NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. MICHAEL FRIEDENBERGER Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1054 WDA 2013

Appeal from the Judgment of Sentence March 22, 2013
In the Court of Common Pleas of Blair County
Criminal Division at No.: CP-07-CR-0001715-2006

BEFORE: FORD ELLIOTT, P.J.E., BOWES, J., and WECHT, J.

DISSENTING MEMORANDUM BY WECHT, J.: **FILED MAY 01, 2014**

Our Supreme Court has instructed: "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."[1] From the inception of this case, Senior Deputy Attorney General David C. Gorman, Esq., ("Deputy Gorman"), repeatedly has lost sight of this essential command. The appeal we address today concerns Deputy Gorman's second questionable action[2] in this case: Deputy Gorman participated in plea negotiations, and stood silent before the trial court, while Michael Friedenberger ("Friedenberger") pleaded guilty to two crimes, all while

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[1] Pennsylvania Rule of Professional Conduct 3.8, Comment; ***Commonwealth v. Eskridge***, 604 A.2d 700, 701 (Pa. 1992).

[2] ***See*** *infra*, at 4-7.

Deputy Gorman knew that three of the material witnesses to those crimes had died. Deputy Gorman did not disclose the deaths of these witnesses to Friedenberger, Friedenberger's counsel, or the trial court.

The learned Majority excuses Deputy Gorman's misconduct primarily by concluding, for the first time in Pennsylvania, that the death of a material witness does not constitute exculpatory evidence for purposes of the prosecutor's disclosure obligations mandated by ***Brady v. Maryland***, 373 U.S. 83 (1963). The Majority reaches this conclusion without analysis of any of the principles espoused in the litany of Pennsylvania decisions that have examined the parameters of ***Brady***. Instead, the Majority relies solely upon one case, and a foreign one at that: ***People v. Jones***, 375 N.E.2d 41 (N.Y. 1978), a New York decision rendered over thirty-five years ago and never cited by a single court in Pennsylvania.[3]

Although I generally am loathe to criticize the court that, in a bygone era, gave us much of the wisdom of Justice Benjamin Cardozo,[4] ***Jones***

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[3] Indeed, in the thirty-five years since its issuance, ***Jones*** has been cited outside New York on only two occasions, in both cases for the general and non-controversial propositions that courts are reluctant to void pleas after sentencing, ***see United States v. Reyes–Acosta***, 334 F.Supp.2d 1077, 1081 n.1 (N.D.Ill. 2004), and that a criminal defendant is not entitled to every nugget of potentially helpful information in a prosecutor's case file. ***See In re Hatfield***, 390 N.E.2d 453, 462 (Ill. App. 1st Dist. 1979).

[4] ***See***, ***e.g.***, ***Ultramares v. Touche***, 174 N.E. 441 (N.Y. 1931); ***Palsgraf v. Long Island Rail Road Co.***, 162 N.E. 99 (N.Y. 1928); ***Berkey v. Third Ave. Railway***, 155 N.E. 58 (N.Y. 1926); ***Hynes v. New York***

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warrants no persuasive value, and certainly should not control this case. I believe that Deputy Gorman's deliberate failure to disclose the death of the three material witnesses violates both the mandate of ***Brady*** and at least one of our Rules of Professional Conduct. Furthermore, I cannot reasonably conclude that Friedenberger's plea was knowing, intelligent, and voluntary, when Friedenberger did not know that Deputy Gorman was without three material witnesses, a circumstance of ignorance arising solely from Deputy Gorman's willful omission. Because the esteemed Majority concludes otherwise, I respectfully, but emphatically, dissent.

This is the second appeal in this case. Like the first, this appeal raises concerns related to Deputy Gorman's professional behavior. In the interest of a full and accurate depiction of this case, it is important to detail the factual and procedural events from the beginning.

Friedenberger, his wife Lynette Friedenberger, and Pamela Cross collectively were charged with dealing in proceeds of unlawful activity, conspiracy to commit same, conspiracy to commit receiving stolen property, and multiple counts of corrupt organizations. In addition to these charges, Friedenberger alone was charged with additional counts of receiving stolen property, criminal use of a communication facility, retail theft, solicitation to commit retail theft, and various tax crimes related to Friedenberger's

(Footnote Continued) _____

Central Railroad Co., 131 N.E. 898 (N.Y. 1921); and ***MacPherson v. Buick Motor Co.***, 111 N.E. 1050 (N.Y. 1916).

personal income tax returns. These charges arose from Friedenberger's apparent criminal operation of a business entitled "Best Buys." Purportedly, the business was supposed to buy and then resell products on eBay for a profit. However, from 2001 until 2005, Friedenberger performed this function with stolen goods. It was alleged that Friedenberger, with the assistance of his wife and Pamela Cross, would enlist various individuals, many of whom were drug addicts and thieves, to steal the items that he then would put up for resale on eBay. It was further alleged that Friedenberger knew at all times that the items that were brought to him for resale in fact were stolen. Friedenberger would pay the thieves and addicts for their illicit assistance, which, in turn, would fund their addictions.

