No. 13-1309

In the Supreme Court of the United States

SAFIYYAH TAHIR BATTLES, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a notice of appeal from a final judgment suffices to appeal a district court's denial of a motion for a new trial based on newly discovered evidence when the defendant filed the new-trial motion after filing the notice of appeal and more than 14 days after the judgment, the defendant filed her court of appeals brief before the district court decided the new-trial motion, and the defendant did not file a second notice of appeal challenging the district court's denial order.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-49a) is reported at 745 F.3d 436. The order of the district court denying petitioner's motion for a new trial (Pet. App. 50a-59a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 11, 2014. The petition for a writ of certiorari was filed on April 28, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Oklahoma, petitioner was convicted of wire fraud, in violation of 18 U.S.C. 1343, and money laundering, in violation of 18 U.S.C. 1957(a). Judgment 1. She was sentenced to 30

months of imprisonment, to be followed by two years of supervised release. *Id.* at 2-3. The court of appeals affirmed in part and dismissed the appeal in part. Pet. App. 1a-49a.

1. In 2006, petitioner built a house on North Lottie Avenue in Oklahoma City, Oklahoma. Pet. App. 2a. She financed the construction project by obtaining bank loans totaling several hundred thousand dollars. *Ibid.*

In 2007, petitioner decided to refinance the mortgage on the North Lottie Avenue house. Pet. App. 2a. She submitted a uniform residential loan application to Saxon Mortgage, Inc., but Saxon rejected the application because her debt-to-income ratio was too high. *Ibid.* She then reapplied for a loan through Saxon's "Score Plus" program, which required her to submit 12 months of bank statements as well as information about her gross monthly income and assets. *Ibid.* She claimed a gross monthly income of $28,723.16—which would yield an annual income of $344,677.92—and asserted that her bank account contained $165,907.90. *Id.* at 2a-3a.

Those statements were false. Petitioner, who worked as an employee of a real-estate firm owned by her mother, actually had a 2007 gross annual income of $14,346. Pet. App. 2a-3a. She also had less than $1000 in her bank account. *Id.* at 3a. In claiming otherwise, petitioner had supplied Saxon with "falsified" bank statements that "inflate[d]" her assets to "improve her chances of qualifying for a loan." *Ibid.*

Unaware of the true facts, Saxon approved a $500,000 loan. Pet. App. 2a. Before the loan proceeds were disbursed, a closing company prepared a settlement statement providing that Emmitt Wisby, a local

builder, would receive $102,630.01. *Id.* at 3a. On May 9, 2007, the closing company gave petitioner a check made out to the builder with the understanding that she would deliver it to him. *Ibid.*

Instead, petitioner misappropriated the funds. She forged Mr. Wisby's signature on the check and deposited it into her own bank account. Pet. App. 3a. She then "quickly dissipated" the proceeds by transferring money to her family members. *Ibid.*

After July 31, 2007, petitioner made no mortgage payments on the North Lottie Avenue house. Pet. App. 3a. At the end of 2007, when the property "fell to foreclosure," the outstanding loan balance was $499,902.34. *Ibid.* The property was subsequently sold for only $173,000, causing Saxon to suffer a "significant loss." *Id.* at 3a-4a.

2. a. On November 15, 2011, a grand jury returned an indictment charging petitioner with making a false statement to a financial institution, in violation of 18 U.S.C. 1014 (Count One); committing wire fraud, in violation of 18 U.S.C. 1343 (Count Two); and laundering money, in violation of 18 U.S.C. 1957(a) (Count Three). Indictment 1-7; see Pet. App. 4a. On June 14, 2012, petitioner's jury trial began. One week later, the jury found her guilty of wire fraud and money laundering. Verdict 1; see Pet. App. 4a.[1]

The district court sentenced petitioner to 30 months of imprisonment, to be followed by two years of supervised release, and ordered her to pay $326,902.34 in restitution to Saxon Securitization

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[1] The jury failed to reach a verdict on the charge of making a false statement to a financial institution. Pet. App. 4a. Accordingly, the district court declared a mistrial on Count One of the indictment and dismissed the count without prejudice. *Ibid.*

Trust. Judgment 2-3, 5. Final judgment was imposed on February 1, 2013, and entered on the docket on February 5, 2013. *Id.* at 1, 6; see Pet. App. 6a; see also Fed. R. App. P. 4(b)(6).

b. On February 12, 2013, petitioner filed a notice of appeal "from the final judgment entered in this action." Notice of Appeal 1-2; see Pet. App. 7a & n.5.

