



# Spoliation In Capital Post-Conviction Proceedings: Using The Adverse Inference And Other Spoliation Sanctions In *Habeas Corpus* - Part 2

By David J. Kessler

Imagine you are counsel in a capital *habeas corpus* proceeding and you discover that the prosecution threw out its file regarding your client during an “office clean-up day” after the trial was completed. Or, imagine you discover that your client’s former counsel trashed his files regarding the mental health expert he hired for your client because they got into a billing spat. These documents and evidence may have proven crucial to your case (and your client’s life), but now they are irretrievable. What do you do?

In Part I of this article (November 2005), we discuss a litigant’s duty to preserve relevant evidence and the court’s power to sanction them under the common law if they fail to fulfill their obligations. In Part II, we discuss how to use these sanctions in *habeas* proceedings where the prosecutor or the defense counsel has destroyed files that they were obligated to preserve.

This article starts with the *habeas* proceedings of Gene Frances Stuart, a man sentenced to death in Idaho.<sup>1</sup> The Idaho Supreme Court underwent a detailed analysis of the destruction of evidence by law enforcement personnel outside the *Youngblood* paradigm.<sup>2</sup> As part of this analysis, the court found that because the destruction of evidence could be attributed to law enforcement, the petitioner was entitled to a favorable inference with respect to the destroyed evidence and that it could be used in the *habeas* court’s examination of his claims for relief. By examining the Idaho Supreme Court’s opinion, and the opinions that came before and after, we can examine how counsel representing a condemned man can use spoliation sanctions to make the best out of a bad situation – the destruction of relevant evidence.

After reviewing Stuart’s case, the article examines how the

adverse inference, as well as other spoliation sanctions, might be used in other situations where the destruction of evidence might arise. These sections look at the differences between the destruction of evidence by prosecutors and defense counsel. In particular, the final section argues that even though former counsel are not technically adverse parties in the *habeas* proceeding (and, in fact, were supposed to be the champion of the defendant in his criminal trial), that *habeas* courts should treat a former counsel’s destruction of his files just as it would the destruction of the prosecutor’s files.

## I. Using the Adverse Inference In Post-Conviction: *Stuart v. Idaho*

### A. The Procedural History: The Story Before The Story

Like many capital post-conviction cases, the procedural history leading to the Idaho Supreme Court’s decision in *Stuart IV* is complex. Gene Francis Stuart was convicted in 1982 of first-degree murder by torture for the beating death of his live-in girlfriend’s child.<sup>3</sup> He was sentenced to death and that sentence was upheld on direct review.<sup>4</sup>

Stuart’s first petition for post-conviction relief was denied, and that denial was affirmed by the Idaho Supreme Court, which also denied Stuart’s petition for rehearing and issued a substitute opinion in *Stuart II*.<sup>5</sup> Stuart filed a second petition for post-conviction relief alleging that the sheriff’s department had improperly interfered with his attorney-client relationship with his original defense counsel by tapping and/or monitoring his attorney-client phone calls.<sup>6</sup> The *habeas* court summarily dismissed the second petition but

the Idaho Supreme Court reversed and remanded holding that there were disputed issues of material fact that prevented summary judgment.<sup>7</sup> The Idaho Supreme Court requested the *habeas* court to determine: “(1) whether there was recording of attorney-client conversations on the part of the sheriff’s department; and (2) whether the [Stuart’s] constitutional rights were violated. If such attorney-client conversations are found to have been recorded, the State would be required to show that the evidence at trial had an origin independent of the eavesdropping.”<sup>8</sup>

### **B. The *Habeas* Court’s Evidentiary Ruling Finding No Spoliation**

On remand, the *habeas* court bifurcated the two questions and asked the parties to first present evidence and argument related to whether the conversations had been monitored.<sup>9</sup> The *habeas* court concluded that it would only reach the question of constitutional violation if Stuart could meet his burden that his conversations had been monitored.<sup>10</sup> Both Stuart and the State called numerous witnesses regarding Stuart’s assertion that his attorney phone calls had been monitored.<sup>11</sup> Most of the witnesses for both sides were employees, or former employees, of the sheriff’s department.<sup>12</sup>

The *habeas* court found that it was undisputed that one of Stuart’s telephone calls was recorded while he was in custody; it was between his sister and him.<sup>13</sup> The fact that this telephone call was recorded was not disclosed to Stuart before or during his criminal trial.

