Spoliation In Capital Post-Conviction Proceedings: Theory Of Spoliation In *Habeas Corpus* - Part 1

By David J. Kessler

When most people consider the destruction of evidence in capital cases, they immediately think of nefarious policemen destroying potentially exculpatory evidence before trial to help the State's case. This leads post-conviction lawyers to the Supreme Court's opinion in *Arizona v. Youngblood* [1] where the Court held that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law."[2] Accordingly, most lawyers representing death-row inmates in post-conviction proceedings, when confronted with the destruction of documents or physical evidence by the State, focus all of their attention on finding and proving that the State acted in "bad faith." But is this their only option? If the destruction of evidence cannot support a constitutional violation standing alone, is the destruction irrelevant to the post-conviction proceedings? The answer, is of course, no.

Destruction of evidence — or spoliation — raises a host of other non-constitutional issues. Post-conviction counsel and the court must examine the discovery, evidentiary and ethical issues that are raised by the destruction and resolve them in a manner to protect the petitioner. Complicating these issues for courts and counsel are the different paths destruction of evidence can emerge from in post-conviction proceedings. For instance, documents or exhibits can be destroyed after trial — during appeals and before and during the habeas proceedings. While this may include the destruction of previously withheld exculpatory evidence (to hamper a petitioner's claims under *Brady v. Maryland*[3] and its progeny), it could also involve the destruction of documents and physical evidence — not necessarily exculpatory on their face — that impedes the petitioner's other claims. Another common avenue is destruction by the petitioner's trial lawyer; he has thrown out some or all of his files because "he was finished with them" and "that is what he does in ordinary course of business." Often, post-conviction counsel merely gets frustrated and turns to whatever is left of the record to piece together the best case they can. But the common law of spoliation can help both courts and post-conviction counsel resolve the problems caused by the destruction of evidence instead of simply sweeping them under the rug and moving on.

All parties to litigation and, in particular, their counsel, have a duty not only not to intentionally destroy evidence, but affirmatively to preserve any that they know may be relevant to their litigation.[4] In fact, in commercial litigation, parties that destroy evidence, even through routine document management systems, are regularly sanctioned for their conduct.[5] These sanctions can range from monetary fines and payment of legal fees to the grant of additional discovery or the striking of witnesses, evidence, or even pleadings and answers.[6] Courts also sanction spoliators by allowing the fact-finders to draw an adverse inference — that the evidence destroyed would have been unfavorable to the spoliator.[7]

Prosecutors and former counsel may not destroy evidence that may be relevant to a capital defendant's appeals or post-conviction proceedings. From the perspective of

spoliation, prosecutors and former counsel are no different than other civil litigants. If anything, they — as stewards of the criminal justice system — have an even greater duty to truth, justice and fairness. If prosecutors and former counsel have destroyed files, then *habeas* courts should make adverse inferences against these parties and presume pertinent facts in the petitioner's favor. While the destruction may not be a free-standing violation of a defendant's constitutional right to due process, especially if it occurred after the conviction, it should still be punished and the petitioner should be made whole. For instance, if a petitioner claims that the prosecution never produced a particular piece of exculpatory evidence to the defense and the prosecution has destroyed its list of disclosed materials, then unless the prosecution could prove otherwise by competent evidence (assuming the prosecution had a duty to preserve the evidence) would it not be appropriate to presume that the evidence existed and was never disclosed?

This two-part article addresses the legal theory and practical application of the duty to preserve in the capital post-conviction context. This article does not examine the case law and jurisprudence regarding the prosecution's suppression of exculpatory information and the destruction of potentially exculpatory evidence in violation of a defendant's due process rights. Rather, it discusses the procedural, evidentiary, and ethical implications of prosecutors' and former counsel's destruction of documents (particularly their files) and other physical evidence that are relevant to a capital defendant's (petitioner's) post-conviction proceedings.

This first article discusses the theoretical underpinnings of the duty to preserve and the doctrine of spoliation — the destruction of evidence — as they have been developed in the common law. These legal theories are then compared to the realities of death penalty cases and their inevitable *habeas corpus* proceedings to see how they fit into the truth-seeking function of habeas courts. The second article in the December 2005 issue discusses the practical application of the adverse inference in capital post-conviction proceedings. Primarily, it is a study of the case of Gene Frances Stuart, whose post-conviction counsel found that the prosecution (the sheriff's office) had destroyed evidence after his trial and was successful in persuading the Idaho Supreme Court to impose an adverse inference against the state in his *habeas corpus* proceeding. After reviewing the opinions in Stuart's case, the second article extrapolates the principles behind the duty to preserve and the adverse inference to examine the potential effect of the destruction of litigation files by the prosecution and former counsel.