On March 22, 2013, while petitioner's appeal was pending, she filed a motion in the district court for a new trial based on newly discovered evidence. Pet. App. 7a; see Fed. R. Crim. P. 33; Pet. App. 50a & n.1. The motion claimed that the government had violated its obligations under *Brady* v. *Maryland*, 373 U.S. 83 (1963), by failing to disclose to petitioner approximately 200 pages of receipts and other documents subpoenaed from her mother's attorney. Pet. App. 7a-8a. Petitioner alleged that she had first discovered the existence of those documents three weeks after trial, and she contended that if she had obtained them sooner they would have helped to impeach a government witness and to undercut the assertion that a remodeling business petitioner ran with her sister was a "'shell company' used to perpetrate mortgage fraud." *Id.* at 5a-6a & n.4; see *id.* at 7a-8a. The motion also asserted that petitioner's constitutional rights were violated when the presentence report identified a different victim (Saxon Securitization Trust) than the government had named at trial (Saxon Mortgage, Inc.). *Id.* at 8a-9a.

While the district court considered the motion for a new trial, petitioner's appeal proceeded. She filed her opening brief in the court of appeals on July 23, 2013, and her reply brief on October 15, 2013. See C.A. Docket. In those briefs, petitioner did not claim that

the district court had erred with respect to her new-trial motion, on which the court had not yet ruled, but she did argue generally that the government's failure to disclose the subpoenaed documents violated *Brady*. Pet. App. 9a-10a.

On the same day that petitioner filed her appellate reply brief, the district court denied the new-trial motion. Pet. App. 59a; see *id.* at 53a-54a. As to the *Brady* issue, the district court explained that the remodeling business's "records and receipts were available to [petitioner] at any time" and would not have "refuted" the evidence that the business was involved in fraudulent schemes or "undermined the government's case against her." *Id.* at 56a-57a. The district court also explained that petitioner had not alleged facts to show that other subpoenaed documents were withheld from her trial attorney or that those documents would have harmed the government's case rather than simply constituting "[a]dditional evidence of the fraud." *Id.* at 57a-59a. As to the issue of the victim's identity, the district court concluded that use of "evidence that the fraudulent loan [petitioner] received from Saxon Mortgage was subsequently securitized and transferred to Saxon Securitization Trust" would not have "produced an acquittal of any charge." *Id.* at 55a-56a. Petitioner did not file a notice of appeal seeking review of that order.

On March 11, 2014, the court of appeals resolved petitioner's appeal, dismissing the appeal with respect to the *Brady* issue and affirming the judgment.[2] Pet. App. 1a, 25a-49a. Because the *Brady* issue did not

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[2] The court of appeals rejected (among other things) petitioner's attacks on an evidentiary ruling, the sufficiency of the evidence, and the sentence. Pet. App. 25a-49a.

arise until the motion for a new trial, the court of appeals explained, the only action by the district court that petitioner could possibly attack as erroneous was the denial of that motion. *Id.* at 16a. The court of appeals ruled, however, that the district court's order denying the motion was "never involved in—i.e., within the scope of—her notice of appeal," which was filed eight months before the order in question and which challenged only the preexisting judgment. *Id.* at 18a-19a. The court of appeals also determined that petitioner's appellate brief did not serve as "a functional equivalent of a notice of appeal" of the denial order because it did not designate or discuss that later-entered order, and it "could hardly have sought * * * appellate review of a district court order that did not exist." *Id.* at 19a-20a. Finally, the court of appeals found "no evidence in the record that, after the district court issued its motion-for-new-trial order, [petitioner] sought within the fourteen-day period prescribed by the federal rules to file a new notice of appeal to challenge that order." *Id.* at 21a; see *id.* at 24a n.13 (noting that "a discrete, separate appeal regarding the motion-for-new-trial issue" can generally be "consolidated with" any "previously filed appeal in the case"). Because no such separate notice was filed, the court of appeals concluded that it lacked the power to review the order in question. *Id.* at 15a, 22a-23a; see *id.* at 24a n.13.