During the evidentiary hearing Sheriff Albers testified that for a period of time Stuart’s outgoing calls were monitored by being close enough to hear Stuart’s end of the conversation.<sup>14</sup> Albers testified that he believed these conversations were with Stuart’s family and the recording was done for security purposes.<sup>15</sup> Albers further testified he had one incoming phone call recorded – the one with his sister – and that no conversation between Stuart and his lawyer was monitored or recorded.<sup>16</sup>

County Prosecutor Stephen Calhoun testified that Sheriff Albers had told him a call had been taped and it was Calhoun’s impression it had happened the day he was told.<sup>17</sup> Calhoun told Albers that he did not want to interfere with security, but that he did not think Stuart’s phone calls should be monitored or recorded.<sup>18</sup> Calhoun believed that no monitoring occurred after his conversa-

tion with Albers and he had no knowledge that any attorney-client conversations had been monitored or recorded.<sup>19</sup>

Stuart called four different witnesses who testified that it was general knowledge that Stuart’s phone calls were being recorded. The *habeas* court found their testimony less than credible because most of their knowledge was hearsay and all of the witnesses had an antagonistic relationship with the sheriff’s department, with Sheriff Albers, or both.<sup>20</sup> Most were former employees who left on bad terms.<sup>21</sup> One witness, Rosanne Page, testified that she had direct knowledge of recordings of Stuart’s telephone calls with his attorney. The *habeas* court did not believe Page for several reasons, including the fact that she was angry over the firing of her boyfriend and herself; her testimony seemed like it came from others; and her testimony was much stronger at trial than it had been during her deposition.

The *habeas* court did find two entries in the jailer’s log to be very suspicious.<sup>22</sup> The first, on October 27, 1981 read:

2055-2105 Stuart made 3 phone 2 incom. Calls-Taped-Back to Cell 15.<sup>23</sup>

The second, on November 6, 1981, read:

2115 incoming call for couie taped per 2001.<sup>24</sup>

It was undisputed that “2001” was the identifying number for Sheriff Albers.<sup>25</sup> Jailer Berry testified that he had no memory of the log entries but reasoned that “this must have meant that he was placing masking tape around an area of the jail to be painted.”<sup>26</sup> The *habeas* court, while suspicious of the entries, held that based on all the evidence in the case, even though portions of the log had been destroyed, it could not find that the entries referred to the taping of telephone conversations.

The Idaho Supreme Court summarized the *habeas* court’s opinion regarding the missing log entries as follows:

The district court described the missing portions of two logs for the period that Stuart was incarcerated at the Clearwater County Jail as an unsolved mystery. Based on the witnesses’ testimony about the journals, the court said that the prisoner telephone log would have shown all calls placed to

or from Stuart, and the dispatcher’s log or radio log would have shown the activities of the dispatchers during this time period. The critical portions of both of these logs were not produced by the Clearwater County sheriff’s office. The court described exhibit 192, a bound journal-type book used as a jail phone log book for the years 1981 and 1982. The court found that it was obvious from an examination of the book that the log sheets for the time period prior to November 26, 1982 had been torn or cut from the book. From the evidence, the district court made a finding that the log sheets of the inmate phone log and the dispatcher’s log were intentionally removed and for that reason were not available at trial.

Gene Fish, the jail administrator at the time of Everitt’s investigation,<sup>27</sup> testified that these portions of the logs were definitely missing at the time he gave the logs to Everitt for the Attorney General’s Office investigation. The district court found that it was probable that the missing portions were taken some time between 1982 and the fall of 1988 when they were turned over to Everitt for inspection.

