d 465, 472 n.3 (5th Cir. 1999) (noting that behavior demonstrating guilty knowledge may include presence or absence of nervousness, failure to make eye contact, non-responsiveness to questions, lack of surprise upon discovery of contraband, inconsistent statements, implausible explanations, possession of large amounts of cash, and obvious or remarkable alterations to container holding drugs).

136. *Id.* at 471 (internal quotation marks omitted); *see also id.* at 471–72 (carrying suitcases containing cocaine into country coupled with "inconsistent statements and implausible explanations" allowed for inference of guilty knowledge).

137. United States v. Garcia, 521 F.3d 898, 901 (8th Cir. 2008) (internal quotation marks omitted).

138. 447 F.3d 28 (1st Cir. 2006).

139. *Ortiz*, 447 F.3d at 30.

140. The evidence adduced at trial showed that on the day of his arrest, Ortiz drove a co-conspirator to various locations where he spoke with yet another co-conspirator, phone calls were made from Ortiz's car to those parties, and one of the co-conspirators placed the gym bag containing the cocaine into Ortiz's trunk. *Id.* at 33.

141. *Id.* at 34.

142. *Id.* at 33–34 (noting that jury reasonably could conclude that Ortiz was aware of nature of passenger's business based on length of time spent together in vehicle, phone calls passenger made in Ortiz's presence, and passenger's placement of blue gym bag in trunk of Ortiz's car). The court reasoned that "competing inferences are not enough to disturb the jury's verdict, and limited involvement is nonetheless involvement. When the pieces of evidence are layered, with inferences taken in the government's favor . . . a jury easily could find that Ortiz . . . was a willing participant at the critical time." *Ortiz*, 447 F.3d at 34; *accord* United States v. Desimone, 119 F.3d 217, 225 (2d Cir. 1997) ("Faced with competing reasonable inferences drawn from the evidence, we are required to defer to the jury's resolution implicit in its guilty verdict.").

143. *See, e.g.*, United States v. Rice, 77 F. App'x 692, 693–95 (4th Cir. 2003) (allowing undercover agent into room where transaction was to take place and locking door behind him was

illustrate that it is permissible to infer knowledge from conduct, reasoning that one acting as a lookout "associates himself with the criminal venture, participates in it, and seeks by his acts to make it succeed."[144] General trends in the other circuits show particularly that acting as a lookout,[145] or even carrying a weapon during the transaction,[146] are sufficient to support an inference of knowledge. Other types of conduct weighing heavily in favor of an inference of knowledge include driving the principal to the transaction site[147] or counting the money exchanged.[148]

There is no definitive formula as to what conduct is sufficient[149] to infer guilty knowledge given the very fact-based nature of these crimes. It is important to note that no one factor is dispositive; rather, it is the quantum of circumstantial

sufficient to support conviction of aiding and abetting even though defendant was not in room during transaction); United States v. Martin, 920 F.2d 345, 348–49 (6th Cir. 1990) (following codefendant from distance and closely watching his movements supported inference of knowledge); United States v. Natel, 812 F.2d 937, 940–42 (5th Cir. 1987) (scouting area for police was strong support for inference of knowledge).

144. *Martin*, 920 F.2d at 348.

145. *See, e.g.*, United States v. Reyes-Ponce, 223 F. App'x 624, 625–26 (9th Cir. 2007) (finding adequate support for inference of knowledge on basis of defendant's role as lookout, defendant's conversation with codefendants shortly before drug deal, and defendant's reference to "the deal" when speaking with police); United States v. Diaz-Boyzo, 432 F.3d 1264, 1270 (11th Cir. 2005) (finding sufficient evidence to support aiding and abetting conviction where defendant rode as passenger during pick-up and drop-off of drugs and watched codefendant conduct drug deal from car while possessing firearm); United States v. Segura-Gallegos, 41 F.3d 1266, 1269–70 (9th Cir. 1994) (concluding evidence was sufficient to support conspiracy conviction where defendant, among other things, appeared to engage in countersurveillance activities from van parked in close proximity to area where drug deal occurred).

146. *See, e.g.*, United States v. García-Carrasquillo, 483 F.3d 124, 131 (1st Cir. 2007) (concluding that defendant fleeing from and shooting at police gave rise to inference that he intended to aid and abet codefendant).

147. *See, e.g.*, *Ortiz*, 447 F.3d at 33–34 (noting that jury reasonably could conclude Ortiz was aware of nature of passenger's business based on length of time spent together in vehicle, phone calls passenger made in Ortiz's presence, and passenger's placement of blue gym bag in trunk of Ortiz's car); United States v. Pitre, 960 F.2d 1112, 1122 (2d Cir. 1992) (concluding that jury reasonably could conclude defendant was aware he transported money to purchase narcotics where defendant followed three codefendants, all in separate vehicles, to points in Brooklyn and Manhattan and showed bag of money to undercover officer); United States v. Diez, 736 F.2d 840, 843 (2d Cir. 1984) (rejecting sufficiency challenge where defendant drove car and witnessed drug transaction between passenger and third party); United States v. Raffo, 587 F.2d 199, 200–01 (5th Cir. 1979) (finding sufficient evidence to support inference that defendant knew bag exchanged contained cocaine where defendant drove principal, principal instructed defendant to exchange money for bag, and after returning with bag, principal told defendant to keep bag concealed).

148. United States v. Williamson, 53 F.3d 1500, 1515–16 (10th Cir. 1995); *Natel*, 812 F.2d at 941–42. The reasoning is that it is a reasonable inference that the defendant could only have verified the correct amount of money if he had knowledge as to how much the buyer was supposed to pay and for what he was paying. *Natel*, 812 F.2d at 941. In addition, verifying the correct amount of money can be seen as "an effort . . . to make [the] venture successful." *Williamson*, 53 F.3d at 1516.