The court of appeals noted that matters would have been different had petitioner filed her motion for a new trial "within the fourteen-day time period prescribed for filing notices of appeal in criminal cases." Pet. App. 15a n.10. In that circumstance, the court observed, Rule 4(b)(3)(C) of the Federal Rules of

Appellate Procedure would have made her notice of appeal from the judgment "effective—without amendment—to appeal from * * * the district court's motion-for-new-trial order." *Ibid.* (quoting Fed. R. App. P. 4(b)(3)(C)) (internal quotation marks omitted).

ARGUMENT

Petitioner contends (Pet. 10-26) that the court of appeals erred in dismissing the portion of her appeal challenging the district court's denial of her motion for a new trial, and she asserts that this Court's review is warranted because the courts of appeals are divided on whether a defendant wishing to challenge the denial of a new-trial motion during the pendency of an appeal must file an additional notice of appeal. But the court of appeals correctly ruled that petitioner's notice of appeal did not suffice to appeal from the subsequent denial order, and petitioner has not identified any conflict among the circuits on that issue warranting this Court's review. In addition, this case would be a poor vehicle for consideration of the question presented because petitioner could not benefit from a disposition in her favor.

1. Under Rule 3 of the Federal Rules of Appellate Procedure, an appeal from a district court to a court of appeals may be taken only by filing a notice of appeal within the time allowed by Rule 4. Fed. R. App. P. 3(a)(1). The notice of appeal must, among other things, "designate the judgment, order, or part thereof being appealed." Fed. R. App. P. 3(c)(1)(B).

Under Rule 4, a criminal defendant's notice of appeal must be filed in the district court within 14 days after the entry of the judgment or order being appealed. Fed. R. App. P. 4(b)(1)(A)(i). A notice of

appeal filed after judgment but before the district court rules on a motion for a new trial under Federal Rule of Criminal Procedure 33 based on newly discovered evidence becomes effective upon the entry of the order disposing of the motion, so long as the motion is filed within 14 days after the entry of the judgment. Fed. R. App. 4(b)(3)(B). Moreover, "[a] valid notice of appeal is effective—without amendment—to appeal from an order disposing of" a Rule 33 motion based on newly discovered evidence that is filed within that time frame. Fed. R. App. P. 4(b)(3)(C).

Here, petitioner filed a timely notice of appeal following entry of the judgment, designating that judgment as the matter being appealed. Well over 14 days after entry of the judgment, she filed a motion for a new trial based on newly discovered evidence. Her notice of appeal was not held in abeyance during the pendency of her motion for a new trial. Fed. R. App. P. 4(b)(3)(B) and (C). She filed briefs on appeal in which she raised the same substantive issue raised in her new-trial motion but did not designate or identify any errors in the district court's disposition of the motion, because no such disposition had yet been rendered. See *Smith* v. *Barry*, 502 U.S. 244, 249 (1992) (rules of procedure do not preclude an appellate court from treating a brief as a notice of appeal "if the filing is timely under Rule 4 and conveys the information required by Rule 3(c)"). On the same day that petitioner filed her appellate reply brief, the district court denied her motion for a new trial, and she did not file a new notice of appeal designating that denial order. Fed. R. App. P. 3(c)(1)(B).

Under the plain language of the rules, petitioner failed to appeal from the district court's denial of her

motion for a new trial.[3] Any other conclusion would flout Rule 4(b)(3)(C), because that provision makes a notice of appeal "effective * * * to appeal from an order disposing" of a Rule 33 motion based on newly discovered evidence only if that motion is filed no more than 14 days after entry of the judgment and does not encompass a motion like petitioner's that is filed months later. Fed. R. App. P. 4(b)(3)(C).

2. a. Petitioner's asserted split among the circuits does not warrant this Court's review because the cases that petitioner says conflict with the decision below were decided before the addition of Rule 4(b)(3)(C) to the Federal Rules of Appellate Procedure—a change that none of those cases could possibly have factored into their analysis. If the circuits in question have to confront the question presented again, they will be required to take a fresh look at the language of Rule 4 as it now exists, and they will very likely adopt the same approach as the court below.

