ORIGINAL

No. 22-5924

IN THE SUPREME COURT OF THE UNITED STATES

CARL JONES,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent(s).

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPERIOR COURT OF PENNSYLVANIA
(WESTERN DISTRICT)

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Does the well-settled standard and scope of review governing sufficiency-of-the-evidence claims - a standard and scope of constitutional dimension - prohibit an appellate court from considering surveillance video proffered by the Commonwealth that was published to the fact-finder at trial, but never actually admitted into the evidentiary record, in determining whether the evidence was legally sufficient to support the verdict?

Suggested Answer: Yes.

Answered in the negative by the courts below.

II. If so, is the evidence of record insufficient as a matter of law to support Mr. Jones's conviction for third-degree murder where such evidence fails to disprove beyond a reasonable doubt that he acted in either perfect or imperfect self-defense?

Suggested Answer: Yes.

Not answered by the courts below due to their respective dispositions of the first question presented.

LIST OF PARTIES

It is respectfully noted that all parties appear in the caption of the case on the cover page.

RELATED CASES

- *Commonwealth v. Jones,* Case No: CP-02-CR-0009893-2019, Court of Common Pleas of Allegheny County. Judgment entered January 23, 2020.

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IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Mr. Jones respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS AND ORDERS IN THE COURTS BELOW

On December 16, 2021, the Superior Court of Pennsylvania issued a published Opinion and Order affirming Mr. Jones's judgment of sentence at, *Commonwealth v. Jones,* 271 A.3d 452 (Pa. Super. 2021), No. 938 WDA 2020. This said Opinion and Order is attached hereto and marked Appendix A.

On December 30, 2021, Mr. Jones, by and through his appellate counsel, Ms. Stephanie M. Noel, Esquire, filed a timely Application for Panel Reconsideration and/or Reargument by the Court *En Banc,* which was denied on February 23,2022. The Superior Court of Pennsylvania (Western District), then issued an unpublished Order at, *Commonwealth v. Jones,* No. 938 WDA 2020, and this said Order denying Mr. Jones's Application for Panel Reconsideration and/or Reargument by the Court *En Banc* is attached hereto and marked Appendix B.

On July 25, 2022, the Supreme Court of Pennsylvania (Western District), issued an unpublished Order denying Mr. Jones's Petition for Allowance of Appeal at, *Commonwealth v. Jones,* No. 64 WAL 2022. This said Order is attached hereto and marked Appendix C.

STATEMENT OF JURISDICTION

It is noted that the date on which the Supreme Court of Pennsylvania (Western District),

denied Mr. Jones's Petition for Allowance of Appeal was on July 25, 2022. A copy of that decision is attached hereto and marked Appendix C.

The jurisdiction of this Court is invoked under **28 U.S.C. § 1257(a)**.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

210 PA. Code § 65.37 provides in pertinent part: "'[N]on-precedential decision' refers to an unpublished, non-precedential, memorandum decision of the Superior Court filed after May 1, 2019. All references to a memorandum decision filed after May 1, 2019, within these operating procedures shall be analogous to 'non-precedential decision' for purposes of Pa.R.A.P. 126(b)."

The **PA. CONST. art. V. § 9** provides that: "There shall be a right of appeal in all cases to a court of record from a court not of record; and there shall also be a right of appeal from a court of record or from an administrative agency to a court of record or to an appellate court, the selection of such court to be as provided by law; and there shall be such other rights of appeal as may be provided by law."

The **U.S. CONST. amend. XIV** provides in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law....."

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY:

On October 28, 2019, Mr. Jones proceeded to a bench trial before the Honorable Anthony M. Mariani ("trial court") having been charged with one count each of criminal homicide, **18 PA.C.S. § 2501(a)**; possession of firearm prohibited, **18 PA.C.S. § 6106(a)**; and carrying a

firearm without a license, **18 PA.C.S. § 6106(a)(1)**. These charges arose in connection with the shooting death of Donnell Demery ("Donnell"). At trial, Mr. Jones acknowledged that he shot and killed Donnell, but contended that he acted in self-defense and, therefore, the killing was legally justified. Following the reception of evidence, the trial court found Mr. Jones guilty of third-degree murder and both firearm offenses. On January 23, 2020, Mr. Jones proceeded to sentencing, at which time the trial court imposed an aggregate sentence of 23½ to 47 years of incarceration.

Following the filing of post-sentence motions, and the entry of an order of their denial, Mr. Jones filed a timely Notice of Appeal *in forma pauperis* to the Superior Court of Pennsylvania. Both the trial court and Mr. Jones complied with **PA.R.A.P. 1925**. Mr. Jones filed his Brief for Appellant on June 1, 2021. The Commonwealth filed its Brief for Appellee on July 28, 2021, and Mr. Jones filed a Reply Brief on August 16, 2021. Both parties proceeded to oral argument on November 10, 2021.

On December 16, 2021, the Superior Court issued a published Opinion and Order affirming Mr. Jones's convictions. *Commonwealth v. Jones,* 271 A.3d 452 (Pa. Super. 2021) ("Op.").

On December 30, 2021, Mr. Jones filed a timely Application for Panel Reconsideration and/or Reargument Before the Court *En Banc,* which the Superior Court denied on February 23, 2022.