The charges against Friedenberger, his wife, and Cross were consolidated for a jury trial. The individuals who stole goods and turned them over to Friedenberger were recruited by the Commonwealth as government witnesses. As the trial court astutely noted, "it [was] obvious that the credibility of the Commonwealth witnesses was central in the defense of each defendant." Trial Court Opinion ("T.C.O."), 6/24/10, at 3. The trial court further observed that "[while the trio] could be acquitted even if these witnesses were believed, it is fair to say that if a jury concluded there was no sale of stolen property to Friedenberger their acquittal would be assured." ***Id.*** Accordingly, sixteen months before the jury trial commenced, Friedenberger filed a motion for discovery, which included the following requests:

> (a) Any evidence favorable to the accused which is material to guilt or punishment;
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> * * *
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> (m) Whether the defendant and any intended Commonwealth witness has any arrest or conviction record whatsoever whether federal, state or local, and the nature of the offense;
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> (q) Copies of any and all arrangements, consideration, plea agreements, and the like between the Commonwealth, Pennsylvania State Police or any other law enforcement agency with respect to said informants'/co-conspirators' cooperation with said agencies in this case;
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> (r) The informants'/co-conspirators' prior criminal record;
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> (s) The prior criminal record of all witnesses the Commonwealth intends to call at the time of trial.

Id. at 3-4.

After Deputy Gorman apparently made no effort to comply with Friedenberger's discovery requests, Friedenberger filed a motion to compel discovery, noting that Friedenberger had "filed discovery motions in October of 2006 requesting among other things any and all criminal records of the witnesses that the Commonwealth intends to call at trial, any arrangements, considerations, and plea agreements of these witnesses." ***Id.*** at 4 (citing "paragraph 3 of Defendant's Motion to Compel"). After oral argument on the motion to compel, the trial court entered the following order, in pertinent part:

> AND NOW, this 16th day of July, 2007, the matter having come before the court on jury selection day and after oral argument

held this date, it is ORDERED, DIRECTED and DECREED as follows:

1. [Defense counsel] shall turn over to [Deputy Gorman] the list of names of which he is speaking to determine whether a plea agreement exists with the Commonwealth. [Deputy Gorman] shall search the records of the State Attorney General and the Blair County District Attorney's Office in regards to these individuals to determine whether there is any plea agreement. If there is, [Deputy Gorman] must turn it over to [defense counsel] forthwith.

2. The Commonwealth is not required to submit plea agreements in regards to the individuals that are dated before 2003.

* * *

Id. (quoting Order, 7/16/2007). The trial court observed that its order was "clear and concise," requiring the Commonwealth to "provide all plea agreements regarding those individuals dating back to 2003." ***Id.*** at 4-5.

Still, Deputy Gorman persisted in flouting his discovery obligations. Rather than comply, Deputy Gorman revealed to the defense only those plea agreements with the witnesses that were related directly to Friedenberger's criminal scheme. Deputy Gorman did not disclose all of the agreements that dated back to 2003. The jury trial commenced thereafter. During the course of the trial, it was revealed that Deputy Gorman had failed to disclose a total of **forty-three** other relevant plea agreements. The trial court determined that Deputy Gorman's disregard of the court's July 16, 2007 order prejudiced Friedenberger, his wife, and Cross. Accordingly, the court was compelled to discharge the jury.

Friedenberger then filed a motion to have the charges against him dismissed on the basis of double jeopardy. After a hearing, the trial court concluded that Deputy Gorman's actions were grossly negligent, but that they were not intentional. As such, the trial court denied Friedenberger's motion. Friedenberger appealed to this Court.