I. Duty To Preserve

While a litigant's duty to preserve varies slightly from jurisdiction to jurisdiction, in general, parties in civil litigation,[8] and particularly their lawyers, have a duty to preserve "what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery, and/or is the subject of a pending discovery request."[9] This duty is triggered "not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation."[10] Accordingly, parties such as the prosecutors and former counsel have a duty to preserve anything that they know, or should know, is reasonably likely to be requested during discovery as soon as they reasonably anticipate litigation.

Breaking this into its component parts, should not all prosecutors and counsel involved with capital litigation anticipate litigation, including appeals and post-conviction proceedings, if the defendant is convicted and sentenced to death? In fact, in almost all jurisdictions, a defendant sentenced to death has an automatic right to appeal and, if the defendant is not successful, virtually all condemned defendants file a petition to initiate post-conviction proceedings. Statistically, appeals and post-conviction proceedings are a practical certainty when defendants are sentenced to death.[11]

Furthermore, most of these cases revolve around alleged misconduct by the prosecution, ineffective assistance of trial and/or appellate counsel, or, most likely, both.[12] Not surprisingly, the prosecutor's and former counsel's files are relevant to these inquiries.

Therefore, in almost every capital post-conviction proceeding, both the prosecutor and former counsel have already had a duty to preserve their files regarding the investigation and trial of the capital defendant. In particular, the prosecutor and the former counsel have a continuing duty to preserve their files from the beginning of their involvement in the matter. For the prosecution, its duty to preserve is primarily focused on the original criminal trial itself — everything that is collected and learned in the criminal investigation may be relevant to the criminal trial and may be discoverable. But, secondarily, the prosecution must be aware that if it successfully prosecutes the case, and in particular is successful in convincing the jury to condemn the defendant to death, there will certainly be an appeal. It would be hard for the prosecution to argue that it did not think it would win a death sentence, so it did not think an appeal or post-conviction proceedings were likely. This response would generate more questions than it would provide answers.

Capital defense counsel are in a similar situation. Any litigator who represents a capital defendant must understand that if he is not successful and his client is sentenced to death, there will be an appeal and, if still unsuccessful, post-conviction proceedings. Post-conviction counsel are duty bound to review the conduct of former counsel to determine if their client's right to effective assistance of counsel under the Sixth Amendment was protected.[13] A former counsel's files are critical to that analysis.[14] It would be inherently unreasonable for a lawyer representing a capital defendant not to anticipate future litigation and to not know that his files would be crucial to his client's post-conviction proceedings. The American Bar Association, put it succinctly in its Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases:

> In accordance with professional norms, all persons who are or have been members of the defense team have a continuing duty to safeguard the interests of the client and should cooperate fully with successor counsel. This duty includes, but is not limited to:
>
> A. *Maintaining the records of the case in a manner that will inform successor counsel of all significant developments relevant to the litigation . . . .*[15]

A capital litigator's duty to preserve follows the contours of his obligation to reasonably investigate, research, prepare and try his client's case. As a defense lawyer investigates and researches his client's case, both in guilt and in sentencing, he will create a record of this work — and this must be preserved because of the certainty that it will be lit-

igated if counsel is unsuccessful in keeping his client off death row. Pursuant to the ABA Guidelines, particularly Guidelines 10.7 and 10.11, counsel has a duty to investigate all reasonable avenues to help his client escape the death penalty.[16] As counsel makes a record of these investigations, and he most assuredly will — no lawyer could keep track of all this information in his head — he must preserve this record for post-conviction proceedings. This includes dead-ends and failures, things that a lawyer knows almost from the beginning that he will not use at trial, because these documents will be relevant evidence for both his client and the State in post-conviction proceedings.

What the ABA Guidelines show with the term "defense team" is that the duty to preserve does not fall merely on the shoulders of lead counsel for the defense or even local counsel and his co-counsel. It rests on the shoulders of every person who worked on the defense including, but not limited to, investigators, experts, and paralegals. It would be unreasonable for anyone on the team not to understand what is at stake and that an appeal and further litigation will occur if they were unsuccessful. A defense expert could not destroy his notes after a capital defendant was sentenced to death, for the simple reason that post-conviction counsel would want those notes in discovery to better understand former counsel's strategy, or lack thereof.