The district court ruled that after considering all of the evidence, which included the testimony of numerous other witnesses in addition to those summarized above, it could not find that the removal and/or destruction of the logs was by Clearwater County or its agents. The court pointed out that it seemed unlikely that anyone wishing to hide this portion of the record would have made the removal so obvious by only partially destroying the evidence. The court also found that the logs were accessible to several individuals, including Bryant, Finley, Geidl, and Page, as well as the present members of the Sheriff’s staff. The court also doubted that, after Prosecutor Calhoun had informed Sheriff Albers that it was not a good idea to record

prisoner telephone conversations, the written records of Clearwater County would have shown that the telephone calls of Stuart were tape recorded.<sup>28</sup>

The *habeas* court concluded that: (1) the spoliation doctrine did not apply; (2) a telephone conversation between Stuart and his sister on September 20, 1981 was the only call recorded; and (3) that no attorney-client calls of Stuart were monitored.

### C. The Idaho Supreme Court Reviews The *Habeas* Court's Conclusion

On appeal, the Idaho Supreme Court concluded that the *habeas* court's conclusion that the intentional destruction of the logs was not attributable to the sheriff's office was clearly erroneous and that Stuart was entitled to an inference that the destroyed evidence was favorable to his petition in his post-conviction proceeding.<sup>29</sup> The Idaho Supreme Court reviewed the *habeas* court's analysis step by step.

First, the Idaho Supreme Court found the *habeas* court's conclusion that it "seemed unlikely that anyone wishing to hide this portion of the record would have made the removal so obvious by only partially destroying the evidence" as mere speculation.<sup>30</sup> The court found that the inartful method of destruction was at best neutral and did not point to or away from the sheriff's office as the culprit.<sup>31</sup> Second, the court found the *habeas* court's conclusion that "after Prosecutor Calhoun had informed Sheriff Albers that it was not a good idea to record prisoner telephone conversations, the written records of Clearwater County would have shown that the telephone calls of Stuart were tape recorded" was likewise neutral.<sup>32</sup> The court reasoned that in order for one of the former employees to destroy the log (assuming it contained no evidence favorable to Stuart), they would need to have a sophisticated understanding of spoliation law.<sup>33</sup> The court rejected this conclusion because there was no evidence of this on the record.<sup>34</sup> Moreover, the Court found, the *habeas* court's conclusion contradicted its own suspicions regarding the logs that were recovered.<sup>35</sup>

Third, and most critically, the Idaho Supreme Court rejected the *habeas* court's conclusion that the logs were accessible to former employees of the sheriff's office after they were terminat-

ed.<sup>36</sup> Because there was no evidence that anyone outside the sheriff's office had access to the logs, the Idaho Supreme Court concluded:

Therefore, because the district court found that the phone records were intentionally destroyed and the record on appeal establishes that the phone records were in the exclusive control and possession of the sheriff's office at the time this took place, the district court's finding that the destruction was not attributable to the sheriff's office must be set aside as clearly erroneous. The next step in our analysis is a determination of the constitutional significance of this erroneous factual finding.<sup>37</sup>

In summary fashion, the Idaho Supreme Court found that, because the destruction was caused by the sheriff's office, the spoliation doctrine would apply in Stuart's favor.<sup>38</sup> The court, however, left the issue of the scope and effect of the inference to be determined by the *habeas* court on remand.<sup>39</sup>

Subsequently, the *habeas* court reversed its earlier holding, based on the adverse inference against the sheriff's office, and found that Stuart's phone conversations with his lawyer were monitored.<sup>40</sup> The *habeas* court also found, however, that Stuart's constitutional rights were not violated because any evidence that was used at trial did not originate from the phone calls.<sup>41</sup> The Idaho Supreme Court affirmed on appeal.<sup>42</sup>

### D. Stuart And The Destruction Of Evidence In Post-Conviction Proceedings

The Idaho Supreme Court's decision in *Stuart IV* and the resulting decision by the *habeas* court on remand shows that the spoliation inference can make a difference in a capital post-conviction proceeding. While Stuart did not receive relief under the Sixth Amendment from the sheriff's office's monitoring of his calls with his attorney, the adverse inference was enough to switch the *habeas* court's factual finding regarding monitoring. Importantly, there was testimony and evidence on both sides of the issue and the spoliation inference made the difference. If Stuart and his *habeas* counsel had not asked for the spoliation finding, then the sheriff's destruction of evidence would have gone unremedied.