In an unpublished memorandum, a three-judge panel of this Court noted that it was bound to accept the trial court's finding that Deputy Gorman's actions were grossly negligent. Ultimately, the panel majority agreed with the trial court that Deputy Gorman did not deliberately engage in egregious misconduct that specifically was designed to deprive Friedenberger of a fair trial. ***Commonwealth v. Friedenberger***, No. 1166 WDA 2010, slip op. at 11 (Pa. Super. June 22, 2011). One member of the panel dissented, and would have concluded that Deputy Gorman's questionable behavior was deliberate and designed to deprive Friedenberger of a fair trial. The dissent would have concluded that the constitutional principles of double jeopardy barred a retrial. ***Id.***, dissenting slip op. at 8. Although the panel majority concluded that Deputy Gorman's gross negligence did not warrant dismissal of the charges against Friedenberger, it left little doubt that his actions were improper, and in direct violation of a court order.

Unfortunately, Deputy Gorman did not learn a lesson from the judicial treatment of his first act of impropriety. After the case returned to the trial court for disposition from this Court, Deputy Gorman at some point learned

that three of the material witnesses that were to testify against Friedenberger had died. Undoubtedly based upon this evidentiary development and his exclusive knowledge thereof, Deputy Gorman offered to drop all of the charges against Friedenberger, his wife, and Cross, except for one count of receiving stolen property and one count of conspiracy to commit same against Friedenberger. Unaware that three Commonwealth witnesses had died, Friedenberger appeared before the trial court, pleaded guilty to these two offenses, and was sentenced to four years' probation. At no point did Deputy Gorman disclose to Friedenberger, his counsel, or the trial court that the aforementioned witnesses had died. Friedenberger was deprived of a fair opportunity to evaluate the strength of the Commonwealth's actual case against him. Moreover, the trial court was not able to ascertain whether there was a sufficient factual basis to accept the plea. Deputy Gorman simply stood silent.

Apparently, Deputy Gorman was unmoved by his ethical, and in my view legal, obligation to disclose this critical information to Friedenberger or the trial court at or before the time of the plea, but he was inclined to discuss the matter when contacted later by a reporter from a local newspaper. When asked why the case ended in the manner in which it did, which was a significant deviation from the case as it originally was charged, Deputy Gorman informed the reporter that three of his essential witnesses had died. Upon learning of this information, Friedenberger filed a motion to

withdraw his guilty plea. The trial court declined to hold a hearing, and denied Friedenberger's motion. This appeal followed.

A criminal defendant "has no absolute right to withdraw a guilty plea; rather, the decision to grant such a motion lies within the sound discretion of the trial court." ***Commonwealth v. Muhammad***, 794 A.2d 378, 382 (Pa. Super. 2002) (citation omitted). As the Majority correctly notes, a trial court should only grant a motion to withdraw a guilty plea after sentencing upon a defendant's demonstration that "prejudice on the order of a manifest injustice" would result if the motion is not granted. ***Id.*** (citing ***Commonwealth v. Carpenter***, 725 A.2d 154, 164 (Pa. 1999)). "A plea rises to the level of manifest injustice when it was entered into involuntarily, unknowingly, or unintelligently." ***Commonwealth v. Stork***, 737 A.2d 789, 790 (Pa. Super. 1999) (citation omitted). To make this assessment, we must evaluate the totality of the circumstances. ***Commonwealth v. Broaden***, 980 A.2d 124, 129 (Pa. Super. 2009).

The Majority properly recites this standard, and ultimately concludes that Friedenberger's plea was entered knowingly, intelligently, and voluntarily. The Majority ultimately concludes that no rule in Pennsylvania imposed a duty upon a prosecutor to disclose the death of material witnesses to the defense before engaging in plea negotiations. ***See*** Maj. Mem. at 13. Absent this duty, the Majority seemingly concludes that Friedenberger cannot establish manifest injustice. I respectfully disagree.

First, the most notable absence from the Majority's analysis is any reference to, or any discussion of, any of the cases in Pennsylvania that address ***Brady***'s mandate or any of the cases that expound upon that mandate. The Majority notes only that no Pennsylvania case or rule addresses precisely the situation that occurred in this case, and, consequently, relies solely upon ***Jones***, a New York case that does not bind, and has never resonated, in Pennsylvania.[5] In my view, the present matter readily can be resolved by straightforward application of the basic ***Brady*** principles already "on the books" in Pennsylvania. We need not venture beyond our borders or our precedents to find a resolution.

