No. 13-1309

In the Supreme Court of the United States

SAFIYYAH TAHIR BATTLES,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

OTHER AUTHORITIES

REPLY BRIEF FOR PETITIONER

The government's Brief in Opposition errs in five respects. First, it mischaracterizes the question presented. Second, it mistakenly attributes the 5-4 circuit split to the 1993 revision to the Federal Rules of Appellate Procedure, a revision that made no relevant substantive change to Rule 4. Third, it misstates the law in the four circuits that require only a single notice of appeal. Fourth, it offers a merits argument that ignores the text and the purpose of Rule 4. And fifth, it wrongly contends that petitioner could not benefit from a decision in her favor.

1. The Brief in Opposition mischaracterizes the question presented.

The question presented in the petition for certiorari is whether, in the absence of a second notice of appeal, a Court of Appeals has jurisdiction to address a claim of error the appellant also raised in a new trial motion in the District Court. The government's rewording of the question turns it into a different question entirely. The question is not, as the government would have it, whether a notice of appeal filed before the denial of a motion for a new trial "suffices to appeal a district court's denial of a motion for a new trial." There is a big difference between these two questions.

Once a Court of Appeals acquires jurisdiction over a case by virtue of a timely notice of appeal, the Court of Appeals has jurisdiction to address *any* claim of trial error the appellant chooses to raise. If the appellant makes an argument in the Court of Appeals that she has not already presented to the

District Court, that might affect the *standard of review* employed by the Court of Appeals, but it does not affect the Court of Appeals' *jurisdiction*. The Courts of Appeals have jurisdiction over *cases*, not over *issues*. Once a direct appeal is properly before a Court of Appeals, the court has the authority to address every issue the appellant raises.

In this case, petitioner argued in the Tenth Circuit that her trial was infected with *Brady* error. This was a claim that an error took place *at her trial*. She made the same argument in a motion for a new trial in the District Court, a motion the District Court denied while the appeal was being briefed in the Tenth Circuit. The government's rewording of the question presented implies, incorrectly, that petitioner's *Brady* claim was an assignment of error only to the denial of her new trial motion, and not an assignment of error to the trial itself. In fact, petitioner's *Brady* argument was not merely a claim that the denial of her new trial motion was erroneous; it was also a claim that her trial was conducted improperly. Petitioner's timely notice of appeal gave the Tenth Circuit jurisdiction to address the *Brady* claim, along with any other claim of trial error petitioner wished to make.

The real question presented is whether a Court of Appeals that has acquired jurisdiction to decide a case, by virtue of a properly filed notice of appeal, is then ousted of that jurisdiction, on an issue-by-issue basis, by the filing of a motion for a new trial in the

District Court. This is the question on which the circuits have divided 5-4.[1]

2. The Brief in Opposition mistakenly attributes the 5-4 circuit split to the 1993 amendments to Rule 4(b).

The government tries (BIO at 9-14) to explain away the circuit conflict by supposing that the 1993 amendments to FRAP 4(b) changed the substance of the rule in a relevant way. That assertion is incorrect.

Before the 1993 amendments, Rule 4(b) provided, in pertinent part:

> If a timely motion in arrest of judgment or for a new trial on any ground other than newly discovered evidence has been made, an appeal from a judgment of conviction may be taken within 10 days after the entry of an order denying the motion. A motion for a new trial based on the ground of newly discovered evidence will similarly extend the time for appeal from a judgment of conviction if the motion is

[1] The Brief in Opposition also mischaracterizes two aspects of the proceedings below. The government asserts that petitioner made false statements to a financial institution (BIO at 2), but in fact the jury did not reach a verdict on the count of making false statements to a financial institution (Pet. App. at 4a). The government asserts that in the Tenth Circuit petitioner "argue[d] generally" that *Brady* error had occurred at trial (BIO at 5), but in fact petitioner made this argument quite specifically and directly, in the very first point of her Tenth Circuit brief, by pointing to the particular documents the government failed to disclose.

> made before or within 10 days after entry of the judgment.

20 *Moore's Federal Practice* 304App.-2 (3d ed. 2013). The rule simply stated that a pending motion for a new trial would toll the deadline for the filing of a notice of appeal. The rule specified that motions for a new trial based on newly discovered evidence would qualify for this tolling period only if such motions were filed within ten days of the entry of judgment. The rule was entirely about the filing deadline for a *first* notice of appeal. It did not say that appellants who had already filed a timely notice of appeal after their convictions would also have to file a *second* notice of appeal once their motions for a new trial had been denied.