On March 3, 2022, Mr. Jones by and through appellate counsel, Ms. Stephanie M. Noel, Esquire, then filed a timely Petition for Allowance of Appeal to the Supreme Court of Pennsylvania (Western District), which the Supreme Court of Pennsylvania denied on July 25,

2022. Mr. Jones now respectfully files this timely Petition for Writ of Certiorari.

B. FACTUAL HISTORY:

On August 13, 2018, at approximately 11:00 p.m., City of Duquesne Police Officers responded to a report of a shooting at the 1313 Bar at 1313 Kennedy Avenue in Duquesne, Pennsylvania. Notes of Testimony, Non-Jury Trial, 10/28/19 ("N.T."), 14, 20. Upon arrival, responding officers found that Donnell, who was not then in possession of any weapons, was suffering from multiple gunshot wounds. N.T. 14-15, 104. Donnell was transported to a nearby hospital and succumbed to his injuries later that morning. N.T. 109. A cell phone was recovered from Donnell's person. N.T. 104. A toxicology report revealed that Donnell's whole blood ethanol was .214 percent and that his urine ethanol was .222 percent. N.T. 113.

Donnell and his twin brother Ronnell Demery ("Ronnell") met at the 1313 Bar earlier in the night. N.T. 14, 70-71. Latoya Lewis ("Lewis") was a bartender at the 1313 Bar and a witness to the events in question. N.T. 23-24. Lewis described the 1313 Bar as "dangerous" and one to which patrons often carried guns. N.T. 32-33, 39. Lewis testified that there is no security at the door and patrons can come and go as they please. N.T. 33. Lewis informed Allegheny County Detective Dale Canofari that "everybody in the bar had one on." N.T. 29. When asked at trial what she meant by "had one[,]" Lewis responded that she was referring to firearms. N.T. 29. Lewis was familiar with Mr. Jones because he had been a patron at the 1313 Bar for the two or three months leading up to the night in question. N.T. 26.

On that evening, Natasha Demery ("Natasha") and Mr. Jones arrived together at the 1313 Bar. N.T. 34, 71-73, 116, 126, 140.[1] Natasha is Donnell and Ronnell's cousin, and Mr. Jones is

[1] Mr. Jones had been at the 1313 Bar earlier that night. He left for about 30 minutes and then returned with Natasha. N.T. 26, 33-34.

Natasha's child's cousin, making Natasha Mr. Jones's "aunt." N.T. 34, 62, 71-72, 114-115, 125. At first, Mr. Jones and Natasha kept to themselves, and did not interact with other patrons at the bar. N.T. 27, 72-73. Eventually, Mr. Jones and another patron known as "Black," began to exchange words. N.T. 27, 34, 73.[2] Donnell inserted himself into the conversation in support of Black. N.T. 27, 73, 128-129. According to Lewis, Donnell threatened to physically harm Mr. Jones. N.T. 27, 35, 117, 142. Indeed, several witnesses testified that Donnell, who was approximately six feet and four inches tall and about 240 pounds, had been provoking Mr. Jones throughout the night, and had issued threats to Mr. Jones consisting of statements like, "I'll beat your ass," "I'll beat you the fuck up," and "I'll beat the fuck out of you, dumbass." N.T. 76, 117-118, 122, 129, 130-132.

Lewis observed Donnell approach Mr. Jones in an aggressive and threatening manner. N.T. 35-36. Mr. Jones attempted to end the interaction with Donnell by walking toward the front doorway of the bar. N.T. 28, 36, 74, 122. Ronnell, believing that Donnell needed to calm down, placed his arm in front of Donnell as Mr. Jones walked away. N.T. 84.

Natasha followed after Mr. Jones to the front door of the bar, assured him that the situation with Donnell was over, and convinced him not to leave. N.T. 36, 122-123, 147, 150. At Natasha's urging, Mr. Jones agreed to come back inside. N.T. 37, 147, 150. As Mr. Jones reentered the bar with Natasha, Lewis watched as Donnell reached into his pants pockets. N.T. 38-39. Immediately after Donnell reached into his pants pockets, Lewis ducked "[b]ecause that's the type of bar that is." N.T. 39. Lewis thought that Donnell was reaching for a "gun, a knife,

[2] Lewis testified that she initially interpreted this exchange as an argument but also acknowledged that she could not discern the nature of the conversation and did not really think they were arguing. N.T. 34-35.

anything. It's dangerous in that bar." N.T. 39.[3] Lewis heard gunshots immediately after watching Donnell reach into his back pocket. N.T. 39, 41. Indeed, Mr. Jones shot at Donnell several times in quick succession. N.T. 74, 84. Mr. Jones did not have a permit to carry a concealed firearm and was not legally permitted to possess a firearm due to a prior conviction for escape, graded as a felony of the third degree. N.T. 106-107.

As one or more shots were fired, Donnell fell to the ground. N.T. 145. Mr. Jones left the bar, and was arrested approximately two weeks later. N.T. 104-105, 147, 148. Ronnell testified at trial that he knew all the men present at the 1313 Bar that night, and that Mr. Jones would have been in danger if he had not fled. N.T. 79-80. Ronnell admitted that he would have killed Mr. Jones if Mr. Jones had stayed at the scene. N.T. 78, 79.

After the shooting, Ronnell identified Mr. Jones as the shooter to the police and provided them a recorded statement about the incident. N.T. 76, 81-82. Detectives left the interview room for a while so Ronnell could speak with his girlfriend. N.T. 82. Ronnell's girlfriend shared with Ronnell that people present at the bar were saying that the incident between Donnell and Mr. Jones was Ronnell's fault. N.T. 82. Ronnell responded by telling his girlfriend, "[I]t wasn't my fault. [Donnell's] always jumping up like a security guard. I wasn't arguing with the dude. I know him." N.T. 82-83. Ronnell testified at trial that Donnell had interpreted an interaction between Ronnell and Mr. Jones as an argument when, in fact, it was not an argument and the two were just playing around. N.T. 80-81.

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[3] Lewis also testified in response to questioning by the trial court as follows: "THE COURT: Okay. And [Donnell], you never saw what it was he reached for, because you were fearful that it was a gun, so you ducked, is that fair? LEWIS: That's fair. Yes, sir. THE COURT: And when you heard gunshots, fair? LEWIS: Yes, sir." N.T. 41.