Before discussing ***Brady***, I first must address the Majority's contention that such a discussion is jurisprudentially improper. The Majority discusses ***Jones*** in great detail. ***See*** Maj. Mem. at 7-8. Moreover, the Majority, at least in part, relies upon ***Jones*** in reaching its conclusion that Appellant should not be permitted to withdraw his guilty plea. ***Id.*** at 12 ("Critically, unlike ***Jones***, this matter involved numerous additional witnesses."). However, the Majority also recognizes that ***Jones*** was decided after ***Brady***, and avowedly was required (at least) to distinguish it. ***See id.*** at 7-8. Apparently, as today's Majority would have it, we would be permitted to

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[5] ***See Commonwealth v. Nat'l Bank & Trust, Co. of Central Penna.***, 364 A.2d 1331, 1335 (Pa. 1976) ("[I]t is a truism that decisions of our sister states are not binding precedent on [Pennsylvania courts.]").

consider ***Jones***, and yet not the bedrock ***Brady*** case or the principles upon which that case was decided. I do not believe that our jurisprudential rules require such a limited consideration of precedent. Moreover, it is entirely incongruent to utilize ***Jones*** in support of affirmance, even though ***Jones*** is not binding in Pennsylvania, and nonetheless simultaneously to refuse to consider the backdrop of the controlling and seminal ***Brady*** rule and its progeny, against which backdrop ***Jones*** ostensibly was developed.

Jones and ***Brady*** are inextricably linked, and consideration of one necessitates consideration of the other. If, as the Majority claims, ***Brady*** is not part of this case, then any discussion of ***Jones*** is equally improper. The Majority does not merely discuss ***Jones*** as part of the procedural backdrop of this matter. Rather, the Majority's discussion of ***Jones*** occurs after the recitation of the standard of review, and following summarization of the parties' arguments. Moreover, as noted in the previous paragraph, the Majority also relies upon ***Jones*** in reaching its ultimate conclusion. The Majority has placed ***Jones*** directly at issue here; as a result, consideration of ***Brady*** is necessarily at the heart of this case. The Majority assails my use of ***Brady*** because Appellant himself does not raise ***Brady*** or any of the other cases that I cite below. However, it is the Majority's invocation of and reliance upon the ***Brady***-defying ***Jones*** that necessarily requires my discussion of ***Brady*** and its progeny; my analysis is not controlled by any ***Brady*** argument, or lack thereof, proffered by Appellant.

Recently, in ***Commonwealth v. Feese***, 79 A.3d 1101 (Pa. Super. 2013), we explained the general parameters of ***Brady*** as follows:

> In the landmark case of ***Brady v. Maryland***, 373 U.S. 83 (1963), the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." ***Id.*** at 87. The ***Brady*** rule is not limited exclusively to directly exculpatory evidence. Because the reliability of a witness may ultimately affect a finding of guilt or innocence, the ***Brady*** mandate also encompasses impeachment evidence. ***See U.S. v. Bagley***, 473 U.S. 667, 677 (1985). Thus, the Supreme Court of the United States held that: "there are three components of a true ***Brady*** violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." ***Strickler v. Greene***, 527 U.S. 263, 281-82 (1999).

Id. at 1106 (citations modified).

In ***Commonwealth v. Ly***, 980 A.2d 61 (Pa. 2009), our Supreme Court provided a more expansive discussion of the essential elements of ***Brady***:

> Under ***Brady***, the prosecution's failure to divulge exculpatory evidence is a violation of a defendant's Fourteenth Amendment due process rights. "[T]o establish a ***Brady*** violation, a defendant is required to demonstrate that exculpatory or impeaching evidence, favorable to the defense, was suppressed by the prosecution, to the prejudice of the defendant." ***Commonwealth v. Gibson***, 951 A.2d 1110, 1126 (Pa. 2008).
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> The burden of proof is on the defendant to demonstrate that the Commonwealth withheld or suppressed evidence. ***See Commonwealth v. Porter***, 728 A.2d 890, 898 (Pa. 1999). The United States Supreme Court has held, "[T]he prosecutor is not required to deliver his entire file to defense counsel, but only to

> disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial." ***United States v. Bagley***, 473 U.S. 667, 675 (1985) (footnote omitted). Similarly, this Court has limited the prosecution's disclosure duty such that it does not provide a general right of discovery to defendants. ***See Commonwealth v. Counterman***, 719 A.2d 284, 297 (Pa. 1998). Moreover, we have held that the prosecution is not obligated to reveal evidence relating to fruitless leads followed by investigators. ***See Commonwealth v. Crews***, 640 A.2d 395, 406 (Pa. 1994).
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> "To satisfy the prejudice inquiry, the evidence suppressed must have been material to guilt or punishment." ***Gibson***, 951 A.2d at 1126-27. [M]ateriality extends to evidence affecting the credibility of witnesses, rather than merely to purely exculpatory evidence. ***See Giglio v. United States***, 405 U.S. 150, 154 (1972) ("When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule."). Moreover, we have held that the protection of ***Brady*** extends to the defendant's ability to investigate alternate defense theories and to formulate trial strategy. ***See Commonwealth v. Green***, 640 A.2d 1242, 1245 (Pa. 1994) (holding that courts must "consider any adverse effect that the prosecutor's failure to disclose might have had not only the presentation of the defense at trial, but the preparation of the defense as well."). "[F]avorable evidence is material, and constitutional error results from its suppression by the government, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." ***Kyles v. Whitley***, 514 U.S. 419, 433-34 (1995) (internal quotation marks omitted).

Ly, 980 A.2d at 75-76 (citations modified).

The Majority effectively addresses none of these principles. Even a cursory consideration of the above passages compels the conclusion that the failure to disclose the deaths of three material witnesses to Friedenberger's crimes is a patent violation of ***Brady***. There is no question that this information is "favorable to the accused." No credible argument can be

made to the contrary. A simple hypothetical will establish this point beyond peradventure. Consider a defendant who is charged with simple assault for punching another person in the stomach in the restroom of a bar. The only witness to the assault is the victim. If that witness dies before trial, the Commonwealth will have no other means to prove its case beyond a reasonable doubt. There can be no doubt that the death of that witness is favorable to the accused. Indeed, it is fair to state that this is the most favorable information that the accused could receive. By the Majority's lights, the prosecutor in this hypothetical could proceed willy-nilly to encourage the assailant in that case to plead guilty to the assault without ever divulging (and while actively concealing) that the sole witness is dead, and that the prosecution's evidence has departed with him. Such a conclusion betrays any reasonable, or common-sense, understanding of the phrase "favorable to the accused."[6]

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[6] The Majority criticizes the fact that none of the cases that I cite in support of my ***Brady*** analysis stand for the proposition that the death of a material witness is "evidence" for ***Brady*** purposes. In my view, such an analysis is unnecessary. It is axiomatic that the death of a witness is the type of material included within the scope of ***Brady***'s command. The death of a witness results in the absence of evidence. There is no meaningful distinction between the death of a witness and, for example, a lab report that reveals that alleged narcotics in fact were not narcotics at all. No reasonable argument can be made that a prosecutor would not have to disclose to the defense that the narcotics for which a defendant is charged as having possessed turned out to be a non-contraband substance. In other words, the prosecutor would be obliged to disclose that absence of evidence. The absence of evidence created by the death of a material witness requires the same result.

There also is no doubt in my mind that the death of these three witnesses was material for ***Brady*** purposes. As the United States Supreme Court noted in ***Whitley***, "[f]avorable evidence is material, and constitutional error results from its suppression by the government, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." ***Whitley***, 514 U.S. at 433-34. A reasonable probability "is a probability sufficient to undermine confidence in the outcome." ***Bagley***, 473 U.S. at 682. Undoubtedly favorable to Friedenberger, the deaths of these three material witnesses also created the very reasonable probability that Friedenberger would not have entered a guilty plea to the two offenses. Indeed, it is hard to believe that Friedenberger would have pleaded guilty knowing that the Commonwealth's case was substantially, if not fatally, weakened by the loss of three material witnesses. At a minimum, Deputy Gorman's suppression of the deaths of three material witnesses "undermine[s] the confidence of the outcome" of this case. Thus, in my view, there is no question that the death of a material witness to a crime is both exculpatory and material for ***Brady*** purposes.

Indeed, to hold otherwise would create an anomaly, and, frankly, an absurdity. Consider the well-settled principle that, under ***Brady***, a prosecutor is duty-bound to disclose impeachment evidence. If we relied solely upon the holding in ***Jones***, as the Majority seemingly does, a prosecutor would have to disclose to a defendant (1) that a witness has a

record of offenses that implicates the witness' veracity, (2) that the witness has made prior inconsistent statements, and (3) other impeaching material, but would not have to inform the same defendant that the same witness is in fact dead and no longer able to testify at trial. For the Majority, the defendant constitutionally is entitled to prepare to cross-examine a material witness, but not to know that the witness no longer exists. I cannot accept this anomaly as a viable principle of law.

