No. 24-550

IN THE

Supreme Court of the United States

TAHAWWUR HUSSAIN RANA,

Petitioner,

—v.—

W.Z. JENKINS II,

Respondent.

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

REPLY TO OPPOSITION

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The government devotes most of its Brief in Opposition to its version of the facts (based, as we discuss below, on the very trial evidence that the federal jury in Chicago rejected) and to the merits of the double jeopardy issue. Only in the last few pages does it address the most critical points at this stage: whether a clear split in the circuits exists and whether this case is an appropriate vehicle for resolving that split.

As we demonstrate in the petition and again below, the answer to both questions is yes. The Court should grant the writ. On the merits, it should hold that the term "offense" in the double jeopardy provision of the United States-India extradition treaty (and many other similar treaties) refers to the conduct underlying the charges in the two countries, rather than the elements of the crimes the respective countries have charged.

ARGUMENT

I. THE CIRCUITS ARE CLEARLY SPLIT.

The split in the circuits is clear and irreparable absent a decision from this Court. The Fourth and Ninth Circuits have expressly rejected the Second Circuit's holding in *Sindona v. Grant*, 619 F.2d 167 (2d Cir. 1980), that the term "offense" in the extradition double jeopardy context refers to conduct rather than elements. App. 20a ("[N]othing in *Sindona* persuades us that 'offense' does not refer to a crime's elements."); *Gon v. Holt*, 774 F.3d 207, 217 (4th Cir. 2014) ("For these reasons, we decline to follow *Sindona*'s 'same conduct' framework, and

adopt the *Blockburger* 'same elements' test as the proper mode of analysis in this context.").

For its part, the Second Circuit has never retreated from *Sindona*; it remains the law there. The government points to a single district court case that adopted the elements standard despite *Sindona*. BIO 19 (citing *Elcock v. United States*, 80 F. Supp. 2d 70 (E.D.N.Y. 2000)). But *Elcock* apparently was not appealed, and the Second Circuit thus had no opportunity to consider the district judge's failure to follow circuit precedent. In the twenty-four years since *Elcock* was decided, no case in the Second Circuit has followed *Elcock*'s double jeopardy analysis or endorsed its rejection of *Sindona*.

The government suggests that the Second Circuit might overrule *Sindona* given developments in domestic double jeopardy law since that case was decided. BIO 17 (citing *United States v. Dixon*, 509 U.S. 688 (1993)); *see id.* at 10-11 (criticizing *Sindona*'s citation to Justice Brennan's concurrence in *Ashe v. Swenson*, 397 U.S. 436 (1970)). But that misreads *Sindona*. The Second Circuit did not cite the *Ashe* concurrence as precedent it was bound to follow--the only circumstance under which *Dixon* could have "eroded" its significance. BIO 11.

Rather, *Sindona* cited Justice Brennan's approach as "somewhat analogous" to the "same conduct or transaction" non bis in idem standard the district court had "correct[ly]" adopted. 619 F.2d at 178. The Second Circuit found the *Ashe* concurrence persuasive in the extradition context, because it--like the Justice Department's Petite Policy--provides a

standard that affords meaningful protection in a dual sovereignty double jeopardy regime. Nothing in *Dixon* is to the contrary.

The government also maintains that no "square conflict" exists, because the wording of the Article containing the United States-India treaty's double jeopardy provision differs slightly from the analogous Article in the United States-Italy extradition treaty interpreted in *Sindona*. But both cases (and *Gon*) turn on the meaning of the same word: "offense." While courts interpreting "offense" in double jeopardy provisions of extradition treaties have drawn inferences from other treaty provisions, those other provisions rarely provide a clear answer, and the inferences courts profess to draw from them sometimes conflict.[1]

These inconclusive textual references aside, courts that adopt the "elements" standard appear to look principally to domestic double jeopardy law (*Blockburger* in particular) and to the views of the Executive Branch, while *Sindona* adopted a conduct-