In the 1980s, the Seventh and Eighth Circuits held, contrary to the view of other circuits, that a timely notice of appeal, filed after a conviction, would become a nullity if the defendant subsequently filed a post-trial motion, so that the defendant would completely lose his ability to appeal the conviction—even with respect to issues that were not raised in the post-trial motion—unless he re-filed his notice of appeal after the District Court disposed of the post-trial motion. *United States v. Gargano*, 826 F.2d 610, 612 (7th Cir. 1987); *United States v. Jones*, 669 F.2d 559, 561 (8th Cir. 1982). The 1993 amendment to Rule 4(b) was intended to undo these holdings, to clarify that that initial notice of appeal did not become a nullity, but remained in effect while the post-trial motions were pending. The only other substantive change to Rule 4(b) was to add a motion

for acquittal to the list of post-trial motions that would qualify for the tolling period.

The Advisory Committee explained: "The amendment grammatically restructures the portion of this subdivision that lists the types of motions that toll the time for filing an appeal. This restructuring is intended to make the rule easier to read. No substantive change is intended other than to add a motion for judgment of acquittal under Criminal Rule 29 to the list of tolling motions." 20 *Moore's Federal Practice* 304App.-15. The Committee added: "The amendment also states that a notice of appeal filed before the disposition of any of the posttrial tolling motions becomes effective upon disposition of the motions. In most circuits this language simply restates the current practice. *See United States v. Cortes*, 895 F.2d 1245 (9th Cir.), *cert. denied*, 495 U.S. 939 (1990). Two circuits, however, have questioned that practice in light of the language of the rule, *see United States v. Gargano*, 826 F.2d 610 (7th Cir. 1987), and *United States v. Jones*, 669 F.2d 559 (8th Cir. 1982), and the Committee wishes to clarify the rule." 20 *Moore's Federal Practice* 304App.-15-16.

The 1993 amendments implementing these changes to Rule 4(b) are reproduced below, with new material in italics and deleted material in brackets. In boldface type is the Advisory Committee's clarification that a notice of appeal filed after conviction does not become a nullity if the defendant subsequently files a post-trial motion.

> If a *defendant makes a* timely motion *specified below, in accordance with the Federal Rules of*

Criminal Procedure, an appeal from a judgment of conviction must be taken within 10 days after the entry of the order disposing of the last such motion outstanding, or within 10 days after the entry of the judgment of conviction, whichever is later. This provision applies to a timely motion:

(1) for judgment of acquittal;

(2) for [in] arrest of judgment*;* [or]

(3) for a new trial on any ground other than newly discovered evidence*; or*

(4) 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. [has been made, an appeal from a judgment of conviction may be taken within 10 days after the entry of an order denying the motion. A motion for a new trial based on the ground of newly discovered evidence will similarly extend the time for appeal from a judgment of conviction if the motion is made before or within 10 days after entry of the judgment.]

A notice of appeal filed after the court announces a decision, sentence, or order but before it disposes of any of the above motions, is ineffective until the date of 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. ***Notwithstanding the provisions of Rule 3(c), a valid notice of appeal is effective without amendment to ap-***

> ***peal from an order disposing of any of the above motions.***

20 *Moore's Federal Practice* 304App.-11-12. In 1998, when the Rules of Appellate Procedure underwent a stylistic revision, the boldfaced sentence became the current Rule 4(b)(3)(C): "A valid notice of appeal is effective—without amendment—to appeal from an order disposing of any of the motions referred to in Rule 4(b)(3)(A)." 20 *Moore's Federal Practice* 304App.-26.

The 1993 amendments to FRAP 4(b) thus had nothing to do with the question presented in this case. The sentence in boldface was intended to clarify that an *initial* notice of appeal, filed after a conviction, did not become a nullity, and cause the defendant to lose the ability to appeal his conviction, if the defendant subsequently filed one of the enumerated post-trial motions. The boldfaced sentence did not address whether a defendant would be required to file a *second* notice of appeal if he wished to raise issues he included in a post-trial motion.

The government is thus mistaken in asserting that the 1993 amendments can explain away the circuit split. It is telling that no court on either side of the split has agreed with the government on this point. While several of the Courts of Appeals have noted the existence of the conflict, not a single one has attributed it to the 1993 amendments. Pet. App. 21a-24a; *United States v. Salem*, 578 F.3d 682, 685 n.2 (7th Cir. 2009); *United States v. Josleyn*, 206 F.3d 144, 150 (1st Cir. 2000). No circuit changed its view after 1993. And while the government is correct

that the most recent decisions from the Fifth, Ninth, and Eleventh Circuits are unpublished (BIO at 11), that is hardly surprising, in view of the fact that the law in these circuits is already well established.

3. The Brief in Opposition misstates the law in the Third, Fifth, Ninth, and Eleventh Circuits.

The government contends (BIO at 14-16) that even the circuits on the correct side of the split—the Third, Fifth, Ninth, and Eleventh—would find jurisdiction lacking in this case, because the District Court disposed of the new trial motion after the appellate briefs were filed. First of all, this contention misstates the timing of events below. Petitioner's reply brief in the Tenth Circuit was filed the same day as the District Court's decision, and in that brief she informed the Tenth Circuit of the decision. The District Court's decision became part of the record on appeal soon after. The record on appeal already included petitioner's new trial motion, the government's response thereto, and indeed all the *Brady* material itself. The Tenth Circuit had everything it needed.