Jones does not alter my analysis. ***Jones*** is not binding on this Court, nor upon any Pennsylvania court. ***See Nat'l Bank & Trust, Co. of Central Penna.***, *supra*. Given the absence of such binding effect, we must decide as a court what persuasive effect, if any, ***Jones*** should have in this case. In my view, it should have none.

In ***Jones***, the Court of Appeals of New York held that the death of a material witness to a robbery was not exculpatory evidence for ***Brady*** purposes. With no ***Brady*** analysis to speak of, the court instead characterized the death information as being relevant only to a defendant's tactical decision-making, and not to the legal issue of guilt. ***Jones***, 375 N.E.2d at 43. For the ***Jones*** Court, the parties were merely disputing "a matter of tactics." ***Id.*** at 44. These antiquated legal conclusions of a foreign forum should have no bearing upon our decision in Pennsylvania today.

Notably, the ***Jones*** Court, in declaring that the case was not controlled by ***Brady***, failed to cite a single passage from ***Brady***, and did not have the

benefit of the decades of development of the ***Brady*** doctrine that we have at our disposal today. The premises relied upon by the ***Jones*** Court are squarely at odds with the core principles that underlie ***Brady***, and those that have derived directly from ***Brady***. It is those principles that drive my conclusion that a prosecutor has a duty to disclose the death of a material witness before engaging in plea negotiations with a criminal defendant. ***Jones*** is not merely inconsistent with our notions of due process and a fair trial; its importation into our Commonwealth and engraftment onto our law affirmatively undercuts those principles.

In ***Jones***, the New York Court commented that "[a] fundamental concern of the criminal justice system, of course, is that an innocent defendant shall not be convicted; not that a possibly guilty actor shall escape conviction because the [state is] not able to establish his guilt." ***Id.*** at 44. From this statement, it appears that the ***Jones*** Court would have reached a different result had the defendant maintained his innocence throughout the proceedings. Troublingly, today's Majority seems to adopt the same rationale. ***See*** Maj. Mem. at 13 ("Appellant acknowledged his commission of the crimes . . . ."). This pronouncement in ***Jones***, whereby the New York Court of Appeals sought to create two categories of law, one for the guilty and one for the innocent, offends our system of justice. We afford the same rights, benefits, and opportunities to all who find themselves charged with a crime, the guilty and innocent alike. The guilty enjoy the full panoply of constitutional rights, and fair treatment, and not only because

our Constitution demands it; our law protects the rights of the guilty steadfastly in order to ensure that the system operates fairly when an innocent person finds himself wrongly charged with a crime. The Constitution and laws of Pennsylvania demand integrity of process; they do not countenance a crass jurisprudence of results.

If we extract anything of value from ***Jones***, it should be its invocation of Justice George Sutherland's words, words which the New York Court of Appeals quoted and then proceeded to ignore:

> The Supreme Court has observed that the prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

Id. at 43 (quoting ***Berger v. United States***, 295 U.S. 78, 88 (1935)). I cannot reconcile the ***Jones*** Court's quotation from ***Berger*** with the decision reached by that court. To encourage a guilty plea, knowing that the witnesses who could establish a defendant's guilt are dead and can never testify, as was the case here, without disclosing that information to the defendant, is the epitome of a foul blow. Such an act of willful omission is an act of trickery and deceit, and unquestionably an improper method

calculated to produce a conviction at all costs. For these reasons, I would assign no persuasive value to ***Jones***.

The Majority asserts that there were "numerous additional witnesses" involved in this case, and that the death of the three witnesses potentially "weakened" the Commonwealth's case. Maj. Mem. at 12.[7] The Majority offers no factual support for this conclusion. The Majority does not identify these witnesses, nor does the Majority discuss how, or if, these witnesses could establish proof of all of the elements of the crimes to which Friedenberger pleaded guilty beyond a reasonable doubt. Indeed, based upon the record before us, it is not clear which witnesses have died, whether those witnesses testified in the original jury trial, and, if they did testify, whether that testimony could be used in a subsequent trial. It may be that,