Mr. Jones testified in his own defense at trial. In pertinent part, Mr. Jones echoed the testimony of other witnesses that Donnell threatened him multiple times on the night in question. N.T. 142, 144, 146. Eventually, Mr. Jones attempted to end the situation by leaving the bar. N.T. 143. Natasha approached him as he was attempting to leave and convinced him to come back because "the situation was quashed." N.T. 143, 147, 150. As they reentered the bar together, Mr. Jones immediately saw Donnell "launch toward [him] with his hand in his pocket." N.T. 143. Donnell continued to threaten Mr. Jones as he "launched" toward him. N.T. 143-144. Mr. Jones then observed Donnell "reach into his pocket and pull out a shiny object." N.T. 144. Believing that the "shiny object" Donnell retrieved from his pocket was a gun - and, therefore, believing that he was in imminent danger of death or serious bodily injury - Mr. Jones retrieved his own firearm and fired at Donnell. N.T. 144. Mr. Jones testified that the entirety of the event transpired in "about a split second. It happened so fast. I couldn't even believe it happened." N.T. 145.

Mr. Jones also testified that, in the days between the shooting and his arrest, he stayed with his friend, Sam. N.T. 147-148. Mr. Jones testified that he was staying with Sam not because he was scared of being arrested, but because he was "scared of being shot by the police. When they [were] looking for me they were telling people that I [was] armed and dangerous and that they would kill me." N.T. 148.

Officers from the City of Duquesne Police Department, the Allegheny County Police Department Homicide Division and Mobile Crime Unit, as well as technicians from the Allegheny County Medical Examiner's Office, secured and collected evidence from the scene, including measurements, ballistics evidence, and surveillance footage. N.T. 16, 20-21, 47-48, 87, 89, 91-92. The length of the bar was approximately 30 feet 4 inches north to south, and

approximately 20 feet 7 inches east to west. N.T. 89. Five spent nine-millimeter caliber Win cartridge casings, two spent projectiles, and a jacket fragment were recovered on scene. N.T. 91-93. Each of the shell casings recovered matched one another and were fired from the same firearm. N.T. 110.

Detective Brian Keefe ("Keefe"), a detective from the Allegheny County Police Department, responded to the 1313 Bar on the night of the shooting and assisted with processing the scene. N.T. 44-45. Keefe observed multiple video surveillance cameras on the inside and outside of the 1313 Bar and reviewed and seized the available surveillance footage. N.T. 47-51. Keefe identified certain individuals from the video surveillance including Mr. Jones, Natasha, Lewis, Ronnell, and Donnell. N.T. 58-59. On cross-examination, Keefe testified that, immediately prior to the shooting, the surveillance video depicted Donnell holding an unknown object in his right hand and reaching with his left hand into his pocket. N.T. 63-65. Photographs of evidence and the bar were also taken, including one photograph of the bar that showed two signs on the wall. One sign depicted a camera; the other depicted a hand holding a firearm with the words "we don't call 911." N.T. 46-47, 50, 88, 89, 97-98.

Of critical importance to the instant Petition for Writ of Certiorari, the disc containing the surveillance video that captured the incident was marked for indentification purposes as Commonwealth's Exhibit 4. N.T. 52. Trial counsel stipulated "to the authenticity of the contents of the disc, that it contains the events that happened at the 1313 Bar on August 12th and 13th of 2018." N.T. 52. There was no stipulation reached between the parties concerning the admissibility of the video surveillance. Although various portions of the surveillance video, from multiple camera angles, were played for the finder of fact, and it is clear from the record that the

trial court considered what the video surveillance depicted in rendering a verdict, the Commonwealth never formally admitted into evidence the disc containing the video surveillance or the video surveillance itself. *See generally* N.T.

On May 24, 2021, Mr. Jones and the Commonwealth entered into a Limited Joint Stipulation to Supplement the Certified Record on Direct Appeal ("Limited Joint Stipulation") concerning the exhibit marked for identification purposes as Commonwealth's Exhibit 4. *See* Limited Joint Stipulation, attached hereto and marked Appendix D.[4] Therein, both parties to this appeal stipulated that although Commonwealth's Exhibit 4 "was published to the finder of fact during the presentation of evidence, the at-issue video surveillance was not admitted into evidence in the trial court." *See* Limited Joint Stipulation ¶3.

REASONS FOR GRANTING THE PETITION

As a threshold matter, there is no right to discretionary review before this Honorable Court. Rather, "[a] petition for a writ of certiorari will be granted only for compelling reasons." **U.S. SUP. CT. RULE 10**. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

> **U.S. SUP. CT. RULE 10(a)-(c)**
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision

[4] *See also* Op. at 4, n.2 (noting that, in light of the Joint Stipulation of the parties to this appeal, "[t]here is no issue of incompleteness of the record or inability of [the Superior] Court to view the surveillance video that was played at trial. A disc containing the video was supplied to this Court as a supplemental record pursuant to a stipulation of the parties that it contains the video played at trial. Limited Joint Stipulation ¶¶2-3. This stipulation further states that the parties agree that the video was not formally admitted into evidence at trial and that Petitioner does not waive his contention that the video cannot be considered in ruling on the sufficiency of the evidence. **Id. ¶¶3-4, 6.**").

> by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Mr. Jones's Petition for a Writ of Certiorari should be granted for each of the following compelling reasons. *First,* in a published Opinion, the *Jones* Court held that, in evaluating an appellant's sufficiency-of-the-evidence claim, an appellate court may consider evidence that was "presented" at trial - here, video surveillance proffered by the Commonwealth - that was published to the fact-finder but never actually admitted into the evidentiary record. As the *Jones* Court itself recognized, whether a reviewing court may consider such extra-record evidence is a question of first impression in the Commonwealth of Pennsylvania. *See* Op. at 5-6.