149. Particularly in the Seventh Circuit, so long as the evidence establishes that the defendant acted as a lookout, the court will uphold the jury's conviction. *See* United States v. Pazos, 993 F.2d 136, 139 (7th Cir. 1993) ("[E]ngaging solely in counter-surveillance at a drug transaction is sufficient to prove membership in a conspiracy to sell drugs . . . .").

evidence that will support an inference of guilt.[150] Although other circuits have addressed cases which are analogous to those presented to the Third Circuit, they have often reached results at apparent odds with those in the *Wexler* line of cases.[151] Elsewhere, where the defendant argues that the government offered no proof that the defendant knew what type of transaction he was aiding and abetting, the courts have responded by examining the "totality of [the defendant's] behavior"[152] and often concluding that an inference of knowledge is reasonable, even without direct proof.[153] However, the trend in other circuits is not without exception. Thus, it is noteworthy that the D.C. Circuit in *United States v. Teffera*[154] relied on the Third Circuit's post-*Wexler* jurisprudence to overturn a conviction under the federal drug statutes. Relying on *Salmon*,[155] the court did not engage in a lengthy discussion, but rather simply cited it for the proposition "that evidence that implies . . . general knowledge of criminality afoot is insufficient to sustain a conviction for aiding and abetting a specific crime."[156]

III. DISCUSSION

The Third Circuit's treatment of conspiracy and aiding and abetting convictions under the federal drug statutes seems problematic for a variety of reasons. Significantly, the Third Circuit's post-*Wexler* jurisprudence seems to contravene the congressional intent of the Comprehensive Drug Abuse Prevention and Control Act[157] by making it extremely difficult for the government to sustain a jury conviction based on circumstantial evidence. Congress enacted these statutes

150. *See, e.g.*, United States v. Diaz-Boyzo, 432 F.3d 1264, 1269–70 (11th Cir. 2005) (accompanying codefendant to initial meeting and delivery meeting, watching codefendant closely during transaction, and possession of loaded firearm during transaction supported inference of guilt); *Pitre*, 960 F.2d at 1122 (holding evidence sufficient where defendant was carrying beeper, drove car to scene of transaction, and saw principal remove bag of money from car that defendant was driving); *Diez*, 736 F.2d at 843 (witnessing transaction, providing transportation, and operating vehicle involved was sufficient to support inference of knowledge).

151. See *supra* Part II.C.4 for a discussion of other circuits' treatment of challenges to conspiracy and aiding and abetting convictions in controlled substances cases.

152. United States v. Garcia, 521 F.3d 898, 901 (8th Cir. 2008).

153. *See, e.g.*, *id.* (conducting countersurveillance before and after transaction, securing and delivering package, and blocking buyer's exit until payment had been made in full allowed reasonable inference of guilt); United States v. Magallon-Jimenez, 219 F.3d 1109, 1113 (9th Cir. 2000) (inferring defendant's knowledge of presence of cocaine wrapped inside Pepsi box was reasonable due to proximity of Pepsi box to defendant's feet); United States v. Martin, 920 F.2d 345, 348 (6th Cir. 1990) (concluding that jury could infer knowledge of cocaine based on conduct as lookout, use of false names, and flight from police even though codefendant testified that Martin had no knowledge of presence of cocaine); United States v. Collazo, 732 F.2d 1200, 1205–06 (4th Cir. 1984) (reasoning that jury was entitled to infer guilty knowledge from circumstantial evidence such as defendant's attitude, behavior, and nature of conspiracy even though evidence was consistent with defendant being only "hired gun" who was not aware of nature of transaction or presence of marijuana).

154. 985 F.2d 1082 (D.C. Cir. 1993).

155. See *supra* notes 65–66 and accompanying text for a discussion of *Salmon*.

156. *Teffera*, 985 F.2d at 1087.

157. See *supra* notes 5–12 and accompanying text for a discussion of the Act.

to deal with a fear of the proliferation of drugs in our society,[158] and thus intended to stunt this type of activity through strict enforcement mechanisms; however, the Third Circuit's lack of deference to jury verdicts in these appeals hinders the ability of federal prosecutors to effectively procure jury convictions. More broadly, the troublesome decisions at issue undermine the jury system and risk public confidence that the work and determinations of lay juries will be respected.

The following analysis examines the problems with the Third Circuit's approach and demonstrates how these problems can be remedied. Part III.A details the problems inherent in the Third Circuit's jurisprudence in light of (1) inconsistency with fundamental constitutional principles and its own precedent, (2) internal inconsistency with other types of cases, and (3) inconsistency with the approach of its sister circuits. Part III.B suggests that the Third Circuit consider en banc its inconsistent decisions, and adopt a deferential standard of review that comports with both established case law throughout the country and the Constitution.

A. The Flaws of Wexler *and Its Progeny*

1. Inconsistency with Fundamental Constitutional Principles and Its Own Precedent

There are legitimate justifications for the appellate courts to scrutinize these cases, such as the importance of proving guilt beyond a reasonable doubt because of the liberty at stake.[159] However, this cannot outweigh the constitutionally mandated function of the jury. As the lamp that makes freedom shine,[160] judgments of a jury are and should be afforded very heavy weight, especially in criminal cases.[161] While the criminal justice system certainly has a strong interest in ensuring that only truly guilty persons are punished, the *jury* trial and verdict is the proper safeguard for this interest because the jury is in a better position to evaluate the evidence than the appellate court.[162] The principles of appellate review articulated in *Jackson v. Virginia*[163] have the practical effect that appellate challenges to sufficiency of evidence rarely succeed.[164] Based on these principles, the cases in the Third Circuit reversing jury convictions on insufficiency grounds

158. H.R. REP. NO. 91-1444, at 1 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4566, 4567.

159. Oldfather, *supra* note 18, at 476.

160. DEVLIN, *supra* note 13, at 164.

161. *See* Oldfather, *supra* note 18, at 478 (discussing highly deferential method of modern appellate review).