[1] For example, in *Gon* the Fourth Circuit drew support for the "elements" standard from the use of the word "acts" in the dual criminality provision of the United States-Mexico extradition treaty. In part because that provision used "acts" to denote a conduct-based standard, the court concluded that the different term "offense" in the double jeopardy provision must refer to elements. *See* 774 F.3d at 215. The United States-India treaty's dual criminality provision uses the word "offense" to denote a conduct-based standard. Rana argued below that by the *Gon* reasoning, and under the principle that the same term in different provisions of the same enactment should receive the same meaning, the word "offense" in the double jeopardy provision of the United States-India treaty should also be conduct-based. But the Ninth Circuit, while purporting to follow *Gon*, App. 18a, rejected this argument out of hand, App. 12a-13a.

based interpretation of "offense" to provide protection against double jeopardy in a dual-sovereign regime. Notably, neither *Gon* nor the Ninth Circuit in this case tried to distinguish *Sindona* based on differences in treaty language; they instead squarely rejected the Second Circuit's reasoning, thereby creating and confirming the Circuit conflict. App. 19a-20a; *Gon*, 774 F.3d at 216.

The government further insists that the Court should deny review "because the issue arises only infrequently." BIO 18-19. That is far from clear; three courts of appeals (the Second, Fourth, and Ninth) have squarely addressed the question presented here. Another--the D.C. Circuit--has acknowledged the issue but declined to adopt either the conduct or elements standards. *United States v. Trabelsi*, 845 F.3d 1181, 1191 (D.C. Cir. 2017). And the Eleventh Circuit has applied the elements standard drawn from *Blockburger* to a double jeopardy provision in the International Covenant on Civil and Political Rights. *United States v. Duarte-Acero*, 208 F.3d 1282, 1286 (11th Cir. 2000).[2]

District courts as well have addressed the meaning of "offense" in double jeopardy provisions of extradition treaties, in some instances--such as *Elcock*--with no appeal having been taken from the ruling. *See, e.g., McKnight v. Torres*, 2008 U.S. Dist. LEXIS 131793, at *19-*33 (C.D. Cal. Feb. 12, 2008),

[2] The district court decision from which *Duarte-Acero* arose cited *Sindona* favorably for its interpretation of non bis in idem provisions in extradition treaties, but concluded that "for purposes of the present Motion, no extradition treaty is at issue, and . . . the ICCPR does not preclude this prosecution." *United States v. Benitez*, 28 F. Supp. 2d 1361, 1365 (S.D. Fla. 1998).

aff'd on other grounds, 563 F.3d 890 (9th Cir. 2009). And, as petitioner noted (Pet. 5, 21), the increasing globalization of international cooperation in law enforcement ensures that the question will occur with greater frequency in the future.

Even if the question could be said to arise "infrequently," however, the significance of the interests involved in each such case warrants this Court's review. This case illustrates the point. Having been acquitted in United States District Court on charges relating to the Mumbai attack; having served his sentence (reduced on compassionate grounds) for the crimes of which he was convicted; having languished in jail for four years while his extradition case has proceeded through the courts--having endured all that, Rana now faces the prospect of transfer to a country where his birthplace (Pakistan), his religion (Muslim), and the nature of the charges (terrorist murder of 166 people) mark him for likely abuse--followed, if he survives pretrial incarceration, by a trial with a predictable result and execution by hanging, per India Code of Criminal Procedure § 354(5).

Rana faces this grim prospect solely because he had the misfortune of being incarcerated in California (at the government's sole discretion); if the government had housed him in New York, Connecticut, or Vermont, he would have the benefit of *Sindona*'s "conduct" standard, and he would have been released long ago. A man's life and freedom should not turn on the happenstance of where the government chooses to imprison him.

II. THIS CASE IS AN EXCELLENT VEHICLE TO RESOLVE THE CIRCUIT SPLIT.

The government does not dispute that Rana preserved the double jeopardy issue at every point in the courts below, or that those courts squarely addressed that issue. Instead, it suggests that the "conduct" versus "elements" issue might not be outcome-determinative, because the conduct at issue in the Chicago case could differ from the conduct underlying the Indian charges. BIO 19.