Effective December 1, 1993, Rule 4 was amended to add the statement that a "valid notice of appeal is effective—without amendment—to appeal from an order disposing of" a motion for a new trial based on newly discovered evidence so long as that motion is

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[3] Petitioner points out that the timeliness of a notice of appeal in a criminal case is not jurisdictional, but does not dispute that the the existence of a notice of appeal (or its functional equivalent) is a jurisdictional requirement. See Pet. 21 n.4. Accordingly, as this case comes to the Court, it does not raise that latter issue. The briefs filed by petitioner in the court of appeals do not challenge the district court denial order that is now claimed to be erroneous. The only question here, then, is whether an order denying a new-trial motion filed more than 14 days after judgment can be construed to be within the scope of a prior notice of appeal from a different and earlier judgment or order.

filed no more than 14 days after "entry of the judgment." Fed. R. App. P. 4(b)(3)(C); see Fed. R. App. P. 4(b) (1994); Fed. R. App. P. 4(b) (1993).[4] As noted above, that language has an important bearing on the analysis of whether a notice of appeal from the judgment in a criminal case is effective to appeal a later district-court ruling on a motion for a new trial based on newly discovered evidence. Because the Rule specifies that a notice of appeal is "effective" to appeal only a limited class of such new-trial motions—that is, motions filed within two weeks of the entry of the judgment—it necessarily implies that such a notice is not "effective" to appeal new-trial motions, like the motion at issue in this case, that fall outside that class. See, *e.g.*, *Custis* v. *United States*, 511 U.S. 485, 491 (1994) (relying on "negative implication" of Congress's specification of certain circumstances); see also Pet. App. 15a n.10.

All of the published cases that petitioner cites in support of the assertion that "[t]he Third, Fifth, Ninth, and Eleventh Circuits take the view that a second notice of appeal is not necessary" (Pet. 11) were decided before December 1993. See *United States* v. *Thornton*, 1 F.3d 149, 157-158 (3d Cir.), cert. denied, 510 U.S. 982 (1993), cited in Pet. 11; *United*

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[4] When the Rule was amended in 1993, the provision made a notice of appeal effective to appeal from an order disposing of a motion "for a new trial based on the ground of newly discovered evidence if the motion is made before or within 10 days after entry of the judgment." Fed. R. App. P. 4(b) (1994). Under the current version of the Rule, a notice of appeal is effective to appeal from an order "for a new trial under Rule 33, but if based on newly discovered evidence, only if the motion is made no later than 14 days after the entry of the judgment." Fed. R. App. P. 4(b)(3)(A) and (C).

States v. *Davis*, 960 F.2d 820 (9th Cir.), cert. denied, 506 U.S. 873 (1992), cited in Pet. 13; *United States* v. *Wilson*, 894 F.2d 1245 (11th Cir.), cert. denied, 497 U.S. 1029) (1990), cited in Pet. 13; *United States* v. *Burns*, 668 F.2d 855 (5th Cir. 1982), cited in Pet. 12. Because those cases were "decided prior to the effective date of the 1993 amendments," they "do not, of course, discuss the provision that is now Rule 4(b)(3)(C)." 16A Charles Alan Wright et al., *Federal Practice & Procedure* § 3949.4, at 121-122 n.44 (4th ed. 2008 & Supp. 2014). Accordingly, they do not demonstrate any conflict among the circuits about the meaning of Rule 4 as it currently stands.

To establish that the relevant circuits ruled on the question presented after the 1993 amendment went into effect, petitioner relies on a handful of unpublished decisions that post-date December 1, 1993. See Pet. 20-21 (citing *United States* v. *Calles*, 271 Fed. Appx. 931 (11th Cir.) (per curiam) (unpublished opinion), cert. denied, 555 U.S. 899 (2008); *United States* v. *Ruiz-Mendoza*, 1995 WL 696846 (5th Cir. 1995) (per curiam) (unpublished opinion), cert. denied, 517 U.S. 1106 (1996); and *United States* v. *Fortanel-Gonzalez*, 1994 WL 108899 (9th Cir. 1994) (unpublished opinion)). But those non-precedential decisions do not indicate that any division of authority has persisted in light of the amendment to Rule 4. *Calles* states that when a "timely tolling motion for a new trial" is filed—that is, the motion falls into the class that *is* covered by Rule 4(b)(3)(C)—a preexisting notice of appeal is effective to sweep in a ruling on that motion. *Calles*, 271 Fed. Appx. 941-942 n.3. That circumstance is not presented by this case, because petitioner's new-trial motion was filed months after the judgment