162. *See Kunsch*, *supra* note 29, at 20 ("[T]he stated rationale for giving deference to the decision of a lower tribunal is that the [jury] was in a better position to make findings on the issue. These decision-makers are present throughout the entire course of the trial. They can observe first-hand the demeanor of each witness and thereby determine each witness' credibility. They spend more time with the facts and parties of the case so they generally have a better understanding of the context within which an issue arises." (footnote omitted)).

163. 443 U.S. 307 (1979).

164. Newman, *supra* note 40, at 988–89.

by weighing the evidence appear inconsistent with both fundamental tenets as espoused by the Supreme Court in *Jackson* and the Third Circuit's own precedent.[165] Every criminal defendant has the right to both a fair trial by jury and a fair appeals process; however, the appeals court is not the proper forum for making factual determinations.

The line of cases from *Wexler* forward demonstrates how the appellate court engages in the factual weighing that is forbidden on appeal.[166] The infamous words of Judge Sloviter that the evidence was "consistent . . . with a conspiracy to transport stolen goods"[167] indicate a judgment that is based on weighing the evidence and choosing inferences. Not only is this type of review forbidden by the Third Circuit's own precedent,[168] it contravenes the "rational trier of fact" standard of *Jackson*,[169] since Judge Sloviter's use of the phrase "just as consistent" [170] leads to a logical conclusion that the evidence is also consistent with the drug offense charged. This in turn indicates that the court is weighing the evidence, rather than assessing it as mandated by *Glasser v. United States*.[171]

Fundamentally, if competing inferences exist, a jury is entitled to choose one over another.[172] It thus seems obvious that even if an inference can be drawn that the defendant was involved in another type of crime, an appellate court's reversal of a jury verdict on this ground impermissibly impinges on the jury's sacred function since inferences by their very nature depend on factual determinations.[173] In the *Wexler* cases, the courts not only picked one inference over another, but also often rejected verdicts on the basis of inferences that appear even less reasonable than the conclusions that the unanimous juries evidently reached.

165. See *supra* notes 30–33 for a discussion of this precedent.

166. *See* United States v. Aguilar, 843 F.2d 155, 157 (3d Cir. 1988) (noting that instead of re-weighing evidence adduced at trial, appellate court must consider whether substantial evidence viewed in light most favorable to prosecution supports result of trial).

167. United States v. Wexler, 838 F.2d 88, 92 (3d Cir. 1988). See *supra* Part II.C.1 for a discussion of *Wexler*.

168. *See* United States v. Migliorino, 238 F.2d 7, 10 (3d Cir. 1956) (viewing facts in light most favorable to prosecution given guilty verdict below). See also *supra* notes 30–33 and accompanying text for a discussion of the Third Circuit's case law regarding the scope of review.

169. Jackson v. Virginia, 443 U.S. 307, 318–19 (1979).

170. *Wexler*, 838 F.2d at 92. Many of the post-*Wexler* cases discussed in this Comment have also used language similar to this in rejecting the jury verdict. *See, e.g.*, United States v. Zavala, 190 F. App'x 131, 137 (3d Cir. 2006) ("[T]he circumstantial evidence here . . . points only to knowledge of some form of contraband."); United States v. Cartwright, 359 F.3d 281, 286 n.3 (3d Cir. 2004) (arguing that defendant "may have just been a casual acquaintance of Jackson who happened to run into him in the parking lot, or he may have been a stranger who merely asked Jackson a question, or he may have just been an ordinary shopper who paused to rest before going about his errands"); United States v. Idowu, 157 F.3d 265, 270 (3d Cir. 1998) (finding fact pattern "consistent with transactions that do not involve drugs of any sort"); United States v. Salmon, 944 F.2d 1106, 1115 (3d Cir. 1991) ("[T]he record contains no evidence that Fitzpatrick knew that the bag contained a controlled substance such as cocaine as opposed to anything else.").

171. 315 U.S. 60 (1942). See *supra* note 38 for a summary of the *Glasser* rule.

172. United States v. Iafelice, 978 F.2d 92, 97 n.3 (3d Cir. 1992).

173. See *supra* note 27 for a definition of "inference."

In *United States v. Salmon*,[174] for example, the Third Circuit Court of Appeals picked apart the facts of the case in reversing the verdict on sufficiency grounds. Relying heavily on *Wexler*, the panel determined that the jury's inference of knowledge was not grounded in sufficient evidence.[175] Even though the evidence clearly showed that the defendant conducted countersurveillance and saw the brown paper bag containing the cocaine, the court found fatal the lack of direct evidence that the defendant "knew that the bag contained a controlled substance such as cocaine as opposed to anything else."[176] However, what seems much more unreasonable is that a person would willfully associate himself to such a degree with an illegal venture when he is ignorant of the actual purpose of that venture. It is more reasonable to conclude, as other courts have, that a reasonable jury may infer knowledge in these circumstances, and an appellate court must affirm a verdict where any reasonable inference supports the judgment.