The government occasionally hinted at this argument during the years this case made its way through the lower courts, but it did not identify any Indian charge that rests on different conduct than the Chicago charges. *E.g.*, *Rana v. Jenkins*, No. 23-1827, Government's Answering Brief at 58-59 n.5 (asking court of appeals, if it adopted the "conduct" standard, to remand to the extradition court "to decide in the first instance whether Rana's prior prosecution bars his extradition under a conduct-based test," but without identifying any Indian charge that would survive that test).

Now the government suggests that the Indian conspiracy to commit forgery charge might rest "in part" on conduct not involved in the Chicago case. BIO 19. That is incorrect. The portion of the Indian extradition request to which the government points, 2-ER-276, alleges:

> David [Headley] used the cover provided by Rana's business while in India. He presented fabricated and falsified

> documents to the Reserve Bank of India with an application to open the branch office for the business in Mumbai which was rejected. Rana had, in fact, directed the attorney at the Immigration Law Center to prepare documents to support David's cover story, including documents given to the Indian authorities to establish the business. These documents identified David as a representative of the Immigration Law Center, despite the fact that he had no immigration expertise . . . .

2-ER-276, ¶ 40.

Yet this alleged conduct was plainly included in the Chicago case. In a bill of particulars, the Northern District of Illinois prosecutors identified Rana's "expert advice and assistance" to include "Rana providing his immigration business expertise to establish and seek the necessary approval to operate an immigration business in Mumbai, India, for the purpose of providing a cover to co-defendant Headley." 2-ER-179.

The Chicago indictment alleged that the material support Rana conspired to provide included "false documentation and identification." 11-ER-2340, ¶ 2. A bill of particulars identified the "false documentation" to include "co-defendant Headley's application for an Indian visa, containing false information." 11-ER-2362. In short, the Indian conspiracy to commit forgery charge encompasses

conduct directly at issue in the Northern District of Illinois prosecution.

Even if the government were correct about the conspiracy to commit forgery charge, however, that would not render the case less worthy of this Court's review. The government does not contend that the conduct underlying the most serious Indian charges--waging war, murder, committing a terrorist act, and conspiracy to commit these crimes--could survive a conduct-based double jeopardy analysis.

If double jeopardy barred extradition for those charges and Rana were extradited only on the conspiracy to commit forgery charge, the rule of specialty embodied in Article 17 of the Treaty (App. 115a) would prohibit Rana's prosecution in India for any charge other than conspiracy to commit forgery. That would remove the possibility that he could be subject to the death penalty or life imprisonment. 2-ER-263-64 (describing maximum punishment for forgery under Indian law as seven years imprisonment plus a fine). Thus, even if the government were correct that the conspiracy to commit forgery charge would survive under a conduct standard (which it does not), the controversy would still have life or death consequences for Rana.

III. THE GOVERNMENT IS WRONG ON THE FACTS AND ON THE MERITS.

The government spends much of its brief on its view of the facts and the merits. BIO 2-4, 9-16. None of this bears directly on whether the Court should grant review, so we respond in summary form.

The government devotes almost two full pages to the alleged facts. BIO 2-4. What it omits, however, is that those "facts" come largely from the record of the Chicago trial and, in particular, from David Headley's trial testimony. Yet, in acquitting Rana on the Mumbai-related charges, the jury necessarily rejected Headley's testimony about Rana's alleged involvement in the Mumbai attacks. And for good reason; as Rana demonstrated below, Headley embodies Judge (and former federal prosecutor) Stephen Trott's observation that "criminal informants are cut from untrustworthy cloth and must be managed and carefully watched by the government and the courts to prevent them from falsely accusing the innocent, from manufacturing evidence against those under suspicion of crime, and from lying under oath in the courtroom." *United States v. Bernal-Obeso*, 989 F.2d 331, 333 (9th Cir. 1993).

Headley has spent much of his adult life doing the things about which Judge Trott warned. *See Rana v. Jenkins*, No. 23-1827, Brief for Appellant at 32-39 (outlining Headley's falsehoods, in and out of court). This Court should give no more weight to Headley's testimony than the Chicago jury did.

The government's discussion of the merits (BIO 7-16) largely parrots the court of appeals' analysis, which we addressed in the petition (Pet. 8-18). We highlight three points here.