and cannot be characterized as a "timely tolling motion" under Rule 4. *Fortanel-Gonzalez* also involves a different question than the one at issue here, addressing only whether a notice of appeal filed after denial of a new-trial motion is sufficient to appeal an earlier judgment. *Fortanel-Gonzales*, 1994 WL 108899, at *2. And *Ruiz-Mendoza* addresses the relevant question only glancingly in a brief footnote that does not acknowledge the existence of Rule 4(b)(3)(C). *Ruiz-Mendoza*, 1995 WL 696846, at *1 n.3.

Petitioner argues (Pet. 18-20) that the 1993 amendment is not important to the analysis because it was not intended to make a substantive change or to address the question presented in this case. Those arguments are wrong. First, petitioner observes (Pet. 18-19) that the advisory committee notes on the 1993 amendment state that "[n]o substantive change [was] intended" by the addition of Rule 4(b)(3)(C), but that statement is not applicable to the entirety of the amendment. The notes address several changes to subdivision (b) of Rule 4, and the statement that "[n]o substantive change is intended" refers only to the amendment's "restructuring" of the "portion of this subdivision that lists the types of motions that toll the time for filing an appeal," which previously was not broken out into numbered subsections. Fed. R. App. P. 4(b) advisory committee's notes (1993); see Fed. R. App. P. 4(b) (1993). The statement has no relevance to the remainder of the changes made by the 1993 amendment—and the notes make clear that the amendment made several substantive alterations to Rule 4(b). Fed. R. App. P. 4(b) advisory committee's notes (1993) (stating, among other things, that the

amendment added a Rule 29 motion to the list of tolling motions).

Second, petitioner relies (Pet. 19) on the advisory committee notes to argue that the addition of Rule 4(b)(3)(C) "was not meant to address the question in this case," but that argument is unsound. Petitioner bases that argument on a portion of the notes explaining that "[t]he [1993] amendment * * * states that a notice of appeal filed before the disposition of any of the posttrial tolling motions becomes effective upon disposition of the motions." Fed. R. App. P. 4(b) advisory committee's notes (1993). But that explanation does not relate to the language in Rule 4(b)(3)(C); it relates to a different change wrought by the 1993 amendment, which added to Rule 4(b) the statement that "[a] notice of appeal filed after the court announces a decision, sentence, or order but before it disposes of any of the [tolling] motions, is ineffective until the date of the entry of the order disposing of the last such motion outstanding, or until the date of the entry of the judgment of conviction, whichever is later." Fed. R. App. P. 4(b) (1994); see Fed. R. App. P. 4(b) (1993); see also Fed. R. App. P. 4(b)(3)(B). It is that language, not the language now found in Rule 4(b)(3)(C), that ensures that an "initial notice of appeal [does] not become a nullity" after certain motions are filed. Pet. 19.

Because petitioner cannot explain away the significance of Rule 4(b)(3)(C), and because the cases on which she relies to establish a split of authority predate that provision, she has not identified any conflict among the circuits that warrants this Court's review. To the extent that a conflict did exist several decades ago, it will likely dissipate as the courts of appeals

take account of Rule 4's amended language and of the various decisions adopting the same approach as the court below. See, *e.g.*, *United States* v. *Wilkinson*, 282 Fed. Appx. 750, 753 (11th Cir. 2008) (per curiam) (relying on Rule 4(b)(3)(C) to hold that a separate notice of appeal was required to challenge a later-entered order disposing of a motion to modify the terms of supervised release); see also, *e.g.*, *United States* v. *Cunningham*, 145 F.3d 1385, 1393 (D.C. Cir.), cert. denied, 525 U.S. 1059 (1998), and 525 U.S. 1128 (1999).

b. Even setting aside the significance of the 1993 amendment, petitioner overstates any disagreement among the circuits. It is not at all clear that the Third, Fifth, Ninth, or Eleventh Circuits would rule—with or without consideration of Rule 4(b)(3)(C)—that a second notice of appeal is superfluous under the specific circumstances presented in this case, in which not only the notice of appeal but also the appellate briefs failed to challenge the district court's decision on the new-trial motion (because it did not yet exist).

