

## **DISCOVERY/NEWLY DISCOVERED EVIDENCE/BRADY VIOLATION**

[State v. Tester](#), 2007 VT 40, (May 11, 2007)

Defendant moved for new trial under V.R.Cr.P 33 on grounds of newly discovered evidence, after having been convicted of sexually assaulting his daughter D.T. The new evidence was a videotaped interview of D.T. and her older sister K.T., which took place approx. 4 months after the alleged sexual assault on D.T and which was conducted by the Springfield police and the same DCF who would later interview D.T. about the allegations that defendant assaulted her. While filing the motion under Rule 33 based upon newly discovered evidence, the defendant argued that the State had committed a Brady violation for not disclosing the videotape, and that the suppression of this tape caused a due process violation sufficient to warrant a new trial. The court analyzed the motion pursuant to Brady and denied the motion finding that there was no reasonably probability that the proffered evidence would have changed the outcome at trial.

On appeal the defendant challenged the lower court's ruling on several grounds, none of which were reached by the Supreme Court because the Court concluded that under either a Brady analysis or the analysis for a motion for new trial based upon newly discovered evidence, the defendant must establish that the evidence was newly discovered and could not have been discovered with due diligence, which under the facts and circumstances, Mr. Tester could not do.

## **DISCOVERY/SELECTIVE PROSECUTION CLAIMS; LIKELIHOOD OF LEADING TO RELEVANT EVIDENCE**

[State v. Wesco, Inc., and Odessa Corporation](#), 2006 VT 93, 17 VLW 321. Full court opinion.

State's appeal of a trial court's discovery order - reversed. The trial court abused its discretion when it ordered the state to disclose materials allegedly relevant to a claim of selective prosecution without requiring the defendant first to make a showing of "some evidence" on each of the elements of a selective prosecution claim. The decision in State v. Simoneau, that discovery need not be shown to be admissible at trial before being discoverable, does not require a different result. The trial court also abused its discretion when it authorized depositions of state computer systems administrators concerning the whereabouts of certain alleged e-mail messages. There was no evidentiary showing that the messages once existed but are now missing. Without this factual predicate, the defendant cannot show that the discovery procedure may lead to relevant or material evidence. The trial court also abused its discretion when it authorized the depositions without requiring the defendant to explain why written materials provided to it earlier on the same issue were inadequate.

## **DISCOVERY/COMPLAINANT'S COUNSELING RECORDS/ PROSECUTOR'S CLOSING ARGUMENT**

[State v. Rehkop](#), 2006 VT 72. J. Skoglund

Sexual assault on a minor reversed. The Court reverses on two grounds. (1) Judge Carroll's failure to order that complainant's counseling records be turned over to the court for an in-camera review. Was a violation of due process where the defendant made a particularized showing that the counselors' privileged records likely contained material evidence necessary to his defense bearing on the trustworthiness of the complainant. (2) Court also found plain error in the prosecutor's closing arguments at trial that amounted to an expression of personal belief that the defense witnesses were lying, and referred to matters outside the record.