The team concept is equally applicable to the prosecution as it is to the defense. Any part of the prosecution team, as broadly defined by *Brady v. Maryland*[17] and its progeny, has a duty to preserve evidence including investigation and litigation files. Discovery regarding these issues, however, is not limited to merely what the prosecution team deems *Brady* material. Rather, what this team knew and what evidence was in their possession, and in particular whether any of it was exculpatory, would be within the scope of any post-conviction proceeding. Thus, the entire team is obligated to preserve any and all information reasonably related to these files. Both former counsel and prosecutors who are involved in capital litigation, however, do have a higher duty to preserve evidence than the rest of the team who are not lawyers because they are officers of the court and ethically bound to do so.[18] Both the Model Rules of Professional Conduct and the Model Rules of Professional Responsibility contain prohibitions against lawyers destroying, or counseling the destruction of, evidence. The Model Rules state:

> A lawyer shall not: unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act.[19]

The Model Code contains two similar, if more ambiguous, provisions:

> In his representation of a client, a lawyer shall not: . . . Conceal or knowingly fail to disclose that which he is required by law to reveal.
>
> A lawyer shall not suppress any evidence that he or his client has a legal obligation to reveal or produce.[20]

In fact, "the obligation to preserve evidence runs *first* to counsel, who then has a duty to advise and explain to the client its obligations to retain pertinent documents that may be relevant to the litigation."[21] Prosecutors and former counsel are not only responsible for preserving their own files, but are also responsible for ensuring that their agents, staff and the rest of their team preserve their documents[22] as well.

II. Spoliation Inference

In circumstances where a prosecutor or former counsel has destroyed part or all of their files, the question then becomes what a petitioner and his counsel can do to rectify the situation. It is well established that in commercial litigation, there are several options; these include: additional discovery,[23] fines,[24] attorneys' fees,[25] striking evidence or witnesses for the spoliator,[26] and defaulting the spoliator.[27] All of these are possible in a post-conviction proceeding, though the last is extremely unlikely and would only be triggered in circumstances where the prosecutor had destroyed exculpatory evidence in violation of petitioner's right to due process. The relief, however, of most interest to petitioners and their counsel is the adverse inference because it could be exceptionally useful to the petitioner in proving the merits of his claims — the only thing that matters when the petitioner has been sentenced to death.[28]

While the adverse inference has been interpreted differently in many jurisdictions and courts continue to disagree about its exact contours, there are common elements that run through most opinions that address the issue.[29]

A. Theory Of The Adverse Inference

The traditional understanding of the adverse inference reflects the Latin maxim: *omnia praesumuntur contra spoliatorem* ("All things are presumed against a wrongdoer."). Courts justify use of the inference by referring to one of two theories: (1) consciousness of guilt; or (2) fair process.[30] Judge Learned Hand once stated that: "When a party is once found to be fabricating or suppressing documents, the natural, indeed, their inevitable conclusion is that he has something to conceal, and is conscious of guilt."[31] The consciousness of guilt theory assumes that the spoliator destroyed the evidence because the evidence showed the spoliator's guilt;[32] thus, a party that destroys evidence of its guilt is presumed guilty. This rationale for the adverse inference was stated concisely by Judge Breyer in *Nation-Wide Check Corp. v. Forest Hills Distrib., Inc.*:

> The evidentiary rationale [for the adverse inference] is nothing more than the common sense observation that a party who has notice that a document is relevant to litigation and who proceeds to destroy the document is more likely to have been threatened by the document than is a party in the same position who does not destroy the document.[33]

The fair process theory justifies several features of the spoliation doctrine that the consciousness of guilt theory cannot justify.[34] Renowned evidence scholars Maguire and Vincent argued for adoption of the fair process theory when writing:

> Courtroom truth is what a jury or judge finds after full and fair presentation of evidence. The correct hostile inference from efforts to prevent a witness from giving testimony is that the offending party, by disclosing unwillingness to let the tribunal use human recollection and all other materials relevant to the shaping of courtroom truth, gives support to the conclusion that a proper

finding would be against him.[35]

Maguire and Vincent's argument about courtroom truth emphasizes that the inference is appropriate even when the spoliator destroys evidence that he believes may lead the fact finder to an erroneous result.[36] The courts most likely to adopt the fair process theory are those courts that believe that fact finders reach "courtroom truth" through a fair process that allows each an equal opportunity to introduce, question, discover, and impeach evidence. These courts are likely to believe that one side should not be able to destroy relevant evidence, even misleading evidence, without consequences. Furthermore, these courts are likely to believe that destruction of evidence undermines the search for truth, even when the spoliator acts with pure motives.

B. Elements Of The Adverse Inference

While each jurisdiction has set out their own nuanced adverse inference doctrine, five requirements appear in nearly all the doctrines:[37]

1. An act of destruction;
2. The destroyed matter was relevant to the dispute;
3. The spoliation was "intentional";
4. The destroyer had a duty to preserve;[38] and
5. The inference is limited to the destruction by parties or their agents.[39]

The first element, an act of destruction, is mostly self explanatory. Before the prosecution or former counsel can be blamed for failing to preserve their files, notes or other evidence, the petitioner must show that the evidence actually existed at one time and that it no longer exists. Destruction, however, does not need to be complete; instead, a party can alter or destroy portions of a document or evidence and still be guilty of spoliation.[40]