A crucial aspect of the *Stuart IV* decision is that it is strictly an evidentiary

and procedural ruling. It does not examine whether Stuart deserves relief because of any constitutional violation by the sheriff's department. Unfortunately, the *Stuart IV* Court included language in its opinion that alluded to the "constitutional" aspects of the sheriff's destruction of evidence.<sup>43</sup> Stuart was not asking for relief under *Youngblood*, *Brady* or *Napue*; he was asking for discovery sanctions against the sheriff's office for its unethical and improper destruction of evidence. The former does have constitutional dimensions, and if a petitioner's constitutional right to due process has been violated, under the framework developed in those cases, then the court should overturn his conviction or sentence. The latter issue, the one appealed by Stuart, is not a constitutional question, but rather a civil procedure and evidentiary question: whether the sheriff's office should be sanctioned and, if so, to what degree.

The spoliation inference can be evidence — even conclusive evidence — of another constitutional violation or, as occurred in *Stuart IV*, evidence of an element of a potential constitutional violation. The *Stuart IV* Court is clearly incorrect when it states that Stuart must show "bad faith" on the part of the sheriff's office under *Youngblood* to obtain the adverse inference instruction. In *Youngblood*, where the defendant could not prove "bad faith," the Supreme Court approved the trial court's providing an adverse inference instruction to the criminal jury (much less a judge sitting in a civil case).<sup>44</sup> In fact, the trial court's instruction was instrumental in the concurrence by Justice Stevens.<sup>45</sup> If Stuart could establish "bad faith" under *Youngblood*, wouldn't Stuart be entitled to relief? Whether a prosecutor or former counsel's destruction of evidence should cause an adverse inference against him in a post-conviction proceeding does not require constitutional analysis unless, by itself, the petitioner is seeking relief for the destruction under due process grounds.

## II. Effect Of A Prosecutor's Destruction Of Evidence

While the direct destruction of exculpatory evidence under *Brady*<sup>46</sup> and its progeny may be the first example of spoliation that comes to mind, it is not the only means whereby the adverse inference could find its way into post-conviction proceedings. For example, it is not inconceivable that the prosecution could destroy its list of disclosed items. Under *Brady*, the petitioner has the burden to show that the prosecution has not disclosed the exculpatory evidence. If the prosecutor states it

was disclosed and the former counsel says it was not,<sup>47</sup> one has a classic “he said, she said” situation and the petitioner has a difficult burden. But, if the *habeas* court has invoked adverse inference against the prosecutor for destroying his list, then the court could presume that the exculpatory evidence was not listed.

In a similar context, there are often factual disputes regarding the prosecutor’s knowledge of the suppression of exculpatory evidence and, in particular, false testimony by a prosecution witness.<sup>48</sup> The resolution of this dispute can be crucial for a petitioner because the burden of materiality under *Napue* and *Giglio* for the knowing proffer of false testimony is significantly less than the burden of materiality under *Brady* for simple suppression of exculpatory evidence.<sup>49</sup> In the circumstances where it is unquestioned that a principal witness for the prosecution did perjure himself and the question is whether the prosecutor knew it (versus simply failing to disclose evidence of the perjury), then a prosecutor’s destruction of his file (or even just his notes from interviews with the witness) could lead to adverse inference against the prosecutor with regard to his knowledge of the witness’s testimony.

The *Stuart* cases demonstrate that where the prosecution has not properly preserved its files, counsel for a condemned defendant must examine how spoliation sanctions can be used to help prove elements of different claims or otherwise move his client’s case forward. If the files of the state’s mental health expert have been destroyed, either by the prosecution or by the expert himself, might the *habeas* court allow the defendant to be reexamined (or even more thoroughly tested) as a discovery sanction? Might the court require the state to pay for the deposition of the mental health expert? Could the destruction lead to an inference that the expert’s raw notes contradicted his report and/or testimony?

