NO.

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2019

YOUNG YI

PETITIONER,

v.

UNITED STATES OF AMERICA

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

RULE 14.1(b) STATEMENT

There are no parties in addition to those listed in the caption.

QUESTIONS PRESENTED

I. Whether the Fourth Circuit erred in affirming the District Court's denial of Ms. Yi's Motion for a New Trial, given the Government's substantial violations of its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963) to produce exculpatory evidence in a reasonable manner?

II. Whether Fourth Circuit erred in affirming the District Court's conviction of Ms. Yi where the evidence and record were sufficient as a matter of law to support the District Court's findings about the amount of restitution?

NO.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is attached hereto as Appendix I.

JURISDICTION

The Judgment of the United States Court of Appeals for the Fourth Circuit was entered on January 30, 2020. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

STATEMENT OF THE CASE

On October 12, 2017, an Indictment was filed charging Ms. Yi and co-defendant Dannie Ahn with: Conspiracy to Commit Health Care and Wire Fraud, in violation of 18 U.S.C. Sec. 1349 (Count I); Health Care Fraud, in violation of 18 U.S.C. Secs. 1347 and 2 (Counts II-VII); Conspiracy to Defraud the United States, in violation of 18 U.S.C. Sec. 371 (Count VIII); and False Tax Return, in violation of 26 U.S.C. Sec. 7206(1) (Count IX) (only Yi charged), and a Forfeiture claim.

On July 16-30, 2018, the Petitioner was tried by a jury before the Honorable Liam O'Grady of the United States District Court for the Eastern District of Virginia, Alexandria Division, in Criminal Case No. 1:17cr00224-LO. Ms. Yi was convicted of Counts I-IX.

On December 7, 2018, the District Court sentenced Ms. Yi as follows: Counts I - VII, 84 months on each count; Counts VIII and IX, 36 months each; all counts (I-IX) to be served concurrently. The District Court ordered restitution of On December 19, 2018, the Appellant filed a timely Notice of Appeal.

On January 30, 2020, the United States Court of Appeals for the Fourth Circuit issued a *Per Curiam* decision affirming the decision of the trial court. (Appendix I.)

STATEMENT OF THE FACTS

I. PRETRIAL MOTIONS AND ISSUES.

A. The Allegations In The Indictment.

The Government alleged that, in 2004, Ms. Yi formed 1st Class Sleep Diagnostics Center, Inc. ("1st Class"), and related affiliate entities (1st Class Medical, Inc., Quality Diagnostics, Quality DME), to offer and provide medically related sleep studies, equipment and treatment. Starting as early as 2008, Yi, working with co-defendant Dannie Ahn ("Ahn"), enticed legitimately referred patients back to 1st Class for medically unnecessary sleep studies, called retitrations. These studies, not actually referred or ordered by doctors, would be billed to insurance companies by 1st Class.

Further, 1st Class did not seek co-pay or co-insurance payments from patients, thereby seeking to induce them to return for the retitrations. The Government alleged that Yi, as owner of 1st Class, knew of and directed this health care fraud scheme. As a result, 1st Class and Yi made millions of dollars over several years from this alleged unlawful scheme.

The Government also alleged that during this same period, Yi filed false tax returns and failed to pay the proper amount of taxes owed. She did this largely by paying for personal items (i.e., luxury watches, clothing, cars, home/real property payments) out of 1st Class assets, thus exploiting 1st Class and lowering her personal taxes owed by shifting personal income to 1st Class income/assets.

Ms. Yi responded to these charges by alleging that: she left the company for a period of time when she married; when she returned and discovered some of these issues, she fired co-defendant Ahn, hired knew medical and accounting personnel, and attempted to rectify problematic practices at 1st Class.

B. Pretrial Motions.

Ms. Yi filed a series of Pretrial Motions, many of which were granted by the District Court. She filed a Motion to Strike Surplusage in the Indictment The District Court granted in part and denied in part the Motion.

Ms. Yi filed a Motion *In Limine* to Preclude the Use of the Term "Kickback" in the trial. The District Court granted the Motion.

Ms. Yi filed a Motion *In Limine* to Exclude Improper Lay Witness Opinion Testimony at Trial. The District Court granted the Motion.

Ms. Yi filed a Motion *In Limine* to Exclude Rule 404(b) Evidence proposed by the Government. The District Court denied the Motion.

The Government filed a series of Motions seeking Use Immunity for the following Government witnesses: Sarah Toran; Joy Lyle; Timothy Ahn; Lam Duang. The District Court granted these Motions.