Second, the *Jones* Court ignored or overlooked *Commonwealth v. Wroten,* 257 A.3d 734 (Pa. Super. 2021), directly relevant and binding authority. In doing so, the *Jones* Court rendered a decision that is in conflict with that precedent.[5]

Third, the *Jones* Court instead chose to rely on an unpublished, non-unanimous memorandum opinion from a Virginia intermediate appellate court, *Cull v. Commonwealth,* 2000 WL 311169 at *3 (Va. App. Mar. 28, 2000), and a decision from Georgia's Supreme Court, *Kennebrew v. State,* 480 S.E.2d 1, 4 (Ga. 1996). Neither of these decisions are binding on the

[5] *Wroten* was decided shortly after Mr. Jones filed his Brief for Appellant. The Commonwealth, in its Brief for Appellee, and Mr. Jones, in his Reply Brief, discussed the significance of *Wroten* to the disposition of the instant case. Further, the same jurist, the Honorable James Gardner Colins, authored both *Wroten* and *Jones.*

Courts of the Commonwealth of Pennsylvania, and neither sought to dispose of the unique issue presented in the instant appeal. Thus, unlike *Commonwealth v. Wroten,* they do not control, or even guide, the outcome here. Mr. Jones respectfully contends that reliance on non-binding cases from other jurisdictions in lieu of directly relevant and binding precedent from this jurisdiction constitutes a significant departure from accepted judicial practices as to call for the exercise of this Court's supervisory authority.

Finally, sufficiency-of-the-evidence claims are litigated with striking regularity on appeal, and the disposition of such claims comprises a significant portion of the Superior Court's criminal docket. Further, a successful suficiency-of-the-evidence claim results in complete discharge of an appellant, and complete relief from any corresponding sentence. Thus, it is of critical public importance that this Honorable Court promptly and definitively resolve the question whether a reviewing court's standard and scope of review governing sufficiency-of-the-evidence claims extends to evidence published to the finder-of-fact but never actually admitted into the evidentiary record.

Based on the foregoing, Mr. Jones respectfully asserts that there exist "special and compelling reasons" for granting his petition for a writ of certiorari.

I. THIS CASE PRESENTS A QUESTION OF FIRST IMPRESSION BECAUSE THIS COURT HAS NEVER EXPLICITLY ADDRESSED WHETHER A REVIEWING COURT'S SCOPE AND STANDARD OF REVIEW EXTENDS TO EVIDENCE THAT WAS PUBLISHED TO THE FINDER OF FACT AT TRIAL BUT NEVER FORMALLY ADMITTED INTO EVIDENCE BY ITS PROPONENT.

In his appeal to the Superior Court, Mr. Jones argued that the evidence was insufficient to support his conviction for third-degree murder because the Commonwealth failed to prove that

he acted with malice and/or failed to disprove that he acted in self-defense. As a threshold matter, Mr. Jones contended that in evaluating his claims on appeal, the Superior Court must not consider the video surveillance which captured the incident. This was so because, although the video surveillance was marked for identification purposes as Commonwealth's Exhibit 4, *see* N.T. 52, and was played for the finder of fact, it was never admitted into the evidentiary record. *See generally* N.T. Therefore, it is not part of the evidentiary record for purposes of this appeal. Stated differently, Mr. Jones contended that the Superior Court, in evaluating his sufficiency claims, was constrained to review only the evidence of record; that is, the testimony of the witnesses presented at trial and the evidence and exhibits properly admitted into evidence.[6]

Having correctly framed Mr. Jones's threshold issue, the Superior Court acknowledged that "there is no Pennsylvania precedent addressing this situation[.]" Op. at 5-6. Indeed, the dearth of authority from this Court caused the *Jones* Court to commit additional errors as set forth in greater detail below. At present, *Jones* constitutes binding authority in the Commonwealth of Pennsylvania for erroneous proposition for which it stands: an appellate court may consider evidence that the Commonwealth failed to admit into the evidentiary record at trial in determining whether a criminal conviction is supported by sufficient evidence as a matter of law.

II. THE *JONES* COURT RENDERED A DECISION THAT IS IN CONFLICT WITH ANOTHER INTERMEDIATE APPELLATE COURT OPINION, *COMMONWEALTH V. WROTEN.*

[6] *See* 4 C.J.S. § 567 (relating to Evidence included within record) (Documents and exhibits introduced into evidence at trial are part of the record.... Exhibits not offered at trial and affidavits created after the fact are not properly part of the record on appeal, and as far as appellate review is concerned, those documents do not exist.").

In *Commonwealth v. Wroten,* the Superior Court addressed whether, on appeal, it could consider exhibits that were presented, but never admitted as evidence, in the lower court. *Wroten,* 257 A.3d at 740-41. There, in the proceeding below - a refile hearing following the dismissal of charges at a preliminary hearing - the Commonwealth offered a transcript of the alleged victim's preliminary hearing testimony and surveillance footage that captured the events in question. *Id.* at 739. Although considered by the fact-finder at the refile hearing, neither the surveillance video nor the notes of testimony were admitted into evidence. *Id.* At the conclusion of the refile hearing, the trial court denied the Commonwealth's motion to refile and, again, the charges were dismissed for lack of *prima facie* evidence. *Id.*