The court's opinion in *United States v. Idowu*[177] most clearly illustrates the extent to which the Third Circuit's jurisprudence in this area has gone down the rabbit hole. In *Idowu*, the evidence showing the defendant's involvement was strong,[178] yet the court concluded that maybe the defendant did not know *exactly* what was in the suitcase for which he was prepared to hand over $18,000 in cash.[179] Since the defendant did not state that he actually knew what his co-conspirator was purchasing with the money that the defendant counted, the court found it reasonable that perhaps the defendant thought that they were purchasing stolen computer chips, laundered money, or maybe even stolen jewelry given that all of these items could fit into a suitcase like the one Idowu handled.[180] To reach this conclusion, the court must have weighed the evidence because it determined that one set of facts was just as believable as another. This type of factual judgment is specifically forbidden by *Jackson*.[181]

United States v. Cartwright[182] again highlights the problems with the Third Circuit's review of the cases at issue. The court of appeals struck down the defendant's conviction, even though the evidence showed that he was participating in an illegal transaction.[183] The court hypothesized about other explanations for the defendant's behavior, finding that the government's lack of direct evidence of Cartwright's knowledge led to impermissible speculation by the

174. 944 F.2d 1106 (3d Cir. 1991). See *supra* notes 65–66 and accompanying text for a discussion of *Salmon*.

175. *Salmon*, 944 F.2d at 1115.

176. *Id.* In reaching its conclusion, the court relied heavily on *Wexler,* including the earlier case's assessment of whether the facts were "just as consistent" with knowledge of another crime. *Id.* at 1114 (internal quotation marks omitted) (quoting United States v. Wexler, 838 F.2d 88, 92 (3d Cir. 1988)).

177. 157 F.3d 265 (3d Cir. 1998).

178. See *supra* notes 68–73 and accompanying text for a summary of the evidence in *Idowu*.

179. *Idowu*, 157 F.3d at 270.

180. *Id.* at 268–69.

181. *See* Jackson v. Virginia, 443 U.S. 307, 326 (1979) (noting that reviewing court must presume that trier of fact resolved any conflicting inferences arising from factual record).

182. 359 F.3d 281 (3d Cir. 2004).

183. See *supra* notes 78–79 and accompanying text for the evidence presented in *Cartwright*.

jury.[184] In doing so, the court again scrutinized the facts adduced at trial, reexamining and weighing rather than considering them to reach its ultimate conclusion. Judge Richard Lowell Nygaard, in a dissenting opinion, illustrated the appropriate standard of review: rather than scrutinizing each bit of evidence presented by the government, he viewed the evidence as a whole, finding the jury's inference reasonable.[185] Where a drug dealer trusted the defendant to escort him to a shopping center parking lot to engage in a drug deal involving a considerable amount of cocaine and to stand armed and guard him while the deal transpired, a reasonable jury could obviously conclude that the defendant would not have participated without awareness of the purpose of the venture. It may be true that the behavior comports with an alternative hypothesis, but under the correct standard of review, that is irrelevant.[186]

There appears to be little deference to the jury's verdict in the Third Circuit's decisions in these drug cases. If, as *Jackson* mandates, the appellate court is to construe the evidence with high deference to the jury's ultimate determination,[187] then the jury's permissible inferences of knowledge based on the defendant's intimate involvement in the transactions[188] should not be reversed. It is an inherently reasonable proposition that one will not facilitate a large and illicit transaction without information about its objective.[189] Each one of these decisions illustrates the court's practice of weighing the evidence. This practice on appeal usurps the task of the jury and appears to exceed the permissible scope of appellate review.[190]

2. The Third Circuit's Controlled Substances Jurisprudence Is Internally Inconsistent with Its Decisions in Other Types of Cases

The Third Circuit's jurisprudence treats controlled substances cases differently from other types of criminal cases. As illustrated by *United States v.*

184. *Cartwright*, 359 F.3d at 289–91.

185. *Id.* at 291–92 (Nygaard, J., dissenting).

186. The response of the Third Circuit in the cases at issue has been that the jury's finding of knowledge rested on "speculation," not a reasonable inference. *See, e.g.*, *id.* at 288 (majority opinion) (finding that facts did not support inference that Cartwright had knowledge of drug transaction); *cf.* Galloway v. United States, 319 U.S. 372, 395 (1943) (distinguishing prohibition against jury speculation from allowable jury resolution of reasonable factual inferences). But as explained above, a conclusion that a person involved in a drug deal knows that drugs are involved is hardly speculation, but is indeed a most reasonable inference.

187. Jackson v. Virginia, 443 U.S. 307, 318–19 (1979).

188. *See* United States v. Idowu, 157 F.3d 265, 268–69 (3d Cir. 1998) (reversing conviction and holding jury's inferences of knowledge about defendant's involvement in crime were not sufficient bases for conviction even though the defendant carried the bag containing the drugs).

189. *Id.* at 271 (Stapleton, J., dissenting); *see also* United States v. Reyeros, 537 F.3d 270, 279 n.12 (3d Cir. 2008) (using same reasoning to approve inference that Customs Inspector who would put his career at risk in illegal importation scheme would demand to know details of affair and would expect payoff).

190. See *supra* Part II.B for a discussion of the role of the jury and the permissible scope of appellate review.

Brodie,[191] the Third Circuit will uphold a conviction for conspiracy based solely on circumstantial evidence.[192] In *Brodie*, the court meticulously considered all conceivable inferences and construed them in favor of finding knowledge.[193] Even though the Third Circuit was meticulous in its analysis, it did not present alternative hypotheses for the conclusions reached by the jury, nor did it find a separate set of inferences based on a set of facts to be more believable than another.