Secondly, a petitioner would need to show that the evidence that was destroyed was relevant to an issue in his post-conviction proceedings. Unless a party is under a specific legal obligation, parties are free to destroy their own documents and materials; in fact, this is an everyday occurrence.[41] The prosecutor's and former counsel's files regarding the defendant, however, are different because the prosecutor and former counsel are aware that they will be relevant to an anticipated litigation: the post-conviction proceedings. This duty, however, may even be broader. Documents concerning co-defendants, other suspects, witnesses, personnel files regarding investigators, law enforcement personnel, paralegals and co-counsel may all be relevant to a post-conviction proceeding. In cases where whole files are destroyed, the capital defendant is in a difficult position because he may not have any documentation to show that any particular document that was destroyed was relevant to his lawsuit. If the defendant can demonstrate a reasonable likelihood that the files contained documents that were relevant to the litigation — not particularly difficult for the prosecution or former counsel's files — then the burden of persuasion should shift to the spoliator to demonstrate that the destroyed files were not relevant.[42] Furthermore, in circumstances where a party was obligated to retain documents or evidence, by law, regulation or internal policy, then their destruction would, by itself, tend to demonstrate that the document was relevant.[43]

Third, the petitioner must show intent, which may, in practice, be the most difficult requirement for petitioners to prove. One of the first obstacles petitioners will need to overcome is obtaining discovery about the destruction of the file after he learns it is gone. This may be particularly tricky with former counsel with whom petitioners (and *habeas* counsel) do not want to enter into a confrontational relationship. *Habeas* counsel, however, must make a record as to the circumstances of any destruction, including what was destroyed and when, if they have any hope of obtaining a spoliation inference.

Most jurisdictions require proof that the spoliator intended to or deliberately destroyed the evidence in order to impose the adverse inference. To fulfill this requirement, however, does not require petitioner to demonstrate that the prosecution or former counsel destroyed the documents because of their content.[44] This is not a question of proving motive. What the petitioner must show is that the prosecution or former counsel purposefully destroyed the documents.[45] This is almost always shown by circumstantial evidence.[46]

In an opinion emphasizing the intent requirement, the U.S. Court of Appeals for the Eighth Circuit recently set forth what it considered to be "the limits of what we are able to uphold as a bad faith determination."[47] Union Pacific appealed a jury verdict for the plaintiffs regarding liability for an accident where a train had hit a car at a train crossing, injuring the driver and killing his wife.[48] During the trial, the judge gave an adverse inference instruction to the jury because Union Pacific, in the normal course of its document retention policy and before the litigation commenced, had destroyed the audio tape between the train personnel and the control tower at the time of the accident.[49] Union Pacific argued that it had not intended to destroy the tape.[50]

The Eighth Circuit explicitly stated that "[w]here a routine document retention policy has been followed . . .we now clarify[51] that there must be some indication of an intent to destroy the evidence for the purpose of obstructing or suppressing the truth in order to impose the sanction of an adverse inference instruction."[52] Even though the railroad destroyed the documents as a matter of ordinary business practice, the appeals court found that the trial court had not abused its discretion for finding that the documents had been destroyed intentionally.[53] The appeals court found that the finding was supported by several facts, including:

> Union Pacific's act of destroying the voice tape pursuant to its routine policy in circumstances where Union Pacific had general knowledge that such tapes would be important to any litigation over an accident that resulted in serious injury or death, and its knowledge that litigation is frequent when there has been an accident involving death or serious injury.[54]

These considerations apply even more strongly in capital post-conviction proceedings because the prosecution and former counsel have "general knowledge" that post-conviction appeals are more than "frequent" following a death sentence and that their files are more than "important" to those proceedings.

Thus, while prosecutors and formal counsel may argue that they were simply negligent and that they did not intend to destroy evidence — it was always their custom (or ordinary business practice) to destroy files once the trial (or direct appeal) was completed — these arguments can be defeated. Implementation of document retention policies in the face of anticipated litigation to destroy relevant evidence is intentional destruction.[55] Where a party has an affirmative duty to preserve evidence, the routine

destruction of the files is an intentional omission with the same consequences as an intentional act to destroy evidence.[56] In fact, some courts have found that the implementation of a document retention policy to destroy documents while anticipating discovery is worse than the *ad hoc* destruction of documents.[57] If a party does not make any attempt to preserve his files, then that party is not merely negligent for allowing them to be destroyed — he has intentionally failed to suspend their routine destruction.[58]

While most courts do require a finding of intent in order to impose an adverse inference instruction, a growing number of courts allow the inference to be drawn for negligent spoliation.[59] The Mississippi Supreme Court explained this trend toward negligent spoliation in this way:

> Requiring an innocent litigant to prove fraudulent intent on the part of the spoliator would result in placing too onerous a burden on the aggrieved party. To hold otherwise would encourage parties with weak cases to "inadvertently" lose particularly damning evidence and then manufacture "innocent" explanations for the loss. In this way, the spoliator could essentially destroy evidence and then require the innocent party to prove fraudulent intent before the destruction of the evidence could be used against it.[60]