The Commonwealth appealed to the Superior Court and challenged the trial court's denial of its motion to refile the charges. Of significance to the instant Petition for Writ of Certiorari, the *Wroten* Court was required to resolve a threshold issue identified by the appellee; namely, that the certified record lacked competent evidence that would have established a *prima facie* case as to the charges. *Id.* at 740. This is so because "while the transcript of the Municipal Court preliminary hearing on the 30th Street Station surveillance video were marked by the Commonwealth's attorney at the refile hearing before the trial court, neither were moved into evidence." *Id.* Accordingly, appellee argued that this Court may not consider the video surveillance "based on the fact that it does not appear in the certified record and the Commonwealth, as the appellant here, bore the responsibility for ensuring the completeness of the record certified by the trial court." *Id.* (citing **PA.R.A.P. 1921**).[7]

[7] The *Wroten* Court noted that upon application of the Commonwealth, this Court entered an order directing the trial court to certify and transmit a supplemental record containing the video pursuant to **PA.R.A.P. 1926(b)(1)**. After the briefs of the parties were submitted in *Wroten,* the trial court transmitted a supplemental certified record consisting

Holding that the Superior Court could consider the unadmitted video surveillance and notes of testimony on appeal, Judge Colins, writing for the *Wroten* Court, reasoned as follows:

> While the ADA did not specifically move the preliminary hearing notes of testimony and surveillance video into evidence, we do not deem this omission as necessitating the exclusion of this evidence from the record. It is apparent from the trial court's statements at the hearing that it accepted these items into evidence and considered them to be part of the record for the purpose of its analysis. We note that, while Appellee now claims that these documents are *dehors* the record, his counsel explicitly relied upon them at the refile hearing to argue that the Commonwealth had not met its burden of establishing a *prima facie* case. Moreover, at no point during the refile hearing did defense counsel lodge an objection to the surveillance video or notes of testimony, state that he had not had an opportunity to review these items, or argue to the trial court that it could not base its decision on this evidence because they were not part of the record. *In making the determination that these items are part of the certified record in this appeal, we are mindful of the relaxed rules of evidence attendant to preliminary hearings and other pre-trial criminal proceedings. See* **PA.R.E. 101,** Comment (*"Traditionally, our courts have not applied the law of evidence in its full rigor in proceedings such as preliminary hearings ..."*); accord **PA.R.CRIM. P. 542**, Comment (relating to preliminary hearings generally); **PA.R.CRIM. P. 1003**, Comment (relating to preliminary hearings in Philadelphia Municipal Court).

Id. at 741 (emphasis added).

The *Jones* Court erred by failing to give meaningful attention to *Wroten* - relegating it to a single footnote - and by apparently rejecting its applicability to the instant case for no reason other than that it "involved pretrial hearings on the sufficiency of the Commonwealth's *prima facie* case, not a trial." *See* Op. at 6, n.3.

Respectfully, this error by the *Jones* Court is a consequence of failing to adhere to the

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of a thumb drive that contained the surveillance video footage. *Id.* Therefore, this Court held that the Commonwealth complied with its obligation with respect to the certified record, and that the surveillance video was properly before this Court on appeal. *Id.*

clear logic of *Wroten.* Indeed, the *Jones* Court overlooked entirely the salient distinction between evidence presented at pretrial proceedings and evidence presented at trials, a distinction of which the *Wroten* Court was steadfastly "mindful." *Wroten,* 257 A.3d at 741. *Wroten's* disposition of the present question explicitly hinged on the fact that the proceeding at issue in the lower court was a preliminary hearing, where the rules of evidence are not applied in their full rigor. *Id.* Here, the proceeding at issue in the lower court was a trial, as to which the application of the rules of evidence is, by law, most robust. The *Wroten* Court's appropriate emphasis on this point compels the conclusion that the opposite result - *that the unadmitted evidence may not be considered on appeal* - should obtain when that same evidence is left unadmitted at trial. *Id.* Yet, the *Jones* Court did not offer a rationale as to why the instant case was not worthy of the same rigorous application of the rules of evidence at criminal trials to which the *Wroten* Court assigned dispositive significance.[8]

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[8] The *Jones* Court also applied the waiver doctrine, contending that Mr. Jones's failure to object to the deficiencies in the Commonwealth's presentation of evidence before the verdict "deprived the trial court of the opportunity to cure the defect." *See* Op. at 6-7, n.4 ("the trial court could have reopened the record after the Commonwealth had rested to permit the Commonwealth to formally move the video into evidence."). Respectfully, this reasoning imposes an unconstitutional obligation on defense counsel to assist the Commonwealth in its presentation of evidence or to give the trial court the opportunity to do so - all for the purpose of generating an evidentiary record that will later be used to support his or her own client's conviction on appeal. This is, of course, contrary to the adversarial system, the Commonwealth's role as the party bearing the sole burden of proof, and defense counsel's ethical duty to advocate zealously for his or her client.

Additionally, and importantly, defense counsel in *Wroten* did not object in the lower court to the Commonwealth's failure to formally admit its exhibits into evidence. *Wroten,* 257 A.3d at 741. In fact, as is true in the case at bar, both parties in *Wroten* referenced the unadmitted exhibits in support of their respective positions. *Id.* at 741. Accordingly, the *Jones* Court's application of the waiver doctrine to deny Mr. Jones relief is, in this regard, also inconsistent with its disposition in *Wroten.*

III. THE JONES COURT'S RELIANCE ON NON-BINDING, NON-UNANIMOUS, AND OFF-TOPIC CASES FROM OTHER JURISDICTIONS WHILE DISREGARDING BINDING PRECEDENT FROM THIS JURISDICTION CONSTITUTES A SIGNIFICANT DEPARTURE FROM ACCEPTED JUDICIAL PRACTICES AS TO CALL FOR THE EXERCISE OF THIS COURT'S SUPERVISORY AUTHORITY.