II. THE TRIAL.

A. The Testimony Of 1st Class Employees.

The Government presented the testimony of numerous 1st Class employees, both in-company and outside professionals. Generally, these witnesses testified about ongoing retitration practices (including their own sleep studies and other employee/family members sleep studies); failure to bill patients for co-pays or co-insurance; improper use of business funds for personal expenses; and other issues.

Olga Levanda: employees had sleep studies; sleep studies not referred by doctors; identified retitrations; bonus to employees for retitrations obtained; no co-pays, no co-insurance; Yi saw these practices; some changes after Ms. Yi returned to the business in 2013;

Byron Donovon-Ly: sleep scheduler, worked in different departments; identified retitrations, not from doctor referrals; no co-pays; employee bonus for referrals; Yi called patients, spoke in Korean; Ahn - said practices were directed by Yi; Yi encouraged employees to have sleep studies; however, Ms. Yi was not around the business for several years; Lam Duong directed him; heard Yi speak with Korean patients, following the retitration script;

Jinah Clark: sleep scheduler; made retitration calls; Yi was at the top, in bullpen talking to managers; Dr. Bergman (hired by Yi), tried to improve 1st Class; employee bonuses for retitrations

obtained;

Yong Sin: she is Ms. Yi's sister-in-law; she was a sleep technician; identified retitrations; no co-pays;

Champei Nouv: sleep scheduler; Yi owned the company; there was no contact from doctors for retitrations; when Yi returned to business, Dr. Bergman came in with new procedures; other doctors referred sleep studies;

Timothy Ahn: Dannie Ahn's first cousin; Yi owned and controlled the business; company policies were set by Ahn and Yi; Yi stepped back when she got married in 2010; reiterations were important part of 1st Class business; Yi followed retitration orders by computer; Yi followed company finances through accounting; company doctors not actually ordering retitrations; Yi supervised billing to insurance companies; Ahn supervised technical side of business; Yi encouraged sleep studies; Yi e-mail - we never charged customers in seven years (co-pays, co-insurance); identified Yi personal expenses paid for by business on company Amex; Yi hired Dr. Bergman to address company problems; there were no written doctor referrals, no co-pays;

Kenneth R. Bergman, Jr., M.D.: was hired by Yi upon her return to the company; identified 1st Class sleep studies with his name, but he didn't refer the patient; he was investigated by the Virginia Dept. Of Health Professions for work related to 1st Class - he agreed to violations and he paid a fine; Yi hired him to

institute new practices/procedures to address issues at 1st Class;

Michael Mellis, M.D.: doctor in northern Virginia; had contract with 1st Class to review sleep studies; worked with Dr. Bergman; 1st Class billed for sleep studies not authorized by Mellis; some 1st Class sleep studies not medically necessary; some of his patients complained about phone calls from 1st Class;

Erika King: worked in accounts receivable; Yi was somewhat involved in billing; Yi remained involved in business through e-mails, when she was not present; she met with Yi re billing issues; King had sleep studies, but no co-pays or co-insurance payments; Yi e-mailed her re payment issues; while doctors names were used in referrals, the doctors actually didn't make the referrals; Yi was a good boss; she had several sleep studies, but no real sleep issues;

Joy Lyle: worked at 1st Class Sleep from 2008-2014; Yi was her boss; Ahn was her nephew; worked in billing; Yi was involved in billing supervision; she acknowledged that Yi knew billing forms were false - there were no actual doctor referrals for sleep studies; false billing sent to Signa, Tricare, CareFirst Blue Cross Blue Shield, Aetna, Anthem, other insurance companies; employees were encouraged to have sleep studies; Yi was aware of false billing practices; mock bills (co-pays) were created for the files; co-pays were routinely waived; Yi remained involved in the billing process; Yi trained her to bill; she lied to the FBI in an

interview; Yi directed her to lie; company billed more than 10,000 false claims;

Phillip Creech: worked for 1st Class Sleep in billing; he was interviewed by Erika King, she reported to Yi; Yi responded to daily tallies of work; cross billing to insurance companies - insurers were billed by 1st Class Medical when work done by 1st Class Sleep;