Moreover, this contention misstates the law in the Third, Fifth, Ninth, and Eleventh Circuits. None of these circuits places any significance on the fortuity of whether the District Court decision comes before or after the filing of appellate briefs. What *is* significant, in all four circuits, is that an initial timely notice of appeal is filed, the issue is adequately briefed, and the government suffers no prejudice. Where these conditions are met, the Court of Appeals has

jurisdiction. *United States v. Thornton*, 1 F.3d 149, 157-58 (3d Cir. 1993), cert. denied, 510 U.S. 982 (1993); *United States v. Burns*, 668 F.2d 855, 858 (5th Cir. 1982); *United States v. Ugalde*, 861 F.2d 802, 805 (5th Cir. 1988), cert. denied, 490 U.S. 1097 (1989); *United States v. Davis*, 960 F.2d 820, 824 (9th Cir. 1992), cert. denied, 506 U.S. 873 (1992); *United States v. Wilson*, 894 F.2d 1245, 1251-52 (11th Cir. 1990), cert. denied, 497 U.S. 1029 (1990); *United States v. Garrison*, 963 F.2d 1462, 1466 n.7 (11th Cir. 1992), cert. denied, 506 U.S. 946 (1992).

These conditions are met in this case as well. In her docketing statement in the Court of Appeals, petitioner included the *Brady* violation as one of the issues she intended to raise on appeal. The *Brady* claim was Point #1 in her opening brief in the Court of Appeals. The government has never suggested that it has suffered any prejudice. Such a claim would be laughable, because the very same Assistant U.S. Attorney was representing the government in both the District Court and the Court of Appeals. If this case had arisen in the Third, Fifth, Ninth, or Eleventh Circuit, the Court of Appeals would have found that it had jurisdiction to decide the *Brady* issue on the merits.

4. The Brief in Opposition offers a merits argument that ignores the text and purpose of Rule 4.

The government defends (BIO at 7-9) the decision below on the merits. But the government's argument ignores three important features of Rule 4.

First, the government, like the court below, relies on Rule 4(b)(3)(C) to infer that appellants must file two separate notices of appeal. As just discussed, however, Rule 4(b)(3)(C) simply does not address this issue. The rule merely clarifies that an initial timely notice of appeal does not become a nullity when the appellant subsequently files a post-trial motion. The rule does not require a second notice of appeal, and it certainly does not say that a Court of Appeals is ousted of jurisdiction on an issue-by-issue basis when the appellant files a motion for a new trial.

Second, the government overlooks the corresponding provision of Rule 4(a), which governs appeals in civil cases. In civil cases, Rule 4(a)(4)(B)(ii) specifies that if the appellant wishes to challenge the disposition of a post-trial motion, the initial notice of appeal is not enough. The appellant must either file a second notice of appeal or amend the initial notice of appeal. There is no analogous requirement for criminal cases in Rule 4(b). The obvious inference is that in criminal cases a second notice of appeal is not required. *Burns*, 668 F.2d at 858 ("Fed. R. App. P. Rule 4(a) is explicit in requiring a second notice of appeal in civil cases . . . . But it is to be noted from this rule, applicable only to civil cases, that only in this one circumstance is a second notice of appeal stated as being required.").

Third, the government ignores the purpose of requiring a notice of appeal. Rule 4(b) does not explicitly address the question presented, so it is appropriate to consider the purpose of the rule in interpret-

ing its text. The purpose of a notice of appeal is to give the appellee notice of what is being appealed. In criminal cases, the appellee is the U.S. Attorney, who will be well aware that a motion for a new trial is pending in the District Court. The U.S. Attorney will know what issues are being raised in the District Court, and he will expect the appellant to raise those same issues in the appeal, whether or not the appellant has filed a second notice of appeal. In criminal cases, a second notice of appeal would be a meaningless piece of paper that would not give any actual notice to anyone. No doubt this is why Rule 4(a) explicitly requires a second notice of appeal in civil cases but Rule 4(b) does not include an analogous requirement in criminal cases.

5. The Brief in Opposition wrongly contends that petitioner could not benefit from a decision in her favor.

The government unsurprisingly takes the view (BIO at 16-17) that petitioner has a weak *Brady* claim, so there is no reason to let the Court of Appeals decide it. We of course think it is a strong claim with a meaningful chance of prevailing in the Court of Appeals. Pet. at 23. That's why we have Courts of Appeals—to decide who is right.

Perhaps more to the point, the question presented is an important jurisdictional question that will resolve a 5-4 circuit split and affect lots of cases—virtually any case in which a criminal defendant files a motion for a new trial based on newly discovered evidence. Whether petitioner's *Brady* claim ul-

timately proves to be a winner or a loser, the Court's intervention is sorely needed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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