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[7] In its brief, the Commonwealth vehemently rejects the contention that the death of the three witnesses rendered it incapable of proving its case beyond a reasonable doubt. Like the Majority, the Commonwealth claims that the loss of these three witnesses merely weakened the prosecution's case. However, also like the Majority, the Commonwealth does not support this assertion with any facts. The Commonwealth does not inform this Court which witnesses died, what information those witnesses would have provided, which witnesses remain, and how the remaining witnesses could prove its case against Friedenberger. Without such information, I simply cannot conclude that the death of the witnesses did not significantly hinder the Commonwealth's ability to prove Friedenberger guilty of any crimes. More importantly, as discussed *infra*, the more troubling aspect of the Majority's ruling is not its application to this case, where we may assume *arguendo* that the death of the witnesses did not prevent the Commonwealth from proving its case, but rather the application of the new rule to future cases where the death of a witness unequivocally prevents the Commonwealth from proceeding.

in this case, the witnesses who have died were the only three that could establish proof beyond a reasonable doubt, and that they did not testify in the original trial. Or, it could be the case, as the Majority suggests, that these witnesses were material witnesses, but that their deaths were not detrimental to the Commonwealth's ability to prove its case. Based upon the record before us, we simply do not know how the deaths of these witnesses affected the Commonwealth's ability to prosecute Appellant. As such, there is no factual basis upon which the Majority could conclude that these deaths only weakened the Commonwealth's case. If the Majority is correct that, in this particular matter, the Commonwealth's case was merely weakened, there may be some who find today's holding tolerable. But we are a common law court. One would not find such a result as tolerable in the case where the only witness to the crime dies, and the Commonwealth is legally incapable of proving its case. If prosecutors are permitted to withhold the fact that a material witness to a crime has died from the defense, such a ruling would not only permit, but, in fact, would encourage prosecutors intentionally to conceal the truth about their ability to prove a case. I cannot subscribe to a holding that so blatantly endorses and thereby fosters willful deceit, and that contravenes all notions of fair play and due process.

Based upon a straightforward application of the ***Brady*** principles that are well-established in Pennsylvania case law, I would hold that a prosecutor is duty-bound to disclose the death of a material witness to the defense.

The evidence is both exculpatory and mandatory, and disclosure of the information is the only result that comports with due process.

However, let us pause now to assume, *arguendo*, that the Majority's result is correct, and that we need not, and should not, consider ***Brady*** as part of our analysis in this case. I would nonetheless persist in the view that a manifest injustice would result if Friedenberger was not permitted to withdraw his plea. As noted earlier, manifest injustice in this context typically results when a defendant demonstrates that his plea was not knowing, intelligent, or voluntary. Indeed, a ***Brady*** violation is not the only avenue to satisfy this burden of proof. Friedenberger's plea was not knowing, intelligent, or voluntary. And this is for one simple reason: the plea was predicated upon a willful misrepresentation.

A plea offer from the Commonwealth, particularly one that involves either the withdrawal or reduction of the charges or a significant downward departure in the expected sentence, inherently constitutes an inducement to the defendant to plead guilty. When such an offer is extended, an acceptance can only be valid, i.e., knowing, intelligent, and voluntary, if the defendant can assess completely the strength of the Commonwealth's case against him. The defendant can make this assessment only from the information available to him at the time, which includes, inter alia, the police reports, earlier transcripts, discussions with the Commonwealth's attorney, and his own investigation. In fair and just negotiations, a defendant can, and must, rely upon this information as being the entirety of the information

necessary to reach the important decision to plead guilty. However, when only the Commonwealth knows that this body of information substantially has changed, particularly when it changes to the benefit of the defendant, but the Commonwealth fails to inform that defendant of the events causing the change, any plea based upon the incomplete body of information necessarily is the result of misrepresentation. That is precisely what occurred here. ***See Bousley v. United States***, 523 U.S. 614, 619 (1998) ("[A] plea is voluntary in a constitutional sense 'unless induced by threats . . ., **misrepresentation** . . ., or perhaps by promises that are by their nature as having no proper relationship to the prosecutor's business.'" (quoting ***Brady v. United States***, 397 U.S. 742, 757 (1970) (emphasis added)).