Melinda Yanger: worked at 1st Class Sleep, 2007-2011 as a sleep scheduler; she identified the retitrations, with no co-pays or co-insurance; employees were paid for generating retitrations; Yi's company Amex card was used to pay for personal items such as Costco, Miller's Furs, Mercedes, and personal real estate; while Yi hired Dixon, Hughes Goodman as accountants, false checks and accounting continued (i.e. $580,000.00 check for vendor ResMed - false claim; personal home payments); Yanger also had sleep studies; Yanger hired by Ahn; he had charges at luxury stores, not Yi; Yi hired Tina Markland (CPA) to address Ahn/company accounting issues; Dixon Hughes trained Markland; identified Yi company Amex luxury clothing purchases;

Tina Markland: she worked as controller at 1st Class for two years; she was hired through Dixon Hughes; Yi was involved in the billing department; Yi's company Amex bills were odd; Markland left 1st Class because accounting system not working; struggle between business and personal expenses;

Dannie Ahn: founded business with Yi; they had romantic relationship for a period of time; eventually co-pays, co-insurance not collected; he identified retitrations, without doctor referrals - Yi was well aware of this practice; Ahn entered plea agreement with Government, pled guilty; Yi conspired with him as to unlawful conduct; employees had sleep studies - no doctor referrals, just collect insurance payments; 1st Class billed everything; Ahn billed personal expenses to business; under his plea agreement, must cooperate, tell truth, but no promises about sentencing; Ahn supervised marketing/scheduling; Yi supervised accounting/billing; company set financial bonuses for employees for referrals; Yi controlled 1st Class; Yi met with billing staff; Yi assigned business expense as cover for home/personal expenses; Yi understood the concept of the owner's draw; when the company was founded, Yi had good intentions; Ahn faced 25 years of incarceration for his plea; some claims to the insurance companies were not paid; Ahn acknowledged mock co-pay letters to clients;

Yi supported all the false company policies;

Fedor de Marchena: he is accountant with his own accounting business; he was hired b 1st Class and Yi for accounting services; he reviewed business and personal income tax returns for 1st Class, Yi, her mother and her sister; Yi provided the information as to business versus personal expenses; he identified certain expenses (real property) that were personal to Yi, and were not business;

personal expenses should not have been denoted as business expenses; Yi didn't necessarily take her ownership draw at end of the year;

Zahid Pervaiz: an accountant and relationship manager at Dixon Hughes Goodman, he worked for 1st Class and its affiliate companies; the information came from 1st Class; Dixon Hughes prepared financial statements for Yi, 1st Class; classifications of business versus personal expenses affect tax returns; personal expenses are listed against an owner's draw from the business; business expenses affect the business' taxes; if he had questions on these issues, he would often speak with Yi;

Jon Holmes: he is a CPA, and he used to work for Dixon Hughes Goodman as a tax manager; he reviewed returns prepared for 1st Class and Yi; financial statements prepared first; Yi's personal vehicle listed on the business return (depreciation) would affect both returns; personal real property expenses listed on the business return would affect both returns; a ResMed business payment actually went for personal use; other business expenses (uniforms, medical equipment) were also false claims.

B. <u>The Testimony Of Other Doctors</u>.

Laurie Susan Markin, M.D.: she was a family physician in northern Virginia; she had referred patients with sleep issues to 1st Class; referrals are signed by doctors; she identified (her) patient referrals to 1st Class that she did not make;

John Molaiy, M.D.: he was a family physician in northern Virginia. He had referred patients with sleep issues to 1st Class; he identified (his) patient referrals to 1st Class that he did not make.

C. Government Agency/Institutional Witnesses.

Wanda Lessner: a senior director of executive inquiry at CareFirst Blue Cross Blue Shield ("CareFirst"), she reviewed CareFirst's reimbursement and enrollment process, and requirements for providers; CareFirst received claims from 1st Class and its affiliates from 2008-14; billing - $79,431,117.70; payments - $17,479,646.21; if CareFirst knew that a doctor had not actually referred a patient for treatment, it would not pay a claim on that treatment;

Emily Russell: an auditor for Cigna Health Care; Cigna conducted an investigation of 1st Class, after it determined that co-pays and co-insurance were not being billed to patients, otherwise known as fee forgiving; Cigna letter sent to Yi; from 2008-14, 1st Class (and its affiliated entities) billed Cigna $29,937,852.93; Cigna paid $8,977,724.21; Cigna would not pay a claim where he co-pay was waived;

Patricia Bramlett: a senior fraud investigator for United Health Care ("UHC"); 1st Class (and affiliated entities) billed UHC $66,134,264.30; UHC paid 1st Class $14,478.97 from 2008-14; UHC would not have paid a claim with false information;

See Parties Stipulation (other representatives from insurance companies would give similar testimony as Lessner, Russell and Bramlett);