Other courts that have reached a middle ground, finding that "gross indifference," "reckless disregard," or "gross neglect" was sufficient intent to allow the inference to be imposed.[61]

C. Scope And Effect Of The Adverse Inference

Once an adverse inference is deemed appropriate because of the destruction of evidence, the question is what is the effect of that inference. Courts faced with spoliation have posited several different effects including: a general negative inference against the spoliator's entire case;[62] a general favorable inference for the victim's case;[63] or a specific factual inference (positive or negative) with respect to the issue to which the destroyed evidence would have been material.[64] One way to harmonize these various results is to relate the effect of the spoliation to the intent of the spoliator as the court proposed in *Miller v. Montgomery County*.[65] A general inference would be drawn if the spoliator destroyed evidence with the intent of depriving his opponent and the court of material evidence.[66] On the other hand, if the spoliator did not act with that specific intent, the effect would be limited to the conclusion that the particular evidence was unfavorable.[67] While these differences might not make much of a difference before a jury, which may respond more emotionally to the destroyed evidence, they do before a *habeas* court where findings of fact will need to be made and more technical application of the doctrine of spoliation can be expected.

Degree of conclusiveness is another issue that petitioners and the post-conviction court will need to address with respect to the adverse inference.[68] There are four possibilities in decreasing order of conclusiveness: (1) an irrebuttable presumption; (2) a rebuttable presumption; (3) weakening of the spoliator's case (or point); or (4) strengthening of the petitioner's case (or point).[69] The more damaging the destruction and more willful the intent, the stronger the inference should be. In their very informative treatise, *Destruction of Evidence*, Messers. Gorelick, Marzen & Solum, concisely explain the connection between the type of inference (definite or indefinite) and the degree of conclusiveness, in the table on this page.

For example, if a prosecutor negligently destroys the list of documents produced to the defense prior to the underlying criminal trial, then it would be proper for a court to impose a rebuttable presumption (since it was not intentional) that the prosecution did not disclose a document to the petitioner that he now claims should have been provided under *Brady* (a definitive, substantive inference). The prosecutor, through his negligent spoliation, has made it impossible for the petitioner to show that the document was not produced. On the other hand, because the prosecution's improper conduct was not intentional, the state should not be barred from affirmatively proving, if it can, the document at issue *was* produced.

Most courts have concluded that no matter the effect of the adverse inference, it does not obviate a party's obligation to present a *prima facie* case with respect to each element of its claim.[71] The U.S. Court of Appeals for the Second Circuit reached the following conclusion on this issue:

> We do not suggest that the destruction of evidence, standing alone, is enough to allow a party who has produced no evidence — or utterly inadequate evidence — in support of a given claim to survive summary judgment on that claim . . . . But at the margin, where the innocent party has produced some (not insubstantial) evidence in support of his claim, the intentional destruc-

Effect of the Spoliation Inference

	Indefinite	Definite
Conclusive	Spoliator loses entire case	Spoliator loses specific issue
Substantive	Victim may use inference to establish *prima facie* case on all issues	Victim can use inference to establish *prima facie* case on specific issue
Impeaching	Spoliator's affirmative contentions weakened on all issues	Spoliator's affirmative contentions weakened on particular issue
Corroborative	Victim's affirmative contentions strengthened on all issues	Victim's affirmative contentions strengthened on particular issue

tion of relevant evidence by the opposing party may push a claim that might not otherwise survive summary judgment over the line. In the absence of such a result, as noted above, the purposes of the adverse inference are eviscerated.[72]

Some courts, however, have shifted the burden of proof/persuasion in the face of spoliation.[73] For example, the U. S. Court of Appeals for the Sixth Circuit has held that: "it is proper for the trial court to create a rebuttable presumption that establishes the missing elements of the plaintiff's case that could only have been proved by the availability of the missing evidence."[74]

III. Conclusion

The principles and theory of the spoliation doctrine are broad enough to capture any situation where the destruction of evidence may arise in post-conviction proceedings. Counsel should not limit herself to merely seeking complete relief based on *Youngblood* from the misconduct. Rather, counsel and the courts should apply the spoliation doctrine to make the petitioner whole after the destruction has occurred. Post-conviction litigation is about constitutional law, but is also a civil litigation that should be conducted fairly and ethically. When a person, whether it is former counsel or a prosecutor, undermines the truth-seeking function of post-conviction proceedings, the spoliation doctrine can help courts and counsel correct the problem, even if the misconduct does not rise independently to a constitutional violation. Part 2 of this article in the December 2005 issue of *The Champion* will examine how one court did exactly that and how post-conviction counsel can repair the destruction of evidence by using the adverse inference and other sanctions to prove elements of their case.