Applying this standard to the controlled substances cases shows just how out of step the court's doctrinal line is. For example, had the court applied the deferential standard apparent in *Brodie* in *Cartwright*, one would have to say that the inference that a person acting as an armed guard during a drug deal knows that the deal involves drugs is, at the very least, a reasonable one. This inference seems wholly more reasonable than the competing inference that the *Cartwright* court addressed, which was that the defendant, standing in a shopping center parking lot with a known drug dealer, thought that the deal involved computer chips.[194] The fact still remains, however, that even if both inferences are reasonable, the appellate court is bound by *Jackson* to assume that the jury properly drew the inference supporting the verdict.[195]

Similarly, in *Idowu*, there seems to be little doubt that the jury could have drawn a reasonable inference that someone who was intimately familiar with the transaction and who knew the amount of money to change hands, also knew what the deal involved. In *Brodie*, the court found that the use of code words for Cuba did little to disprove knowledge.[196] Based on this reasoning, the co-conspirator's reference to "the stuff" in *Idowu* would not conclusively prove his ignorance as to the aim of the transaction, as "stuff" could mean "drugs." [197] In addition, it is more reasonable to conclude that Idowu knew what was in the bag when he pressed down on it to check its contents, because a bag packed with stolen jewelry or even computer chips would feel different from one packed with heroin.

A comparison of *Brodie* and *Zavala* further illustrates the disconnect between the Third Circuit's treatment of drug conspiracies and other types of conspiracies. In both *Zavala* and *Brodie*, the other members of the alleged conspiracies were the brothers of the defendants.[198] For the *Brodie* court, the family relationship was one additional piece of evidence from which the jury could properly infer intent and knowledge.[199] By analogy, the jury's inference that Zavala was aware of what was

191 . 403 F.3d 123 (3d Cir. 2005).

192 . See *supra* notes 116–28 and accompanying text for a discussion of *Brodie*.

193 . *Brodie*, 403 F.3d at 155–58.

194 . United States v. Cartwright, 359 F.3d 281, 287 (3d Cir. 2004) (citing United States v. Idowu, 157 F.3d 265, 266 (3d Cir. 1998)).

195 . See *supra* notes 24–38 and accompanying text for further discussion of the *Jackson* standard of review.

196 . *Brodie*, 403 F.3d at 155–56.

197 . *See Idowu*, 157 F.3d at 268 (stating that reference to "the stuff" does not supply "critical inference" that Idowu knew it was drug transaction).

198 . United States v. Zavala, 190 F. App'x 131, 132 (3d Cir. 2006); *Brodie*, 403 F.3d at 150–51.

199 . *Brodie*, 403 F.3d at 150–51; *see also* United States v. Reyeros, 537 F.3d 270, 279 n.12 (3d Cir. 2008) (applying this inference in sustaining conviction of brothers in drug trafficking case).

in the package would certainly be reasonable based on the familial relationship, particularly where the package was sent to a fake recipient and still claimed by Zavala's brother.[200] However, the court rejected this possibility.[201] Moreover, the defendants in both *Zavala* and *Brodie* took steps to try to conceal wrongdoing;[202] the *Zavala* court essentially dismissed this evidence without comment,[203] yet the *Brodie* court found that such attempts supported a reasonable inference of knowledge of past misdeeds.[204]

The painstakingly detailed analysis in *Brodie* clearly demonstrates the Third Circuit's general fidelity to the standard of review of evidence in conspiracy cases that do not involve controlled substances. While *Brodie* involved a deeply detailed analysis, the court did not present or weigh alternative hypotheses; it merely reconsidered the evidence adduced at trial and determined that the jury's ultimate verdict was reasonable. Clearly, there is a fine line between weighing the evidence and considering it on appeal, and the *Brodie* case illustrates an appellate court carefully walking that line.

The Third Circuit's drug cases are also inconsistent with each other. For example, taken as a whole,[205] the facts of *Iafelice* and *Idowu* are not distinguishable. In each case the defendant exercised dominion over the valise containing the drugs, and drove to the scene of the transaction.[206] Oddly, the later *Idowu* opinion does not even mention *Iafelice*.

3. The Third Circuit's Approach is Inconsistent with the Approaches of Sister Circuits

The Third Circuit's lack of deference to jury verdicts in conspiracy and aiding and abetting drug cases is anomalous to the approach of the other circuits. First, other circuits have permitted circumstantial evidence to establish guilty knowledge.[207] While the Third Circuit has recognized that a conspiracy "may be proven entirely by circumstantial evidence,"[208] the substance of the decisions in this area shows the courts' unwillingness to use circumstantial evidence for this

200. *Zavala*, 190 F. App'x at 132.

201. *Id.* at 135.

202. Zavala used a fake recipient and fake return address on the mailing label and made false statements during questioning about the contents of the package. *Id.* at 132–33. Brodie gave "veiled instruction[s]" to present and former employees about the government's investigation. *Brodie*, 403 F.3d at 157–58.

203. *See Zavala*, 190 F. App'x at 135 (stating simply that attempts to conceal wrongdoing could show Zavala was involved in something illicit, but have little probative value).

204. *Brodie*, 403 F.3d at 157–58.

205. The Third Circuit has taken the position that on appeal the evidence should be viewed as a whole. *Id.* at 150.

206. See *supra* notes 83–94 and accompanying text for a discussion of *Iafelice*, and *supra* notes 67–75 and accompanying text for a discussion of *Idowu*.

207. See *supra* Part II.C.4 for a discussion of other circuits' treatment of these cases.

208. United States v. Wexler, 838 F.2d 88, 90 (3d Cir. 1988).

purpose, showing the court's statement of the law to be merely perfunctory.[209] Other circuits demonstrate deference to a jury's determination of guilt and adherence to a basic tenet of conspiracy law—that the crime may be proven by circumstantial evidence.[210]

Other federal circuits have also held that dominion and control of either the package actually containing the drugs or of the vehicle transporting the drugs is sufficient to infer guilty knowledge.[211] This is the same approach that the Third Circuit declined to apply in *Zavala*, even though it had done so in *Iafelice*,[212] demonstrating internal inconsistency as well as departure from other circuits' approaches.