### III. Effect Of A Former Counsel’s Destruction Of Evidence

The destruction of former counsel’s files can be as devastating (or even more so) to petitioner’s post-conviction proceeding than the destruction of the prosecutor’s files. From a practical perspective, for *habeas* counsel the former counsel and his files may often be the best resource for learning what the original criminal trial and case was about. From a legal perspective, former counsel’s files are the best record of what former counsel did and did not do in representing his client in the underlying trial. This is

especially true in capital cases where years can elapse between the time the former counsel is appointed to represent the capital defendant and post-conviction proceedings begin and *habeas* counsel arriving on the scene.

“While any criminal defense lawyer whose client is convicted is subject to the possibility of a claim for ineffective assistance, *lawyers in capital cases are virtually guaranteed such claims.*”<sup>50</sup> This is an unpleasant prospect for the original defense counsel and one that he may like to resist, but he has a duty to assist *habeas* counsel in reviewing the record and exploring this claim.<sup>51</sup> Unfortunately, because of the passage of time and the innate desire in everyone to defend themselves, former counsel’s memory is not always the best evidence. Rather, the former counsel’s files may be the only credible evidence and, if it has been destroyed, the petitioner can be severely prejudiced.<sup>52</sup>

For example, under the learning of *Wiggins v. Smith*,<sup>53</sup> counsel has a duty to reasonably investigate, both factually and legally, defenses and mitigation available to his client.<sup>54</sup> Because ineffective assistance of counsel is a claim in almost every capital post-conviction case, as a lawyer investigates his client’s case, he has a con-

temporaneous duty to preserve the record he creates of that investigation.

Thus, in a post-conviction proceeding, if there is no evidence in the former counsel’s files that he undertook some or all of the investigation that counsel should have reasonably undertaken, the court should reasonably presume that the counsel did not undertake that investigation. Either no files exist because counsel failed to undertake the investigation, or counsel destroyed his files and an adverse inference against the former counsel may be warranted on the question of the scope of the former counsel’s investigation.

Because the adverse inference is not irrefutable (or, in some jurisdictions, even mandatory), this would not conclude the inquiry into the reasonableness of the former counsel’s conduct. Nor would the adverse inference affect strongly the second prong that must be demonstrated under *Strickland v. Washington*<sup>55</sup> and *Wiggins*: prejudice.

Some might balk at finding an adverse inference against the former counsel with respect to any element of an ineffective assistance of counsel claim because, in practical effect, the former counsel’s destruction of evidence arguably assists the capital defendant in

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making his claims and, in turn, harms the state's post-conviction case. In other words, the former counsel's actions, which the state cannot control, prejudice the state's case. While true, drawing a negative inference is, nonetheless, the best way to proceed for several reasons.

First, under Sixth Amendment jurisprudence the state is responsible for the constitutional failings of former counsel. It is the state's responsibility, with the assistance of the courts, to ensure that the defendant has received effective assistance of counsel. To the extent that a capital defense counsel destroys his files, the state is responsible for the consequences.

Second, a destruction of the former counsel's files is evidence of the lawyer's failure to fulfill his ethical and legal obligations. Evidence of committing one bad act may not be direct evidence of other failures, but it does show a callousness or ignorance of the responsibilities of counsel. All things being equal, a lawyer who breaches his duty to preserve his files may have breached it to destroy evidence of other ethical or legal failures.

Third, the alternative would be that former counsel who have failed their clients by not effectively representing them could destroy their files with impunity. What is a death row inmate going to do? Sue his former counsel for

malpractice? Bring a disciplinary action? While the capital defendant arguably can do either, the likelihood of an indigent prisoner bringing these actions is remote.