Notes

1. 488 U.S. 51 (1988).

2. *Id.* at 58.

3. 373 U.S. 83 (1963).

4. *See, e.g.*, Silvestri v. Gen. Motors Corp., 271 F.3d 583, 591 (4th Cir. 2001); William T. Thompson Co. v. Gen. Nutrition Corp., 593 F. Supp. 1443, 1445 (C.D. Cal. 1984).

5. *See, e.g.*, Stevenson v. Union Pac. R.R. Co., 354 F.3d 739 (8th Cir. 2004); *In re* Prudential Ins. Co. of Am. Sales Practices Litig., 169 F.R.D. 598 (D.N.J. 1997).

6. *See, e.g.*, *In re Prudential*, 169 F.R.D. 598 (million dollar sanction for negligent spoliation); Zubulake v. UBS Warburg LLC, 220 F.R.D. 212 (S.D.N.Y. 2003) (permitting additional discovery and compelling spoliator to pay for it); Metro. Opera Ass., Inc. v. Local 100, Hotel Employees & Rest. Employees Int'l Union, 212 F.R.D. 178 (S.D.N.Y. 2003) (striking defendant's answer).

7. One of the forgotten facts from *Youngblood* is that in the original criminal trial, the judge instructed the jury: "If you find that the State has . . . allowed to be destroyed or lost any evidence whose content or quality are in issue, you may infer that the true fact is against the State's interest." 488 U.S. at 54, 59-60 (concurrence, Stevens, J.) (citing 10. Tr. 90). The Supreme Court did not criticize the judge for authorizing the inference, even though the Supreme Court found "there was no suggestion of bad faith on the part of the police." *Id.* at 58. Moreover, Justice Stevens highlights the trial court's use of the inference in his argument that the defendant had not been denied due process because "it [was] unlikely that the defendant was prejudiced by the State's omission." *Id.* at 59.

8. Collateral post-conviction proceedings are civil, not criminal, proceedings. *See* Randy Hertz & James S. Liebman, 1 Federal Habeas Corpus Practice and Procedure, § 2.2, p. 7 (4th ed. 2001). These proceedings are governed by a blend of state and federal particular post-conviction procedure and the rules of civil procedure and evidence as enlightened by common law and precedent. *See Id.* Just as post-conviction parties and counsel for both sides are bound by the rules of civil discovery, they are bound by the universal duty in civil discovery to preserve evidence.

9. William T. Thompson Co., 593 F. Supp. at 1455. *See also* Scott v. IBM Corp., 196 F.R.D. 233, 249 (D.N.J. 2000); Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68, 72-73 (S.D.N.Y. 1991); Telectron, Inc. v. Overhead Door Corp., 116 F.R.D. 107, 127 (S.D. Fla. 1987).

10. Silvestri v. Gen. Motors Corp., 271 F.3d 583, 591 (4th Cir. 2001). *See also* Rambus, Inc. v. Infineon Technologies, 220 F.R.D. 264 (E.D. Va. 2004).

11. ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 10.8, History (In Subsection A(2)(b), the phrase 'near certainty' is new and replaces the word 'likelihood' from the original edition. The change reflects recent scholarship indicating that appellate and post-conviction remedies are pursued by almost 100% of capital defendants who are convicted and sentenced to death."); Gelman, *et al.*, *A Broken System: The Persistent Patterns of Reversals of Death Sentences in the United States*, 1 J. of Empirical L. Stud. 209, 215 (July 2004) (implying that the 2,694 death sentences not reversed on direct appeal between 1973-1995, all went into post-conviction proceedings). This is the principal reason this article is limited to the capital context. In non-capital post-conviction cases, the prosecution and former counsel may be able to make a persuasive argument that they had no reason to know that a defendant was going to appeal or, more likely, would file a petition for writ of habeas corpus. Accordingly, they would have no reason to know that their files would be relevant to an *anticipated* litigation. This argument, however, fails in the capital context where appeals and post-conviction proceedings are a matter of course.

12. Gelman, *et al., supra.* 219 ("About 80 percent of the state court reversals at the second stage of review, and just under 75 percent of the federal court reversals at the third stage of review, were because of egregiously incompetent lawyering, prosecutorial misconduct or suppression of evidence, misinstruction of jurors, or biased judges or jurors. . . . Incompetent representation by defense lawyers accounted for about one-third of these reversals; misconduct by police and prosecutors and misinstruction of jurors by judges each accounted for about 20 percent of the reversals . . . .").