Jessica Marrone: she was the FBI Special Agent on the case; she reviewed the search warrant executed on 1st Class, the chain of custody for documents and items obtained from the search warrant, and certain documents found pursuant to the search warrant;

Paul Lee: an FBI computer forensic examiner, he was certified as an Expert in Computer Forensics; he was part of the search of 1st Class office pursuant to the search warrant; he obtained and reviewed Ms. Yi's computer; he identified certain e-mails (between Ahn and Melina Yanger) identifying payments for Ms. Yi with company funds to pay for personal expenses (i.e., real property);

Stephanie Anderson: an FBI forensic accountant, CPA, and a certified fraud examiner, focusing on health care fraud; she had reviewed 43 of 61 financial statements, signed by Yi; she identified cross-billing among 1st Class and its affiliated companies; she testified that Yi made personal purchases on business accounts - Mercedes Benz ($83,479.27), second Mercedes, Land Rover, real property purchases (Chicago, Virginia), home renovations, others; Yi was not on certain of the accounts reviewed by Anderson;

Jennifer Maroulis: an IRS revenue agent, criminal division-tax fraud; she was certified as an Expert in the computation and

calculation of taxes, IRS rules and regulations; there were discrepancies between company checks and Quick Book records; accurate records showed taxes owed by 1st Class and Yi for 2010; inaccurate entries for purpose of checks; other checks misrepresented their real purpose; all 1st Class and Yi income not reported; Yi owed IRS additional taxes ($896,303.00).

See also Parties Stipulation regarding commencement of FBI investigation in March 2013.

D. Ms. Yi's Motion Under Fed. R. Crim. P. 29(a).

At the conclusion of the Government's case, Ms. Yi moved for judgment of acquittal under Fed. R. Crim. P. 29(a). The District Court denied the Rule 29(a) Motion.

E. Ms. Yi's Witnesses.

Ms. Yi offered witnesses in her defense.

Karleigh Zeltner: she began as an intern at 1st Class in 2008, and became an employee in 2010 as a sales representative; she saw Ahn, she didn't see Yi, didn't talk to Yi; after Ahn was fired, Yi became her supervisor; co-pays were waived; she got sleep studies, but with no doctor referrals;

Alan Schwartz, M.D.: a doctor specializing in sleep medicine at Johns Hopkins School of Medicine; qualified as an expert in sleep medicine; he was contacted by attorney Eric Eisen re 1st Class Sleep; he was hired by 1st Class to improve 1st Class study results and to reform 1st Class practices; concerns about billings; he

completed written study of and for 1st Class (December 2013); some sleep studies (a high percentage) where no doctor referral were justifiable; employees getting sleep studies without doctor referrals would be medically questionable; he was aware of the fraud claim against 1st Class; he relied on medical records in doing his study, as opposed to meeting with 1st Class personnel, patients; he did not analyze the retitrations as part of his study; he had no opinion as to claim forms;

Eric Eisen, Esq.: an attorney, he was retained to help Yi with business and personal matters; Yi hired him after she discovered problems with 1st Class; he set up LLCs for Yi, but not to hide assets; he helped Yi bring in Dr. Bergman as part of the reorganization of the company; Yi supported the reforms of the business that Eisen assisted with; he identified the script for cold calls used by employees; Eisen helped Yi bring in Dr. Schwartz; he helped install a strategic management compliance program; he was unsure if he told Schwartz about the Virginia Dept. of Health investigation and the censure of Dr. Bergman;

Dan Duis: a character witness, pastor at Ms. Yi's church, he knew Yi through pastoral and religious contexts; he testified as to Ms. Yi's "superior character";

Bum Hyuan Son: Ms. Yi's husband and a teacher, he testified as to her generous spirit, help for the needy; he testified as to several properties they owned, some were transferred to him after

the criminal investigation started; some Yi personal expenses paid for by business;

Westly K. Hong: a doctor and veterinarian, he knew Ms. Hi through their bible studies together; a character witness, he knew Ms. Yi to be truthful, sincere, reliable, trustworthy, frugal with herself but generous with others.

F. The Jury Verdict.

On July 30, 2018, the jury returned a verdict of Guilty on Counts I-IX of the Indictment.

G. Ms. Yi's Motion For A New Trial.

Ms. Yi filed a Motion to Dismiss the Indictment, for Judgment of Acquittal, or alternatively for a New Trial. The Government filed an Opposition to that Motion. Ms. Yi filed a Reply.

The District Court denied the Motion.