Moreover, rather than picking apart the facts of each case, other circuits have evaluated the totality of the evidence in determining the sufficiency of the jury's verdict.[213] The Third Circuit articulated this reasonable approach in *Brodie*,[214] but none of the opinions in the *Wexler* doctrinal line have used this mode of analysis.[215]

The Third Circuit's shift away from the accepted mode of analysis of conspiracy and aiding and abetting is problematic because it creates disjunction with the other circuits, causing a different result than would have been reached in other factually similar cases. Not only is this practice costing the federal prosecutors in the Third Circuit many convictions, but there is a risk that this aberration in the Third Circuit could potentially muddy the law of conspiracy and aiding and abetting in other circuits, as *Teffera*[216] demonstrates.

B. How the Third Circuit Can Fix This Problem

1. Be Faithful to Deferential Standard of Review on Appeal

The Third Circuit should reconsider en banc the treatment of circumstantial evidence in controlled substances cases like those in the *Wexler* line. The court should reconcile its drug statute jurisprudence with that of other types of crimes, such as its treatment of cases like *Brodie* and *Kemp* where the Third Circuit upheld

209. See *supra* Parts II.C.1, II.C.2, and II.C.3 for discussions of the Third Circuit's decisions concerning conspiracies.

210. Blumenthal v. United States, 332 U.S. 539, 549 (1947).

211. See *supra* notes 143–48 and accompanying text for a discussion of these holdings.

212. See *supra* notes 83–94 and accompanying text for a discussion of *Iafelice*, and *supra* notes 98–103 for a discussion of *Zavala*.

213. See *supra* note 153 for some examples of this approach.

214. See *supra* notes 116–28 and accompanying text for a discussion of the court's reasoning and holding in *Brodie*.

215. See *supra* Part II.C.2 for a discussion of the Third Circuit's post-*Wexler* opinions.

216. See *supra* notes 154–56 and accompanying text for discussion of *Teffera* and the D.C. Circuit's reliance on *Salmon* in that instance.

juries' convictions on conspiracy and aiding and abetting charges.[217] It is imperative that the court be true to its constitutional mandate[218] and to its own precedent[219] in applying a deferential standard of review on appeal.

In approaching future conspiracy cases in the controlled substances area, the Third Circuit should resist the temptation to reexamine the facts presented in the lower court, and should instead consider the evidence, rather than weighing it, and remember that reasonableness depends on "viewing the evidence as a whole."[220] The court should be faithful to the rule that all reasonable inferences that favor the verdict must be accepted.[221] Among the relevant aspects of the defendant's conduct that the court should examine are a prior relationship with the co-conspirator,[222] acting as a lookout during the transaction,[223] driving the principal to the transaction site,[224] and counting the money exchanged.[225] A temporal analysis is also useful, as participation during the actual exchange will weigh more heavily in favor of guilt than innocence.[226] The rationale underlying the view of these types of

217. *See* United States v. Kemp, 500 F.3d 257, 287, 293 (3d Cir. 2007) (upholding jury conviction on charges of conspiracy and aiding and abetting); United States v. Brodie, 403 F.3d 123, 158 (3d Cir. 2005) (upholding jury conviction of conspiracy).

218. See *supra* notes 13–29 and accompanying text for a discussion of the constitutional parameters of appellate review.

219. See *supra* notes 30–38 and accompanying text for a discussion of the Third Circuit's case law on appellate review.

220. *Brodie*, 403 F.3d at 150.

221. See *supra* notes 24–29 and accompanying text for a discussion of the rule that jury inferences are not to be reexamined on appeal unless found to be irrational.

222. *See* United States v. García-Carrasquillo, 483 F.3d 124, 131 (1st Cir. 2007) (noting that uncle-nephew relationship allowed inference of trusted confidant relationship); *Brodie*, 403 F.3d. at 150–51 (finding fraternal relationship between defendant and other co-conspirator added to inference of knowledge).

223. *See, e.g.*, United States v. Reyes-Ponce, 223 F. App'x 624, 625 (9th Cir. 2007) (indicating circumstantial evidence showed that Reyes-Ponce acted as lookout or bodyguard during drug deal); United States v. Diaz-Boyzo, 432 F.3d 1264, 1270 (11th Cir. 2005) (summarizing evidence which supported conclusion that Diaz-Boyzo served as lookout in drug transaction); United States v. Segura-Gallegos, 41 F.3d 1266, 1269–70 (9th Cir. 1994) (finding evidence sufficient to conclude defendant was acting as lookout in drug deal); United States v. Martin, 920 F.2d 345, 348 (6th Cir. 1990) (finding that evidence supported conclusion that Martin was acting as lookout).

224. *See, e.g.*, United States v. Ortiz, 447 F.3d 28, 34 (1st Cir. 2006) (finding evidence adequate to support Ortiz's conviction even though his involvement was limited to driving for codefendant in drug deal); United States v. Pitre, 960 F.2d 1112, 1122 (2d Cir. 1992) (finding evidence sufficient to support jury verdict where Pitre was only acting as driver in heroin transaction); United States v. Diez, 736 F.2d 840, 843 (2d Cir. 1984) (finding evidence sufficient for conviction where Diez was driver in drug deal even though Diez was not owner of car); United States v. Raffo, 587 F.2d 199, 200–01 (5th Cir. 1979) (upholding conviction where defendant carried bag containing cocaine even though he claimed to be unaware of bag's contents and where defendant was also driver during cocaine deal).

225. *See, e.g.*, United States v. Williamson, 53 F.3d 1500, 1515–16 (10th Cir. 1995) (finding evidence sufficient for conviction for aiding and abetting drug transaction because defendant was present during transaction and counted sum of $2,800); United States v. Natel, 812 F.2d 937, 940–42 (5th Cir. 1987) (upholding conviction because defendant's action of counting money went beyond mere presence during drug transaction).

