

SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA  
Criminal Division

UNITED STATES OF AMERICA

v.

KRISTINA MALIMON,

*Defendant.*

Case No.: 2021 CMD 000195

Judge Yvonne Williams

Arraignment January 7, 2021

**DEFENDANT'S NOTICE OF DISCOVERY REQUEST**

The defendant, through counsel, requests that the attached Rosser letter requesting discovery, dated Thursday, January 07, 2021, be made part of the record in this case.

Respectfully Submitted,

/s/ Michelle Stevens

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Michelle Stevens (#1008788)  
Counsel for Kristina Malimon  
The Law Office of Michelle Stevens  
503 D Street, NW Suite 250  
Washington, D.C. 20001  
(202) 695-2836

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the above Defendant's Notice of Discovery Request and attached Rosser Letter was served on the United States Attorney's Office for the District of Columbia via CaseFileXpress today Thursday, January 07, 2021.

/s/ Michelle Stevens

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## **THE LAW OFFICE OF MICHELLE STEVENS**

Thursday, January 07, 2021

Assistant United States Attorney  
United States Attorney's Office  
555 4<sup>th</sup> Street, N.W.  
Washington, D.C. 20530

**Re: *United States v. Kristina Malimon*, 2021 CMD 000195**

Dear AUSA:

Pursuant to *Rosser v. United States*, 381 A.2d 598, 605 n.6 (D.C. 1977), I write to request discovery in the above-cited case. If the requested materials exist, but the government declines to provide them based on a theory that they are not discoverable, please let me know of that position so that I might file appropriate motions in a timely manner. If I do not receive a response as to the requested materials, I will assume that those materials do not exist and will prepare the case. Accordingly, in connection with the following requests, I additionally request that the government take steps immediately to preserve any and all evidence to which Ms. Malimon is entitled access under Rule 16, *Brady*, or any other applicable law. Please send all material to me directly. I do not accept service through the CJA folders.

### **1. Eyewitnesses To The Incident**

If the government is aware of any individuals who have witnessed the alleged criminal conduct at issue here and/or have identified or failed to identify my client or any other individual as involved in the incident, I request the names and contact information for these witnesses. The primary basis for this request is my client's well-settled constitutional guarantees to due process, a fair trial, confrontation of government witnesses, and effective assistance of counsel. Our Court of Appeals noted in *Gregory v. United States*, 369 F.2d 185, 188 (D.C. Cir. 1966):

Witnesses, particularly eyewitnesses, to a crime are the property of neither the prosecution nor the defense. Both sides have an equal right, *and should have an equal opportunity*, to interview them.

The *Gregory* Court further notes:

The defense could not know what the eye witnesses to the events in suit were to testify to or how firm they were in their testimony unless defense counsel was provided a fair opportunity for interview.

Id. at 189. Moreover, in *United States v. Holmes*, 343 A.2d 272 (D.C. 1975) (hereinafter Holmes I), reh'g denied, 346 A.2d 517 (1975) (hereinafter Holmes II), our Court of Appeals upheld a trial court order that compelled the government to provide defense counsel with the identities of witnesses to an alleged murder.

Moreover, interviews of such witnesses are likely to produce evidence that comes within the scope of *Brady* and *Giglio*; in other words, such witnesses will likely have some information that is either directly exculpatory for my client or materially diminishes the witnesses' own credibility and reliability. Defense interviews of these witnesses are also germane to constitutional issues that may arise with regard to their participation in identification procedures. Counsel for the defendant cannot adequately confront the testimony of these witnesses without the opportunity to interview them and use the information from the interviews to fully investigate the case.

If you believe that identification of government witnesses raises legitimate safety and security concerns, please advise me of such, and we can work out a protective order to address these concerns. If you are not willing to disclose the names of these eyewitnesses, please advise me and provide your reasons for denying this request so that this matter may be litigated in a timely fashion.