H. Sentencing.

On December 7, 2018, the District Court sentenced Ms. Yi as follows: Counts I - VII, 84 months on each count; Counts VIII and IX, 36 months each; all counts (I-IX) to be served concurrently. The District Court ordered monetary penalties of $10,696,447.86, (JA 3114), and entered a Restitution Order in the same amount. On December 19, 2018, the Appellant filed a timely Notice of Appeal.

SUMMARY OF ARGUMENT

1. The Fourth Circuit erred in affirming the District Court's denial of Ms. Yi's Motion for a New Trial in light of the Government's substantial violation of its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963) to produce exculpatory evidence in a timely and reasonable manner.

2. The Fourth Circuit erred in affirming the District Court's conviction because the evidence was insufficient to support the District Court's findings on restitution.

ARGUMENT

I. THE GOVERNMENT VIOLATED ITS OBLIGATIONS UNDER *BRADY v. MARYLAND* BY PRODUCING VOLUMINOUS DOCUMENTS BUT NOT IDENTIFYING ONE DOCUMENT AS *BRADY* MATERIAL.

Ms. Yi filed a Motion to Dismiss the Indictment, for Judgment of Acquittal, or in the Alternative, for a New Trial ("Motion for a New Trial"), under Fed. R. Crim. P. 12, 29 and 33, based on the Government's failure to identify *Brady* material. In a nutshell, the Government produced *millions of pages of documents* to the defense, containing potential *Brady* material and information, and left it to the defense to ascertain *Brady* material and information. This production, the result of scorched earth litigation tactics, violated Ms. Yi's rights under *Brady v. Maryland*, 373 U.S. 83 (1963).

A. The Standard Of Review.

The Fourth Circuit reviews denial of a Motion for Judgment of

Acquittal *de novo*. *See United States v. Romer*, 148 F.3d 359, 364 (4th Cir. 1998); *United States v. United Medical & Surgical Supply Corporation*, 989 F.2d 1390, 1401-02 (4th Cir. 1993). When the Motion for Judgment of Acquittal is based upon insufficiency of the evidence, the conviction must be sustained if the evidence, viewed in the light most favorable to the Government, is sufficient for any rational trier of fact to find the essential elements a of the crime beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

At the conclusion of the Government's case, Ms. Yi moved for judgment of acquittal under Fed. R. Crim. P. 29(a). The District Court denied the Rule 29(a) Motion.

B. <u>The Government's Voluminous Production On The Defense</u>.

On February 14, 2014, the Government executed several search warrants at First Class and affiliate locations, seizing millions of documents in the process, both hard copies and on computers. This seizure of documents occurred four (4) years before the July 16, 2018 trial.

The Government eventually produced over *four million (4,000,000)* documents to the defense. The Indictment was handed down on October 12, 2017. Thereafter the Government began a phased production of the discovery documents. As the defense realized the voluminous nature of the discovery documents, Ms. Yi moved to continue the July 16, 2018 trial date so the defense could review

all the documents and prepare for trial. The Motion was unopposed by the Government. The District Court *denied* that Motion to Continue.

The defense then wrote a letter to the Government, requesting that it identify any *Brady* documents or material in its voluminous discovery production. The Government responded that it was unaware of any authority "that requires us to enumerate [*Brady*] material in the manner you have demanded."

The defense made further written requests for the Government to identify *Brady* documents/information. The Government continued to rebuff the defense and flout *Brady*.

By the time the trial started, the defense, despite its best efforts at document review, had been unable to review millions of pages of discovery.

The Government never identified one document as *Brady* throughout the case.

C. The Government Violated Its Constitutional *Brady* Duties.

The Government has constitutionally-based disclosure duties. The Fifth and Fourteenth Amendments require the Government to disclose specific types of evidence to defendants. In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the Supreme Court held that due process requires the prosecution to disclose, upon request, evidence favorable to an accused person when such evidence is material to guilt or punishment. Evidence "favorable to an accused"

includes exculpatory evidence and evidence that impeaches a government witness. *See United States v. Bagley*, 473 U.S. 667, 676 (1985) (quoting *Brady*, 373 U.S. at 87). *See also Owens v. Baltimore City State's Attorney's Office*, 767 F.3d 379, 397-98 (4th Cir. 2014) (undisclosed witnesses' statements favorable to accused because they would have supported defendant's contention that witness raped and murdered the victim).