First, the government does not dispute that applying the elements test in a dual sovereignty double jeopardy regime renders the double jeopardy

protection nugatory--the concern that led the Second Circuit in *Sindona* to look beyond *Blockburger* for the appropriate standard. Pet. 9-11. The government, like the court of appeals, waves this concern away on the surmise that the drafters of the treaty intended such an absurd result. BIO 13. But a court should be loath to find that drafters of a treaty or statute deliberately included a meaningless provision, especially when that provision, in the words of the habeas court, "provide[s] important individual protections." App. 32a.[3]

Second, the government insists that courts must defer to the Executive Branch's "technical analysis" of the Treaty's double jeopardy provision, even though that "analysis" provides no reasoning. BIO 15-16. The government rejects any analogy to *Chevron* deference, and it ignores *Auer* deference entirely. It thus insists that the Court's recent rejection of *Chevron* deference in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), has no bearing here, and it presumably views the Court's limitation of *Auer* deference in *Kisor v. Wilkie*, 588 U.S. 558 (2019), as similarly irrelevant.

But courts and commentators have analogized deference to the Executive's treaty interpretation to *Chevron* deference (Pet. 15-16), and *Auer* deference provides a similarly useful analogy. Under *Chevron*

[3] *See, e.g., Wilder v. Virginia Hospital Association*, 496 U.S. 498, 514 (1990) ("We decline to adopt an interpretation of [a statutory provision] that would render it a dead letter."); *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) ("It is our duty to give effect, if possible, to every clause and word of a statute, rather than to emasculate an entire section, as the Government's interpretation requires.") (cleaned up).

(before its overruling by *Loper Bright*) courts deferred to an agency's reasonable interpretation of an ambiguous term in a statute governing its work, and under *Auer* (as limited by *Kisor*) courts defer to an agency's reasonable (and reasoned) interpretation of an ambiguous term in one of the agency's own regulations.

Here, the government insists that the Court must defer to the State Department's interpretation of an ambiguous term in a treaty that agency negotiated. The parallels are clear: in each circumstance, a legal text before the court contains an ambiguous term; in each circumstance, the court has the duty to interpret that term--it is, as the Court reminded us last term, "'the province and duty of the judicial department to say what the law is,'" *Loper Bright*, 144 S. Ct. at 2257 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)), and treaties, like statutes and regulations, are "laws"; and in each instance the Executive Branch insists that the court must defer to the Executive's interpretation of the term because the Executive has some superior expertise or insight.

If any deference is due Executive Branch treaty interpretation in the wake of *Loper Bright* and *Kisor*, it should be afforded only when the Executive interpretation reflects "fair and considered judgment." *Kisor*, 588 U.S. at 579 (quotation omitted); *see, e.g., Hill v. Norton*, 275 F.3d 98, 104-05 (D.C. Cir. 2001). Courts should give no deference to unsupported ipse dixit of the kind found in the so-called "technical analysis."

Third, the government dismisses as an "inartful reference" United States Attorney Patrick Fitzgerald's invocation of the United States-India extradition treaty as the basis for the conduct-based double jeopardy provision in Headley's plea agreement. BIO 15. Nonsense. United States Attorney Fitzgerald was among the most widely respected federal prosecutors in the country. The prosecution of Headley was one of the highest profile cases his office handled, with obvious international ramifications. The fact that Fitzgerald himself handled Headley's plea colloquy, rather than leaving the matter to one of his assistants (or even a deputy or unit chief), underscores the importance of the occasion. The notion that Fitzgerald fumbled his lines at such a critical moment is ludicrous.

And the government ignores both the requirement that federal prosecutors obtain approval from Main Justice for extradition provisions in plea agreements and Rana's repeated requests for in camera review of the communications between United States Attorney Fitzgerald's office and the Departments of Justice and State on the extradition provision in Headley's plea agreement. Pet. 12-13 & n.2. The government's gaslighting on this point merely shows that it will interpret "offense" to suit its purposes: as conduct-based when seeking Headley's cooperation and as elements-based when seeking to extradite Rana.

CONCLUSION

The petition for a writ of certiorari should be granted.

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