226. *See, e.g.*, *Ortiz*, 477 F.3d at 34 (finding defendant's participation during transaction showed his willing participation at crucial moment); United States v. Desimone, 119 F.3d 217, 224 (2d Cir.

conduct is a fundamental understanding of basic human nature: "'it runs counter to human experience to suppose that criminal conspirators would welcome innocent nonparticipants as witnesses to their crimes.'"[227] Judgments based on these basic ideas of human conduct are exactly the type of determinations that juries are supposed to make as the arbiters of fact and credibility.

In applying this standard in future drug conspiracy cases, the Third Circuit will regain consistency with its sister circuits, as well as stay true to a crucial staple of the American system of justice—trial by jury.

2. Create an Exception to the Requirement of Direct Knowledge Where the Defendant Actually Has Control over the Package Containing the Drugs

An alternative solution to this problem would be for the Third Circuit to carve out a narrow exception to the rule that the prosecutor must prove direct knowledge of the aim of the transaction.[228] This exception should apply in cases where the defendant actually handled the package containing the controlled substance, as in *Zavala*,[229] or controlled the vehicle transporting the drugs, as in *Iafelice*.[230] This exception would allow a permissible inference by the jury that the defendant had knowledge of what he or she handled or transported. While none of the Third Circuit cases in this genre contain explicit reasons for the exacting scope of review, it seems a fair assumption that at least part of the justification is the mandate that guilt must be proven beyond a reasonable doubt.[231] It appears, however, that in its quest for justice, the Third Circuit Court of Appeals has become too bogged down by Judge Sloviter's "just as consistent" with another crime language in *Wexler*,[232] possibly stretching it beyond its intended bounds.

The exception allowing an inference of knowledge absent direct evidence should apply where it is clear that the defendant exercised dominion and control over the item or the instrumentality used to hold the item. One situation where this exception should apply is when the defendant drives the vehicle transporting the drugs. [233] Another is where the defendant is actually seen holding the package

1997) (finding assistance in completing sale supported inference of knowledge); *Segura-Gallegos*, 41 F.3d at 1270 (finding that acting as lookout during transaction supported inference of knowledge because this type of behavior is most common and most helpful during deal); *Diez*, 736 F.2d at 843 (noting that presence at moment cocaine was exchanged was deciding factor showing knowledge).

227. United States v. Olivo-Infante, 938 F.2d 1406, 1409 (1st Cir. 1991) (quoting United States v. Batista-Polanco, 927 F.2d 14, 18 (1st Cir. 1991)); *see also* United States v. Idowu, 157 F.3d 265, 271 (3d Cir. 1998) (Stapleton, J., dissenting) (arguing common sense dictates that as trusted confidant of principal left alone with drugs, Idowu would have knowledge of aim of transaction).

228. See *supra* notes 59–63 and accompanying text for a discussion of this rule from *Wexler*.

229. See *supra* notes 98–103 and accompanying text for a discussion of *Zavala*.

230. See *supra* notes 83–94 and accompanying text for a discussion of *Iafelice*.

231. *See* United States v. Wexler, 838 F.2d 88, 90 (3d Cir. 1988) (holding that each element of crime must be proven beyond reasonable doubt).

232. *Id.* at 92.

233. Various circuits have applied this concept. *See, e.g.*, United States v. Resio-Trejo, 45 F.3d 907, 911 (5th Cir. 1995) (indicating knowledge of presence of drugs can be inferred if defendant exercises control over vehicle containing drugs); United States v. Olivo-Infante, 938 F.2d 1406, 1409 (1st Cir. 1991) (reasoning that since drivers generally exercise dominion and control over vehicles

containing the drugs.[234] While this exception could run the risk of being too harsh, particularly in situations where a third party placed the drugs in the defendant's suitcase, bag, etc. without his or her knowledge, there is a safeguard used by the Fifth Circuit which can protect innocent defendants in situations such as these. This safeguard would require that there be some type of additional evidence "that is suspicious in nature or demonstrates guilty knowledge."[235] This evidence could include nervousness or lack thereof, lack of eye contact, refusal to cooperate with questioning, absence of surprise at the discovery of the drugs, conflicting statements, unbelievable explanations, possessing large quantities of cash, and noticeable changes to the container holding the drugs, particularly if it was in the defendant's possession for a long time.[236]

Finally, the exception to the requirement of direct knowledge should apply where the defendant mails a package containing the drugs. Other circuits have applied this exception to address the issue, [237] and the government urged, albeit unsuccessfully, for its adoption in *Zavala*.[238] While, as noted above, a bright-line exception such as this might lead to extreme consequences, it could also be balanced with factors indicating knowledge or a lack of knowledge. In addition to those previously listed,[239] other factors could include the mailing label being in the defendant's handwriting, and using a false recipient and/or return address.[240] Furthermore, the inference would not be conclusive and, as with all inferences, could be undermined by other evidence.

This exception finds its justification in the common sense approach that in many situations a factfinder can impute knowledge of the contents of an item to the

driven, permissive inference of knowing possession logically follows); United States v. Levario, 877 F.2d 1483, 1485–86 (10th Cir. 1989) (finding it permissible to infer that driver of vehicle has knowledge of controlled substance in vehicle), *abrogated on other grounds by* Golzon-Peretz v. United States, 498 U.S. 395, 403–07 (1991); United States v. Laughman, 618 F.2d 1067, 1076–77 (4th Cir. 1980) (finding that operating vehicle containing controlled substances qualifies as constructive possession). The Second Circuit has extended this even further to a defendant transporting the money with which to purchase the drugs. United States v. Pitre, 960 F.2d 1112, 1122 (2d Cir. 1992).