13. ABA Guidelines for the Appoint-

Seeking a "Reasonable" Federal Sentence?
We assist attorneys by completing
Comprehensive Pre-Plea and Pre-Sentence Evaluations
Thorough Bureau of Prisons Drug Abuse Treatment Program Eligibility Assessments
Reality-based consultations with clients & families regarding federal incarceration
We have over 100 years of combined Federal Criminal Justice Experience
For More Information Please Contact
GARETH LASKY Ed.D. & ASSOCIATES
garethlasky@comcast.net
TOLL FREE 800.658.8358

ment and Performance of Defense Counsel in Death Penalty Cases 10.15.1(C) (Duties of Post-Conviction Counsel); Even if a claim of ineffective assistance of counsel is arguably frivolous, that claim should be brought in capital post-conviction proceedings. Monroe H. Freedman, *The Professional Obligation to Raise Frivolous Issues in Death Penalty Cases*,31 HOFSTRA L. R. 1167 (2003).

14. Wiggins v. Smith, 539 U.S. 510 (2003); Williams v. Taylor, 529 U.S. 362 (2000); Strickland v. Washington, 466 U.S. 608 (1984).

15. *Id*. at § 10.13 (emphasis supplied).

16. *Id*. at §§ 10.7 and 10.11.

17. 373 U.S. 83 (1963).

18. *See* Lady v. State Bar, 170 P.2d 460 (Cal. 1946); Bar Ass'n of San Francisco v. De Vall, 210 P. 279 (Cal. 1922); People ex rel. Colo. Bar Ass'n v. [Attorney at Law], 295 P. 917 (Colo. 1931); *In re* Williams, 23 N.W.2d 4 (Minn. 1946); *In re* Bear, 578 S.W.2d 928 (Mo. Ct. App. 1979); State ex rel. Neb. State Bar Ass'n v. Fisher, 103 N.W.2d 325 (Neb. 1960); *In re* Marron, 22 N.M. 252, 160 P. 391 (1916); *In re* Osofsky, 18 N.Y.S.2d 8 (App. Div. 1940); Bar Ass'n of Greater Cleveland v. Cassaro, 399 N.E.2d 545 (Ohio 1980); Cincinnati Bar Ass'n v. Leggett, 199 N.E.2d 590 (Ohio 1964); Office of Disciplinary Counsel v. Campbell, 345 A.2d 616 (Pa. 1975); *In re* Schmidt, 16 N.W.2d 41 (S.D. 1944); District of Columbia Comm. on Prof'l Ethics & Grievances, Op. 119 (1983); Wisconsin Comm. on Prof'l Ethics, Op. E-82-1 (1982). *See also*, Gorelick, Marzen & Solum, DESTRUCTION OF EVIDENCE, § 7.6; Lawrence J. Fox, *"Making the Last Chance Meaningful: Predecessor Counsel's Ethical Duty to the Capital Defendant,* 31 HOFSTRA L. REV. 1181, 1189-90 (2003) [hereinafter *Fox, Predecessor Counsel's Ethical Duty*].

19. Model Rule 3.4(a).

20. DR 7-102(A)(3) and 7-109(A).

21. Telecom Int'l Am., Ltd. v. AT&T Corp., 189 F.R.D. 76, 81 (S.D.N.Y. 1999) (emphasis in original). *See also*, Zubulake v. UBS Warburg, LLC, 02-Civ-1243, 2004 U.S. Dist. LEXIS 13574, at *38 (S.D.N.Y. July 20, 2004); Mosel Vitelic Corp. v. Micron Tech., Inc., 162 F. Supp. 2d 307, 311 (D. Del. 2000); Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68 (S.D.N.Y. 1991).

22. Currently there is a great deal of case law discussing the definition of "documents" and, in particular, the scope of a party's duty to preserve various electronic documents. *See e.g.* Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 311-12 (S.D.N.Y. 2003); McPeek v. Ashcroft, 202 F.R.D. 31, 34-35 (D.D.C. 2001); see also Proposed Amendments to the Federal Rules of Civil Procedure. This discussion is beyond the scope of this article, but as this issue is settled by courts and legislatures, prosecutors and former counsel will have the same duty to preserve these electronic documents as other civil litigants.

23. *See e.g.* Zubulake v. UBS Warburg LLC, 220 F.R.D. 212 (S.D.N.Y. 2003).

24. *See In re* Prudential Ins. Co. of Am. Sales Practices Litig., 169 F.R.D. 598 (D.N.J. Jan. 6, 1997); Danis v. USN Communs., Inc., No. 98 C 7482, 2000 U.S. Dist. LEXIS 16900; 53 Fed. R. Serv. 3d (Callaghan) 828 (N.D. Ill. Oct. 20, 2000).

25. *See* Trigon Ins. Co. v. United States, 204 F.R.D. 277 (E.D. Va. 2001).