A *Brady* violation occurs when: (1) evidence is favorable to the accused because it is exculpatory or impeaching; (2) evidence was suppressed by the prosecution, either willfully or inadvertently; and (3) prejudice ensues. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999); *Cone v. Bell*, 556 U.S. 449, 469 (2009) ("[W]hen the State withholds from a criminal defendant evidence that is material to his guilt or punishment, it violates his right to due process of law in violation of the Fourteenth Amendment.")

Favorable evidence is material if there is a reasonable probability that disclosure of the evidence would have changed the outcome of the proceeding. *Bagley*, 473 U.S. at 682, 685; *see also United States v. Parker*, 790 F.3d 550, 558-59 (4th Cir. 2015) (evidence that SEC investigating government witness material because it impeached the only witness who provided direct evidence that defendant's wife involved in a gambling operation). A reasonable probability under *Bagley* is "a probability sufficient to undermine confidence in the outcome." *Bagley*, 473 U.S. at 678, 682

(plurality opinion).

When assessing evidence's materiality, the trial court must take into account the cumulative effect of the suppressed evidence in light of other evidence, not merely the probative value of the suppressed evidence standing alone. *See Kyles v. Whitley*, 514 U.S. 419, 436 (1995). The prosecution's intent behind the suppression of evidence does not determine whether the evidence is material or whether the proceeding's outcome would have changed. *See Brady*, 373 U.S. at 87. Some circuits have stated, however, that government suppression in bad faith may suggest that the evidence is material. *See V.I. v. Fahie*, 419 F.3d 249, 253 n. 5 (3d Cir. 2005), *United States v. Jackson*, 780 F.2d 1305, 1311 n. 4 (7th Cir. 1986).

The Government has an affirmative duty to learn of and disclose any exculpatory or impeachment evidence known to other government agents, including any agents or officers involved in the investigation. *See Kyles*, 514 U.S. at 437; *Parker*, 790 F.3d at 558-59 (*Brady* violation where government failed to disclose favorable impeachment evidence from an SEC investigation of a witness).

The Government's duty to disclose continues throughout the proceedings. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987).

The instant case presents unusual facts and circumstances:

* the Government seized over 4,000,000 documents;

* the Government began its phased discovery production on February 22, 2018, and continued producing documents, including

over 80,000 documents, as late as June 27, 2018;

* the Government produced multiple terabytes of data seized from 1st Class computers and servers, produced without Bates numbers;

* the Government produced 636,609 documents and 1,432,053 pages of hard copy documents;

* yet, the District Court denied an unopposed Motion to Continue the trial as the defense scrambled to review these voluminous documents;

* while the defense did its best to review discovery documents, "millions of pages of material remained unreviewed" by the trial date;

* the District Court denied Ms. Yi's post-trial Motion, inexplicably stating "[b]ut the focal point for me in looking at whether there was a fair trial is whether there was the ability to use the documents that were recovered in time for effective cross-examination or impeachment. And they were ... And so, through the diligence of defense counsel, those documents were discovered." (JA 3063.)

* the District Court's finding is refuted by the Record; defense counsel were inundated and overwhelmed with documents, and there were thousands of documents the defense never got to review by the trial.

Further, the Government's *Brady* obligations are not met by

producing, or dumping, hundreds of thousands of documents on the defense and stating in so many words - "you figure out the *Brady* documents". Instead, *Brady* and its progeny constitute an affirmative Constitutional Duty on the Government *to identify Brady documents, materials and information*. *Brady*, 373 U.S. at 87 (Supreme Court held that due process requires the prosecution to disclose, upon request, evidence favorable to an accused person when such evidence is material to guilt or punishment).

Indeed, in its Motion for a New Trial, the defense cited authority in support of its position that the Government does not meet its *Brady* obligations by merely producing hundreds of thousands of documents to the defense, with no *Brady* identification provided. "[T]he United States does not comply with the requirement of *Brady* by merely including all known *Brady* material within [millions of] pages of discovery." *United States v. Blankenship*, No. 14-cr-00244, 2015 WL 3687864, at *6 (S.D.W.Va. June 12, 2015).

"[A]t some point (long since passed in this case) a duty to disclose may be unfulfilled by disclosing too much; at some point, 'disclosure' in order to be meaningful, requires 'identification' as well." *United States v. Salyer*, No. CR. S-10-0061, 2010 WL 3036444, at *6 (E.D. Cal. Aug. 2, 2010).

"The Government cannot met its *Brady* obligations by providing [the defendant] with access to 600,000 documents and then claiming that she should have been able to find the exculpatory information

in a haystack." *United States v. Hsia*, 24 F.Supp.2d 14, 29 (D.D.C. 1998), *rev'd in part on other grounds*, 176 F.3d 517 (D.C. Cir. 1999).