234. This approach has also been applied in numerous circuits. *See* United States v. Morgan, 385 F.3d 196, 206–07 (2d Cir. 2004) (possessing suitcase containing drugs allowed for inference of knowledge); United States v. Moreno, 185 F.3d 465, 471 (5th Cir. 1999) (carrying suitcase containing cocaine through customs and claiming it supported inference of knowledge); United States v. Castro-Lara, 970 F.2d 976, 981 (1st Cir. 1992) (carrying bag containing cocaine off of plane sufficient to support jury's inference of knowledge).

235. *Moreno*, 185 F.3d at 471 (internal quotation marks omitted).

236. *Id.* at 472 n.3.

237. *See, e.g.*, United States v. Johnson, 57 F.3d 968, 971–72 (10th Cir. 1995) (stating that defendant showed requisite knowledge when mailing package using false name and return address); United States v. Hillison, 733 F.2d 692, 698 (9th Cir. 1984) (holding that trier of fact could conclude that defendant was engaging in conspiracy to sell cocaine from evidence that he mailed package containing cocaine).

238. Brief for Appellee United States of America at 22–26, United States v. Zavala, 190 F. App'x 131 (3d Cir. 2006) (No. 04-1776).

239. See *supra* notes 222–226 and accompanying text for outline of factors used in other circuits.

240. This was the situation in *Zavala*. 190 F. App'x at 132.

one exerting dominion and control over it.[241] While this is not a total solution to the problem with the Third Circuit's scope of review in these cases, it could be a meaningful first step in correcting the standard of review while still protecting the important liberty interest at stake. There is a high premium on proving guilt beyond a reasonable doubt because of the high liberty interest of the accused;[242] however, there is an equally important interest in upholding the jury verdicts that are the benchmark of our justice system.[243] In implementing this approach, the Third Circuit will be able to strike a balance between these two important, and sometimes competing, interests.

IV. CONCLUSION

In conclusion, it is time for the Third Circuit to reconsider en banc its past jurisprudence in the area of aiding and abetting and conspiracy to commit controlled substances crimes. There are meaningful liberty interests at stake in any criminal trial, but those interests are protected, as the Supreme Court held in *Jackson v. Virginia*,[244] by a standard of review which demands the existence of sufficient evidence upon which a reasonable jury may rely to find guilt. Where such evidence exists, even if an alternative hypothesis of innocence may be constructed, it is a jury's fundamental role to choose the prevailing inference, and an appellate court's role to uphold its judgment. In the sole area of controlled substances offenses, the Third Circuit has inexplicably strayed too far from the constitutionally appropriate standard of review. The current state of the law in this area in the Third Circuit is inconsistent with the constitutionally mandated scope of appellate review,[245] and with review of other conspiracy predicates in the Third Circuit.[246] Finally, the Third Circuit's scope of review is inconsistent with the law of aiding and abetting and conspiracy in general, as illustrated by the rulings of sister circuits.[247] The line of cases in this circuit reversing guilty verdicts because the defendants' behavior was just as consistent with another crime has not only skewed the law in the Third Circuit, but also runs the risk of affecting other

241. *See* United States v. Idowu, 157 F.3d 265, 271 (3d Cir. 1998) (Stapleton, J., dissenting) (noting that Idowu had been given task of patting down bag to confirm that drugs were inside, and would not have performed task if he had not known what to look for).

242. See *supra* notes 13–18 and accompanying text for a discussion of the underpinnings of the importance of the jury in criminal cases.

243. See *supra* notes 13–23 and accompanying text for a discussion of the importance of the jury in criminal cases.

244. 443 U.S. 307 (1979).

245. See *supra* Part III.A.1 for an analysis of the Third Circuit's standard of review in comparison to the constitutionally accepted scope of appellate review in criminal cases.

246. See *supra* Part III.A.2 for a discussion of internal inconsistency in the Third Circuit in the level of scrutiny given sufficiency of evidence challenges in the establishment of predicates in drug conspiracy cases compared to the level of review given sufficiency of evidence challenges in establishing predicates in other types of conspiracy cases.

247. See *supra* Part III.A.3 for an analysis of the Third Circuit's standard of review in these cases juxtaposed with that of sister circuits.

circuits' proper jurisprudence in this area.[248] It has also resulted in the release of defendants convicted by juries of criminal offenses, and stands to chill the charging decisions of prosecutors with respect to other culpable individuals.

The optimal result would be for the Third Circuit to sit en banc and reconsider its mode of review for these cases, recognizing that their review has gone from a consideration of the evidence to weighing it, which is forbidden both by Supreme Court precedent and the Third Circuit's own precedent. In reevaluating its mode of review, the Third Circuit should look to the approach of its sister circuits, which consider the totality of the defendant's behavior in determining whether the inferences drawn by the jury were wholly unreasonable.[249]

Another possible solution would be for the Third Circuit to create an exception to the rule of proof of actual knowledge of the specific aim of the illegal venture where the defendant has actually exercised control over the package containing the drugs.[250] While this is not the ideal solution, it is a step in the right direction towards a more constitutionally consistent standard of review, and at the same time will likely accomplish the court's goal of protecting the important liberty interests at stake because it would incorporate the Fifth Circuit's requirement of additional evidence of guilt.[251]

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248. See *supra* notes 154–56 and accompanying text for an example of the influence of this doctrinal line on the D.C. Circuit.

249. See *supra* Part III.B.1 for an analysis of this solution.

250. See *supra* Part III.B.2 for a discussion of this possible exception.

251. See *supra* notes 135–36 and accompanying text for a discussion of the Fifth Circuit's application of this standard.

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