## 2. Rule 16 Discovery Requests

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### Statements, Rule 16(a)(1)(A)

I hereby request all statements made by Ms. Malimon. This request includes any written or recorded statements by Ms. Malimon and the substance of any relevant oral statements made by Ms. Malimon, whether before or after arrest, in response to interrogation by any person then known to Ms. Malimon to be a government agent. Unless I hear otherwise, I will assume that Ms. Malimon made no statements beyond those listed here:

**Disclosed Statements:**

**Made To:**

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1. None disclosed at the time of filing
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### Prior Record, Rule 16(a)(1)(B)

I request a list of Ms. Malimon's prior convictions which could be used for impeachment purposes under D.C. Code § 14-305 should my client choose to testify at trial. In addition, pursuant to *Morris v. United States*, 469 A.2d 432, 436 (D.C. 1983), please provide me with information regarding any arrests or other acts that the government would use to rebut possible character evidence at trial.

### **Documents, Rule 16(a)(1)(C)**

Please provide any documents, papers, or books within the custody of the government that the government either intends to use at trial or which are material to the preparation of the defense. This request includes any and all WACIIS reports done by police in relation to this case, copies of any photos or photo arrays that were used for any identifications of Ms. Malimon and copies of any notes made by police officers or detectives in this case.

### **Tangible Objects, Rule 16(a)(1)(C)**

Please provide me with a list of, and the opportunity to view, any tangible objects involved in this case which the government intends to use at trial or which are material to the preparation of the defense. Unless notified otherwise, I will assume that the government does not possess any tangible objects, and prepare for the case accordingly. I request the government preserve any tangible objects in their present condition, and provide access for purposes of inspection. It is my understanding the government allegedly recovered evidence in the form of:

#### **Tangible Objects**

1. None disclosed as of the time of filing

Please provide a viewing letter authorizing my investigator and me to view and photograph any physical evidence in this case.

### **Photographs, Rule 16(a)(1)(C)**

I also request digital copies of all photographs taken, including photographs taken of the scene of the alleged crime and of Ms. Malimon (including the arrest photograph) during the course of the investigation of this case. Such photographs are material to the preparation of the defense. I request the photographs be provided in their original digital format with all metadata intact. This generally means that the files should be provided as .JPEG or .RAW files.

### **Tape Recording, Rule 16(a)(1)(C)**

I request any and all radio runs, scout runs, ambulance runs, 911 calls, TAC communications, and police and ambulance recordings in connection with Ms. Malimon's arrest, which are within the possession, custody, or control of the government, and which are material to the preparation of the defense or are intended for use by the government as evidence in their case-in-chief at trial. This request comes pursuant to Rule 16 (a)(1)(C) as well as pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963).

I also request any audio and/or video recordings within the possession, custody, or control of the government material to the preparation of the defense. With regard to such recordings, please provide an uncompressed native file to allow for effective inspection of the recordings. Also, because there are hundreds if not thousands of different formats for such recordings, at the time you provide the recording please also provide the format and codec it is in and what software is required to play the recording. If the software is proprietary and not readily available, please provide the software so that I may access the files. Because of potential difficulties concerning the length, quality, and need to transcribe such materials, I request they be provided as soon as they are available.

### **Reports of Examinations and Test, Rule 16(a)(1)(D)**

Pursuant to Rule 16 (a)(1)(D), please provide me with the results and reports relating to each and every individual scientific test or experiment performed in relation to the alleged incident. This includes, but is not limited to, the testing an examination of any weapons, all examinations and reports of any medical treatment generated as a result of this alleged incident, and any fingerprints, handwriting, or other analysis and/or examination generated in this case. Please also provide me with authorization to visit and inspect the laboratory where any examinations were performed.

### **Expert Witnesses, Rule 16(a)(1)(E)**

If the government intends to use an expert witness, I hereby request notice of that expert and a written summary of the expert testimony that the government intends to use during its case-in-chief at trial, and the bases of that testimony. Include in the summary, the expert witness's opinions, the bases and the reasons therefore, and the witness's qualifications. If the government intends to call an expert, but cannot say which of two or more possible expert witnesses the government will actually call at the time of trial, then please be sure to include the requisite discovery materials for each potential expert.