Moreover, the Government's "knowledge of evidence and witnesses" put it "in a far better position than the Defendant to know what evidence might be exculpatory and/or impeachment material under *Brady*"." *Blankenship*, 2015 WL 3687864, at *7.

While the defense managed to identify some *Brady* material (JA 2658-59), to this day there may be substantial *Brady* material in both documents produced, and not produced. This Record hardly supports the District Court's glib finding of a fair trial.

The findings and conclusions of the Fourth Circuit and the District Court should be reversed, the Motion for a New Trial should have been granted, and the decision of the District Court should be reversed and remanded.

II. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE DISTRICT COURT'S FINDINGS ON RESTITITION.

The District Court imposed restitution of $10,646,447.86 on Ms. Yi. However, the record did not support this amount. Other than perhaps the Presentence Report, there is nothing in the Record to support the amount of restitution.

A. The Standard Of Review.

When sufficiency of the evidence is raised, the conviction must be sustained if the evidence, viewed in the light most

favorable to the Government, is sufficient for any rational trier of fact to find the essential elements a of the crime beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

B. The Record Does Not Support The Amount Of Restitution.

The District Court ordered monetary penalties of $10,696,447.86, and entered a Restitution Order in the same amount.

However, the Record does not appear to support this award of restitution:

* The Government's Sentencing Memorandum identified restitution as $10,696,447.86. It argued that this was based on the Declarations of Michael Petron health care loss), and the Declaration of Revenue Agent Maroulis (tax loss).

The District Court gave scant attention to this important issue at sentencing. The District Court just accepted the Government's analysis, without considering on the Record Ms. Yi's objections to the analysis.

Under United States Sentencing Guidelines Section 2B1.1 ("USSG"), the Government must establish loss by a preponderance of the evidence, and the District Court must make factual findings on the Record to support a finding of loss and restitution. The District Court did not make such factual findings.

The Government conceded that, under USSG Sec. 2B1.1, app. Note 3, there must be a "reasonable estimation of loss".

However, a review of the Petron Declarations shows they were based on speculations, conjecture, averaging, and "guesstimations".

For example, Petron stated: I have calculated the *average dollar amount ... the average amount received per sleep study...."* (emphasis added); "[o]n average, this means that the latter two entities received *approximately* 2.13 times as much for each sleep study encounter.... (emphasis added); "on average" analysis continues throughout Petron's analysis - "[u]sing the average comparative increase...."; "[t]he *estimate is approximately* $3,356,305.29...." (emphasis added).

Further, Petron's review and inclusion of "cross-billing" amounts was misplaced. A "cross-billed" claim means that the claim was billed by an affiliate entity. After Ms. Yi noted her Objection to Petron's initial analysis on this issue, Petron lowered his "guesstimate" by over $2,000,000.00. This hardly inspires confidence in Petron's methodology. Even Petron's lower figure regarding cross-billing was highly speculative and not supported by evidence, as opposed to averaging and "gussstimations".

Moreover, Petron's analysis of the loss associated with patients with multiple studies was also flawed and speculative. In fact, the evidence at trial that numbers of sleep studies for patients is not necessarily an accurate indicator of lack of medical necessity, and therefore not a false claim. The testimony of Dr. Schwartz, Dr. Markin and Dr. Bergman supported that concept.

Despite this evidence in the Record (never considered by the District Court, on the record), Petron assumed that patients with three or more encounters should be grouped into the loss based on a lack of medical necessity. Petron's analysis, and ultimate health care loss amount ($9,016,196.87) failed the preponderance of the evidence test because it did not account for patients who had multiple but medically necessary sleep studies. Instead, Petron's analysis was improperly based on the premise that all multiple sleep studies and treatments were medically unnecessary. Finally, there can be no sympathy for the Government's "guesstimation" and faulty work. It had the underlying documents for over four (4) years, prior to trial. Petron had access to real data and information. He and the Government chose to proceed on speculation, "guesstimation", and averaging. The District Court compounded the problem by giving scant analysis and attention to this issue at sentencing, and failed to make the requisite record on this issue.

The findings and conclusions of the Fourth Circuit and the District Court as to loss restitution should be reversed, and the matters should be remanded to the District Court with instructions to apply this Court's ruling as to restitution.

CONCLUSION

The Petitioner requests that this Court grant Certiorari and reverse the Fourth Circuit's affirmance of the jury's decision

and/or the trial court's decision and remand the case to the trial court with instructions to either dismiss or retry this case, consistent with this Court's decision.