Despite the existence of *Wroten,* binding precedent from the Commonwealth of Pennsylvania, which was authored by Judge Colins himself, the *Jones* Court chose to rely on an unpublished, non-unanimous memorandum opinion of an intermediate appellate court of Virginia, *Cull v. Commonwealth,* 2000 WL 311169 at *3 (Va. App. Mar. 28, 2000), and an opinion from the Supreme Court of Georgia, *Kennebrew v. State,* 480 S.E.2d 1, 4 (Ga. 1996). Op. at 6.

The *Jones* Court appropriately recognized that some cases have precedential value, that some cases have persuasive value, and that some cases have no value. *See* Op. at 6, n.3 (citing **PA.R.A.P. 126(b)** and **210 PA. Code § 65.37** (articulating the general rule that unpublished, non-precedential, memorandum decisions even of the Superior Court filed prior to May 2, 2019, shall not be relied upon or cited by a Court or a party in any other action or proceeding)).

Instantly, the *Jones* Court turned a blind eye to *Wroten* and chose instead to rely on *Cull,* a case of no value in the Commonwealth of Pennsylvania, and a case lacking precedential value even in the jurisdiction in which it was decided.[9] The *Jones* Court violated Pennsylvania's Rules

[9] *See Cull,* 2000 WL 311169 at n.*** ("Pursuant to Code § 17.1-413... this opinion is not designated for publication."); *Kilpatrick v. Commonwealth,* 857 S.E.2d 163, 174 n.9 (Va. App. 2021) (providing that the unpublished memorandum opinions of the Court of Appeals have no precedential value even in the jurisdiction in Virginia); Rules of Supreme Court of Virginia, 5A:1(f) ("The citation of judicial opinions, orders, judgments, or other written dispositions that are not officially reported, whether designated as "unpublished," "not for publication," "non precedential," or the like, is permitted as informative, but will not be received as binding authority."), *available online at* https://www.vacourts.gov/courts/scv/rulesofcourt.pdf

of Appellate Procedure, its own Internal Operating Procedures, and well-settled jurisprudential norms by ignoring *Wroten* and, instead, citing and relying on *Cull* to deny Mr. Jones relief.

Moreover, even if the *Jones* Court did not err in citing *Cull,* the question presented in *Cull* is considerably different than the one presented here. In *Cull,* the defendant's videotaped confession was marked for identification purposes and played for the jury. *Cull,* 2000 WL 311169 at *3. At the time it was played, the trial court withheld judgment as to whether the tape would be made available to the jury during its deliberations. *Id.* When the jury did, ultimately, request the tape during deliberations, the trial court granted that request. *Id.*

On appeal, *Cull* argued that it was error to permit the jury to access the tape because it created a danger that, by replaying it, that aspect of the evidence would be overemphasized. *Id.* In evaluating this claim on appeal, its analysis remarkably thin, the *Cull* court stated that:

> *[i]rrespective of the characterization made by the trial judge, the contents of the tape were admitted into evidence when the jury viewed it.* The decision to make the tape available to the jury during deliberations was reserved by the trial judge, presumably, because if the jury did not ask for the tape, he would not have to rule on the question. The jury did ask for the tape, and the trial judge allowed it to be available to them during deliberation.

Id. (emphasis added).

Thus, the question presented in *Cull* - whether the trial court erred by allowing the deliberating jury unfettered access to the defendant's videotaped confession - is quite different than the question presented in Mr. Jones's appeal - whether an appellate court's defined scope and standard of review permits it to consider unadmitted evidence in determining whether the evidence is legally sufficient to support the verdict.

The *Jones* Court seized on the language emphasized above to deny Mr. Jones relief. This

was so despite the fact that one of the judges on the three-judge *Cull* panel authored a forceful and convincing concurring opinion supporting Mr. Jones's contentions precisely: that "[m]erely marking an exhibit for identification...does not designate that exhibit has been admitted as evidence." *Id.* at *5. The Honorable James W. Benton, Jr. persuasively reasoned that:

> [a]lthough it was marked only for identification, the jury had seen and heard the entire videotape, without objection, during the trial. Thus, the oral and visual content of the videotape became evidence that the jury could consider. That circumstance, however, does not make the videotape itself evidence...Moreover, when the videotape was played in the trial court for the jury, the court reporter did not make a stenographic record of its contents. Thus, the record before us contains no transcription of what the jury heard and contains no exhibit admitted in evidence during the trial of that videotape. *Cf. Matson v. Wilco Office Supply & Equip.,* 541 So.2d 767, 769(Fla.App.1989) (holding that when a videotape is played at trial it is evidence *that must be made a part of the record on appeal either by a stenographic record of the evidence presented at trial or by the videotape being admitted in evidence).*
>
> For these reasons, I would hold that the trial judge erred in giving the jury the videotape, which was marked only for identification in the record and which was not properly admitted in evidence at trial. *See Brittle v. Commonwealth,* 281 S.E.2d 889, 890 (Va. 1981) (holding that a jury improperly was permitted to see photographic exhibits that were not admitted in evidence)...As other courts have held, an exhibit that was not admitted in evidence by the trial judge is not "evidence." *See Bowman v. Weill Const. Co.,* 502 So.2d 133, 136-37 (La.App.1987) (noting that "[i]tems of evidence which are physically placed in the record...but which are not properly introduced and admitted in evidence by the trial court, may not be considered by any tribunal in deciding the merits of the case"); *see also Commonwealth, Dept. of Transp. v. McCrea,* 526 A.2d 474, 475 (Pa. Commw. Ct. 1987) (holding that "[i]t is fundamental and essential that, at trial, a document must be offered to and admitted by the court before it may be considered evidence; merely having the document marked as an exhibit, without more, is insufficient").

Id. (some internal citations omitted and emphasis added).