Fourth, while the state argues that it cannot control the former counsel's actions, neither can the death row inmate. More likely than not, the inmate has never seen the file and may have had no contact with his former lawyer since being sentenced to death (depending on whether the lawyer handled the post-trial motions and appeal). On the other hand, the state is a sophisticated party that does have limited control over the former counsel's files. At a minimum, the State could request the trial court to remind counsel to preserve his files in case of appeal and post-conviction proceedings. It may even be appropriate for the state to request a copy of former counsel's files to be placed under seal after a defendant is sentenced to death (so that the state cannot gain an advantage during the appeal or review privileged information).<sup>56</sup>

What states cannot do is blame the capital petitioner for his former counsel's destruction of the file. The petitioner does not have control of the file and is powerless to prevent his lawyer from destroying it. If the state wants to prevent the destruction of these files, then it can either seek protection of the file *ex*

*ante* or it can seek to punish the defense lawyer for his bad act. The State can seek criminal indictment or professional disciplinary proceedings for a lawyer's improper and unethical conduct or attempt to have him prohibited from taking on additional death penalty cases. Obviously, this does not improve the state's position in the post-conviction proceeding, but it does help solve the problem on a systemic level. Nor should prosecutors complain that they are left with only disciplinary proceedings to punish a defense lawyer's potentially intentional bad conduct; this is exactly the position a defendant is left when his prosecutor has intentionally suppressed exculpatory material.<sup>57</sup>

#### IV. Conclusion

There can be no question that prosecutors and defense counsel have a duty to preserve their files in capital cases. This duty begins at the very moment they enter the case and ends with its final disposition. While a prosecutor or defense counsel's destruction of evidence may not be cause to grant a petitioner relief on its own in a post-conviction proceeding, the petitioner is not left without options. Spoliation is sanctionable in every jurisdiction under the rules of civil discovery, the court's inherent powers or both. If a prosecutor or a defense counsel has destroyed some or all of their files, the petitioner deserves to be made whole and courts should fashion remedies, within the bounds of discovery and evidence, to cure the prejudice to the petitioner.

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#### Notes

1. *Stuart v. State*, 907 P.2d 783 (*Id.* 1995) ("*Stuart IV*").
2. *Id.*
3. *Id.* at 785.
4. *State v. Stuart*, 715 P.2d 833 (*Id.* 1985) ("*Stuart I*").
5. *Stuart v. State*, 801 P.2d 1216 (1990) ("*Stuart II*").
6. *Stuart v. State*, 801 P.2d 1283 (1990) ("*Stuart III*").
7. *Id.*
8. *Id.* at 1286.
9. *Stuart IV* at 786.
10. *Id.*

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11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.* at 786-787.
17. *Id.* at 787.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at 789.
23. *Id.* at 788.
24. *Id.* at 788.
25. *Id.*
26. *Id.* at 788-789.

27. Randall Everitt, an investigator from the Attorney General's Office, investigated Stuart's allegations. He twice visited the sheriff's department in the fall of 1988 and concluded that there was only one recorded conversation – between Stuart and his sister.

*Stuart IV* at 788.

28. *Id.* at 789.

29. *Stuart IV* at 791, 793. The Idaho Supreme Court also found that even if the destruction was not directly attributable to the sheriff's office, it was caused by the sheriff's office's failure to produce the recording of Stuart's conversation with his sister, which would inevitably have led to discovery of other telephone recordings and the preservation of the log.

*Stuart IV* at 792-793.

30. *Id.* at 790.

31. *Id.*

32. *Id.* at 791.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 793 ("The spoliation doctrine is a general principle of civil litigation which provides that upon a showing of intentional destruction of evidence by an opposing party, an inference arises that the missing evidence was adverse to the party's position." (citing MCCORMICK ON EVIDENCE, 4th Ed. § 265, pp. 189-94 (1992)).

39. *Id.*

40. *Stuart v. State*, 36 P.3d 1278, 1281 (Id. 2001) ("*Stuart V*").

41. *Id.* at 1282.

42. *Id.* at 1287.

43. *Stuart IV*, 907 P.2d at 816-817.

44. 488 U.S. at 54.

45. *Id.* at 59-60.

46. 373 U.S. 83 (1963).

47. A common defense to *Brady* allegations is that the material was provided to the defense. See, e.g., *Castillo v. Johnson*, 141 F.3d 218, 233 (5th Cir. 1998); *Norris v. Schotten*, 146 F.3d 314, 333-35 (6th Cir.

1998); *Mills v. Singletary*, 63 F.3d 999, 1015-16 (11th Cir. 1995).

48. See *United States v. Alzate*, 47 F.3d 1103, (11th Cir. 1995).

49. *Alzate*, 47 F.3d at 1110 ("A different and more defense-friendly standard of materiality applies where the prosecutor knowingly used perjured testimony, or failed to correct what he subsequently learned was false testimony.").

50. David M. Siegel, *My Reputation or Your Liberty (or Your Life): The Ethical Obligations of Criminal Defense Counsel in Post-Conviction Proceedings*, 23 J. LEGAL PROF. 85, 90-91 (1998) (emphasis supplied).

51. See *Fox*, *Predecessor Counsel's Ethical Duty*, 1191-93 and authority cited therein.

52. One issue that differentiates the destruction of evidence by former counsel from the prosecution is motive. It is highly unlikely, to the point of preposterous, that the prosecution would ever selectively destroy documents to aid the petitioner in post-conviction proceedings. On the other hand, certain former counsel, out of loyalty to their client and over-exuberance, could destroy documents they may feel are detrimental to their former client's success in his appeal or post-conviction proceedings.

This is a real concern that courts need to consider when determining whether an adverse inference is appropriate. Facts a court might consider are the nature and extent of the destruction (Are only documents helpful to the defendant remaining?) and the counsel's testimony and bearing in the post-conviction proceeding (Is he openly hostile to defendant or is he falling on his sword).

A *habeas* court, however, should read nothing from a lawyer's refusal to cooperate with the state in post-conviction proceedings because of his continuing duty of loyalty and confidentiality to his former client. See *Fox*, *Predecessor Counsel's Ethical Duty*, 1186-88; David M. Siegel, *My Reputation or Your Liberty (or Your Life): The Ethical Obligations of Criminal Defense Counsel in Post-Conviction Proceedings*, 23 J. LEGAL PROF. 85, 105-10 (1998). In fact, evidence that a former counsel has assisted the state, including by volunteering information to the state, would argue strongly for an adverse inference in the petitioner's favor if documents had been destroyed.

53. 539 U.S. 510 (2003)

54. *Id.* at 523. See also, *ABA Guidelines*, 10.7 and 10.11.

55. 466 U.S. 668 (1984)

56. In no event should the prosecution be granted unfettered access to the former counsel's files at the end of the original trial or even during post-conviction proceedings. Even if the capital defendant does

bring a claim for ineffective assistance of counsel, which is likely, the claim acts as only a limited waiver of the attorney-client privilege. See *Waldrip v. Head*, 532 S.E.2d 380, 387 (Ga. 2000); *In re: Dean*, 711 A.2d 257, 259 (N.H. 1998); *State v. Taylor*, 393 S.E.2d 801, 805 (N.C. 1990).

*Habeas* counsel must be given an opportunity to review the file and invoke the attorney-client privilege as to any document for which it has not been waived. Any disagreements would then be resolved by the *habeas* court.

57. *Imbler v. Pachtman*, 424 U.S. 409, 428-429 (1976) ("We emphasize that the immunity of prosecutors from liability in suits under § 1983 does not leave the public powerless to deter misconduct or to punish that which occurs. This Court has never suggested that the policy considerations which compel civil immunity for certain governmental officials also place them beyond the reach of the criminal law. Even judges, cloaked with absolute civil immunity for centuries, could be punished criminally for willful deprivations of constitutional rights on the strength of 18 U.S.C. § 242, the criminal analog of § 1983. *O'Shea v. Littleton*, 414 U.S. 488, 503 (1974); cf. *Gravel v. United States*, 408 U.S. 606, 627 (1972). *The prosecutor would fare no better for his willful acts. Moreover, a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers.*" (emphasis supplied)). ■

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