For instance, the Fifth Circuit's decision in *Burns* notes that the defendant's appellate brief "dealt with the denial of his motion for a new trial" and thus served as a "substitute for a second notice of appeal." 668 F.2d at 858; see Pet. App. 23a n.13.[5] Likewise, the Eleventh Circuit's decision in *Wilson* explains that the defendants "argue[d] on appeal that the district court

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[5] In addition, the Fifth Circuit apparently does not always follow *Burns*. See *United States* v. *Bouldin*, 466 Fed. Appx. 327, 328 (5th Cir. 2012) (per curiam) (unpublished decision) (refusing to review denial of second motion for new trial where notice of appeal referred only to denial of first motion for new trial, even though appellate brief referenced both rulings).

erred in denying their new trial motions," 894 F.2d at 1251—a fact that the court of appeals seems to consider significant. See *United States* v. *Hogan*, 240 Fed. Appx. 324, 327 (11th Cir. 2007) (per curiam) (unpublished decision) ("Hogan's brief also cannot be construed as his notice to appeal from the order denying the renewed motion for appointment of counsel because the brief was filed on October 19, 2006, two days before that order was entered. * * * If Hogan wanted to appeal the order denying his renewed motion for the appointment of counsel, he needed to file a separate notice of appeal after that order was entered."), cert. denied, 552 U.S. 1208 (2008).[6]

In this case, petitioner's appellate briefs did not deal with the denial of her motion for a new trial, because that denial had not happened yet. The same courts of appeals that decided cases like *Burns* and *Wilson* might well conclude that the new-trial issue has not been appealed where the briefs do not give the

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[6] The Ninth Circuit's decision in *Davis*, which is devoid of "any meaningful analysis," Pet. App. 23a n.13, does not specify whether the defendants' appellate briefs addressed the district court's denial of their new-trial motion. See *Davis*, 960 F.2d at 824. The Third Circuit's decision in *Thornton* is similarly opaque on that point, stating merely that the defendants "have briefed the new trial issues on the merits." 1 F.3d at 158. In both cases, however, the timing of the appellate proceedings suggests some likelihood that the court of appeals briefs did address the district court's denial order. See 89-50359 Docket (9th Cir.) (indicating that *Davis* defendants were granted very large extensions of time to file their opening appellate briefs); compare Docket entry No. 248, at 16, *United States* v. *Jones*, No. 91-cr-570 (E.D. Pa.) (docket entries 236 and 238 showing that motion for new trial in *Thornton* was denied on January 4, 1993) with 92-1635, 92-1785 Dockets (3d Cir.) (*Thornton* defendants' opening appellate briefs filed on January 22, 1993).

court of appeals a fair chance to review the district court's order or provide the government with a sufficient opportunity to defend that court's reasoning. See, *e.g.*, *Wilson*, 894 F.2d at 1252 (considering the new-trial issue only because "the government was not prejudiced * * * by [defendants'] failure to file a separate notice of appeal from the district court's denial of their new trial motion"). For that reason, too, the decisions on which petitioner relies do not establish a conflict with the decision below that would warrant this Court's review.

3. Finally, this case is a poor vehicle for consideration of the question presented because petitioner could not ultimately benefit from resolution of the issue in her favor. As the district court explained (Pet. App. 50a-59a), her motion for a new trial based on newly discovered evidence—a type of motion that is "generally disfavored," *United States* v. *Gwathney*, 465 F.3d 1133, 1143-1144 (10th Cir. 2006), cert. denied, 550 U.S. 927 (2007)—lacks merit. Petitioner's claim that the government violated the requirements of *Brady* by withholding receipts and documents produced by a business "over which [she] had control during the relevant time period" is flawed; those documents were already available to her, and they did not aid her case in any event. Pet. App. 56a-57a. And petitioner's assertion that the government improperly withheld "investigative reports of buyer interviews" also does not hold water, because she did not actually "allege facts to show these documents were withheld" and because the evidence in question was consistent with evidence that was presented at trial and therefore "would not have undermined the government's case * * * or likely have affected the jury's ver-

dict." Pet. App. 57a-58a; see *id.* at 58a-59a (finding that if the interviewee identified by petitioner from the documents had been called as a witness at trial "her testimony would have supported the government's case"). Such arguments could not convince the court of appeals that the district court erred in denying the new-trial motion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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