In *Kennebrew v. State,* the defendant sought to impeach a co-defendant by playing for the

jury the co-defendant's entire tape-recorded statement. *Kennebrew,* 480 S.E.2d at 4. Kennebrew was warned by the trial court that if he played the entire tape recording, rather than specific portions of the recording for purposes of impeachment, he would be introducing evidence and forfeiting his right to open and close final arguments. *Id.*[10] After admitting the entire statement made by the co-defendant, the trial court ruled that Kennebrew forfeited his right to open and close final arguments pursuant to section 17-8-71. *Id.* On appeal, Kennebrew contended that the trial court erred because the tape-recorded statement was not "introduced" as it was not marked for identification or formally tendered into evidence. *Id.* The Supreme Court of Georgia disagreed and held that "by playing the entire recorded statement Kennebrew *introduced evidence for purposes of section 17-8-71." Id.* (emphasis added).

Kennebrew is as unpersuasive as *Cull* in that it, too, seeks to answer a unique question related to Georgia state law, one that is entirely different than the question presented in Mr. Jones's appeal as articulated above. Thus, *Kennebrew* neither controls nor guides this Court's inquiry.

But even for purposes of section 17-8-71, the reasoning contained in the majority opinion in *Kennebrew* did not garner the full support of the Court. Indeed, two justices disagreed with this aspect of the decision. *See id.* at *5 (Sears, J., concurring) ("...I believe that this Court's earlier opinions show that within the meaning of section 17-8-71, a defendant only "introduces

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[10] Although the Petitioner is far from being an expert in Georgia's rules of criminal procedure, it appears that a prior version of **OCGA § 17-8-71** provided that a criminal defendant forfeits the right to open and close final argument to the jury if he introduces evidence other than his own testimony during the course of trial. Significantly, the Commonwealth of Pennsylvania recognizes no such rule or procedure.

evidence" during cross examination if he actually tenders something into evidence, not if he merely reads or plays documentary or recorded evidence for the jury's listening. Therefore, I believe that the trial court erred in ruling that Kennebrew waived his claim to open and close final arguments."); *id.* at 6 ("I believe that in this case, Kennebrew's playing of the tape recording during cross examination of the State's witness is analogous to the mere reading of documentary evidence and exhibiting such evidence to the jury, as occurred in *Freeney* [*v. The State,* 59 S.E. 788 (Ga. 1907)] and *Park* [*v. The State,* 162 S.E.2d 359 (Ga. 1968)]. As made clear by those cases, unless the evidence is *actually introduced into the body of evidence,* it does not affect a claim to open and close arguments under section 17-8-71.") (emphasis in original)).

Like *Cull, Kennebrew,* is a non-binding, non-unanimous and off-topic decision. Its existence does not encourage, much less permit, the Superior Court to ignore or overlook binding authority *(Wroten)*, Pennsylvania's Rules of Appellate Procedure, its own internal operating procedures, and jurisprudential norms governing authority in law. *Jones's* reliance on *Cull* and *Kennebrew*, and its concomitant disregard of *Wroten,* constitutes a significant departure from accepted judicial practices as to call for the exercise of this Court's supervisory authority.

IV. DUE TO THE REGULARITY IN WHICH THE SUFFICIENCY-OF-THE-EVIDENCE CLAIMS ARE LITIGATED ON APPEAL, THE QUESTION PRESENTED IS ONE OF SUBSTANTIAL PUBLIC IMPORTANCE AND THIS COURT SHOULD PROVIDE PROMPT AND DEFINITIVE GUIDANCE TO LOWER COURTS ON THE QUESTION PRESENTED.

Stated simply, sufficiency-of-the-evidence claims are litigated with striking regularity on appeal, and the disposition of such claims comprises a significant portion of the Superior Court's criminal docket. Further, a successful sufficiency-of-the-evidence claim results in complete

discharge of an appellant, and complete relief from any corresponding sentence. Thus, it is of critical public importance that this Honorable Court promptly and definitively resolve this unanswered question: Does the well-settled standard and scope of review governing sufficiency-of-the-evidence claims permit an appellate court to consider evidence - here, surveillance video proffered by the Commonwealth - that was published to the fact-finder at trial, but never actually admitted into evidence, in determining whether the evidence was sufficient to support the verdict?[11]

V. WHERE A CRIMINAL DEFENDANT HAS AN ABSOLUTE RIGHT TO APPEAL HIS CRIMINAL CONVICTION UNDER ARTICLE V, SECTION 9 OF THE PENNSYLVANIA CONSTITUTION, IT IS INCUMBENT UPON THE COMMONWEALTH AS THE PARTY BEARING THE BURDEN OF PROOF TO DEVELOPE AN EVIDENTIARY RECORD THAT WILL WITHSTAND APPELLATE SCRUTINY.

That the prosecution bears the burden of proving each element of the charge is beyond question. *In re Winship,* 397 U.S. 358, 364 (1970) (the Fourteenth Amendment's "Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."). Pennsylvania law, too, has long been settled that proof beyond a reasonable doubt of each element of the offense is required to *sustain* a conviction. *Commonwealth v. Bailey,* 292 A.2d 345, 346 (Pa. 1972) ("To sustain a conviction, the facts and circumstances which the Commonwealth [must] prove must be such that every essential element of the crime is established beyond a reasonable doubt.").

[11] The instant appeal is a suitable vehicle through which this Honorable Court may answer the important question presented. This is so because Mr. Jones's conviction for third-degree murder can only arguably be affirmed if a reviewing court considers the unadmitted evidence. The evidence of record definitively failed to disprove beyond a reasonable doubt that Mr. Jones acted in perfect or imperfect self-defense. *See* Brief for Appellant, 06/01/2021 at 30-42.