26. *See* United States v. Philip Morris USA, Inc., 327 F. Supp. 2d 21 (D.D.C. 2004) (Philip Morris was fined several million dollars and 11 executives were barred from testifying for failure to comply with "print and retain" e-mail policy); Cincinnati Ins. Co. v. General Motors Corp., No. 940T017, 1994 Ohio App. LEXIS 4960, *8-9 (Ohio Ct. App. Oct. 28, 1994). *(*"In product liability cases where evidence is intentionally or negligently 'spoiled' or destroyed by a plaintiff or his expert before the defense has an opportunity to examine that evidence for alleged defects, a court may preclude any and all expert testimony as a sanction for 'spoliation of evidence.'").

27. *See* Kucala Enters. v. Auto Wax Co., No. 02-1403 2004 U.S. Dist. LEXIS 22271 (N.D. Ill. Nov. 2, 2004) (court struck defendant's affirmative defenses and imposed preliminary injunction in wake of defendant's intentional spoliation); *In re Comair Aircrash Litig.*, No. 79-106 (E.D. Ky. Dec. 8, 1986) (court struck answer because "document retention policy was a sham for a program to destroy unfavorable [evidence] in anticipation of litigation and even after the inception of litigation."); Metro. Opera Assoc. v. Local 100 Hotel Employees & Rest. Employees Int'l Union, 212 F.R.D. 178 (S.D.N.Y. 2003) (struck defendant's answer because of a series of discovery abuses including intentional spoliation).

28. While this article focuses on the adverse inference sanction, post-conviction counsel should not forget or ignore other possible sanctions. In particular, a court that may not be willing to use the adverse inference may prevent a spoliator (such as the D.A.'s office or a law enforcement department) from presenting evidence or testifying on a particular subject. *See Kucala Enterprises,* 2004 U.S. Dist. LEXIS 22271. For example, it might be very helpful to a petitioner if a court prevented a former counsel from testifying about his strategy at the competency hearing or the penalty phase after it was learned that former counsel destroyed his notes after the appeal.

29. The contours of the adverse inference and spoliation differ from jurisdiction to jurisdiction and counsel in post-conviction proceedings must research and apply the law of their jurisdiction.

30. *Compare* Kronisch v. United States, 150 F.3d 112, 126 (2d Cir. 1998) (referring to the consciousness of guilt theory as the rationale for the spoliation inference); Phillips v. Covenant Clinic, 625 N.W.2d 714, 718 (Iowa 2001) (same) *with* Vazquez-Corales v. Sea-Land Serv., Inc., 172 F.R.D. 10, 14 (D.P.R. 1997) (holding that fair process theory is primary reason for spoliation inference).

31. Warner Barnes & Co. v. Kokosai Kisen Kabushiki Kaisha, 102 F.2d 450 (2d Cir. 1939).

32. *See*, *e.g.*, Brewer v. Quaker State Oil Ref. Corp., 72 F.3d 326, 334 (3d Cir. 1995) ("When the contents of a document are relevant to an issue in a case, the trier of fact generally may receive the fact of the document's non production or destruction as evidence that the party that has prevented production did so out of the well-founded fear that the contents would harm him.").

33. 692 F.2d 214, 218 (1st Cir. 1982)

34. *See* Jamie S. Gorelick *et al*., DESTRUCTION OF EVIDENCE, § 2.3, p. 35 (1989).

35. John Arthur Maguire & Robert C. Vincent, *Admissions Implied from Spoliation or Related Conduct,* 45 YALE L.J. 226, 230 (1935).

36. *See* Gorelick *et al*., *supra*, § 2.3, p. 36.

37. *See* Gorelick *et al.*, *supra*, § 2.5, p. 38.

38. This element was addressed in the previous section. *See supra*.

39. This element is discussed in Sections IV and V, *infra*.

40. *See*, *e.g.*, Stuart v. State, 907 P.2d 783 (*Id.* 1995). In fact, it may be easier to prove the harm of spoliation and the spoliator's intent when only a portion of relevant evidence is destroyed. *See infra* Section V. Courts, however, need to be wary of this trap because punishing inartful spoliators compared to those who are wise enough to leave no secondary evidence of the evidence destroyed will only teach prosecutors and former counsel to destroy more, not less, of their files. In capital cases, where post-conviction proceedings are a virtual certainty, any destruction — especially total destruction — should be viewed very suspiciously.

41. China Ocean Shipping Co. v. Simone Metals Inc., No. 97-26941999 U.S. Dist. LEXIS 16264, at *12 (N.D. Ill. Sept. 30, 1999) (litigant has a duty to preserve evidence over which it had control and "reasonably knew or could reasonably foresee was material to a potential legal action," but does not have to go to "extraordinary measures."). *See also* Wiginton v. CB Richard Ellis, No. 02-68322003 U.S. Dist. LEXIS 19128, at *13 (N.D. Ill. Oct. 24, 2003) (A litigant "does not have to preserve every single scrap of paper in its business.")

42. *See* Gorelick *et al*., *supra*, § 2.7, p. 39.