In *Ferguson, v. United States*, 866 A.2d 54 (D.C. 2005), our Court of Appeals found error in the government's failure to provide an adequate written summary and related information in connection with an expert that the government planned to call in its case-in-chief. Specifically, the court held that a government letter providing the subject areas of the expert's proposed testimony could not even "remotely" be interpreted to satisfy Rule 16(a)(1)(E)'s requirements of a "written summary."

In a more recent case, *Murphy-Bey v. United States*, 982 A.2d 682, 688 (D.C. 2009), our Court of Appeals reiterated that "a list of topics that fails to describe the expert's expected testimony, fails to describe the expert's actual opinions, and fails to describe the bases for those opinions" is inadequate disclosure under Rule 16. Even a fuller disclosure that describes the expert's opinions, but "does not provide the bases and reasons for those opinions, nor any details of them" fails to satisfy Rule 16's requirements. *Id.* at 689.

Accordingly, if it is the government's intention to call an expert, please provide in detail a summary of the testimony, the opinions the expert will offer, and the reasons and bases for those opinions. That means, for example, that a firearm examination report will not suffice. The typical report does not provide all the opinions the government will seek to elicit from the firearms expert on the stand. Nor does the report provide in detail the bases and reasons for those opinions. With regard to the reasons and bases for the opinions, at a minimum, the expert's complete laboratory or bench notes, any photographs or any other documents memorializing the process by which the expert came to his or her opinions, and citations to relevant literature and research findings validating the methodology used by the expert must be disclosed.

If I do not receive expert disclosure consistent with Rule 16, *Ferguson*, and *Murphy-Bey*, I will be unable to prepare adequately to confront the expert and will move the Court to preclude the government from calling the expert.

Please consider this to be written notice that the defense will not stipulate to the results of a drug analysis and requests that the above described information be provided regarding a chemist if the government intends to call one at trial.

### **Evidence of Uncharged Alleged Misconduct**

Please notify me if the government intends to introduce any evidence of Ms. Malimon's uncharged alleged misconduct. This request covers the substance of any such prior misconduct that the government may seek to introduce. Unless notified otherwise, I will assume that the government does not intend to introduce evidence of uncharged alleged misconduct.

### **Identification Procedures**

If any identification procedures were conducted by the police in this case, please provide the following information: the time, location, and nature of any identification procedure, the exact words of the identifying witness, any information regarding false identifications or non-identifications, and the physical surroundings of my client (including information regarding custody, police presence, and lighting conditions) at the time of the identification. In addition, I request the substance of any look-out broadcast in relation to this case.

### **3. *Brady* Requests**

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In a December 6, 2006 letter to the Chief Judges of the Superior Court and District Court for the District of Columbia, United States Atty. for the District of Columbia, Jeffrey Taylor indicates that the Department of Justice had amended its manual with regard to disclosure of exculpatory and impeachment information in criminal cases. The letter indicates that the DOJ now requires prosecutors in Superior Court (as well as federal jurisdictions) to (1) take a broad view of the materiality of exculpatory and impeachment evidence and disclose “information that is inconsistent with any element of the charged crime, establishes a recognized affirmative defense, substantial doubt on the accuracy of witness testimony or other evidence, the prosecutor intends to rely on to establish the elements of the charged crime, or has a significant bearing on the admissibility of prosecution evidence”; and (2) “disclose exculpatory information reasonably promptly after it is discovered [and] impeachment information at a reasonable time before trial...”

In *Sykes*, our Court of Appeals indicated that the prosecutor should have turned over *Brady* materials promptly after the prosecution obtained such materials (i.e., soon after the witnesses testified at the grand jury). This is especially notable because the materials at issue in *Sykes* were *Giglio* impeachment materials.

More recently, our Court of Appeals in *Shelton v. United States*, 983 A.2d 363 (D.C. 2009), held that it is error for a trial court to preclude evidence and argument to the effect that the failure of the government representatives to disclose exculpatory evidence to the defense in a timely fashion is affirmative evidence of the weakness of the government’s case.

I hereby make a general request for exculpatory and impeachment information pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny. I also make the following specific request pursuant to *Brady* and *Lewis v. United States*, 408 A.2d 303 (D.C. 1979):

- a. The identity of any witnesses who indicate that Ms. Malimon did not commit this offense, and the substance of those witnesses’ statements;
- b. The identity of any and all witnesses who do not fully corroborate the government’s case or who serve to impeach the government’s evidence;
- c. Any information tending to show the unreliability of a government witness, or which would tend to discredit the testimony of a government witness;
- d. Any prior inconsistent, non-corroborative, or other witness statement that will not reflect the witness’s trial testimony;
- e. Any evidence that any government witness or informant was under the influence of any alcohol, narcotics, or any other drug at the time of the incident about which the witness will testify, or that the witness’s faculties were impaired in any way;
- f. Information concerning any impeachable convictions of government witnesses, including police officers;
- g. All information indicating that:
  1. Any government witness had a pending juvenile or criminal case at the time of the incident in the present case and/or has had any such cases since that date;

2. Any government witness had an arrest, guilty plea, trial, fact-finding hearing, sentencing or disposition pending at the time of Ms. Malimon's arrest and/or since that date;
3. Any government witness was on juvenile or criminal aftercare or parole, or probation at the time of the incident in the present case and/or has been since that time;
4. Any government witness has now, or has had, any liberty interest that the witness might believe or might have believed would be favorably affected by government action; and,
5. Any deals, promises, or inducements that have been made to any government witness in exchange for their testimony.

With respect to the above information, I hereby request docket numbers, dates, and jurisdictions for any and all requested cases.

- h. Any information that any government witness was, has been, or is a police informant, from the time of the incident in this case up to and including the day(s) of trial;
- i. Any evidence or information that tends to link another individual to the crime charged;
- j. Any and all information in the police department personnel, disciplinary, and internal investigation files, which would tend to undermine the credibility of the government's key witnesses who are police officers. This request includes pending internal investigations and past reprimands, resulting in periods of probation or other supervision within the police force.

With respect to any of the information requested above, I hereby request any reports, records, or other documents containing such information. If such reports, records, or other documents are in the custody, control, or possession of the government, they must be disclosed to the defense.

In carrying out your constitutionally mandated *Brady* obligations, you should:

1. Speak with all members of the "prosecution team;"
2. Speak with all employees of the U.S. Attorney's Office involved with the case;
3. Speak with all police investigators who handled the case;
4. Speak with all federal agents who worked on the case;
5. Review all case files maintained by your office, both the federal and the D.C. Superior Court divisions, not just concerning the instant case but any related case;
6. Search all criminal record databases to which you have access for criminal records concerning any potential witnesses in this case;
7. Ask the FBI, DEA, and MPD, if they have any relevant files; and
8. Examine any pre-sentence reports and probation files relevant to this case.



The foregoing requests are made pursuant to the authority of the *Brady* decision and its progeny. If you disagree with the legality of these requests, please let me know in writing so that we can litigate this matter before the court.

It is worth noting some established principles of the *Brady* jurisprudence were reiterated and reaffirmed in a 2006 decision of our Court of Appeals. In *Sykes v. United States*, 897 A.2d 769 (D.C. 2006), the Court of Appeals reversed the conviction for, *inter alia*, first-degree felony murder, based on the prosecutor's failure to provide the defense with impeachment evidence from the grand jury in a timely fashion. The Court articulated the following principles as well settled under *Brady* jurisprudence:

1. The government must disclose exculpatory material in time to allow the defense to use the material effectively in the preparation and presentation of its case. *Sykes*, 897 A.2d at 777 (quoting *Edelen v. United States*, 627 A.2d 968, 970 (D.C. 1993));
2. The material to be disclosed includes not only outright exculpatory material but also any evidence that affects adversely the credibility of a government witness. *Sykes*, 897 A.2d at 777 (quoting *Ebron v. United States*, 838 A.2d 1140, 1155 (D.C. 2003));
3. A prosecutor's obligation for timely disclosure can never be overemphasized and the practice of delayed production must be disapproved and discouraged. *Sykes*, 897 A.2d at 777 (quoting *Curry v. United States*, 658 A.2d 193, 197 (D.C. 1995)).