In addition to the presumption of innocence, criminal defendants in Pennsylvania enjoy the absolute right to appeal their convictions and sentences. **PA. CONST. ART. V, § 9**; *Commonwealth v. Wilkerson,* 416 A.2d 477, 479 (Pa. 1980). *See also Commonwealth v. Lantzy,* 736 A.2d 564, 568 (Pa. 1999) (citing *Evitts v. Lucey,* 469 U.S. 387, 396-97 (1985) (under United States Supreme Court precedent, where a state constitution provides for a first appeal as of right, such appeal represents an integral part of the adjudication of guilt or innocence)). And, unless waived during the process prescribed by Pennsylvania Rule of Appellate Procedure 1925, a claim that the evidence was insufficient to support the verdict cannot be waived on appeal. *Commonwealth v. Williams,* 959 A.2d 1252, 1257 (Pa. Super. 2008). Because criminal defendants enjoy absolute constitutional right to a direct appeal, *it is incumbent upon the Commonwealth as the party bearing the burden of proof at trial to develope an evidentiary record that will withstand appellate scrutiny.* Where the evidentiary record is not properly developed by the Commonwealth and devoid of legally sufficient evidence to support the verdict, a reviewing court may not sustain the challenged conviction.

In examining the sufficiency of the evidence on appeal, a reviewing court is bound by the evidentiary record generated in the trial court. *See Commonwealth v. Peck,* 242 A.3d 1274 (Pa. 2020) (when reviewing a claim challenging the sufficiency of the evidence to support a conviction, an appellate court must determine whether *the evidence admitted at trial,* as well as all reasonable inferences derived therefrom, viewed in favor of the Commonwealth, supports the "fact-finder's finding of all of the elements of the offense beyond a reasonable doubt.") (emphasis added)).

Put another way, when evaluating a challenge to the sufficiency of the evidence, an

appellate court's determination to affirm or reverse a conviction must be based upon evidence contained in the evidentiary record; an appellate court may not uphold a conviction on the basis of off-the-record facts. *M.P. v. M.P.*, 54 A.3d 950, 955 (Pa. Super. 2012). That is to say, where a certain piece of evidence is not formally admitted into evidence by its proponent, it is not part of the evidentiary record reviewable by an appellate court. Indeed, after an exhaustive search of the case law, there is simply no support for the proposition that evidence not admitted into evidence at trial may be used to assist this Court in affirming a criminal conviction on appeal. To the contrary, "it is a fundamental evidentiary requirement that a document must be formally introduced and admitted into the record before the document may be considered and form the basis of an adjudication." *Denver Nursing Home v. Department of Public Welfare,* 552 A.2d 1160, 1163 (Pa. Cmwlth. 1989).

> The presentation of exhibits such as writings, photographs, knives, guns, and other tangible objects often proves troublesome to neophytes. There are variations in local procedures, but the general process can be briefly described here. The attorney essentially walks the legs of a triangle-from the court reporter to the opposing attorney, then to the witness, and finally back to the judge. The party wishing to introduce evidence of this type should first have the object marked "for identification" as an exhibit. After the proponent has the thing marked by the court reporter or clerk for identification as an exhibit, the proponent submits the proposed exhibit to the opposing attorney for his inspection, at least on his request. After showing the exhibit to the opponent, the proponent approaches the witness. At this point, the proponent "lays the foundation" for its introduction as an exhibit by having it appropriately authenticated or identified by the witness's testimony. [...]
>
> After laying all the required foundations or predicates, the proponent tenders the exhibit to the judge by stating, "Plaintiff offers this (document or object, describing it), marked 'Plaintiff's Exhibit No. 2' for identification, into evidence as Plaintiff's Exhibit No. 2" At this juncture, the opponent can object to its receipt in evidence, and the judge will rule on the objection.

1 McCormick On Evidence § 51 (8th ed. 2020) (footnotes omitted). *See also id.* (even where a courtroom is equipped with computer technology and the exhibit at issue is in a digital form, the

proponent of the evidence must still "tender the exhibit" to the judge as described above.

Instantly, the Commonwealth failed to create and develope an evidentiary record in the trial court that can withstand appellate scrutiny by this Court. Although marked for identification purposes, the Commonwealth failed to move for the admission of, and the trial court did not admit into evidence, Commonwealth's Exhibit 4, the video surveillance which captured the shooting at issue here. *See generally* N.T. The parties to this appeal have stipulated that the Commonwealth's Exhibit 4 was not admitted into evidence in the trial court. *See* Limited Joint Stipulation.

With due respect to the Commonwealth's trial prosecutor, the instant misstep appears to be one of imperfect and imprecise lawyering. Yet, our system of justice - which "recognizes an adversary system as the proper method of determining guilt[,]" *see Singer v. United States,* 380 U.S. 24, 36 (1965) - requires that parties to a criminal action to formally admit evidence according to prescribed rules and procedures that make its admission into the evidentiary record clear. Certainly, the necessity of formal introduction and admission of evidence into the evidentiary record is not an idea that is subject to reasonable dispute. The omnipresent and well-embedded concept in the appellate courts of the importance of developing and protecting the record cannot belong to criminal defendants alone. The Commonwealth must formally admit evidence not just to win a conviction, but to create an evidentiary record for the inevitable exercise by a criminal defendant of his right to appeal. And where evidentiary and procedural rules exist for good reason, but are not followed, our system as a whole suffers from an air of illegitimacy and unfairness.

CONCLUSION

Based on the above reasons of law and fact, Mr. Jones respectfully submits that he has presented the "compelling reasons" needed for this Honorable Court to hear his case. Accordingly, Mr. Jones respectfully requests this Honorable Court to grant the petition for a writ of certiorari.

I, Carl S. Jones Jr., declare under penalty of perjury that the forgoing is true and correct.

Respectfully Submitted,

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