Again, assuming, *arguendo*, that the Majority is correct that Deputy Gorman was not duty-bound to disclose the information under ***Brady***, the failure to do so unquestionably played a role in Friedenberger's decision to plead guity. In his motion to withdraw his guilty plea, Friedenberger asserted that "[t]he Commonwealth had certified that they were ready to go to trial on the case in this matter and that they were prepared to proceed." Motion to Withdraw Guilty Plea, 4/3/2013, at 2 ¶8. Although we do not know which witnesses died, and whether Deputy Gorman could prove the charges to which Friedenberger pleaded guilty without those witnesses, Deputy Gorman's certification — at a minimum — gave the misleading impression that his case had not changed from the first time the matter was

tried. There is no substantive distinction between a material omission and an affirmative misrepresentation. Friedenberger averred that he relied upon Deputy Gorman's false pretenses in making the decision to plead guilty. ***Id.***

The decision to plead guilty is perhaps the most critical decision that a criminal defendant can make, primarily because pleading guilty requires a defendant to relinquish most of the constitutional rights that are associated with a criminal trial, including the presumption of innocence, the right to a trial by jury, and the right to confront the witnesses against him. Because these rights are essential to due process and a fair trial, we require that the defendant waive them knowingly, voluntarily, and intelligently. The defendant cannot do so without a true and honest depiction of the Commonwealth's case against him. Instantly, Friedenberger was induced to plead guilty based upon his incorrect belief that the strength of the Commonwealth's case had not changed since the first trial. It is inconceivable to believe that Friedenberger could have knowingly waived his constitutional rights, and entered a valid guilty plea, when he did not know that three of the material witnesses against him had died, and that the Commonwealth's case had irreparably weakened.

The Majority focuses upon the fact that Friedenberger completed both a written colloquy and an oral colloquy with the trial judge. This much is true. But it is beside the point. While both of the colloquies explained to Friedenberger the rights that he was giving up by pleading guilty, neither could or did inform him that there was a distinct possibility that Deputy

Gorman could not prove the charges against Friedenberger beyond a reasonable doubt. Only Deputy Gorman had that information, and he made the choice to keep it to himself. This choice must have a consequence. The colloquies could not render the plea knowing, intelligent, or voluntary, because they were tainted by Deputy Gorman's concealment.

Put simply, Friedenberger's decision to plead guilty was not knowing, voluntary, or intelligent because Friedenberger intentionally was deprived of all of the information that absolutely was necessary to decide whether pleading guilty and waiving his constitutional rights was in his best interests. The Majority finds no manifest injustice, because it concludes that the death of these witnesses only weakened the Commonwealth's case. The Majority misses the point. This was Appellant's decision to make. In the first instance, this was information to which Appellant was entitled so that his decision to plead guilty could be "voluntary, knowing and intelligent." ***See Commonwealth v. Diehl***, 61 A.3d 265, 268 (Pa. Super. 2013), ***appeal denied***, 77 A.3d 1258 (Pa. 2013). Because of Deputy Gorman's actions, Appellant was denied that opportunity. Worse, Appellant now is being punished for the Commonwealth's failure to disclose, and this punishment is validated by means of judicial compulsion binding him to his uninformed guilty plea. In my view, a guilty plea that is induced by misrepresentation through material omission constitutes a manifest injustice. It beggars belief that Pennsylvania law could hold otherwise.

Finally, I note that Deputy Gorman's actions violate, or flirt with violating, at least one provision in our Rules of Professional Conduct.[8] Rule 3.8 sets forth the "Special Responsibilities of a Prosecutor." Rule 3.8(d) specifically states that a prosecutor must "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense." Pa.R.P.C. 3.8(d). It is obvious to me that the death of three material witnesses falls within the parameters of this rule. ***Id.*** It does not matter whether the information **actually** negates or mitigates the offense. The rule requires disclosure even if the information **tends** to do so. Deputy Gorman was not faithful to this rule, and, as a result, Friedenberger entered a plea that was not knowing, intelligent or voluntary.

In sum, I believe that the death of a material witness constitutes exculpatory evidence for ***Brady*** purposes. Deputy Gorman's ***Brady*** violation prejudiced Friedenberger at the level of manifest injustice in this case. Additionally, even if Deputy Gorman was not duty-bound by ***Brady*** to reveal the information, the failure to do so nonetheless resulted in an unknowing,

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[8] Rule 3.8(a) of our Rules of Professional Responsibility mandates that a prosecutor must "refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause." As noted frequently above, it is not clear whether the remaining witnesses could have provided sufficient testimony to prove the charges to which Friedenberger pleaded guilty beyond a reasonable doubt. To the extent that they could not, Deputy Gorman would have violated this rule as well.

involuntary, and unintelligent plea. I would conclude that the trial court abused its discretion in denying Friedenberger's motion to withdraw his guilty plea. Consequently, I would vacate Friedenberger's judgment of sentence, and remand for further proceedings.

Because the Majority concludes otherwise, I dissent.