It is noteworthy that the *Sykes* court found the only appropriate remedy for the prosecutor's *Brady* violations was reversal of the defendant's conviction, despite the fact the prosecutor's violation consisted of not providing the defense grand jury testimony of an impeaching nature and that it was eventually provided to the defense and was admitted as evidence at the trial in lieu of the testimony of the witnesses who had testified before the grand jury.

In reversing the defendant's convictions, the *Sykes* court makes clear that the grand jury transcripts with the impeaching evidence should have been disclosed to the defense shortly after the witnesses testified, not months later, at or near the time of trial. The *Sykes* court made clear that the government had an obligation to provide the defense with access to the witness, and an opportunity to interview the witnesses with impeaching information. Finally, the court rejected the government's attempted rationalization that the safety of its own witness required the delay.

The *Sykes* decision provides notice that any delay in producing *Brady* material, whether it be surely exculpatory or impeachment evidence, is unacceptable and subjects the government to serious sanctions. The decision in *Miller v. United States*, 14 A.3d 1094 (D.C. 2011) further emphasizes the importance of timely disclosure.

#### **4. Jencks (Rule 26.2) Requests**

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Please be advised that Ms. Malimon is requesting prompt disclosure of any and all *Jencks* material pursuant to Superior Court Rules of Criminal Procedure 26.2. Undersigned counsel is aware that Rule 26.2 (A) does not require the government to produce such material until after a witness has testified. Rule 26.2 (d), however, expressly authorizes the Court to recess proceedings when counsel requires time to examine and use the materials provided under subsection (a). Such a recess wastes valuable court time and resources. Thus, the defense requests that the government provide *Jencks* in advance of trial to avoid delay.

#### **5. Duty to Preserve Discoverable Evidence**

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I am requesting that you preserve all physical evidence material to the preparation of my client's defense, including but not limited to all property allegedly belonging to all complaining witnesses and my client, unless such property is released directly to my client of his/her authorized designate. This preservation request is served in part to ensure that counsel has an opportunity to conduct tests and examination on any physical property that counsel deems appropriate and necessary.

"The duty to produce discoverable evidence entails the antecedent duty to preserve that evidence." *Allen v. United States*, 649 A.2d 548, 553 (D.C. 1994) (citing *Brown v. United States*, 372 A.2d 557, 560 (D.C. 1977)). Accordingly, I remind you of the government's duty to preserve any evidence that is discoverable or that the government is obligated to disclose pursuant to *Brady* and its progeny, including, for example, any vehicle involved in the incident in question, or any materials that might yield biological evidence.

I am also requesting that you preserve all photographs and video in the possession of the government that may show any events related to the alleged offense or offenses. This request includes any video showing my client in police custody; any video captured by MPD or other governmental agencies' traffic/security cameras that may show the alleged events; and any other video that may show the arrest of my client or the alleged events leading up to the arrest. Please preserve all video that may be relevant. After preserving such video, please disclose it to me. If you are unable or unwilling to disclose such video, please inform me immediately so that I may take appropriate action.

Please provide any and all BWC and surveillance footage recorded in this case.

## **6. Continuing Duty to Disclose**

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The duty to disclose under Rule 16 and under *Brady* and its progeny is a continuing one and the requests stated above are therefore continuous, stretching and until final disposition of this case. Thank you for your prompt attention to these requests.

This letter contains a full account of the discovery that has been provided to me so far. If you have any further discovery, please disclose it to me immediately so that I may properly advise my client regarding their case. Early disclosure can often facilitate a quicker resolution in cases.

Sincerely,

/s/ Michelle Stevens

Michelle Stevens  
Counsel for Kristina Malimon  
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(202) 695-2836

cc. Superior Court