Respectfully submitted,

/S/

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APPENDIX I

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-4931

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

YOUNG YI,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Liam O'Grady, District Judge. (1:17-cr-00224-LO-1)

Submitted: January 9, 2020 Decided: January 30, 2020

Before DIAZ and FLOYD, Circuit Judges, and TRAXLER, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Peter L. Goldman, SABOURA, GOLDMAN & COLOMBO, P.C., Alexandria, Virginia, for Appellant. Brian A. Benczkowski, Assistant Attorney General, Matthew S. Miner, Deputy Assistant Attorney General, Jeremy R. Sanders, Kevin Lowell, Fraud Section, Criminal Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; G. Zachary Terwilliger, United States Attorney, Ryan Scott Faulconer, Special Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria Virginia, for Appellee.

PER CURIAM:

Young Yi was convicted after a jury trial of conspiracy to commit health care and wire fraud, in violation of 18 U.S.C. § 1349 (2018) (count 1), six counts of health care fraud, in violation of 18 U.S.C. §§ 2, 1347 (2018) (counts 2 through 7), conspiracy to defraud the United States, in violation of 18 U.S.C. § 371 (2018) (count 8), and filing a false tax return, in violation of 26 U.S.C. § 7206(1) (2018) (count 9). The district court sentenced Yi to concurrent terms of 84 months' imprisonment on each of counts 1 through 7 and concurrent terms of 36 months' imprisonment on counts 8 and 9 and ordered restitution in the amount of $10,696,447.86. On appeal, Yi challenges the district court's denial of her Fed. R. Crim. P. 33(a) motion for a new trial, arguing that the Government violated *Brady v. Maryland*, 373 U.S. 83 (1963), by producing voluminous documents to the defense but not identifying one as "*Brady* material." She also challenges the district court's restitution judgment, arguing that the evidence is insufficient to support it. We affirm.

Yi waited until her post-verdict Rule 33(a) motion for a new trial to raise the *Brady* issue she presents on appeal. Accordingly, we review the denial of that motion for plain error only. *See United States v. Harris*, 890 F.3d 480, 490-91 (4th Cir. 2018) (providing standard of review); *United States v. Godwin*, 272 F.3d 659, 672 (4th Cir. 2001).

In *Brady*, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or the bad faith of the prosecution." *Brady*, 373 U.S. at 87. To establish a *Brady* violation, a criminal defendant

"must show (1) that the undisclosed information was favorable, either because it was exculpatory or because it was impeaching; (2) that the information was material; and (3) that the prosecution knew about the evidence and failed to disclose it." *United States v. Parker*, 790 F.3d 550, 558 (4th Cir. 2015). Here, Yi fails to identify any favorable and material information that the Government did not disclose and does not dispute that the Government produced in time for effective use at trial the material within which she speculates exculpatory material likely will be found. We reject as without merit Yi's argument that fulfillment of the Government's obligation under *Brady* requires it to identify exculpatory material, *see United States v. King*, 628 F.3d 693, 702 (4th Cir. 2011), and conclude that Yi did not establish a *Brady* violation, s*ee United States v. Lopez*, 860 F.3d 201, 217 n.6 (4th Cir. 2017); *United States v. Caro*, 597 F.3d 608, 619 (4th Cir. 2010); *United States v. Smith Grading & Paving, Inc.*, 760 F.2d 527, 532 (4th Cir. 1985). Thus, we discern no plain error in the district court's denial of Yi's Rule 33(a) motion premised on this alleged due process violation.

With respect to the district court's restitution order, here the presentence report (PSR) established that the losses for restitution purposes sustained by the victims totaled $10,696,447.86. The district court adopted the PSR and relied on the information therein in ordering restitution. As Yi made no affirmative showing that this information in the PSR was not correct, the district court was free to adopt and rely on it in imposing restitution. *See United States v. Revels*, 455 F.3d 448, 451 n.2 (4th Cir. 2006); *United States v. Dawkins*, 202 F.3d 711, 716 (4th Cir. 2000); *United States v. Randall*, 171 F.3d 195, 210-11 (4th Cir. 1999). Th18-49e undisputed restitution sums in the PSR support the

district court's restitution order, and we therefore reject as without merit Yi's claim of insufficient evidence.

Accordingly, we affirm the criminal judgment. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

FILED: January 30, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-4931
(1:17-cr-00224-LO-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

YOUNG YI

Defendant - Appellant

J U D G M E N T

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK